SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 11, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 11, 2022

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1056.1/20

CA 20-00129

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

S.S., AN INFANT, BY MARY S. AND VLADIMIR S., HER PARENTS AND NATURAL GUARDIANS, MARY S. AND VLADIMIR S., ADMINISTRATORS OF THE ESTATE OF M.S., DECEASED, MARY S., INDIVIDUALLY, AND VLADIMIR S., INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT-RESPONDENT, AND CHRISTIAN P. MYERS, DEFENDANT.

S.S., AN INFANT, BY MARY S. AND VLADIMIR S., HER PARENTS AND NATURAL GUARDIANS, MARY S. AND VLADIMIR S., ADMINISTRATORS OF THE ESTATE OF M.S., DECEASED, MARY S., INDIVIDUALLY, AND VLADIMIR S., INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V

THE BUFFALO OLMSTED PARKS CONSERVANCY, INC., DEFENDANT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN L. MURAD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

BARTH CONDREN LLP, BUFFALO (DOUGLAS P. HAMBERGER OF COUNSEL), FOR DEFENDANT CHRISTIAN P. MYERS.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered December 13, 2019. The order denied the motion of defendant City of Buffalo for summary judgment dismissing the complaint and all cross claims against it and denied the motion of defendant The Buffalo Olmstead Parks Conservancy, Inc., for summary judgment dismissing the complaint and all cross claims against it and for summary judgment on its cross claim against the City of Buffalo for indemnification.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 13, 2021,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1208/20

CA 19-02166

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

IN THE MATTER OF RYAN WAID,
PETITIONER-APPELLANT,

V ORDER

CITY OF JAMESTOWN, CITY OF JAMESTOWN FIRE
DEPARTMENT AND SAMUEL SALEMME,
RESPONDENTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DIANE M. PERRI ROBERTS OF COUNSEL), FOR PETITIONER-APPELLANT.

MACHELOR LAW FIRM, BUFFALO (KRISTEN M. MACHELOR OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered November 8, 2019 in a CPLR article 78 proceeding. The judgment dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 1, 2022,

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

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

552/21

CA 20-00929

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

IN THE MATTER OF ARBITRATION BETWEEN
RYAN WAID, PETITIONER-RESPONDENT,

AND ORDER

CITY OF JAMESTOWN AND JAMESTOWN FIRE DEPARTMENT,
RESPONDENTS-APPELLANTS.

MACHELOR LAW FIRM, BUFFALO (KRISTEN M. MACHELOR OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DIANE M. PERRI ROBERTS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered June 30, 2020. The order granted the petition to the extent that respondents were directed to arbitrate the denial of petitioner's General Municipal Law § 207-a (2) benefits, and were temporarily enjoined and restrained from conducting an administrative hearing originally scheduled for March 11, 2020, pending the completion of the arbitration.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 1, 2022,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

781/21
CA 20-01660
PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

LATIESHA VASS, PLAINTIFF-RESPONDENT,

V ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
AND NILES B. HARDY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. FROMEN, ATTORNEYS AT LAW, P.C., AMHERST (JOHN J. FROMEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 25, 2020. The amended order granted the motion of plaintiff for summary judgment on the issue of liability and dismissing defendants' second and seventh affirmative defenses.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 31, 2022,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

782/21

CA 20-01696

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

LATIESHA VASS, PLAINTIFF-RESPONDENT,

V ORDER

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,
NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
AND NILES B. HARDY, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. FROMEN, ATTORNEYS AT LAW, P.C., AMHERST (JOHN J. FROMEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 24, 2020. The order granted defendants' motion for leave to renew and, upon renewal, adhered to a prior order granting plaintiff summary judgment on the issues of proximate cause and serious injury.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 31, 2022,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

875

CA 20-01319

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

JOHN HUMMEL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ELEANOR HUMMEL, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CILICI, LLC, DEFENDANT-RESPONDENT.

DAVID M. KAPLAN, HORSEHEADS, FOR PLAINTIFF-APPELLANT.

KNUCKLES, KOMOSINSKI & MANFRO, LLP, ELMSFORD (JOHN E. BRIGANDI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Thomas E. Moran, J.), entered September 14, 2020. The order granted the motion of defendant to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the first cause of action in the amended complaint insofar as it seeks a declaration pursuant to RPAPL article 15 concerning defendant's interest in and right to foreclose upon the property at issue and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that defendant has no enforceable interest in the property known as 5489 Federal Road, Conesus, New York 14435, and that defendant and every person claiming under defendant, by title accruing after the filing of the judgment roll, is forever barred from asserting such a claim,

and as modified the order is affirmed without costs.

Memorandum: Defendant claims to hold a mortgage on certain real property owned by the estate of plaintiff's decedent. It is undisputed that the underlying promissory note was lost at some point between October 2011 and June 2015 while in the custody of its holder, nonparty Omat I Reo Holdings, LLC (Omat). It is also undisputed that defendant is not now, and has never been, in physical possession of the original promissory note.

Plaintiff commenced the instant action against defendant following the dismissal, without prejudice, of two successive foreclosure actions against plaintiff. In his first cause of action,

plaintiff sought to quiet title to the subject property—i.e., to "compel the determination of any claim [to real property] adverse to that of . . . plaintiff which . . . defendant makes, or . . . might make" (RPAPL 1501 [1]; *see* RPAPL 1501 [5])—by means of, inter alia, a declaration under RPAPL 1521 (1) that defendant does not own the note underlying the mortgage on the subject property and thus has no enforceable interest in the subject property, i.e., that defendant lacks standing to foreclose. Plaintiff's second cause of action sought, inter alia, a similar declaration under CPLR 3001.

Defendant moved to dismiss the amended complaint under CPLR 3211 (a) (1) and (7). Supreme Court granted the motion, and plaintiff now appeals.

Preliminarily, we reject defendant's contention that the order appealed from was entered on default and hence is not appealable. The order does not purport to have been entered on plaintiff's default, and there is no reason to infer that the order was entered on default by virtue of its passing reference to the fact that plaintiff's lawyer did not appear at oral argument. Moreover, plaintiff timely opposed defendant's motion on the merits, and his lawyer's failure to appear for oral argument on a fully briefed motion would not constitute a default in the absence of unusual circumstances not present here (*see All State Flooring Distribs., L.P. v MD Floors, LLC*, 131 AD3d 834, 835 [1st Dept 2015]; *cf. Britt v Buffalo Mun. Hous. Auth.,* 109 AD3d 1195, 1196 [4th Dept 2013]).

On the merits, we agree with plaintiff that defendant's evidentiary submissions do not warrant the dismissal of the amended complaint under either CPLR 3211 (a) (1) or (7) (*see generally Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182-1183 [4th Dept 2017]). Indeed, defendant's evidentiary submissions actually establish conclusively that defendant *lacks* standing to foreclose, i.e., lacks an enforceable interest in the subject property. We therefore modify the order accordingly, and we issue a declaration in plaintiff's favor (*see generally Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 153-155 [4th Dept 2021]). Our reasoning is as follows.

An entity has standing to foreclose a mortgage if "it [is] either the holder of, or the assignee of, the underlying note" (*Deutsche Bank Natl. Trust Co. v Gulati*, 188 AD3d 999, 1000 [2d Dept 2020] [internal quotation marks omitted]; *see Aurora Loan Services, LLC v Taylor*, 25 NY3d 355, 361 [2015]; *Wells Fargo Bank N.A. v Ho-Shing*, 168 AD3d 126, 131 [1st Dept 2019]). Here, defendant lacks noteholder standing because the promissory note upon which defendant relies is neither endorsed in blank nor specially endorsed to defendant (*see U.S. Bank N.A. v Moulton*, 179 AD3d 734, 737 [2d Dept 2020]; *McCormack v Maloney*, 160 AD3d 1098, 1100 [3d Dept 2018], *lv dismissed* 32 NY3d 1185 [2019]; *see generally* UCC 3-202 [1], [2]; 3-204). To the contrary, the version of the note upon which defendant relies is specially endorsed to Omat (*see* UCC 3-204 [3]). Moreover, even had the note been endorsed in blank or specially endorsed to defendant, defendant's admitted failure to physically possess the original note would

independently preclude it from foreclosing as a noteholder (*see U.S. Bank Trust, N.A. v Rose*, 176 AD3d 1012, 1014-1015 [2d Dept 2019]; *McCormack*, 160 AD3d at 1099-1100; *see generally Residential Credit Solutions, Inc. v Gould*, 171 AD3d 638, 640 [1st Dept 2019]; *Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1928 [4th Dept 2017]).

Nor does defendant have assignee standing. The affidavits submitted on defendant's behalf do not aver that the subject note was ever assigned to defendant, and "there is not a scintilla of proof in the record that the note was []assigned to [defendant]" at any point (*McCormack*, 160 AD3d at 1099; *see U.S. Bank Trust, N.A.*, 176 AD3d at 1015; *cf. Capital One, N.A. v Gokhberg*, 189 AD3d 978, 978 [2d Dept 2020]; *Cenlar FSB v Glauber*, 188 AD3d 1141, 1143 [2d Dept 2020]). In fact, defendant's evidentiary submissions—including the affidavit of Omat's attorney—demonstrate conclusively that the note was *not* "transferred" to anyone beyond Omat, much less to defendant. Contrary to defendant's contention, Omat's assignment of the *mortgage*—but not the *note*—in August 2015 was ineffective to transfer any interest in the underlying debt and thus did not confer standing to foreclose upon Omat's assignee or its subsequent assigns (*see Merritt v Bartholick*, 36 NY 44, 45 [1867]; *Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59 [2d Dept 2015]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 280 [2d Dept 2011]; *see generally Aurora Loan Services, LLC*, 25 NY3d at 361). Contrary to defendant's further contention, a 2020 asset purchase agreement between itself and an entity called Cerastes LLC did not transfer any interest in the underlying debt such that defendant thereby acquired assignee standing to foreclose. Indeed, the agreement does not even purport to transfer or assign the subject note to defendant (*see McCormack*, 160 AD3d at 1099-1100), and even if it did, the agreement would have been void to that extent as an ineffective assignment of something that Cerastes did not and could not have owned given Omat's retention of the subject note (*see Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]; *Silverberg v Bank of N.Y. Mellon*, 165 AD3d 1193, 1194-1195 [2d Dept 2018]).

Contrary to defendant's further contention, UCC 3-804 is inapplicable under these circumstances. UCC 3-804 is available only to the "owner" of a lost instrument, and because defendant's own submissions show conclusively that it was never the assignee or holder of the subject note, defendant is not and never has been the "owner" of that note for purposes of UCC 3-804 (*see U.S. Bank N.A. v Kohanov*, 189 AD3d 921, 924 [2d Dept 2020]; *U.S. Bank Trust, N.A.*, 176 AD3d at 1014-1016; *cf. Capital One, N.A.*, 189 AD3d at 978-979; *Bank of N.Y. Mellon v Hardt*, 173 AD3d 1125, 1126-1127 [2d Dept 2019]; *see also Bank of Am., N.A. v Sebrow*, 180 AD3d 982, 983-985 [2d Dept 2020]; *Weiss v Phillips*, 157 AD3d 1, 8 [1st Dept 2017]).

Finally, inasmuch as an action to quiet title pursuant to RPAPL article 15 is a proper procedural vehicle for determining defendant's standing to foreclose (*see* RPAPL 1501 [1], [5]; *see e.g. Ditech Fin. LLC v Levine*, 176 AD3d 1521, 1521-1523 [3d Dept 2019]; *East Riv. Mtge. Corp. v OneWest Bank, N.A.*, 172 AD3d 515, 515-517 [1st Dept 2019]; *but*

see Wood v Villanueva, 175 AD3d 1465, 1467 [2d Dept 2019]; *see generally* RPAPL 1515 [1] [b]; RPAPL 1521 [1]; RPAPL 1551), and given that a successful RPAPL article 15 action produces a declaration in the plaintiff's favor (*see* RPAPL 1521 [1]), we conclude that declaratory relief under CPLR 3001 is unnecessary for present purposes (*see Bennett v Vonder Bosch*, 26 App Div 311, 313 [2d Dept 1898], *appeal dismissed* 155 NY 693 [1898]). Thus, on that basis alone, we reject plaintiff's challenge to the dismissal of the second cause of action (*see generally Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142, 1144 [4th Dept 2009]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

942

KA 19-00167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. WITHEROW, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, 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 (Michael M. Mohun, A.J.), rendered March 30, 2018. The judgment convicted defendant, upon a plea of guilty, of assault in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is 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 [3]) and assault in the second degree (§ 120.05 [6]), arising from an incident in which he attacked his wife and a second victim. In appeal No. 2, defendant appeals from an order directing him to pay restitution and reparation to the second victim.

Contrary to defendant's contention with respect to both appeals, the plea colloquy establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see People v Mess*, 186 AD3d 1069, 1069 [4th Dept 2020]; *see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Moreover, "the lack of a written waiver 'is of no moment where, as here, the oral waiver was adequate' " (*People v Thomas*, 178 AD3d 1461, 1461 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge in appeal No. 1 to the severity of the incarceration component of his sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Defendant contends in appeal No. 2 that County Court erred by ordering an amount of restitution or reparation in excess of the statutory cap for the second victim's past lost earnings because that form of loss does not fall within the exception to the statutory cap pursuant to Penal Law § 60.27 (5) (b). Initially, even assuming,

arguendo, that defendant's contention is not a challenge to the legality of the sentence (*see People v Graves*, 163 AD3d 16, 24 [4th Dept 2018], *lv denied* 35 NY3d 970 [2020]), we nevertheless conclude that review of defendant's contention is not foreclosed by his waiver of the right to appeal because the amount of restitution and reparation, including any amount in excess of the statutory cap, was not included in the terms of the plea agreement (*see People v Fontaine*, 144 AD3d 1658, 1659 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]; *cf. People v Brown*, 37 NY3d 940, 941 [2021 plurality]; *see also People v Parker*, 196 AD3d 970, 971 [3d Dept 2021]; *People v Isaacs*, 71 AD3d 1161, 1161 [2d Dept 2010]).

On the merits, we agree with defendant, and we therefore modify the order accordingly. " 'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' " (*People v Golo*, 26 NY3d 358, 361 [2015]; *see People v Pabon*, 28 NY3d 147, 152 [2016]). "[W]hen the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used" (*People v Jones*, 26 NY3d 730, 733 [2016] [internal quotation marks omitted]; *see Pabon*, 28 NY3d at 152). With respect to the statutory language at issue in this case, "Penal Law § 60.27 (1) addresses the related concepts of restitution and reparation, allowing a court to order a defendant to 'make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss caused thereby' " (*People v Horne*, 97 NY2d 404, 410 [2002]). Penal Law § 60.27 (5) (a) provides, in relevant part, that "[e]xcept upon consent of the defendant or as provided in paragraph (b) of this subdivision, or as a condition of probation or conditional discharge as provided in [Penal Law § 65.10 (2) (g)], the amount of restitution or reparation required by the court shall not exceed [$15,000] in the case of a conviction for a felony" (*see Horne*, 97 NY2d at 414). In turn, Penal Law § 60.27 (5) (b) provides that "[t]he court in its discretion may impose restitution or reparation in excess of the [subject statutory cap] amount[] . . . , provided however that the amount in excess must be limited to the return of the victim's property, including money, or the equivalent value thereof; and reimbursement for medical expenses actually incurred by the victim prior to sentencing as a result of the offense committed by the defendant" (*see Horne*, 97 NY2d at 414).

Here, defendant does not dispute that the court properly imposed restitution and reparation, including past lost earnings, up to the statutory cap of $15,000 (*see* Penal Law § 60.27 [5] [a]; *People v Denno*, 56 AD3d 902, 903-904 [3d Dept 2008], *lv denied* 12 NY3d 757 [2009]), as well as $12,520.09 in excess of the statutory cap for the second victim's qualifying property loss and medical expenses (*see* § 60.27 [5] [b]; *Horne*, 97 NY2d at 414; *People v Grant*, 185 AD3d 608, 609-610 [2d Dept 2020], *lv denied* 35 NY3d 1045 [2020]; *People v Ayers*, 45 AD3d 1290, 1291 [4th Dept 2007], *lv denied* 10 NY3d 808 [2008]). Defendant correctly contends, however, that the court erred in imposing restitution and reparation in excess of the statutory cap for the second victim's past lost earnings because, under the plain

meaning of the statute, that form of loss does not fall within the exception to the statutory cap pursuant to Penal Law § 60.27 (5) (b) (*see Grant*, 185 AD3d at 609). In particular, contrary to the court's determination, inasmuch as past lost earnings are wages, salary, or other income that the second victim could have, but did not, earn (*see* Black's Law Dictionary [11th ed 2019], lost earnings), the excess amount ordered as restitution and reparation for that loss does not constitute reimbursement for "the *return* of the [second] victim's *property*" or equivalent thereof (§ 60.27 [5] [b] [emphasis added]; *cf. Horne*, 97 NY2d at 414; *Ayers*, 45 AD3d at 1291; *see generally Grant*, 185 AD3d at 609).

We note that the legislative history largely supports this reading of the statute. "[A]lthough the strongest indication of the statute's meaning is in its plain language, the legislative history of an enactment may also be relevant and is not to be ignored, even if words be clear" (*People v Badji*, 36 NY3d 393, 399 [2021] [internal quotation marks omitted]). Here, the legislative history shows that, while the original proposal sought total repeal of the statutory cap, the language granting a court discretion to exceed the statutory cap, but simultaneously limiting the imposition of excess restitution and reparation to the named items, was added as a compromise necessary to obtain legislative approval (*see* Attorney General's Mem in Support, Bill Jacket, L 1983, ch 468 at 14). Consistent with its plain meaning as discussed above, the limiting language was understood at the time of enactment as permitting restitution and reparation in excess of the statutory cap as reimbursement for property taken or stolen from the victim, i.e., property once in the victim's possession, and for medical expenses actually incurred by the victim prior to sentencing as a result of the crime (*see id.* at 16; *see also* Budget Report on Bills, Bill Jacket, L 1983, ch 468 at 11; Executive Chamber Mem in Support, Bill Jacket, L 1983, ch 468 at 18).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

943

KA 19-01396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. WITHEROW, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Ontario County Court (Michael M. Mohun, A.J.), dated July 19, 2018. The order, among other things, directed defendant to pay restitution and reparation.

It is hereby ORDERED that the order so appealed from is modified on the law by reducing the total amount of restitution and reparation to $27,520.09, and as modified the order is affirmed.

Same memorandum as in *People v Witherow* ([appeal No. 1] — AD3d — [Mar. 11, 2022] [4th Dept 2022]).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

952

CA 21-00004

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

FRANCIS DESTINO, CLAIMANT-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 119498.)

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

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

Appeal and cross appeal from a judgment of the Court of Claims (J. David Sampson, J.), entered June 10, 2020. The judgment awarded claimant money damages.

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

Memorandum: Claimant commenced this action seeking damages for injuries he sustained when the vehicle he was operating collided with a New York State Police (NYSP) vehicle responding to an emergency. Following a bifurcated trial on liability, the Court of Claims determined that defendant, State of New York (State), was 75 percent liable and claimant was 25 percent liable for the accident. Ultimately, a judgment was entered awarding claimant damages, as reduced by his percentage of liability. The State appeals and claimant cross-appeals. Both parties contend that the court's liability determination is not supported by a fair interpretation of the evidence. We affirm.

The undisputed testimony at trial established that an NYSP trooper, while responding to a call regarding a domestic violence incident with firearms present, proceeded into an intersection against a traffic control device at a time when there was "[v]ery dense fog" that created "almost . . . white-out condition[s]" with little visibility. Claimant's vehicle, which was proceeding with the right-of-way, struck the trooper's vehicle.

Addressing first the State's appeal, we agree with the State that the applicable standard of liability with respect to the trooper is reckless disregard for the safety of others, as opposed to ordinary negligence (*see* Vehicle and Traffic Law § 1104 [e]), inasmuch as the

trooper was operating an authorized emergency vehicle while involved in an emergency operation and engaged in privileged conduct (*see* §§ 101, 1104 [a], [b]; *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *Perkins v City of Buffalo*, 151 AD3d 1941, 1942 [4th Dept 2017]), and his police vehicle was not required to have its emergency lights or siren activated (*see* § 1104 [c]; *Perkins*, 151 AD3d at 1942).

Viewing the evidence in this nonjury trial in the light most favorable to claimant, the prevailing party (*see Yerdon v County of Oswego*, 43 AD3d 1437, 1438 [4th Dept 2007]), and deferring to the court's credibility determinations (*see Williams v State of New York*, 187 AD3d 1522, 1522 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]; *Phearsdorf v State of New York*, 175 AD3d 1819, 1820 [4th Dept 2019]), we conclude that the evidence at trial established that the trooper passed a stop sign and entered an intersection at a high rate of speed and directly into oncoming traffic without a siren or horn in a situation where there was "almost no visibility" due to "extreme" and "[v]ery dense" fog. Contrary to the State's contention, such circumstances support a determination that the trooper acted with reckless disregard for the safety of others (*see e.g. Coston v City of Buffalo*, 162 AD3d 1492, 1493 [4th Dept 2018]; *Ruiz v Cope*, 119 AD3d 1333, 1334 [4th Dept 2014]; *Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243 [4th Dept 2013]; *cf. Levere v City of Syracuse*, 173 AD3d 1702, 1704 [4th Dept 2019]; *Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]; *Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373-1374 [4th Dept 2012]).

Contrary to claimant's contention on his cross appeal, the court's determination that claimant was negligent and its apportionment of some liability to claimant are supported by a fair interpretation of the evidence (*see Ruiz*, 119 AD3d at 1334; *Yerdon*, 43 AD3d at 1438).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

953

CA 20-01165

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

TINA M. DEGENFELDER, AS ADMINISTRATRIX OF THE ESTATE OF DOROTHY M. CONROW, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAMSVILLE SUBURBAN, LLC, GOLDEN LIVING CENTERS, LLC, KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE SUBURBAN HOSPITAL, AND KALEIDA HEALTH, DEFENDANTS-APPELLANTS.

CAITLIN ROBIN & ASSOCIATES PLLC, BUFFALO (MARK A. LAUGHLIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS WILLIAMSVILLE SUBURBAN, LLC AND GOLDEN LIVING CENTERS, LLC.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANTS-APPELLANTS KALEIDA HEALTH, DOING BUSINESS AS MILLARD FILLMORE SUBURBAN HOSPITAL AND KALEIDA HEALTH.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 4, 2020. The order, among other things, granted plaintiff's motion to amend her complaint.

Now, upon reading and filing the stipulation of discontinuance with respect to defendants Kaleida Health, doing business as Millard Fillmore Suburban Hospital, and Kaleida Health, signed by the attorneys for the parties on February 2 and 7, 2022,

It is hereby ORDERED that the appeal by defendants Kaleida Health, doing business as Millard Fillmore Suburban Hospital, and Kaleida Health is dismissed upon stipulation, and the order is affirmed without costs.

Memorandum: Plaintiff, in her capacity as power of attorney for Dorothy M. Conrow (decedent), commenced this personal injury action in 2015 to recover damages for injuries sustained by decedent. Decedent passed away approximately three weeks after the complaint was filed. In 2016, plaintiff was appointed administratrix of decedent's estate and was substituted as the named plaintiff in that capacity. In June 2020, plaintiff moved for leave to amend the complaint to add a claim for wrongful death. Supreme Court, inter alia, granted plaintiff's

motion, and Williamsville Suburban, LLC and Golden Living Centers, LLC (defendants) appeal.

The decision whether to grant leave to amend a pleading rests within the sound discretion of the trial court and "will not be disturbed absent a clear abuse of that discretion" (*Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]; *see Taylor v Deubell*, 153 AD3d 1662, 1662 [4th Dept 2017]), and we conclude that the court did not abuse its discretion here. The wrongful death cause of action "arose out of the same occurrence[s] set forth in the original pleadings" (*Taylor*, 153 AD3d at 1662; *see* CPLR 203 [f]; *Caffaro v Trayna*, 35 NY2d 245, 250-251 [1974]), and defendants failed to demonstrate that they would be unduly prejudiced if the motion were granted (*see Caffaro*, 35 NY2d at 250-251; *Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]). Finally, defendants failed to demonstrate that the proposed amendment was palpably insufficient or patently devoid of merit (*see Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013]).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

954

CA 20-01269

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

LANDCO H & L, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

377 MAIN REALTY, INC., DEFENDANT-APPELLANT,
LI LI, AN INDIVIDUAL, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, SARATOGA SPRINGS (PHILLIP A. OSWALD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered September 1, 2020. The order granted plaintiff a preliminary injunction.

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

Memorandum: Plaintiff was the owner of property located at 377 Main Street in Buffalo, New York (property). In January 2020, a deed for the property was executed by defendant Li Li, the former sole shareholder of plaintiff, who held herself out as plaintiff's president, conveying the property to defendant 377 Main Realty, Inc. (Main Realty). Defendant Elena Fu is the president of Main Realty. One month later, plaintiff commenced this action alleging, inter alia, fraud on the ground that Li conveyed the property to Main Realty without the authority to do so. In appeal No. 1, Main Realty appeals from an order that granted plaintiff's motion by order to show cause seeking, among other things, a preliminary injunction precluding Main Realty from, inter alia, conveying or encumbering the property pending final resolution of the matter. In appeal No. 2, Main Realty and Fu appeal from an order that, among other things, granted plaintiff's motion for leave to file and serve a supplemental summons and amended complaint to, inter alia, add Fu as a defendant and assert a cause of action for conspiracy to commit conversion against her.

In appeal No. 1, we reject Main Realty's contention that Supreme Court abused its discretion in granting that part of plaintiff's motion by order to show cause seeking a preliminary injunction. A preliminary injunction requires a demonstration of "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable

injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Here, Main Realty does not dispute that plaintiff met its burden with respect to the first and third factors, but contends that plaintiff failed to meet its burden with respect to the second factor inasmuch as the notice of pendency filed by plaintiff eliminates the threat of irreparable injury. Contrary to Main Realty's contention, the mere existence of a notice of pendency does not preclude a party from establishing the prospect of irreparable injury in the absence of a preliminary injunction (*see Vanderbilt Brookland, LLC v Vanderbilt Myrtle, Inc.*, 147 AD3d 1106, 1110-1111 [2d Dept 2017]; *Maestro W. Chelsea SPE LLC v Pradera Realty Inc.*, 38 Misc 3d 522, 535-536 [Sup Ct, NY County 2012]). Moreover, plaintiff established that it has spent time and money in remediation and renovation work for its intended commercial use of the property, and it seeks in this action a declaration cancelling the allegedly fraudulent conveyance and restoring title to the property to it to, inter alia, prevent alteration of the property by Main Realty that is inconsistent with plaintiff's intended use. Under the circumstances of this case, we conclude that plaintiff established that it will be irreparably injured if, in the absence of a preliminary injunction, Main Realty transfers or otherwise alters the property (*see generally Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 625 [2d Dept 2011]; *Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [4th Dept 1979]).

In appeal No. 2, we conclude that it was an abuse of discretion for the court to grant those parts of plaintiff's motion seeking leave to file and serve a supplemental summons and amended complaint to add Fu as a defendant and to assert a cause of action for conspiracy to commit conversion against her, and we therefore modify the order accordingly. "It is well settled that leave to amend a pleading shall be freely given, provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit . . . , and the decision to permit an amendment is within the sound discretion of the court" (*Stone v City of Buffalo*, 189 AD3d 2124, 2125 [4th Dept 2020] [internal quotation marks omitted]). Initially, plaintiff clarified in the amended complaint that the first cause of action, which is asserted against all defendants and seeks to set aside the deed and mortgage, was brought under RPAPL article 15. Pursuant to RPAPL article 15, an action may be maintained against any "person [who] . . . may have an . . . interest in the real property which may in any manner be affected by the judgment" (RPAPL 1511 [2]). Here, plaintiff failed to allege in the amended complaint any interest that Fu may have in the property and, thus, she is not a proper party to that cause of action (*see generally Ellison Hgts. Homeowners Assn., Inc. v Ellison Hgts. LLC*, 112 AD3d 1302, 1305 [4th Dept 2013]). Furthermore, New York does not recognize civil conspiracy to commit a tort, such as fraud or conversion, as an independent cause of action (*see Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1400 [4th Dept 2012]; *Scott v Fields*, 85 AD3d 756, 757 [2d Dept 2011]; *Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007], *lv denied* 10 NY3d 703 [2008]). Therefore, the proposed amendments with respect to Fu are patently devoid of

merit.

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

955

CA 21-00450

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

LANDCO H & L, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

377 MAIN REALTY, INC., ELENA FU, AN INDIVIDUAL,
DEFENDANTS-APPELLANTS,
LI LI, AN INDIVIDUAL, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, SARATOGA SPRINGS (PHILLIP A. OSWALD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered March 9, 2021. The order, insofar as appealed from, granted the motion of plaintiff for leave to file and serve a supplemental summons and amended complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying those parts of plaintiff's motion seeking leave to file and serve a supplemental summons and amended complaint to add Elena Fu, an individual, as a defendant and to assert a cause of action for conspiracy to commit conversion against her, and as modified the order is affirmed without costs.

Same memorandum as in *Landco H & L, Inc. v 377 Main Realty, Inc.* ([appeal No. 1] — AD3d — [Mar. 11, 2022] [4th Dept 2022]).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

967

CA 21-00259

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

ANNE E.V. MORALES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH MORALES, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ARROWOOD INDEMNITY COMPANY, DAWN CHRISLER, MELISSA PIRAINO, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

COUGHLIN MIDLIGE & GARLAND LLP, NEW YORK CITY (GABRIEL E. DARWICK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS, LLP, BUFFALO (ANDREW DEBBINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 20, 2021. The order denied in part defendants' motion to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by granting those parts of the motion seeking to dismiss the complaint in its entirety against defendants Dawn Chrisler and Melissa Piraino, seeking to dismiss the 1st through 10th and 14th causes of action against defendant Arrowood Indemnity Company, seeking to dismiss the 11th and 12th causes of action against defendant Arrowood Indemnity Company insofar as those causes of action assert claims that accrued prior to February 20, 2017, and seeking to dismiss the 13th cause of action against defendant Arrowood Indemnity Company except insofar as it is based on the surviving portions of the 11th and 12th causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting causes of action arising from defendants' conduct in denying or delaying approval of workers' compensation benefits and payment of claims submitted by or on behalf of plaintiff's late husband, Joseph Morales (decedent). Decedent submitted workers' compensation claims after he was injured on two separate occasions during his employment with nonparty Strategic Minerals Corporation (Strategic Minerals). Defendant Arrowood Indemnity Company (Arrowood), as workers' compensation insurer for Strategic Minerals, became responsible for those claims. Arrowood and its claims adjusters Dawn Chrisler and Melissa Piraino (collectively, defendants) appeal from an order

insofar as it denied that part of their motion seeking to dismiss the complaint against them.

Initially, we conclude that Supreme Court erred in denying the motion insofar as it sought dismissal of the complaint against Chrisler and Piraino, who are employees of Arrowood. We therefore modify the order accordingly. Our review of the record " 'fails to reveal any factual allegations that [those employees] acted either outside the scope of their employment or for personal profit' in a manner that would open them to personal liability" (*Maki v Travelers Cos. Inc.*, 145 AD3d 1228, 1230 [3d Dept 2016], *appeal dismissed* 29 NY3d 943 [2017]; *see O'Keefe v Allstate Ins. Co.*, 90 AD3d 725, 726 [2d Dept 2011]; *Freyne v Xerox Corp.*, 98 AD2d 965, 965 [4th Dept 1983]).

We also conclude that the court erred in denying the motion insofar as it sought dismissal of the 1st through 10th causes of action against Arrowood, and we further modify the order accordingly. A number of plaintiff's causes of action are barred by the exclusivity provisions of the Workers' Compensation Law. Under that statute, an employer such as Strategic Minerals must, with certain exceptions not relevant here, "secure compensation to [its] employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury" (Workers' Compensation Law § 10 [1]). An employer's liability under that statute is "exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom" (§ 11). Thus, "the Workers' Compensation Law provides the exclusive remedy to an employee for a work-related injury. In addition the law is settled that an employee has no cause of action against his employer for the negligent aggravation of [a work-related] injury" (*Burlew v American Mut. Ins. Co.*, 99 AD2d 11, 14 [4th Dept 1984], *affd* 63 NY2d 412 [1984]). That is because "[t]he legislative scheme for workers' compensation benefits is far-reaching. It concerns itself not only with the simple fact of a work-related injury, but it provides a thorough system of regulation, administration, and, where the Legislature has deemed them appropriate, sanctions" (*Burlew*, 63 NY2d at 416). "In addition to providing relief for work-related injuries, the Workers' Compensation Law also regulates the processing of claims. Injuries allegedly occurring as a result of an employer's delay in authorizing surgery are subject to the exclusive remedies provided in that legislative plan" (*id.* at 414-415). The Workers' Compensation Law does not "provide that a separate lawsuit may be instituted to recover damages for the emotional distress triggered by an employer's delay" in processing claims (*id*. at 417; *see Mark B. v County of Onondaga*, 273 AD2d 834, 834 [4th Dept 2000], *lv denied* 95 NY2d 764 [2000]). "Furthermore, a compensation carrier stands in the place of the employer and is subrogated to its rights and claims when the carrier performs its obligations under its insurance policy . . . It may avail itself of any defense possessed by its insured, the employer" (*Burlew*, 99 AD2d at 14).

Here, in denying the motion, the court concluded that the complaint alleged that defendants acted intentionally in denying or delaying decedent's claims for benefits. "Intentional injuries are not covered by the Workers' Compensation Law, and an employee may bring a tort action for such wrongs against the offending employer or insurer" (*Burlew*, 63 NY2d at 417; *see Acevedo v Consolidated Edison Co. of New York, Inc.*, 189 AD2d 497, 500-501 [1st Dept 1993], *lv dismissed* 82 NY2d 748 [1993]). Nevertheless, in order "[t]o sufficiently plead an intentional tort that will neutralize the statute's exclusivity there must be alleged an intentional or deliberate act . . . directed at causing harm to the particular employee" (*Acevedo*, 189 AD2d at 500-501; *see Briggs v Pymm Thermometer Corp.*, 147 AD2d 433, 436 [2d Dept 1989]).

Accepting the facts as alleged in the complaint as true and according plaintiff the benefit of every favorable inference, as we must on this motion to dismiss under CPLR 3211 (*see Hall v McDonald's Corp.*, 159 AD3d 1591, 1592 [4th Dept 2018]; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the 2nd through 5th, 7th, 8th, and 10th causes of action against Arrowood must be dismissed inasmuch as they do not allege intentional conduct by defendants and thus are barred by the exclusivity provisions of the Workers' Compensation Law (*see Pereira v St. Joseph's Cemetery*, 54 AD3d 835, 836-837 [2d Dept 2008]; *see generally Burlew*, 63 NY2d at 414-415).

Although the 1st cause of action, which seeks damages for bad faith denial of an insurance claim, arguably alleges intentional conduct by defendants, there is "no separate cause of action in tort for an insurer's bad faith failure to perform its [contractual] obligations" under an insurance policy (*Zawahir v Berkshire Life Ins. Co.*, 22 AD3d 841, 842 [2d Dept 2005] [internal quotation marks omitted]; *see Paterra v Nationwide Mut. Fire Ins. Co.*, 38 AD3d 511, 512-513 [2d Dept 2007]; *see generally New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320 [1995]). In addition, plaintiff failed to allege or demonstrate "the creation of a relationship or duty between herself [or decedent] and [Arrowood] separate from this contractual obligation; therefore, no independent tort claim lies" (*Alexander v GEICO Ins. Co.*, 35 AD3d 989, 990 [3d Dept 2006]).

With respect to the 6th cause of action, for deceptive business practices under General Business Law § 349, we note that "[a] plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Reid v Univera Healthcare*, 178 AD3d 1406, 1406-1407 [4th Dept 2019], *lv denied* 35 NY3d 1062 [2020] [internal quotation marks omitted]). In the 6th cause of action, plaintiff alleges only a private contract dispute unique to the parties, which does not constitute the consumer-oriented conduct required by the statute (*see New York Univ.*, 87 NY2d at 320-321).

Plaintiff's 9th cause of action, for fraud, fails inasmuch as " 'a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation' " (*Reid*, 178 AD3d at 1407-1408). Moreover, the complaint fails to state in detail the circumstances constituting the alleged fraud (*see Leonardi v County of Cayuga*, 103 AD3d 1232, 1233-1234 [4th Dept 2013]; *see generally* CPLR 3016 [b]).

Arrowood further contends that the 11th, 12th, and 14th causes of action are barred by the applicable statutes of limitations. "On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). If the defendant meets that burden, the burden then shifts to the plaintiff to "aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*Arnell Constr. Corp. v New York City Sch. Constr. Auth.*, 186 AD3d 543, 543-544 [2d Dept 2020] [internal quotation marks omitted]; *see Rider*, 192 AD3d at 1562).

Here, we conclude that Arrowood met its burden with respect to the 14th cause of action by establishing that the one-year statute of limitations for intentional prima facie tort expired (*see generally 10 Ellicott Sq. Ct. Corp. v Violet Realty Inc.*, 81 AD3d 1366, 1368-1369 [4th Dept 2011], *lv denied* 17 NY3d 704 [2011]), and plaintiff failed to meet her burden of averring evidentiary facts establishing that the limitations period " 'has not expired, that it is tolled, or that an exception to the statute of limitations applies' " (*Arnell Constr. Corp.*, 186 AD3d at 543-544). Consequently, we further modify the order by granting the motion insofar as it sought dismissal of the 14th cause of action against Arrowood.

Plaintiff's 11th cause of action, which seeks to recover for, in essence, tortious interference with business relations, is governed by a three-year statute of limitations (*see generally Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47-48 [1st Dept 2009], *lv dismissed in part and denied in part* 14 NY3d 736 [2010]), as is her 12th cause of action for tortious interference with contract (*see* CPLR 214 [4]; *Andrew Greenberg, Inc. v Svane, Inc.*, 36 AD3d 1094, 1099 [3d Dept 2007]). Such claims are "not enforceable until damages are sustained and that point, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual" (*Andrew Greenberg, Inc.*, 36 AD3d at 1099 [internal quotation marks omitted]; *see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]; *Sapienza v Notaro*, 172 AD3d 1418, 1420 [2d Dept 2019]).

Here, Arrowood met its burden of establishing that the limitations period had expired with respect to most of the injuries alleged in the 11th and 12th causes of action. Accepting the facts alleged in the complaint as true and according plaintiff the benefit of every favorable inference (*see generally Leon*, 84 NY2d at 87-88),

however, we conclude that the complaint alleges an injury within three years preceding the filing of the complaint in 2020, specifically that decedent was injured by the denial of back surgery at the Bonati Spine Institute in 2017 due to Arrowood's refusal to permit him to obtain MRIs of his spine at earlier dates, and thus Arrowood failed to meet its burden on the motion with respect to those allegations. We therefore further modify the order by granting those parts of the motion seeking to dismiss the 11th and 12th causes of action against Arrowood insofar as they assert claims that accrued more than three years preceding the filing of the complaint.

Finally, the 13th cause of action is a "derivative cause of action [that] cannot survive the dismissal" of the underlying causes of action (*Klein v Metropolitan Child Servs., Inc*., 100 AD3d 708, 711 [2d Dept 2012]; *see Allington v Templeton Found.*, 167 AD3d 1437, 1440 [4th Dept 2018]), and we therefore further modify the order by granting that part of the motion seeking dismissal of the 13th cause of action against Arrowood except insofar as that cause of action is based on the surviving parts of the 11th and 12th causes of action.

All concur except DeJoseph, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1034

KA 21-00605

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENDELL GRIFFIN, DEFENDANT-APPELLANT.

STEVEN M. SHARP, ALBANY, 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 July 19, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him after a jury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and two counts of robbery in the first degree (§ 160.15 [1], [2]), in connection with the shooting death of the victim that occurred during the course of a robbery. We affirm.

Defendant contends that the conviction is not supported by legally sufficient evidence because the People did not establish that a robbery occurred, which is an element of all the counts of which defendant was convicted. Insofar as relevant here, a person commits felony murder when he or she "[a]cting either alone or with one or more other persons, . . . commits or attempts to commit robbery . . . and, in the course of and in furtherance of such crime or of immediate flight therefrom, he [or she], or another participant . . . causes the death of a person other than one of the participants" (Penal Law § 125.25 [3]). "A person is guilty of robbery in the first degree when he [or she] forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he [or she] or another participant in the crime . . . [either c]auses serious physical injury to another person who is not a participant in the crime; or . . . [i]s armed with a deadly weapon" (§ 160.15 [1], [2]).

Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see*

generally People v Bleakley, 69 NY2d 490, 495 [1987]). Specifically, we conclude that a rational jury could have inferred beyond a reasonable doubt that defendant committed felony murder and robbery by participating in a robbery that resulted in the shooting death of the victim. There is ample evidence to establish defendant's identity as a perpetrator of the charged crimes inasmuch as surveillance video clearly showed defendant and the codefendant acting in concert in the moments leading up to the codefendant shooting the victim. Supporting the inference that defendant participated in a robbery is evidence that the victim often wore a necklace, but that the necklace was not found on the victim's body after his death (*see People v Good*, 201 AD2d 254, 254-255 [1st Dept 1994]). Further, defendant's course of conduct depicted on the surveillance video fit a " 'pattern common to robberies' " that would allow the jury to reasonably infer that he robbed the victim (*People v Lamont*, 25 NY3d 315, 321 [2015]; *see People v Gordon*, 23 NY3d 643, 652-653 [2014]; *People v Luke*, 279 AD2d 534, 535 [2d Dept 2001], *lv denied* 96 NY2d 785 [2001]). The surveillance video showed defendant peering into the parked vehicle in which the victim was sleeping as though he was casing it, keeping other people who may have interfered to thwart the robbery away from the sleeping victim, and—most crucially—reaching into the vehicle in the vicinity of the victim's neck moments before the shooting and then running away as though he was holding something (*see People v Reed*, 22 NY3d 530, 532, 535 [2014], *rearg denied* 23 NY3d 1009 [2014]; *Luke*, 279 AD2d at 535; *People v Hope*, 128 AD2d 638, 638-639 [2d Dept 1987], *lv denied* 69 NY2d 1005 [1987]). In short, "[a]lthough the surveillance footage did not clearly show defendant [taking the necklace from the victim], his other actions on the video . . . support a rational inference of [robbery]" (*People v Johnson*, 197 AD3d 61, 69 [3d Dept 2021]). For the same reasons, viewing the evidence in light of the elements of the crimes as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that he was denied effective assistance of counsel by defense counsel's failure to challenge for cause a prospective juror during jury selection because such a challenge would have had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). Although at the beginning of voir dire the prospective juror made statements that raised concerns about her impartiality, after further questioning she unequivocally and credibly stated that she would decide the case based solely on the trial evidence and no longer held the opinions that had previously raised concerns about her impartiality (*see People v Warrington*, 28 NY3d 1116, 1120 [2016]; *People v Anderson*, 113 AD3d 1102, 1103 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]; *see generally People v Patterson*, 173 AD3d 1737, 1739 [4th Dept 2019], *affd* 34 NY3d 1112 [2019]).

We reject defendant's further contention that defense counsel was ineffective because he did not request a circumstantial evidence charge, inasmuch as such a request also "would have had little or no

chance of success" (*People v Lawrence*, 192 AD3d 1686, 1688 [4th Dept 2021] [internal quotation marks omitted]). A circumstantial evidence charge "is required only where the evidence against defendant is wholly circumstantial" (*People v Smith*, 145 AD3d 1628, 1630 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]; *see People v Slade*, 133 AD3d 1203, 1207 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]), which we conclude is not the case here given, inter alia, the surveillance camera video depicting the robbery and murder (*see People v Geddes*, 49 AD3d 1255, 1256-1257 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]; *People v Buskey*, 13 AD3d 1058, 1059 [4th Dept 2004]; *see generally People v Lewis*, 300 AD2d 827, 829 [3d Dept 2002], *lv denied* 99 NY2d 630 [2003]). Even assuming, arguendo, that defendant was entitled to such a charge, we conclude that the "single error in failing to request such a charge [would] not constitute ineffective representation as it was not so serious as to compromise defendant's right to a fair trial" (*People v Gunney*, 13 AD3d 980, 983 [3d Dept 2004], *lv denied* 5 NY3d 789 [2005]; *see Geddes*, 49 AD3d at 1257).

We likewise reject defendant's contention that he was deprived of a fair trial through the use of an interpreter who allegedly had difficulty accurately interpreting a witness's testimony. Defendant failed to establish "a serious error in translation [or] that the alleged problems with the translation prevented him from conducting an effective cross-examination [of the witness in question] or caused any other prejudice" (*People v Chowdhury*, 180 AD3d 455, 456 [1st Dept 2020]; *see People v Dat Pham*, 283 AD2d 952, 952 [4th Dept 2001], *lv denied* 96 NY2d 900 [2001]). Further, to the extent that "there were occasional difficulties in translation, they were sufficiently rectified so that the [witness's] testimony was properly presented to the jury" (*People v Kowlessar*, 82 AD3d 417, 418 [1st Dept 2011]; *see People v Restivo*, 226 AD2d 1106, 1107 [4th Dept 1996], *lv denied* 88 NY2d 883 [1996]). Defendant's further contentions that the interpreter was not properly sworn and that County Court should have conducted an inquiry into the accuracy of the translation are not preserved for our review (*see generally People v Maldonado*, 140 AD3d 1530, 1530 [3d Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *People v Rodriguez*, 32 AD3d 1203, 1204 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]; *People v Hubbard*, 184 AD2d 781, 781 [2d Dept 1992], *lv denied* 80 NY2d 1027 [1992]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We also reject defendant's contention that, at trial, the court erred in allowing a police detective to identify defendant in a surveillance video depicting the robbery and shooting. "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, 336 [2d Dept 1991], *affd* 79 NY2d 1024 [1992]). We conclude that the court did not abuse its discretion in permitting the challenged testimony because

the People presented evidence establishing that the police detective was familiar with defendant based on several prior contacts with defendant over the course of several years. Thus, there "was some basis for concluding that the [police detective] was more likely to identify defendant correctly than was the jury" (*People v Gambale*, 158 AD3d 1051, 1053 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *see People v Trowell*, 172 AD3d 1112, 1113 [2d Dept 2019], *lv denied* 33 NY3d 1074 [2019]). We reject defendant's contention that a change in his appearance was a prerequisite to the admission of the police detective's testimony (*see People v Pinkston*, 169 AD3d 520, 521 [1st Dept 2019], *lv denied* 33 NY3d 1107 [2019]). Based on the foregoing, the police detective's testimony " 'served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant' " (*People v Montanez*, 135 AD3d 528, 528 [1st Dept 2016], *lv denied* 27 NY3d 1072 [2016]). We also note that the court properly instructed the jury that the police detective merely provided his opinion that defendant was depicted in the video and that the jurors were the ultimate finders of fact on the issue of the identity of the perpetrator, and the jury is presumed to have followed the court's instruction (*see People v Brown*, 145 AD3d 1549, 1549 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]).

We reject defendant's further contention that the court erred in permitting a witness to testify at trial about the identification procedures. Testimony about a photo array procedure, and the array itself, may be admitted where, inter alia, the procedure is " 'blinded,' " that is, where the person administering the array procedure does not know the suspect's position in the array (CPL 60.25 [1] [c] [ii]; *see* CPL 60.30). Here, although the array viewed by the witness was created by the police detective who administered the procedure, the specific procedure conducted was nevertheless blind because the police detective placed three different arrays in envelopes, which he shuffled before having the witness pick one. This procedure is sufficient, in our view, to ensure that, at the time the witness was viewing the array, the police detective did not know the position of defendant in that array (*see Dennis v Secretary, Pennsylvania Dept. of Corr.*, 834 F3d 263, 321 [3d Cir 2016, McKee, C.J., concurring]; *see generally* CPL 60.25 [1] [c] [ii]).

However, we agree with defendant that the court erred to the extent that it limited defense counsel's cross-examination of a witness regarding his criminal history. "[C]urtailment [of cross-examination] will be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony" (*People v Gross*, 71 AD3d 1526, 1527 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010] [internal quotation marks omitted]; *see People v Dizak*, 93 AD3d 1182, 1183 [4th Dept 2012], *lv denied* 19 NY3d 972 [2012], *reconsideration denied* 20 NY3d 932 [2012]). Here, we conclude that the court erred in limiting defense counsel's cross-examination regarding the underlying facts of a witness's prior drug conviction that occurred two months before the shooting at issue here, inasmuch as those facts bore on the witness's credibility and were not remote or cumulative (*see People v Caines*, 221 AD2d 278, 278 [1st Dept

1995], *lv denied* 88 NY2d 845 [1996]; *People v Robinson*, 133 AD2d 859, 861 [2d Dept 1987]; *cf. People v Corby*, 6 NY3d 231, 235-236 [2005]; *People v Burton*, 286 AD2d 772, 773 [2d Dept 2001], *lv denied* 97 NY2d 679 [2001]).

Nonetheless, we conclude that any error in admitting the challenged testimony, i.e., the police detective testimony regarding the surveillance video and the witness testimony describing the photo array identification, or in limiting the cross-examination of a witness, is harmless in light of the otherwise overwhelming evidence of defendant's guilt and because there was no significant probability that the court's error with respect to any of that testimony contributed to the conviction (*see People v Harlow*, 195 AD3d 1505, 1508 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *People v Flowers*, 95 AD3d 1233, 1234 [2d Dept 2012], *lv denied* 19 NY3d 1025 [2012]; *People v Chestnut*, 237 AD2d 528, 528 [2d Dept 1997], *lv denied* 90 NY2d 856 [1997]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of murder in the second degree under Penal Law § 125.25 (1), and it must therefore be amended to reflect that defendant was convicted under Penal Law § 125.25 (3) (*see People v Ealahan*, 198 AD3d 1376, 1377 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

1038

KA 18-00613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY HARRIS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT 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 7, 2017. The judgment convicted defendant, upon a jury verdict, of aggravated criminal contempt.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of aggravated criminal contempt (Penal Law § 215.52 [1]). We affirm.

Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention that the People violated their discovery obligations with respect to the protective order itself is without merit (*see People v Mack*, 193 AD2d 439, 439 [1st Dept 1993], *lv denied* 84 NY2d 829 [1994]; *see generally People v Ranghelle*, 69 NY2d 56, 63 [1986]; *People v Nichols*, 163 AD3d 39, 48 [4th Dept 2018]). Contrary to defendant's further contention, County Court was not obligated to impose a sanction for the People's belated disclosure of a short audio file inasmuch as defense counsel "received the materials at a time when they were still useful to [the] defense" (*People v Martinez*, 198 AD2d 67, 67 [1st Dept 1993], *lv denied* 82 NY2d 927 [1994]; *see People v Collins*, 203 AD2d 888, 889 [4th Dept 1994], *lv denied* 85 NY2d 861 [1995]). Defendant's claims of prosecutorial misconduct on summation are unpreserved for appellate review (*see People v Haynes*, 104 AD3d 1142, 1144 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

The record "falls short of establishing conclusively the merit of . . . defendant's claim" that defense counsel was ineffective for failing to alert him, during plea negotiations, to the possibility of

persistent felony offender sentencing after trial (*People v Lopez-Mendoza*, 33 NY3d 565, 573 [2019]). In particular, the unsworn assertions by defendant and defense counsel on that issue raise credibility issues requiring a CPL 440.10 motion (*see generally id.* at 572-573). We thus cannot decide that claim on direct appeal, i.e., "[w]ithout the benefit of additional facts that might [be] developed after an appropriate postconviction motion" (*People v Denny*, 95 NY2d 921, 923 [2000]; *see People v Spotards*, 23 AD3d 586, 587 [2d Dept 2005], *lv denied* 7 NY3d 763 [2006]).

Contrary to defendant's further contention, defense counsel's failure to call an expert witness at trial does not constitute ineffective assistance because defendant has not demonstrated "that such testimony . . . would have assisted the jury in its determination or that he was prejudiced by its absence" (*People v Gonzales*, 145 AD3d 1432, 1433 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017] [internal quotation marks omitted]). Nor was defense counsel ineffective for not moving to reopen the suppression hearing inasmuch as no "additional pertinent facts [were] discovered [at trial] which would have affected the [suppression] determination" (*People v Xing Chen*, 117 AD3d 762, 763 [2d Dept 2014], *lv denied* 24 NY3d 1090 [2014]; *see generally People v Huffman*, 41 NY2d 29, 34-35 [1976]). Contrary to defendant's further contention, defense counsel was not ineffective for failing to present mitigating evidence at the persistent felony offender hearing inasmuch as defendant has not demonstrated that any genuinely mitigating evidence existed (*see People v Rosario*, 157 AD3d 988, 995 [3d Dept 2018], *lv denied* 31 NY3d 1121 [2018]). We have considered and rejected defendant's remaining allegations of ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 146-152 [1981]).

Contrary to defendant's further contention, the court properly exercised its discretion in sentencing him as a persistent felony offender (*see People v Morris*, 21 AD3d 251, 251 [1st Dept 2005], *lv denied* 5 NY3d 831 [2005]; *see generally* Penal Law § 70.10 [2]; *People v Prindle*, 29 NY3d 463, 467 [2017], *cert denied* — US —, 138 S Ct 514 [2017]; *People v Lowery*, 158 AD3d 1179, 1181 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]). Under the circumstances of this case, "[t]he fact that defendant had been offered a favorable plea bargain does not negate the validity of the sentence imposed" (*Morris*, 21 AD3d at 251). Defendant's *Apprendi* challenge to the persistent felony offender statute is both unpreserved and meritless (*see People v Dingle*, 147 AD3d 1080, 1081 [2d Dept 2017], *lv denied* 31 NY3d 1146 [2018]; *see generally Prindle*, 29 NY3d at 465-466). Defendant's remaining contentions are without merit.

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1053

KA 18-00389

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AYKUT OZKAYNAK, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered January 11, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree and tampering with physical evidence.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [2]), defendant contends, inter alia, that the verdict is against the weight of the evidence and that County Court erred in refusing to suppress certain cell site location information (CSLI) on the ground that he lacked standing to challenge a search warrant issued for that information.

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]).

We agree with defendant, however, that he has standing to challenge the CSLI search warrant. At the time of the court's decision, controlling caselaw in this Department held that the acquisition of CSLI was not a search under the State or Federal Constitution because a defendant's use of a phone "constituted a voluntary disclosure of his [or her] general location to [the] service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties" (*People v Jiles*, 158 AD3d 75, 79-80 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]). Following defendant's conviction, the United States Supreme Court decided *Carpenter v United States* (— US —, 138 S Ct 2206, 2217 [2018]), which held that "an individual maintains a legitimate

expectation of privacy in the record of his [or her] physical movements as captured through CSLI" (*see People v Lively*, 163 AD3d 1466, 1467 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]). As a result of the *Carpenter* decision, defendant is entitled to a determination on the merits regarding his challenges to the CSLI search warrant.

On appeal, the People contend that the warrant was supported by probable cause and, for the first time, that defendant failed to establish his individual standing to challenge the CSLI search warrant because he did not assert ownership or possession of the cell phone in question. We lack the jurisdiction to review the People's contentions because the court failed to address their merits and thus did not decide the issues adversely to defendant (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]).

In addition, we cannot conclude that the court's error in refusing to suppress the CSLI information on the basis of lack of standing is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine whether the CSLI warrant was supported by probable cause, which was the only ground asserted by the People in opposition to defendant's motion.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1070

CA 20-01411

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

JOSEPH SZYMKOWIAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK POWER AUTHORITY, DEFENDANT-APPELLANT.

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

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (ETHAN W. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 6, 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 defendant's motion insofar as it effectively sought summary judgment dismissing the claims for damages related to post-concussion syndrome and a concussion condition stemming from the October 2015 accident and dismissing those claims and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action against defendant seeking damages for injuries he allegedly sustained in two workplace accidents. Following discovery, defendant moved for summary judgment dismissing the complaint "in its entirety" or, in the alternative, for summary judgment seeking, in effect, dismissal of plaintiff's claims for damages related to post-concussion syndrome (PCS) and headaches, as barred by the doctrine of collateral estoppel, and a finding that plaintiff did not sustain an injury to his left shoulder as a result of the second accident. In its motion, defendant addressed only those causes of action and injuries related to the second of the two accidents. In opposition to the motion, plaintiff likewise addressed only those causes of action and injuries related to the second accident.

Supreme Court granted the motion with respect to the common-law negligence, Labor Law § 200, and Labor Law § 241 (6) causes of action. In addition, the court granted defendant's motion insofar as it sought a finding that plaintiff did not sustain an injury to his left shoulder. The court denied the motion insofar as it sought summary judgment dismissing the Labor Law § 240 (1) "cause of action" and

plaintiff's claims for damages related to PCS and headaches.

On appeal, defendant contends that the court erred in denying the motion to that extent. We agree with defendant in part, and we therefore modify the order.

With respect to the Labor Law § 240 (1) cause of action related to the second accident, we conclude that defendant failed to establish as a matter of law that plaintiff was not "obliged to work at an elevation" (*Broggy v Rockefeller Group, Inc*., 8 NY3d 675, 681 [2007]). Citing *Broggy* and *Maracle v Autoplace Infiniti, Inc.* (161 AD3d 1524, 1525 [4th Dept 2018]), defendant contends that there were other methods of dislodging a tagline from a 10- to 12-foot fence that would not have required plaintiff to work at an elevation, and plaintiff is not entitled to the protections of the statute. We reject that contention. In *Broggy* and *Maracle*, the tasks could be performed by the respective plaintiffs without any need for those plaintiffs to work at an elevation. Here, by contrast, defendant submitted the deposition testimony of plaintiff, who asserted that, in order to release the tagline from the fence, he needed to work at an elevation. As the Court of Appeals noted, "liability turns on whether a particular . . . *task* creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" (*Broggy*, 8 NY3d at 681 [emphasis added]; *see Ventimiglia v Thatch, Ripley & Co., LLC*, 96 AD3d 1043, 1045 [2d Dept 2012]). Moreover, plaintiff's deposition testimony that he was required to stand on an elevated surface to perform the task is enough, under the circumstances of this case, for plaintiff "to ward off summary judgment" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]).

Contrary to defendant's contention, plaintiff's decision to employ one method of performing a necessary task, "even if a safer method existed, constitute[s] nothing more than 'comparative fault that is not a defense under the statute' " (*Salzer v Benderson Dev. Co., LLC*, 130 AD3d 1226, 1228 [3d Dept 2015]). "The mere fact that a plaintiff negligently chooses one method of elevation over another and the device chosen contributes to the accident is not a defense to the absolute liability imposed under the statute" (*Rose v Mount Ebo Assoc.*, 170 AD2d 766, 768 [3d Dept 1991]). Here, we conclude that "[t]he work 'exposed plaintiff to an elevation-related risk' " because plaintiff was working four to five feet above the ground, and we further conclude that " 'the absence of an appropriate safety device such as a ladder [may have been] a proximate cause of plaintiff's injuries' " (*Worden v Solvay Paperboard, LLC*, 24 AD3d 1187, 1188 [4th Dept 2005]).

Defendant further contends that it was entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action related to the second accident inasmuch as plaintiff was the sole proximate cause of that accident. We reject that contention. To establish a sole proximate cause defense under Labor Law § 240 (1), a defendant must demonstrate that the plaintiff had " 'adequate safety devices available; that [the plaintiff] knew both that they were available and that he [or she] was expected to use them; that [the plaintiff] chose

for no good reason not to do so; and that had [the plaintiff] not made that choice he [or she] would not have been injured' " (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see generally Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Here, defendant's own submissions raise triable issues of fact whether there was a "readily available" ladder (*Lojano v Soiefer Bros. Realty Corp.*, 187 AD3d 1160, 1162 [2d Dept 2020]; *cf. Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]), whether it was "adequate" for the task (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]), and whether plaintiff "chose for no good reason" not to use it (*Cahill*, 4 NY3d at 40; *see Dziadaszek v Legacy Stratford, LLC*, 177 AD3d 1276, 1278 [4th Dept 2019]; *cf. Arnold v Barry S. Barone Constr. Corp.*, 46 AD3d 1390, 1390-1391 [4th Dept 2007], *lv denied* 10 NY3d 707 [2008]). Inasmuch as defendant failed to meet its initial burden with respect to that cause of action, the burden never shifted to plaintiff to raise a triable issue of fact in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We agree with defendant that the court erred in denying its motion insofar as it effectively sought summary judgment dismissing plaintiff's claims for damages related to PCS or a concussion condition as barred by the doctrine of collateral estoppel, but we conclude that plaintiff's claims for damages related to headaches and the alleged concussion itself are not so barred. The quasi-judicial determinations of administrative agencies, such as the Workers' Compensation Board (Board), "are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]; *see Ryan v New York Tel. Co.*, 62 NY2d 494, 499 [1984]; *King v Malone Home Bldrs., Inc.*, 137 AD3d 1646, 1648 [4th Dept 2016]). Although there is a distinction between a determination regarding the level of a plaintiff's disability (*see Auqui*, 22 NY3d at 255-256) and a determination whether a plaintiff actually sustained a physical injury causally related to an accident (*see Roserie v Alexander's Kings Plaza, LLC*, 171 AD3d 822, 823-824 [2d Dept 2019]; *Vega v Metropolitan Transp. Auth.*, 133 AD3d 518, 519 [1st Dept 2015]; *Emanuel v MMI Mech., Inc.*, 131 AD3d 1002, 1003 [2d Dept 2015]), the Board in this case specifically found that plaintiff did not have "post-concussion syndrome" or a "concussion condition" that were causally related to the second work accident.

Inasmuch as there is an identity of issues and there is no dispute that plaintiff had a full and fair opportunity to litigate the causation issue before the Board, we conclude that defendant met its initial burden of establishing that plaintiff is collaterally estopped from claiming in this personal injury action that he sustained a PCS injury or a concussion condition as a result of the second accident (*see Roserie*, 171 AD3d at 823-824; *Vega*, 133 AD3d at 519; *Emanuel*, 131 AD3d at 1003; *cf. Auqui*, 22 NY3d at 255-256). Inasmuch as plaintiff

did not submit any additional exhibits in opposition thereto, he did not raise any triable issues of fact sufficient to defeat the motion to that extent. We therefore modify the order accordingly. However, defendant failed to establish that the Board rendered any determination on whether plaintiff suffered from headaches or sustained an actual concussion. As a result, we conclude that plaintiff's claims for damages related to those purported injuries are not barred.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1082

KA 19-01904

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES DUBOIS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (J. SCOTT PORTER 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 (Thomas J. Miller, J.), rendered July 26, 2019. The judgment convicted defendant upon a jury verdict of arson in the first degree and murder in the first degree (four counts).

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the sentence imposed on count nine of the indictment and imposing an indeterminate sentence of imprisonment of 25 years to life on that count, to run concurrently with the sentences imposed on counts one through four, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of arson in the first degree (Penal Law § 150.20) and four counts of murder in the first degree (§ 125.27 [1] [a] [vii]; [b]) related to an incendiary house fire, which resulted in the death of four members of his family. 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]).

We also reject defendant's contention that County Court erred in refusing to suppress statements that he made while being transported from the scene of the fire to the police station and statements that he made after he allegedly invoked his right to remain silent while being interviewed at the station. Initially, we agree with defendant that he preserved for our review his contention that the statements he made while being transported were the product of an unlawful detention. Although defendant did not raise that issue in his omnibus motion, "[a] question of law with respect to a ruling of a suppression court is preserved for appeal when 'a protest thereto was registered,

by the party claiming error, at the time of such ruling . . . or at any subsequent time when the court had an opportunity of effectively changing the same . . . , or if in response to a protest by a party, the court expressly decided the question raised on appeal' " (*People v Murray*, 194 AD3d 1360, 1362 [4th Dept 2021], quoting CPL 470.05 [2]). Here, defendant specifically raised the issue of unlawful detention in a posthearing submission (*cf. id.*), which is a time when the court still had an opportunity of changing its ruling. Moreover, the court expressly decided that issue in its decision and order (*see People v Curry*, 192 AD3d 1649, 1650 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]).

With respect to the merits, the officer testified at the *Huntley* hearing that she "asked [defendant] to step into [her] vehicle" to be transported to the station to be interviewed. At that time, defendant was one of the only survivors of a house fire at his residence. Although defendant, who was not known to the officer to be a suspect, was not handcuffed, he was pat frisked pursuant to standard protocol. A reasonable person, innocent of any crime, would not have considered himself or herself in custody under those circumstances (*see People v Box*, 181 AD3d 1238, 1239 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *rearg denied* 26 NY2d 845, 883 [1970], *cert denied* 400 US 851 [1970]).

Even assuming, arguendo, that defendant was in custody while he was being transported, we conclude that the court correctly determined that the officer's single question about whether defendant was home when the fire engulfed his home was not interrogation but, rather, a question to clarify a situation after defendant spontaneously mentioned that he had been elsewhere at the time of the fire (*see People v Naradzay*, 11 NY3d 460, 468 [2008], *rearg dismissed* 17 NY3d 840 [2011]; *People v Hymes*, 132 AD3d 1411, 1411 [4th Dept 2015], *lv denied* 26 NY3d 1146 [2016]).

We further conclude that the court did not err in refusing to suppress the statements defendant made at the station inasmuch as the court properly concluded that defendant did not unequivocally invoke his right to remain silent when he told officers in the interview room that he was "done" after he refused to say the words he believed that they wanted to hear (*see People v Lowin*, 36 AD3d 1153, 1155 [3d Dept 2007], *lv denied* 9 NY3d 847 [2007], *reconsideration denied* 9 NY3d 878 [2007]; *cf. People v Williams*, 184 AD3d 1010, 1013 [3d Dept 2020], *lv denied* 35 NY3d 1097 [2020]; *People v Johnson*, 150 AD3d 1390, 1396 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]) or when he told them that he "just want[ed] to go to sleep" (*see People v Perry*, 194 AD3d 849, 850 [2d Dept 2021], *lv denied* 37 NY3d 1098 [2021]). Whether a defendant's statement constitutes an unequivocal assertion of the right to remain silent " 'is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' " (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20

NY3d 1015 [2013], quoting *People v Glover*, 87 NY2d 838, 839 [1995]). The court's determination that defendant did not unequivocally invoke his right to remain silent when he made those two statements "is 'granted deference and will not be disturbed unless unsupported by the record' " (*id.*).

Contrary to defendant's contention, the court properly permitted the People to introduce *Molineux* evidence that a witness had seen defendant making " 'cocktail bombs' " several months before the fire. Defendant's initial challenge, i.e., that the prior bad act was too remote in time, is not preserved for our review inasmuch as defendant "did not object to the evidence on that ground" (*People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]). 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 the evidence was properly admitted inasmuch as it was relevant to the issues of intent and identity "in view of defendant's theory at trial that the fire was the result of an accident and was not intentionally started" (*People v Brown*, 57 AD3d 1461, 1463 [4th Dept 2008], *lv denied* 12 NY3d 814 [2009], *reconsideration denied* 12 NY3d 923 [2009]; *see generally People v Alvino*, 71 NY2d 233, 241-242 [1987]) and the probative value of that evidence was not outweighed by its prejudicial effect (*cf. People v Vincek*, 75 AD2d 412, 414-416 [4th Dept 1980]).

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment. We do, however, conclude that the judgment must be modified inasmuch as the sentence imposed on count nine, for arson in the first degree (Penal Law § 150.20), is illegal. On that class A-I felony, defendant was sentenced to a determinate term of imprisonment of 25 years, with 5 years of postrelease supervision. Pursuant to Penal Law § 70.00 (1), (2) (a), and (3) (a) (i), defendant should have been sentenced to an indeterminate sentence of imprisonment with a minimum term between 15 years and 25 years and a maximum term of life. In the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence (*see People v Thacker*, 156 AD3d 1482, 1483-1484 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). In view of the concurrent sentences of life without the possibility of parole imposed on the four murder counts, we modify the judgment by vacating the sentence imposed on count nine of the indictment and imposing an indeterminate term of imprisonment of 25 years to life to run concurrently with the sentences imposed on the murder counts (*see Thacker*, 156 AD3d at 1484; *see generally People v Minaya*, 54 NY2d 360, 364-365 [1981], *cert denied* 455 US 1024 [1982]).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1083

KA 19-00799

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE RODRIGUEZ-RIVERA, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 7, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: On appeal 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 unlawful possession of marihuana (former § 221.05), defendant contends that Supreme Court erred in refusing to suppress a handgun and marihuana seized from his vehicle because the police did not have probable cause to search the vehicle. We reject that contention. The record establishes, and defendant does not dispute, that the arresting officer was entitled to stop defendant's vehicle after he observed defendant violate a provision of the Vehicle and Traffic Law (*see People v Ricks*, 145 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *see also* Vehicle and Traffic Law § 1163 [a]; *see generally People v Robinson*, 97 NY2d 341, 349-350 [2001]). We also conclude that, following the traffic stop, the officer had probable cause to search the vehicle after he detected—based on his training and experience—the " 'odor of marihuana emanating from [the inside of the] vehicle' " (*Ricks*, 145 AD3d at 1611; *see People v Clanton*, 151 AD3d 1576, 1577 [4th Dept 2017]; *People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]). Further, we note that defendant spontaneously admitted to the officer that he had been smoking marihuana and that there was marihuana located inside the vehicle (*see People v Milerson*, 51 NY2d 919, 920-921 [1980]; *Cuffie*, 109 AD3d at 1201). We reject defendant's contention that probable cause came to an end once the police discovered a single jar of marihuana; the police had reason to

believe that there was additional marihuana to be found inside (*see generally Milerson*, 51 NY2d at 920-921). While lawfully searching for the additional marihuana, the police recovered the handgun inside the vehicle (*see generally People v Brown*, 96 NY2d 80, 88-89 [2001]).

We also reject defendant's contention that the court erred in refusing to suppress statements he made to the police. Defendant's statement about the odor in his vehicle, which he made immediately after he was pulled over by the police, was a "response[] to threshold inquiries by the police . . . intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and th[at] statement[] thus w[as] not subject to suppression" (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016] [internal quotation marks omitted]; *see generally People v Huffman*, 41 NY2d 29, 34 [1976]). Defendant's statement admitting that there was marihuana inside the vehicle was not subject to suppression because it was "spontaneous and not the result of inducement, provocation, encouragement or acquiescence" (*People v Bumpars*, 178 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 36 NY3d 1055 [2021] [internal quotation marks omitted]; *see People v Rivers*, 56 NY2d 476, 480 [1982], *rearg denied* 57 NY2d 775 [1982]; *People v Maerling*, 46 NY2d 289, 302-303 [1978]). Even assuming, arguendo, that defendant's subsequent statement informing the police that the marihuana was under the driver's seat should have been suppressed because it was made in response to a question "reasonably likely to elicit an incriminating response" (*Rhode Island v Innis*, 446 US 291, 301 [1980]), we conclude that any error in failing to suppress that statement was harmless (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant also contends that the court erred in refusing to suppress a statement he made after one of the officers advised him of his *Miranda* rights because the People failed to establish that he knowingly, voluntarily, and intelligently waived those rights. We reject that contention. Although defendant initially answered "no" when the officer asked him if he understood the *Miranda* rights, the evidence at the suppression hearing established that the officer immediately asked defendant what he could clarify about the *Miranda* rights and that defendant ignored that question to express displeasure at the escalation of the traffic stop—indicating that defendant was not, in fact, confused about his *Miranda* rights. Moreover, "an explicit verbal waiver [of the *Miranda* rights] is not required; an implicit waiver may suffice and may be inferred from the circumstances" (*People v Smith*, 217 AD2d 221, 234 [4th Dept 1995], *lv denied* 87 NY2d 977 [1996]; *see People v Jones*, 120 AD3d 1595, 1595 [4th Dept 2014]). Here, we conclude that the People established an implicit waiver by virtue of the fact that "defendant ha[d] been advised of his *Miranda* rights and within [seconds] thereafter willingly answer[ed] questions during interrogation" (*People v Goncalves*, 288 AD2d 883, 884 [4th Dept 2001], *lv denied* 97 NY2d 729 [2002] [internal quotation marks omitted]; *see Jones*, 120 AD3d at 1595).

As defendant correctly concedes, he failed to preserve for our review his contention that his conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Viewing the evidence in light of the elements of the crime and the violation as charged to the jury (*see generally 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]).

We also reject defendant's contention that he was denied effective assistance of counsel based on the alleged failure of his attorney to advise him to accept the People's plea offer. The record amply demonstrates that, on multiple occasions, the People extended a favorable plea offer to defendant and that he discussed the offer with defense counsel and ultimately rejected it each time, insisting that he wanted to go to trial. Defendant therefore failed to satisfy his burden of showing "that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer" (*People v Fernandez*, 5 NY3d 813, 814 [2005] [internal quotation marks omitted]; *see also People v Spencer*, 183 AD3d 1258, 1259 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). Defendant's remaining allegations of ineffective assistance of counsel lack merit (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Burgess*, 159 AD3d 1384, 1385 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]). In short, 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 [defense counsel] provided meaningful representation" (*Baldi*, 54 NY2d at 147; *see generally People v Ross*, 118 AD3d 1413, 1415-1416 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014]).

All concur except CARNI, J., who is not participating.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1097

KA 18-00799

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YOKOHIRO VIDAL-ORTIZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON 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 February 3, 2017. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree (four counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]).

To the extent that defendant contends that he was improperly penalized for asserting his right to a trial, that contention is not preserved for our review (*see People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]; *People v Griffin*, 48 AD3d 1233, 1236-1237 [4th Dept 2008], *lv denied* 10 NY3d 840 [2008]; *People v Irrizarry*, 37 AD3d 1082, 1083 [4th Dept 2007], *lv denied* 8 NY3d 946 [2007]) and, in any event, that contention lacks merit (*see People v Washington*, 160 AD3d 1451, 1452 [4th Dept 2018]; *Griffin*, 48 AD3d at 1236-1237). However, we agree with defendant that the sentence is unduly harsh and severe under the circumstances of this case. Thus, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence of imprisonment imposed on each count to a determinate term of eight years (*see* CPL 470.15 [6] [b]), to be followed by the three years of postrelease supervision imposed

by County Court, with the sentences remaining concurrent.

Finally, as the People correctly concede, the certificate of conviction incorrectly reflects that defendant was sentenced as a second violent felony offender, and it must therefore be amended to reflect that defendant was sentenced as a second felony offender (*see People v Williams*, 187 AD3d 1564, 1565 [4th Dept 2020]; *People v Kowal*, 159 AD3d 1346, 1347 [4th Dept 2018]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1101

KA 19-01150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE PONCE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered May 8, 2019. The judgment convicted defendant upon a plea of guilty of attempted 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 is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Defendant contends that Supreme Court erred in refusing to suppress physical evidence arising from an allegedly unlawful seizure. We agree.

Defendant asserts that the stop of the vehicle in which he was a passenger was unlawful because the 911 call to which police responded failed to provide reasonable suspicion that defendant, who had outstanding arrest warrants, was either the driver or occupant of the vehicle. As relevant here, "a vehicle stop in New York is legal when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Walls*, 37 NY3d 987, 988 [2021] [internal quotation marks omitted]). "Where a defendant moves to suppress evidence recovered during a search, the People bear the burden of going forward to show the legality of the police conduct in the first instance" (*id.* [internal quotation marks omitted]). The United States Supreme Court has "recognized . . . [that] there are situations in which an anonymous tip, sufficiently corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to

make [an] investigatory stop' " (*Florida v J.L.*, 529 US 266, 270 [2000], quoting *Alabama v White*, 496 US 325, 327 [1990]). However, "[s]ince an anonymous tip 'seldom demonstrates the informant's basis of knowledge or veracity,' it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability" (*People v Brown*, 172 AD3d 41, 42 [1st Dept 2019], *lv denied* 33 NY3d 1067 [2019], quoting *J.L.*, 529 US at 270). The anonymous tip must be reliable, not only "in its assertion of illegality," but also "in its tendency to identify a determinate person" (*J.L.*, 529 US at 272).

The evidence at the suppression hearing established that police officers were dispatched based on an anonymous tip that defendant was in a specific vehicle at a specific location. However, when police responded to the area, neither defendant nor the vehicle was present. Over 3½ hours later, officers observed the vehicle and two individuals inside. The only officer to testify at the suppression hearing admitted that he could not determine whether the occupants of the vehicle were male or female, let alone whether one of them was defendant. Further, the vehicle was not registered to defendant. Nevertheless, the officers activated their emergency lights and attempted to stop the vehicle. After a brief pursuit, the driver of the vehicle lost control, and the vehicle struck a parked car and a stop sign before coming to rest against a fence. Defendant exited the front passenger door and attempted to flee before being restrained a few feet away. A loaded firearm was observed in plain sight on the driver's side floorboard.

We agree with defendant that the totality of the information known to the police at the time of the stop of the vehicle did not provide the reasonable suspicion necessary to believe that defendant was either the driver or an occupant of the vehicle (*see J.L.*, 529 US at 272; *Walls*, 37 NY3d at 989). We therefore conclude that "the People's evidence was insufficient to justify the stop and [that], absent evidence of the weapon, the indictment should be dismissed" (*Walls*, 37 NY3d at 989).

Defendant's remaining contention is academic in light of our determination.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

1130

KA 16-02257

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT BULLARD-DANIEL, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 23, 2016. The judgment convicted defendant upon a jury verdict of predatory sexual assault and burglary 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 a jury verdict of predatory sexual assault (Penal Law § 130.95 [1] [a]) and burglary in the first degree as a sexually motivated felony (§§ 130.91, 140.30 [2]), defendant contends that County Court erred in refusing to suppress evidence concerning the results of an analysis of the DNA contained in numerous samples of seminal fluids and other biological material located in the apartment in which the incident occurred. Defendant's contention that the admission of the DNA evidence violated his right of confrontation is not preserved for our review because defendant failed to assert it at the time of the trial (*see People v Liner*, 9 NY3d 856, 856-857 [2007], *rearg denied* 9 NY3d 941 [2007]; *People v Peterkin*, 89 AD3d 1455, 1456 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012]), 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]).

Defendant further contends that the court erred in permitting the People to introduce the results of an analysis of the DNA material using the STRmix DNA analysis program (STRmix program) because such testing is not generally accepted by the relevant scientific community. We reject that contention. Briefly, the People introduced evidence that biological samples were recovered from several locations at the scene of the incident and that those samples were analyzed using the STRmix program, which indicated that defendant's DNA was contained in those samples. Before trial, the People provided

defendant with notice of the results of the tests and the program used to conduct them and, at defendant's request, the court ordered a *Frye* hearing concerning that program (*see Frye v United States*, 293 F 1013, 1014 [DC Cir 1923]; *see generally People v Wesley*, 83 NY2d 417, 422-424 [1994]). The People introduced evidence at the hearing that the STRmix program had been the subject of numerous peer-reviewed journal articles and had been evaluated and approved by the National Institute of Standards and Technology and by the Erie County Central Police Services Forensic Laboratory before it began using the STRmix program. In addition, the People established that the STRmix program was being used by numerous forensic testing agencies and laboratories in New York, California, the United States Army, Australia, and New Zealand, and that it had been approved by the DNA Subcommittee of the New York State Forensic Science Committee. We note that the Court of Appeals has stated with respect to the admissibility of DNA analysis programs that "[t]he [DNA] Subcommittee's approval is certainly relevant and may constitute some evidence of general acceptance at a *Frye* hearing" (*People v Williams*, 35 NY3d 24, 41 [2020]). Here, after reviewing the evidence introduced at the *Frye* hearing, we conclude that the People established that the methods employed in the STRmix program were generally accepted as reliable within the relevant scientific community at the time the DNA evidence was analyzed (*see generally Wesley*, 83 NY2d at 422; *People v Wilson*, 192 AD3d 1379, 1380-1381 [3d Dept 2021]; *People v Wakefield*, 175 AD3d 158, 162-163 [3d Dept 2019], *lv granted* 35 NY3d 1097 [2020]), and thus the court did not err in concluding that the results of the DNA analysis were admissible. We have considered defendant's remaining contention concerning the STRmix program, and we conclude that it lacks merit.

Defendant further contends that the court erred in permitting the People to introduce certain *Molineux* evidence concerning prior acts of misconduct that he perpetrated against the victim. We likewise reject that contention. "Evidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity . . . Where there is a proper nonpropensity purpose, the decision whether to admit [such] evidence . . . rests upon the trial court's discretionary balancing of probative value and unfair prejudice" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Here, we conclude that the court properly balanced the probative value of the evidence and the prejudice arising therefrom, and thus the victim's testimony concerning the uncharged acts was properly admitted "to complete the narrative of the events charged in the indictment . . . and [to] provide[] necessary background information" (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009] [internal quotation marks omitted]; *see People v Morris*, 21 NY3d 588, 594 [2013]; *People v Feliciano*, 196 AD3d 1030, 1031 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]) as well as to place "the charged conduct in context" (*Dorm*, 12 NY3d at 19; *see People v Leeson*, 12 NY3d 823, 827 [2009]). We note in particular that the court excluded many of the prior bad acts that the People sought to introduce (*see e.g. People v Medley*, 165 AD3d 1585, 1585 [4th Dept 2018]; *People v Burkett*, 101 AD3d 1468, 1471 [3d Dept 2012], *lv denied* 20 NY3d 1096 [2013]), that it admitted only prior bad acts that the

victim had reported to the police before the charged incident, and that its limiting instructions "served to alleviate any potential prejudice resulting from the admission of the evidence" (*People v Alke*, 90 AD3d 943, 944 [2d Dept 2011], *lv denied* 19 NY3d 994 [2012]; *see People v Freece*, 46 AD3d 1428, 1429 [4th Dept 2007], *lv denied* 10 NY3d 811 [2008]).

Next, 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 contrary to the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, we note that the uniform sentence and commitment form fails to indicate that defendant's conviction of burglary in the first degree was as a sexually motivated felony, and it must be amended accordingly (*see generally People v Brown*, 166 AD3d 1579, 1579-1580 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1143

KA 21-00021

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADLY C. LUND, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI 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 December 23, 2020. 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 (Correction Law § 168 *et seq*.), defendant contends that County Court's upward departure from his presumptive classification as a level two risk is not supported by clear and convincing evidence. We reject that contention.

"It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence . . . , the existence of an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (*People v Cardinale*, 160 AD3d 1490, 1490-1491 [4th Dept 2018] [internal quotation marks omitted]; *see People v Hackrott*, 170 AD3d 1646, 1647 [4th Dept 2019], *lv denied* 33 NY3d 908 [2019]). Here, we conclude that the court's determination to grant an upward departure was based on clear and convincing evidence of aggravating factors not adequately accounted for by the risk assessment guidelines, including evidence of defendant's lengthy history of sexually aggressive behavior toward children (*see People v Coon*, 184 AD3d 1091, 1092 [4th Dept 2020], *lv denied* 35 NY3d 916 [2020]; *People v Zimmerman*, 101 AD3d 1677, 1678 [4th Dept 2012]; *People v Howe*, 49 AD3d 1302, 1302 [4th Dept 2008]). Contrary to defendant's contention, "the statements in the presentence report and case summary constitute

'reliable hearsay' upon which the court properly relied in making the upward departure" (*Coon*, 184 AD3d at 1092, quoting Correction Law § 168-n [3]; *see People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]; *see generally People v Mingo*, 12 NY3d 563, 573 [2009]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

1146

KA 19-02253

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE KILGORE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered June 19, 2019. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the third degree (two counts), sexual abuse in the third degree (two counts), endangering the welfare of a child (two counts) and perjury in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal sexual act in the third degree under count one of the indictment, sexual abuse in the third degree under counts three and four of the indictment and endangering the welfare of a child under counts six and eight of the indictment, and dismissing counts three, four, six and eight of the indictment, and as modified the judgment is affirmed and a new trial is granted on count one of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of criminal sexual act in the third degree (Penal Law § 130.40 [2]), two counts of sexual abuse in the third degree (§ 130.55), two counts of endangering the welfare of a child (§ 260.10 [1]), and one count of perjury in the first degree (§ 210.15). Defendant contends that the verdict is against the weight of the evidence. We reject that contention. In performing a weight of the evidence review, this Court essentially sits as a thirteenth juror, and we must "weigh the evidence in light of the elements of the crime[s] as charged to the other jurors" (*People v Danielson*, 9 NY3d 342, 349 [2007]). Here, viewing the evidence in light of the elements of the abovementioned crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on

this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Dame*, 144 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 29 NY3d 948 [2017] [internal quotation marks omitted]; *see People v Labell*, 198 AD3d 1352, 1353-1354 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]).

However, we agree with defendant that County Court abused its discretion in curtailing defendant's cross-examination of a police detective who took a statement from the victim. " 'Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness' " (*People v Bradley*, 99 AD3d 934, 936 [2d Dept 2012]; *see People v Duncan*, 46 NY2d 74, 80 [1978], *rearg denied* 46 NY2d 940 [1979], *cert denied* 442 US 910 [1979], *rearg dismissed* 56 NY2d 646 [1982]; *People v Collins*, 145 AD3d 1479, 1480 [4th Dept 2016]). "To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he [or she] has made such statements; and the usual and most accurate mode of examining the contradicting witness, is to ask the precise question put to the principal witness" (*Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871]; *see Bradley*, 99 AD3d at 936). Here, defendant laid a proper foundation by eliciting testimony from the victim that was inconsistent with the detective's written report purporting to record the victim's statement, and the court therefore should have permitted cross-examination of the detective regarding that inconsistency (*see Collins*, 145 AD3d at 1480; *People v Mullings*, 83 AD3d 871, 872 [2d Dept 2011], *lv denied* 17 NY3d 904 [2011]).

The People contend that any error in excluding the testimony is harmless. We agree with the People only in part. Where, as here, the error is constitutional in nature (*see generally People v Hudy*, 73 NY2d 40, 57 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]), the People must establish "that there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). The testimony of the victim was the only direct evidence supporting count one of the indictment, charging criminal sexual act in the third degree, counts three and four of the indictment, charging sexual abuse in the third degree, and counts six and eight of the indictment, charging endangering the welfare of a child. We conclude that the admissible evidence of guilt with respect to those counts is not overwhelming, and that there is a reasonable possibility that the error in curtailing defense counsel's cross-examination of the detective may have contributed to defendant's conviction. We therefore modify the judgment by reversing those parts convicting defendant under counts one, three, four, six, and eight of the indictment (*see generally People v Purdy*, 106 AD3d 1521, 1523 [4th Dept 2013]), and by dismissing counts three, four, six, and eight of the indictment inasmuch as those are misdemeanor counts and defendant has already completed the sentence imposed on them (*see People v Smouse*, 160 AD3d

1353, 1356 [4th Dept 2018]), and we grant a new trial on count one of the indictment (*see Collins*, 145 AD3d at 1480).

We reach a different conclusion, however, with respect to counts two and nine of the indictment, charging criminal sexual act in the third degree and perjury in the first degree, respectively, inasmuch as the victim's testimony concerning those counts was supported by DNA evidence. With respect to those two counts, we conclude that the court's error in curtailing defense counsel's cross-examination of the detective is harmless inasmuch as the evidence of guilt is overwhelming and there is no reasonable possibility that the erroneous exclusion of testimony contributed to defendant's conviction (*see Crimmins*, 36 NY2d at 237; *see generally Purdy*, 106 AD3d at 1523-1524).

We further conclude that the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contentions and conclude they do not warrant reversal or further modification of the judgment.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

1147

KA 16-01494

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEROME L. PHILLIPS, ALSO KNOWN AS “JERRY,” ALSO KNOWN AS “BUMBA,” DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered June 15, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant’s contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that a new trial is warranted because he was denied his right to be present at a material stage of the trial (*see People v Turaine*, 78 NY2d 871, 872 [1991]). County Court precluded defendant from being present during a material witness hearing and permitted defense counsel to be only a non-participatory observer. At that hearing, the witness in question testified that she had been threatened by defendant, the codefendant, and others in an attempt to prevent her from testifying at trial. Although the court granted the People’s application for a material witness order and set bail to ensure the witness’s availability, the next day the People requested a *Sirois* hearing and sought a determination that the witness had been made constructively unavailable to testify at trial by threats attributable to defendant (*see generally People v Geraci*, 85 NY2d 359, 365-366 [1995]). The court granted the request for the

hearing, which was held in defendant's presence. The People presented the testimony of an investigator and a victim witness advocate, but the witness herself did not testify. The court then determined, based on its own observations of the witness during her material witness hearing testimony, its review of the transcript of that hearing, and the additional witnesses presented by the People, that the witness was constructively unavailable to testify at trial and that her unavailability had been procured by defendant.

That was error. A defendant generally has no constitutional right to be present at a material witness hearing (*see People v Brown*, 195 AD2d 967, 967 [4th Dept 1993], *lv denied* 82 NY2d 804 [1993]); however, a "[d]efendant's absence from [a *Sirois*] hearing[] could have a substantial effect on his [or her] ability to defend" (*Turaine*, 78 NY2d at 872; *see People v McCune*, 98 AD3d 631, 632 [2d Dept 2012]). Here, although there is no dispute that the initial material witness hearing was not intended to address any *Sirois* or other evidentiary issues (*see Brown*, 195 AD2d at 967), the court erred in relying on the unchallenged testimony taken therein in making its *Sirois* determination (*see McCune*, 98 AD3d at 632). Indeed, the court effectively, and erroneously, incorporated the material witness hearing into the subsequent *Sirois* hearing by expressly relying on that testimony and on its own observations of the witness's demeanor in making its determination. We note that "[e]xpediency may not dictate procedural changes so as to take from a defendant the right to be present at the taking of testimony" (*People v Anderson*, 16 NY2d 282, 287 [1965]). Inasmuch as defendant was deprived of his ability to "confront [an] adverse witness[ ] and advise counsel of any inconsistencies, errors or falsehoods in [her] testimony" (*Turaine*, 78 NY2d at 872), we reverse the judgment and grant a new trial (*see McCune*, 98 AD3d at 633).

In light of our conclusion, defendant's remaining contentions are academic.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1148

KA 18-00927

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS P. PERDUE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 26, 2018. The judgment convicted defendant upon a jury verdict of assault 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 of assault in the second degree (Penal Law § 120.05 [2]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). The conviction arises from an incident in which defendant, following an argument between the victim and another person, shot the victim in the right leg. Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that Supreme Court erred in denying his pretrial request for substitution of counsel. We reject that contention. "Whether counsel is substituted is within the discretion and responsibility of the trial [court] . . . , and a court's duty to consider such a [request] is invoked only where a defendant makes a seemingly serious request[] . . . Therefore, it is incumbent upon a defendant to make specific factual allegations of serious complaints

about counsel" in support of his or her request (*People v Porto*, 16 NY3d 93, 99-100 [2010] [internal quotation marks omitted]). Here, we conclude that defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*id.* at 100; *see People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]). To the contrary, defendant made only conclusory assertions that "did not suggest a serious possibility of good cause for substitution" (*People v Boswell*, 117 AD3d 1493, 1494 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014] [internal quotation marks omitted]; *see People v Stevenson*, 36 AD3d 634, 635 [2d Dept 2007], *lv denied* 8 NY3d 927 [2007]).

With respect to defendant's contention that the court erred in permitting the prosecutor to present testimony on redirect examination of a police investigator concerning actions taken by the police to ascertain the shooter's identity, we conclude that the court properly determined that defense counsel opened the door to that testimony during cross-examination of the investigator (*see People v Gonzales*, 145 AD3d 1432, 1433 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]). "Inasmuch as defendant's cross-examination of a witness may have created a misimpression, the People were entitled to correct that misimpression on redirect examination" (*People v Paul*, 171 AD3d 1467, 1469 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 953 [2019], *cert denied* — US —, 140 S Ct 1151 [2020]; *see People v Singh*, 147 AD3d 787, 787 [2d Dept 2017], *lv denied* 29 NY3d 1037 [2017]).

Defendant next contends that the court erred in permitting a certain witness to identify him for the first time at trial. We reject that contention. Where, as here, "there has been no pretrial identification procedure [with respect to a witness] and the defendant is identified in court for the first time [by that witness], the defendant is not [thereby] deprived of a fair trial because [the defendant] is able to explore weaknesses and suggestiveness of the identification in front of the jury" (*People v Madison*, 8 AD3d 956, 957 [4th Dept 2004], *lv denied* 3 NY3d 709 [2004] [internal quotation marks omitted]; *see People v Jackson*, 94 AD3d 1559, 1560 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]; *People v Spirles*, 275 AD2d 980, 981-982 [4th Dept 2000], *lv denied* 96 NY2d 807 [2001]).

Defendant failed to request a missing witness charge until after the close of proof, and therefore the court properly denied that request as untimely (*see People v Hymes*, 132 AD3d 1411, 1412 [4th Dept 2015], *lv denied* 26 NY3d 1146 [2016]; *People v Garner*, 52 AD3d 1329, 1330 [4th Dept 2008], *lv denied* 11 NY3d 788 [2008]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions, and we conclude that they do not warrant modification or reversal of the judgment.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

1150

KA 18-01673

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFTON STITH, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 1, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the fifth degree, resisting arrest and harassment 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 controlled substance in the fifth degree (Penal Law § 220.06 [5]), resisting arrest (§ 205.30), and harassment in the second degree (§ 240.26 [1]). We affirm.

Defendant contends that the prosecutor's exercise of a peremptory challenge with respect to a prospective juror constituted a violation of *Batson v Kentucky* (476 US 79 [1986]). Under *Batson* and its progeny, "the party claiming discriminatory use of peremptories must first make out a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more [prospective] jurors for an impermissible reason . . . Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory—step two . . . The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented" (*People v Smocum*, 99 NY2d 418, 421-422 [2003]; *see People v Morgan*, 75 AD3d 1050, 1051-1052 [4th Dept 2010], *lv denied* 15 NY3d 894 [2010]).

At the second step, "[t]he burden . . . 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 Hernandez v New York*, 500 US 352, 360 [1991]; *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 and emphasis omitted]; *see Purkett v Elem*, 514 US 765, 767-768 [1995]; *Payne*, 88 NY2d at 183).

Initially, because the prosecutor offered a race-neutral reason for the challenge and County Court thereafter "ruled on the ultimate issue" of discriminatory intent, the issue of the sufficiency of defendant's prima facie showing of discrimination under step one of the *Batson* analysis is moot (*Smocum*, 99 NY2d at 423; *see People v Bridgeforth*, 28 NY3d 567, 575 n 2 [2016]; *People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]). With respect to the second step, we conclude that the court properly determined that the People met their burden of offering a facially race-neutral explanation for the challenge of the prospective juror (*see Smouse*, 160 AD3d at 1355). Specifically, the prosecutor explained that she challenged the prospective juror based on his experience of having previously testified as a witness in court, the fact that he was not native to the city where the crimes occurred, and his employment as a therapist (*see People v Jackson*, 185 AD3d 1454, 1454-1455 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *see also People v Hecker*, 15 NY3d 625, 663-664 [2010]; *People v Toliver*, 102 AD3d 411, 411 [1st Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied* 21 NY3d 1077 [2013]).

We also reject defendant's contention that the court erred at step three. 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 reasons were not pretextual (*see People v Wheeler*, 124 AD3d 1136, 1137 [3d Dept 2015], *lv denied* 25 NY3d 993 [2015]).

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

1165

KA 19-01167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL W. SOCCIARELLI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI 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 April 25, 2019. The judgment convicted defendant upon a jury verdict of rape in the first degree, criminal sexual act in the first degree, rape in the third degree, sexual abuse in the first degree and criminal sexual act in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, rape in the first degree (Penal Law § 130.35 [2]) and criminal sexual act in the first degree (§ 130.50 [2]), which stemmed from his conduct with a minor who was physically helpless due to extreme intoxication. Contrary to defendant's contention, County Court did not err in refusing to suppress, as involuntary, statements he made to law enforcement (*see generally* CPL 60.45 [2] [a], [b] [i]). As the basis for his contention, defendant identifies an investigator's statement that the police would be "going on the assumption" that defendant forcibly raped the victim, which amounted to a "big difference in the law," unless defendant provided his explanation of events. Defendant thus contends that he was coerced into confessing. We reject that contention. The investigator's statement was a "generalized comment to defendant regarding the benefits of cooperating with the police" (*People v Woods*, 93 AD3d 1287, 1288 [4th Dept 2012], *lv denied* 19 NY3d 969 [2012]), which did not create any "undue pressure" (CPL 60.45 [2] [a]) or "a substantial risk that . . . defendant might falsely incriminate himself" (CPL 60.45 [2] [b] [i]; *see People v Clark*, 194

AD3d 948, 951 [2d Dept 2021], *lv denied* 37 NY3d 991 [2021]).

We conclude that defendant waived his contention that the court erred in responding to two jury notes when the court provided the exact response requested by the defense (*see People v Capella*, 180 AD3d 498, 499 [1st Dept 2020], *lv denied* 35 NY3d 968 [2020]; *People v Backus*, 67 AD3d 1428, 1429 [4th Dept 2009], *lv denied* 13 NY3d 936 [2010]). Defendant " 'ought not be allowed to take the benefit of the favorable charge and complain about it on appeal' " (*People v Shaffer*, 66 NY2d 663, 665 [1985]; *see People v O'Neill*, 169 AD3d 1515, 1515 [4th Dept 2019]). We further conclude that defendant failed to preserve for our review his contention that he was denied a fair trial by instances of prosecutorial misconduct inasmuch as "defendant did not object to any of those alleged instances at trial" (*People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *see People v Streeter*, 166 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 32 NY3d 1210 [2019]). 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 Standsblack*, 162 AD3d 1523, 1527 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]).

We agree with defendant, and the People correctly conceded at trial, that the prosecutor's delay in disclosing a video that was provided to an investigator by a witness constituted a *Rosario* violation inasmuch as the video "was in the actual possession of a law enforcement agency" (*People v Washington*, 86 NY2d 189, 192 [1995]). Contrary to defendant's contention, however, the court did not err in denying his request for a mistrial. Where, as here, there is an issue of delayed disclosure of *Rosario* material, reversal is required only "if the defense is substantially prejudiced by the delay" (*People v Martinez*, 71 NY2d 937, 940 [1988]; *see People v Lluveres*, 15 AD3d 848, 849 [4th Dept 2005], *lv denied* 5 NY3d 807 [2005]). Here, the court gave the defense additional time to review the evidence and the opportunity to recall witnesses for further cross-examination (*see People v Gardner*, 26 AD3d 741, 741 [4th Dept 2006], *lv denied* 6 NY3d 848 [2006]). Under the circumstances, "defendant has not made the necessary showing of substantial prejudice" (*People v Walters*, 124 AD3d 1321, 1323 [4th Dept 2015], *lv denied* 25 NY3d 1209 [2015]).

We also reject defendant's contention that a mistrial was warranted as the result of an alleged *Brady* violation. Even assuming, arguendo, that the evidence on the video could be deemed exculpatory, we conclude that a mistrial was not warranted "inasmuch as defendant received the material in time for its meaningful and effective use at trial" (*People v Hines*, 132 AD3d 1385, 1385 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016]). Moreover, defendant knew or should have known of the existence of the video as well as the nature of its contents inasmuch as the video itself leaves no doubt that defendant knew he was being recorded (*see People v LaValle*, 3 NY3d 88, 110 [2004]; *People v Rivera*, 82 AD3d 1590, 1592 [4th Dept 2011], *lv denied* 17 NY3d 800 [2011]).

We likewise conclude that, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant contends that he was denied effective assistance of counsel based on several alleged errors, we reject that contention. Viewing the evidence, the law and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant contends that the aggregate sentence of 32 years' imprisonment is unduly harsh and severe because he has no prior sex offenses on his criminal record and the People's preindictment plea offer contemplated a 10-year sentence, which was increased to 15 years postindictment. We agree and therefore modify the judgment as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently with one another (*see* CPL 470.15 [6] [b]), which results in an aggregate term of imprisonment of 25 years plus 25 years of postrelease supervision.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KAH 20-01156

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WAYNE C.J., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL
NEW YORK PSYCHIATRIC CENTER, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

KATHRYN F. HARTNETT, UTICA, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered June 22, 2020 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking habeas corpus relief with respect to his civil commitment to Central New York Psychiatric Center pursuant to Mental Hygiene Law article 10. In appeal No. 1, petitioner appeals from a judgment denying his petition. In appeal No. 2, petitioner appeals from an order denying his motion for leave to reargue his petition.

In appeal No. 1, petitioner challenges the initiation of the Mental Hygiene Law article 10 proceeding against him and the use of certain evidence at that proceeding. We reject that challenge and agree with Supreme Court that " 'the article 10 proceeding itself is the proper forum for petitioner to challenge the validity of the . . . underlying article 10 petition' " and proceeding (*People ex rel. Charles B. v McCulloch*, 155 AD3d 1559, 1561 [4th Dept 2017], *lv denied* 31 NY3d 906 [2018]). Thus, habeas corpus relief does not lie (*see People ex rel. Quartararo v Demskie*, 238 AD2d 792, 793-794 [3d Dept 1997], *lv denied* 90 NY2d 802 [1997]).

With respect to appeal No. 2, we dismiss petitioner's appeal because no appeal lies from an order denying leave to reargue (*see*

Empire Ins. Co. v Food City, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KAH 20-01685

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
WAYNE C.J., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL
NEW YORK PSYCHIATRIC CENTER, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

KATHRYN F. HARTNETT, UTICA, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered October 27, 2020 in a habeas corpus proceeding. The order denied the motion of petitioner seeking leave to reargue.

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

Same memorandum as in *People ex rel. Wayne C.J. v McCulloch* ([appeal No. 1] — AD3d — [Mar. 11, 2022] [4th Dept 2022]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

21

CA 21-01043

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

RONALD BENDERSON 1995 TRUST,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 2, 2021. The order, among other things, granted plaintiff's motion insofar as it sought a preliminary injunction.

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

Memorandum: Plaintiff commenced this action seeking damages and declaratory and injunctive relief following the alleged breach of a commercial lease between the parties. Thereafter, plaintiff moved for various forms of injunctive relief. Defendant appeals from an order that, inter alia, granted plaintiff's motion insofar as it sought a preliminary injunction.

In reviewing an order deciding a motion for a preliminary injunction, "we should not determine finally the merits of the action and should not interfere with the exercise of discretion by [the motion court] but should review only the determination of whether that discretion has been abused" (*Esi-Data Connections v Proulx*, 185 AD2d 705, 705 [4th Dept 1992] [internal quotation marks omitted]; *see Delphi Hospitalist Servs. LLC v Patrick*, 163 AD3d 1441, 1441-1442 [4th Dept 2018]). We conclude, on the record before us, that Supreme Court did not abuse its discretion in granting plaintiff's motion insofar as it sought a preliminary injunction.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01661

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE J. BUCHANAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), dated September 9, 2020. 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 classifying him as a level three sex offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant challenges County Court's assessment of points under risk factor 10. Defendant's contention is unpreserved (*see People v Gallagher*, 129 AD3d 1252, 1254 [3d Dept 2015], *lv denied* 26 NY3d 908 [2015]) and, in any event, is without merit (*see People v Fabian-Lopez*, 160 AD3d 536, 537 [1st Dept 2018], *lv denied* 32 NY3d 901 [2018]; *People v Lott*, 160 AD3d 1458, 1459 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). We add only that, contrary to defendant's characterization, his challenge to the court's point assessment in this SORA proceeding is "not properly analyzed within the framework that governs our review of the weight of the evidence underlying a [trial] verdict" (*People v Magee*, 200 AD3d 1619, 1621 [4th Dept 2021]; *see generally People v Romero*, 7 NY3d 633, 636-646 [2006]; *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00257

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND BANNISTER, JJ.

ERIC SEAN ALSTON, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIVINE BROTHERS COMPANY, DEFENDANT,
PCC AIRFOILS, LLC, AND NHVS INTERNATIONAL, INC.,
DEFENDANTS-RESPONDENTS.

WEITZMAN LAW OFFICES, L.L.C., NEW YORK CITY (RAPHAEL WEITZMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL), FOR DEFENDANT-RESPONDENT PCC AIRFOILS, LLC.

BRESSLER, AMERY & ROSS, P.C., NEW YORK CITY (JORKEELL ECHEVERRIA OF COUNSEL), FOR DEFENDANT-RESPONDENT NHVS INTERNATIONAL, INC.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered February 9, 2021. The order, inter alia, discontinued the action with prejudice.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when his right hand was allegedly pulled into a finishing machine, partially amputating three fingers. At the time of the incident, plaintiff, an employee of defendant NHVS International, Inc. (NHVS), was operating the machine in an NHVS facility. Defendant Divine Brothers Company (Divine) allegedly manufactured the machine and sold it to defendant PCC Airfoils, LLC (PCC), which allegedly sold or leased the machine to NHVS. Defendants each moved to dismiss the complaint against them. Defendants asserted, inter alia, that plaintiff's claims were barred by collateral estoppel inasmuch as Supreme Court, Bronx County, had dismissed another personal injury action commenced by plaintiff relating to the same incident and injuries on the ground of forum non conveniens. Thereafter, plaintiff attempted to discontinue the instant action without prejudice by stipulation, but defendants refused to stipulate to the discontinuance. Plaintiff moved for a court order of discontinuance without prejudice pursuant to CPLR 3217 (b). Supreme Court effectively granted the motion insofar as it sought a discontinuance, but directed that the action be discontinued with prejudice. Plaintiff now appeals.

The determination whether to grant a plaintiff's motion for an order of discontinuance rests within the court's sound discretion (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *see also White v County of Erie* [appeal No. 2], 309 AD2d 1299, 1300 [4th Dept 2003]). If the court grants the discontinuance, the court can set the "terms and conditions" of the discontinuance, "as the court deems proper" (CPLR 3217 [b]). Under the circumstances of this case, the court properly denied plaintiff's motion insofar as it sought the discontinuance of this action without prejudice. We conclude that plaintiff's motion to that extent was an apparent attempt to evade the consequences of an adverse order on defendants' pending motions to dismiss (*see Turner v Ritter*, 293 AD2d 404, 404 [1st Dept 2002]; *NBN Broadcasting v Sheridan Broadcasting Networks*, 240 AD2d 319, 319 [1st Dept 1997]).

We decline to address the merits of plaintiff's remaining contentions inasmuch as we thereby would be rendering an advisory opinion (*see generally Matter of Monroe Sq. Assoc., L.P. v Board of Assessors*, 23 AD3d 985, 986 [4th Dept 2005]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

58

KA 19-01166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL W. SOCCIARELLI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered April 25, 2019. The judgment convicted defendant, upon his plea of guilty, of possessing a sexual performance by a child (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of two counts of possessing a sexual performance by a child (Penal Law § 263.16), defendant contends that the judgment must be reversed on the ground that he pleaded guilty based on the promise that the sentence would run concurrently with the sentence in *People v Socciarelli* ([appeal No. 1] — AD3d — [Mar. 11, 2022] [4th Dept 2022] [decided herewith]; *see People v Fuggazzatto*, 62 NY2d 862, 863 [1984]; *see also People v Williams*, 79 AD3d 1653, 1655 [4th Dept 2010], *affd* 17 NY3d 834 [2011]). Although we are modifying the judgment in appeal No. 1 by reducing the sentence (*Socciarelli*, — AD3d at —), we reject defendant's contention that the judgment on appeal in this case should be reversed, inasmuch as the sentence in this case "will still run 'concurrently with and not exceed' the sentence imposed" in appeal No. 1, even as reduced (*People v Freeman*, 159 AD3d 1337, 1337 [4th Dept 2018], *lv denied* 31 NY3d 1147 [2018]; *see People v Dibble*, 176 AD3d 1584, 1587 [4th Dept 2019], *lv denied* 34 NY3d 1077 [2019]).

We reject defendant's further contention that County Court erred in refusing to suppress evidence obtained pursuant to a search warrant for defendant's smartphone. Contrary to defendant's contention, there was probable cause to support the issuance of the search warrant. It is well settled that, "[i]n dealing with probable cause, . . . we deal with probabilities" (*Brinegar v United States*, 338 US 160, 175 [1949], *reh denied* 338 US 839 [1949]). " 'The affidavit [supporting the warrant application] need not contain information providing certainty

that the objects sought will be found in the search . . . The issue is . . . rather whether the facts and circumstances taken as a whole gave the magistrate probable cause to believe that the desired items would be found in the search' " (*People v Hayon*, 57 Misc 3d 963, 970 [Sup Ct, Kings County 2017], quoting *United States v Brinklow*, 560 F2d 1003, 1006 [10th Cir 1977], *cert denied* 434 US 1047 [1978]; *see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). The application established, inter alia, that a photograph of a "pubescent minor in a sex act" was uploaded from an IP address attributed to a residence where defendant was the sole occupant. That photograph was then shared, via a Facebook account in defendant's name, with a person in the Philippines, where defendant admitted he had Facebook "friends."

We agree with the many federal courts that "have reached the conclusion that illegal internet activity associated with a particular IP address is a sufficient basis to find a nexus between the unlawful use of the Internet at the IP address and a [device] possessed by the subscriber assigned that address" (*Hayon*, 57 Misc 3d at 970; *see generally People v DeProspero*, 20 NY3d 527, 530 [2013]). Based on the information set forth in the application and the well-established principle that "[a]pproval by a reviewing magistrate cloaks a search warrant with 'a presumption of validity' " (*People v DeProspero*, 91 AD3d 39, 44 [4th Dept 2011], *affd* 20 NY3d 527 [2013], quoting *People v Castillo*, 80 NY2d 578, 585 [1992], *cert denied* 507 US 1033 [1993]; *see People v Welch*, 2 AD3d 1354, 1357 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]), we conclude that there was probable cause to believe that defendant's electronic devices, including his smartphone, would contain information relevant to a criminal offense, i.e., the dissemination of child pornography (*see DeProspero*, 91 AD3d at 44-45; *see also People v Vanness*, 106 AD3d 1265, 1266-1267 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]).

Contrary to defendant's further contention, the search warrant was not overly broad inasmuch as the description of the electronic files to be seized from defendant's cell phone "was not broader than was justified by the probable cause upon which the warrant[] [was] based" (*People v Crupi*, 172 AD3d 898, 899 [2d Dept 2019], *lv denied* 34 NY3d 950 [2019], *cert denied* — US —, 140 S Ct 2815 [2020]; *cf. People v Carter*, 31 AD3d 1167, 1169 [4th Dept 2006]).

Finally, defendant contends that the affiant who prepared the application lacked "personal knowledge of how IP address[es] functioned or any knowledge of computer forensics beyond investigating child pornography." Inasmuch as defendant "did not challenge the warrant in [the suppression c]ourt on that ground," his contention is not preserved for our review (*People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]; *see People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *see generally People v Lanaux*, 156 AD3d 1459, 1460 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]), and we decline to exercise our power to review it as a matter

of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CAF 20-00895

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

IN THE MATTER OF MEYAH F., FALLYN T., AND FARRAH T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SHELBY L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

RACHEL K. MARRERO, BUFFALO, ATTORNEY FOR THE CHILD.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MELISSA HORVATITS OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered July 21, 2020 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, in appeal No. 1, respondent mother appeals from an order that terminated her parental rights with respect to the three subject children on the ground of mental illness and, in appeal Nos. 2 and 3, the mother appeals from subsequent orders determining that the permanency goal of placement for adoption is in the best interests of each child.

We note at the outset that the mother's appeals from the orders in appeal Nos. 2 and 3 must be dismissed. Inasmuch as her parental rights had been terminated before the entry of the permanency orders, the mother " 'is . . . not aggrieved by the permanency . . . orders and lacks standing to pursue her appeals from the orders in [appeal Nos. 2 and 3]' " (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]; *see Matter of Maria M. [Kristin M.]*, 183 AD3d 1251, 1251 [4th Dept 2020]; *see generally*

Matter of April C., 31 AD3d 1200, 1201 [4th Dept 2006]).

Contrary to the mother's contention in appeal No. 1, we conclude that petitioner "met its burden of demonstrating by clear and convincing evidence that the mother is presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for the children" (*Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1633 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019] [internal quotation marks omitted]). At trial, petitioner presented evidence establishing that the mother suffers from antisocial personality disorder (*see id.*; *Matter of Neveah G. [Jahkeya A.]*, 156 AD3d 1340, 1341 [4th Dept 2017], *lv denied* 31 NY3d 907 [2018]), and that the "children would be in danger of being neglected if they were returned to her care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]). To the extent that the opinion of the mother's psychological expert conflicts with the opinion of petitioner's psychological expert, "the opinion of [the mother's expert] merely raised a question of credibility for [Family Court] to determine" (*Matter of Damion S.*, 300 AD2d 1039, 1040 [4th Dept 2002]). The court's "determination regarding the credibility of witnesses is entitled to great weight on appeal, and will not be disturbed if supported by the record" (*Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1501 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Amanda Ann B.*, 38 AD3d 537, 538 [2d Dept 2007]), and we perceive no basis for disturbing the court's credibility determinations (*see generally Burke H.*, 134 AD3d at 1501; *Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1649 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]).

Further, even assuming, arguendo, that the court improperly admitted in evidence portions of the report of petitioner's expert that contained hearsay, we conclude that the error is harmless because "the result reached herein would have been the same even had [the report], or portions thereof, been excluded" (*Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019] [internal quotation marks omitted]). Contrary to the mother's assertion, the court did not rely solely on the report of petitioner's expert, but also relied on the testimony of petitioner's expert, the mother, and the mother's expert, as well as the mother's treatment records, which were admitted into evidence without objection. Thus, "[t]he admissible evidence in the record, including the portions of the expert's report that did not include hearsay, was sufficient to support the finding that . . . mother is mentally ill within the meaning of Social Services Law § 384-b" (*Matter of Chad Nasir S. [Charity Simone S.]*, 157 AD3d 425, 425-426 [1st Dept 2018]).

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CAF 20-01296

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

IN THE MATTER OF MEYAH F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHELBY L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

RACHEL K. MARRERO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered September 29, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, approved the permanency goal of adoption.

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

Same memorandum as in *Matter of Meyah F. (Shelby L.)* ([appeal No. 1] — AD3d — [Mar. 11, 2022] [4th Dept 2022]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CAF 20-01297

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

IN THE MATTER OF FALLYN T. AND FARRAH T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHELBY L., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MELISSA HORVATITS OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered September 29, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, authorized petitioner to consent to the adoption of the subject children.

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

Same memorandum as in *Matter of Meyah F. (Shelby L.)* ([appeal No. 1] — AD3d — [Mar. 11, 2022] [4th Dept 2022]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

63

CAF 21-00146

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

IN THE MATTER OF SACHA M. SANTANA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD W. BARNES, RESPONDENT-RESPONDENT.

TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered December 24, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child and set a visitation schedule for respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that modified a prior order of custody and visitation by, inter alia, granting the mother sole custody of the subject child, granting respondent father visitation with the child, setting a visitation schedule, and restricting the father's girlfriend from being present when the parents exchange the child. The mother contends that Family Court erred in failing to prohibit the father's girlfriend from having any contact with the child. We reject that contention. "Family Court is afforded wide discretion in crafting an appropriate visitation schedule . . . and has the power to impose restrictions on [a] child[ ]'s interactions with third parties during visitation if it is in the child[ ]'s best interests to do so" (*Matter of Chromczak v Salek*, 173 AD3d 1750, 1751-1752 [4th Dept 2019] [internal quotation marks omitted]). Here, the record establishes that there were verbal and physical altercations between the mother and the girlfriend during the exchanges of the child. However, there is no evidence in the record that the girlfriend had harmed or threatened the child. We thus conclude that the court's determination to restrict the girlfriend from the exchanges, but not to restrict her from all contact with the child, is supported by a sound and substantial basis in the record (*cf. Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1755-1756 [4th Dept 2020]; *see generally Matter of Allen v Boswell*,

149 AD3d 1528, 1529 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]).

We reject the mother's contention that the court erred in failing to appoint an attorney for the child (AFC). The determination whether to appoint an AFC in a custody and visitation proceeding is discretionary (*see* Family Ct Act § 249 [a]; *Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]; *Lee v Halayko*, 187 AD2d 1001, 1002 [4th Dept 1992]). Although a court may appoint an AFC on its own motion (*see* § 249 [a]), we conclude that, given that the child was less than one year old at the time and thus would have been unable to express his wishes to an AFC, the court did not abuse its discretion in not appointing an AFC (*see Matter of Keen v Stephens*, 114 AD3d 1029, 1032 [3d Dept 2014]*; Matter of Darcie T. v Robert M.L.*, 255 AD2d 955, 955 [4th Dept 1988]; *see also* § 249 [a]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

72

KA 20-00958

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB RITCHIE, DEFENDANT-APPELLANT.

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS, FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered February 25, 2020. 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 reversed on the law without costs and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order classifying him as a level three sex offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). We reverse.

In its risk assessment instrument (RAI), the Board of Examiners of Sex Offenders (Board) assessed points in various categories, totaling 105 points, making defendant a presumptive level two risk. Based on his "prior felony conviction for a sex crime," however, the Board recommended an override to classify defendant as a presumptive level three risk. Nevertheless, when the parties appeared for the SORA hearing, defendant's counsel and the Assistant District Attorney agreed that defendant "should be scored at a Level II," and asked County Court to issue an order to that effect. The court responded, "So ordered," and the proceedings came to a close. No mention was made by anyone of the Board's recommendation for an override to risk level three.

In the order on appeal, however, the court assessed the 105 points recommended by the Board, but then also assessed an additional 10 points under risk factor 12, for failure to accept responsibility. That point assessment made defendant a presumptive level three risk. Based on its determination that defendant was a presumptive level three risk, the court stated that it "need not address the applicability of an override," but it noted that, had it adhered to the Board's point assessment, it would still have found the level three assessment appropriate "due to the override."

Defendant contends that the court erred in assessing points under risk factor 12. As a preliminary matter, we conclude that defendant's contention is properly before this Court inasmuch as defendant had no opportunity to object to the court's action due to the fact that the court gave no indication that it would be assessing those points until it was too late for defendant to raise any objection (*see People v Griest*, 143 AD3d 1058, 1059 [3d Dept 2016]; *cf. People v Chrisley*, 172 AD3d 1914, 1915 [4th Dept 2019]).

With respect to the merits, we agree with defendant and conclude that he is entitled to a new SORA hearing. Initially, it is well established that " '[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment' " (*People v Montufar-Tez*, 195 AD3d 1052, 1053 [2d Dept 2021]; *see People v Wilke*, 181 AD3d 1324, 1325 [4th Dept 2020]). As a result, "a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond" (*People v Segura*, 136 AD3d 496, 497 [1st Dept 2016]; *see Montufar-Tez*, 195 AD3d at 1052). That is what happened here.

Furthermore, we agree with defendant that the court erred in assessing him 10 points under risk factor 12, for failure to accept responsibility, given that he pleaded guilty and admitted his guilt (*see People v Kowal*, 175 AD3d 1057, 1058 [4th Dept 2019]). Although defendant once stated that he believed the 16-year-old victim was 18 years of age, we have held that "pointing out a mitigating aspect of one's conduct is not necessarily inconsistent with accepting responsibility for that conduct" (*id.* at 1059; *see People v Whalen*, 22 AD3d 900, 902 [3d Dept 2005]). Inasmuch as defendant's knowledge of the victim's age is not an element of the offense to which defendant pleaded guilty (*see* Penal Law § 130.25 [2]), and as defendant never denied that he had sexual intercourse with the underage victim, we conclude that his comment does not reflect a failure to accept responsibility for his actions. We also note that defendant pleaded guilty to statutory rape as charged in the superior court information, obviating the need for the victim to testify before the grand jury.

We further agree with defendant that the error cannot be considered harmless, notwithstanding the court's alternative determination that a level three designation would be appropriate based on the override for a prior felony sex crime conviction, inasmuch as that alternative determination violated defendant's right to due process (*see Wilke*, 181 AD3d at 1325). It is well settled that the override for a prior felony conviction of a sex crime is not mandatory (*see People v Douglas*, 199 AD3d 1330, 1331 [4th Dept 2021]; *People v Reynolds*, 68 AD3d 955, 956 [2d Dept 2009]). Inasmuch as the court indicated that it agreed with the level two designation proposed by the parties, defendant was not afforded a meaningful opportunity to argue against the override or in favor of a downward departure (*see Wilke*, 181 AD3d at 1325; *cf. People v June*, 195 AD3d 1443, 1443-1444 [4th Dept 2021], *lv denied* 37 NY3d 912 [2021]).

Based on our determination, we do not address defendant's remaining contention.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

73

KA 19-02104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARINO PADILLA, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 10, 2019. 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [7]). Defendant's challenges to the voluntariness of his guilty plea are unpreserved, and the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case (*see People v Padilla*, 151 AD3d 1700, 1700-1701 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]; *see generally People v Peque*, 22 NY3d 168, 182 [2013], *cert denied* 574 US 840 [2014]). We note in that regard that, contrary to defendant's assertion, "serious physical injury" is not an element of the crime to which he pleaded guilty (*see* § 120.05 [7]). Moreover, defendant's "assertion that his allocution failed to affirmatively establish each element of the crime[to which he pleaded guilty] 'is not a recognized ground for vacating a guilty plea' " (*People v Rathburn*, 178 AD3d 1421, 1422 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020]; *see People v Goldstein*, 12 NY3d 295, 300-301 [2009]; *People v Gulbin*, 165 AD3d 1611, 1612 [4th Dept 2018], *lv denied* 32 NY3d 1172 [2019]; *People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

75

KA 18-02091

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC CLAY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (John L. DeMarco, J.), rendered October 27, 2016. The judgment convicted defendant upon a nonjury verdict of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the fourth degree and menacing 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 after a nonjury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to consider the defense of justification (*see* § 35.20 [3]). Even assuming, arguendo, that the court refused to consider that defense, we conclude that any such refusal was proper. Penal Law § 35.20 (3) provides that "[a] person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary." It is well established that "if on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified [under the requested defense], the failure [in a bench trial] to charge [or to consider] the defense constitutes reversible error" (*People v Padgett*, 60 NY2d 142, 145 [1983]). When viewed in the light most favorable to defendant (*see People v Patterson*, 176 AD3d 1637, 1638-1639 [4th Dept 2019], *lv denied* 34 NY3d 1080 [2019]), the evidence herein establishes that the victim's brother was engaged in a fistfight with defendant on defendant's porch steps. The victim's brother never attempted to enter defendant's house, but rather attempted to prevent defendant

from entering the house by grabbing defendant's shirt, because the victim's brother knew that defendant had a gun in the house. After the victim's brother lost hold of defendant, the victim's brother and the victim ran away from defendant's house and across the street for safety. Meanwhile, defendant retrieved the gun and from the porch shot at the victim, killing him. We conclude that no reasonable view of the evidence permits the inference that defendant reasonably believed deadly force was necessary to prevent the commission or attempted commission of a burglary (*see People v Cox*, 92 NY2d 1002, 1004-1005 [1998]; *cf. People v Fagan*, 24 AD3d 1185, 1186-1187 [4th Dept 2005]).

We further reject defendant's contention that the sentence is unduly harsh and severe.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

77

KA 20-00953

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOREY SMITH, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CAITLIN M. CONNELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered June 5, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Pursuant to the plea agreement, County Court sentenced defendant as a second felony offender to concurrent determinate terms of imprisonment of five years plus two years of postrelease supervision. The court also ordered defendant to pay restitution in the amount of $832.00.

Defendant initially contends, and the People correctly concede, that his waiver of the right to appeal is unenforceable because County Court mischaracterized it as an absolute bar to a direct appeal (*see People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020]). Nevertheless, we reject defendant's contention that his negotiated sentence is unduly harsh and severe.

Finally, defendant contends that the restitution order must be vacated because the court did not require an affidavit pursuant to Penal Law § 60.27 (9). Because defendant's contention is raised for the first time on appeal, it is unpreserved for our review (*see People v Dehoyos*, 166 AD3d 1576, 1577 [4th Dept 2018], *lv denied* 33 NY3d 1068 [2019]). Moreover, inasmuch as defendant agreed to the amount of restitution as a condition of his plea, he is deemed to have waived his contention (*see People v Connors*, 91 AD3d 1340, 1342 [4th Dept

2012], *lv denied* 18 NY3d 956 [2012]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

79

CAF 20-00636

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

IN THE MATTER OF JION T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JILL H., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 11, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

Contrary to the mother's contention, we conclude that petitioner established " 'by clear and convincing evidence that [the mother], by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for [the] child[ ]' " (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1575 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). Testimony from petitioner's expert psychologist overwhelmingly established that the mother suffered from mental illness and that the child "would be in danger of being neglected if [he] were returned to [the mother's] care at the present time or in the foreseeable future" (*Jason B.*, 160 AD3d at 1434).

The mother contends that reversal is required because petitioner's case consisted almost entirely of inadmissible hearsay. We reject that contention. Even assuming, arguendo, that her

contention is fully preserved (*see generally Matter of Raymond H. [Dana C.]*, 186 AD3d 1125, 1126 [4th Dept 2020]) and that Family Court improperly admitted hearsay into evidence at the fact-finding hearing (*see generally Matter of Leon RR*, 48 NY2d 117, 123 [1979]), we conclude that any error by the court in admitting the challenged testimony is harmless (*see Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

80

CAF 20-01036

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

IN THE MATTER OF FAITH K.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMIE K. AND CINDY R., RESPONDENTS-APPELLANTS.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT JAMIE K.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT CINDY R.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered July 9, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order that, inter alia, terminated their parental rights with respect to their daughter, Faith K., on the ground of permanent neglect. It is undisputed that the child was removed from respondents' care shortly after her birth and was never returned to respondents' care.

Contrary to respondents' contention, we conclude that petitioner met its burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen respondents' relationship with the child (*see* Social Services Law § 384-b [7] [a]; *Matter of Braylynn S. [Eric S.]*, 181 AD3d 1205, 1205 [4th Dept 2020]). Furthermore, the record establishes that, "although petitioner made affirmative, repeated and meaningful efforts to assist [respondents], its efforts were fruitless because [respondents] [were] utterly uncooperative" (*Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1519 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020] [internal quotation marks omitted]; *see Braylynn S.*, 181 AD3d at 1205). Contrary to respondents' further contention, petitioner also

established that respondents failed to plan for the child's future and that they failed to address the problems that caused the removal of the child (*see Matter of Maria M. [Kristin M.]*, 183 AD3d 1250, 1250-1251 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]*; Matter of Justain R. [Juan F.]*, 93 AD3d 1174, 1174-1175 [4th Dept 2012]).

Respondents' contention that Family Court erred in failing to grant a suspended judgment is unpreserved for our review, inasmuch as neither the mother nor the father requested that relief at the dispositional hearing (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *Matter of Hayleigh C. [Ronald S.]*, 172 AD3d 1921, 1922 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019]).

Even assuming, as the mother contends, that the court erred in taking judicial notice of testimony and evidence postdating the filing of the permanent neglect petition, we conclude that any such error is harmless (*see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]). Even without such evidence, we conclude that the record of the fact-finding hearing "contains sufficient admissible facts to support the court's permanent neglect finding" (*id*.).

Finally, contrary to the mother's contention, she was not deprived of effective assistance of counsel by her attorney's failure to present her as a witness. While the mother correctly contends that the court offered accommodations for her to testify and yet she was not presented as a witness, the mother failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]).

We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-01449

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAWANZA ALEXANDER, 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 January 28, 2019. The judgment convicted defendant upon a plea of guilty of rape in the first degree and rape in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon an *Alford* plea of rape in the first degree (Penal Law § 130.35 [1]) and rape in the third degree (§ 130.25 [3]), defendant contends that Supreme Court abused its discretion in summarily denying his request to withdraw his plea. We reject that contention.

"[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 . . . 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 Crosby*, 195 AD3d 1602, 1603 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021] [internal quotation marks omitted]; *see People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

Here, both defense counsel and the court reviewed the terms of the plea offer with defendant in detail, including the period of postrelease supervision, and "defendant repeatedly confirmed that he understood" them (*Lewicki*, 118 AD3d at 1329; *see People v Smith*, 123 AD3d 950, 950-951 [2d Dept 2014], *lv denied* 25 NY3d 953 [2015]; *People v Johnson*, 97 AD3d 695, 696 [2d Dept 2012], *lv denied* 19 NY3d 1026

[2012]; *cf. People v Walton*, 177 AD3d 786, 787 [2d Dept 2019]). Moreover, "[w]here a sentencing court keeps the promises it made at the time it accepted a plea of guilty, a defendant should not be permitted to withdraw his [or her] plea on the sole ground that he [or she] misinterpreted the agreement. Compliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580 [1976]; *see People v Guillory*, 81 AD3d 1394, 1395 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]).

Defendant additionally contends that the court erred in failing to hold a hearing on his request to withdraw his plea. We reject that contention as well. It is well settled that, "in considering a motion to withdraw a guilty plea, a hearing is required only in rare instances" (*People v Osborn*, 198 AD3d 1363, 1364 [4th Dept 2021], *lv denied* — NY3d — [2022]), and here defendant "was afforded a reasonable opportunity to present his contentions such that the court was able to make an informed determination" (*id.*; *see also People v Stafford*, 195 AD3d 1466, 1467 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *see generally People v Tinsley*, 35 NY2d 926, 927 [1974]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

109

KA 18-01725

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH 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 July 2, 2018. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts), robbery in the first degree (two counts) and criminal use of a firearm in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts each of burglary in the first degree (Penal Law § 140.30 [3], [4]), robbery in the first degree (§ 160.15 [3], [4]), and criminal use of a firearm in the first degree (§ 265.09 [1] [b]), defendant contends that reversal is required because he may have been convicted on an uncharged theory. We reject that contention. Although the trial evidence may have supported a theory different from the one set forth in the bill of particulars—namely that defendant was a getaway driver and did not enter the residence where the robbery occurred—and although County Court erred in denying defense counsel's objection to the prosecutor's remarks during summation presenting that theory, reversal is not warranted inasmuch as the court's "charge to the jury eliminated any danger that the jury convicted defendant of an unindicted act" (*People v Bradford*, 61 AD3d 1419, 1421 [4th Dept 2009], *affd* 15 NY3d 329 [2010] [internal quotation marks omitted]; *see People v Gerstner*, 270 AD2d 837, 838 [4th Dept 2000]; *cf. People v Petersen*, 190 AD3d 769, 770 [2d Dept 2021], *lv denied* 36 NY3d 1123 [2021]).

Contrary to defendant's further contention, the record as a whole demonstrates that the court did not err in denying his request to waive his right to counsel so that he could proceed pro se. It is well settled that a defendant in a criminal case has the right to

proceed pro se (*see* NY Const, art I, § 6; CPL 210.15 [5]), and may invoke that right "provided: (1) the request is unequivocal and timely asserted[;] (2) there has been a knowing and intelligent waiver of the right to counsel[;] and (3) the defendant has not engaged in conduct [that] would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17 [1974]; *see People v Herman*, 78 AD3d 1686, 1686 [4th Dept 2010], *lv denied* 16 NY3d 831 [2011]). Here, the court properly denied defendant's request inasmuch as defendant engaged in a pattern of disruptive conduct meant to undermine orderly determination of the issues, arising from his mistaken belief that the court had no jurisdiction over him as a sovereign citizen (*see generally McIntyre*, 36 NY2d at 18; *United States v Pryor*, 842 F3d 441, 445-451 [6th Cir 2016], *cert denied* — US —, 137 S Ct 2254 [2017]).

We also reject defendant's contention that the sentence is unduly harsh and severe. Finally, we have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-02225

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK HARRIS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered November 20, 2019. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We reject defendant's contention that County Court erred in refusing to suppress his statements to the police during an interview. The evidence presented at the suppression hearing demonstrated that defendant was twice informed of his *Miranda* rights, that he understood those rights, and that he was not under duress or undue influence when he made those statements (*see People v Sanders*, 171 AD3d 1460, 1461 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]). Under the circumstances of this case, the tactics used by the police in suggesting that others could be adversely affected if defendant did not admit to owning the subject handgun did not require suppression of defendant's statements (*see People v Lewis*, 93 AD3d 1264, 1265 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]).

Defendant's further contention that his plea was not knowingly, intelligently, and voluntarily entered is not preserved for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction on the grounds presently raised on appeal, nor did the court expressly decide the questions raised on appeal (*see People v Barrett*, 153 AD3d 1600, 1601 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]; *see also People v Bentley*, 191 AD3d 1392, 1392 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Molski*, 179 AD3d

1540, 1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]). We reject defendant's contention that the court abused its discretion in denying his pro se motion to withdraw his guilty plea without conducting an evidentiary hearing or conducting a further inquiry into his allegation. As limited by defendant at sentencing, that motion was " 'patently insufficient on its face' " (*People v Shorter*, 179 AD3d 1445, 1446 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]; *see also People v Williams*, 103 AD3d 1128, 1128-1129 [4th Dept 2013], *lv denied* 21 NY3d 915 [2013]).

We likewise reject defendant's final contention that he was deprived of effective assistance of counsel. The record belies defendant's assertion that defense counsel failed to properly inform defendant of the circumstances and consequences of his plea (*see generally People v Demus*, 82 AD3d 1667, 1668 [4th Dept 2011], *lv denied* 17 NY3d 815 [2011]). Contrary to defendant's further assertion, defense counsel's failure to join in defendant's pro se motion to withdraw the plea at sentencing did not constitute ineffective assistance (*see People v Weinstock*, 129 AD3d 1663, 1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]; *People v Trombley*, 91 AD3d 1197, 1202-1203 [3d Dept 2012], *lv denied* 21 NY3d 914 [2013]; *see generally People v Roberts*, 121 AD3d 1530, 1532 [4th Dept 2014], *lv denied* 24 NY3d 1122 [2015]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

131

KA 17-00226

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALEX ZINKOVITCH-HELU, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 22, 2016. 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.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

132

KA 20-00590

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH LOBDELL, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (TYLER BUGDEN 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 (Matthew J. Doran, J.), rendered September 5, 2019. The judgment convicted defendant upon a plea of guilty of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

133

KA 17-01697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REMY D. ALLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 14, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant does not raise any challenge to the validity of his waiver of the right to appeal (*see People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Rosado-Thomas*, 181 AD3d 1166, 1166 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]). Thus, defendant's challenge to the severity of the postrelease supervision component of his agreed-upon sentence "is foreclosed by his unchallenged waiver of the right to appeal" (*Rosado-Thomas*, 181 AD3d at 1167; *see Seymore*, 188 AD3d at 1770).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

137

KA 17-01321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK GARCIA, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Sam L. Valleriani, J.), rendered June 2, 2017. Defendant was resentenced upon his conviction of attempted murder in the first degree.

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

Memorandum: Defendant was convicted upon a jury verdict of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [viii]; [b]). On a prior appeal, we modified the judgment of conviction by vacating the sentence imposed on count three of the indictment and remitted the matter to County Court for resentencing (*People v Garcia*, 148 AD3d 1559, 1561-1562 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]). Defendant now appeals from the resentence. We affirm.

Defendant contends that the court erred in failing sua sponte to order a competency examination pursuant to CPL 730.30 (1) based on defendant's statements during the resentencing. "It is well settled that the decision to order a competency examination under CPL 730.30 (1) lies within the sound discretion of the trial court" (*People v Williams*, 35 AD3d 1273, 1274 [4th Dept 2006], *lv denied* 8 NY3d 928 [2007]; *see People v Morgan*, 87 NY2d 878, 879-880 [1995]). "A defendant is presumed competent . . . , and the court is under no obligation to issue an order of examination . . . unless it has 'reasonable ground . . . to believe that the defendant was an incapacitated person' " (*Morgan*, 87 NY2d at 880). Based on the record before us, we conclude that the court did not abuse its discretion in failing sua sponte to order a competency examination (*see id.* at 879-880; *People v Estruch*, 164 AD3d 1632, 1633 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]). Defendant's remarks "were suggestive of

a[n] . . . obstructionist frame of mind, not an incompetent one" (*People v Johnson*, 145 AD3d 1109, 1110 [3d Dept 2016], *lv denied* 29 NY3d 949 [2017]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

139

KAH 19-01958

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DANIEL KARLIN, PETITIONER-APPELLANT,

V ORDER

TODD BAXTER, MONROE COUNTY SHERIFF, RESPONDENT,
AND JOHN BIRD, AREA SUPERVISOR, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENT-RESPONDENT.

CRAIG M. CORDES, SYRACUSE, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Sam L. Valleriani, A.J.), entered August 16, 2019 in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see People ex rel. Billinger v Harper*, 198 AD3d 1295, 1295 [4th Dept 2021]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

141

OP 21-01482

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOHN BRADLEY, ON BEHALF OF WILLIE J. TOLBERT,
PETITIONER,

V MEMORANDUM AND ORDER

TODD K. BAXTER, MONROE COUNTY SHERIFF, RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR PETITIONER.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 7002 [b] [2]) for a writ of habeas corpus.

It is hereby ORDERED that said proceeding is unanimously converted to a declaratory judgment action and the action is transferred to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner commenced this original proceeding pursuant to CPLR 7002 (b) (2) seeking a writ of habeas corpus on the ground that his pretrial detention was prohibited by CPL 510.10 and 530.20. The day after filing the petition, petitioner was released from custody pursuant to CPL 530.30, rendering the petition moot (*see generally People ex rel. McManus v Horn*, 18 NY3d 660, 663 [2012]; *People ex rel. Doyle v Fischer*, 159 AD2d 208, 208 [1st Dept 1990]). Nevertheless, the exception to the mootness doctrine applies here inasmuch as the propriety of remand under CPL 530.20 “is an important issue that is likely to recur and which typically will evade our review” (*McManus*, 18 NY3d at 664).

In light of the fact that petitioner no longer needs, and is no longer eligible for, affirmative habeas corpus relief (*see generally* CPLR 7002 [a]), and upon petitioner’s request, we convert this proceeding into a declaratory judgment action (*see* CPLR 103 [c]; *cf. People ex rel. McBride v Alexander*, 54 AD3d 423, 424 [2d Dept 2008]; *see generally Matter of State of New York v Cuevas*, 49 AD3d 1324, 1326 [4th Dept 2008]). However, such an action is not properly commenced in this Court (*see* CPLR 3001; *Matter of Sibley v Watches*, 194 AD3d 1385, 1388 [4th Dept 2021], *appeal dismissed and lv denied* 37 NY3d 1131 [2021]; *Matter of Jefferson v Siegel*, 28 AD3d 1153, 1154 [4th Dept 2006]). We therefore transfer the declaratory judgment action to Supreme Court, Monroe County, for further proceedings (*see Matter of Nelson v Stander*, 79 AD3d 1645, 1645-1646 [4th Dept 2010]; *Donaldson v State of New York*, 156 AD2d 290, 292 [1st Dept 1989], *lv dismissed in*

part and denied in part 75 NY2d 1003 [1990]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

142

CA 21-00400

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

JOANNA M. FRIEDEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VERNON L. FRIEDEL, DECEASED, AND INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V

ASBESTOS CORPORATION, LTD., ET AL., DEFENDANTS, AND HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.

SHERYL PAPIERNIK, EXECUTRIX OF THE ESTATE OF WILLIAM SANTERSERO, DECEASED, PLAINTIFF-RESPONDENT,

V

ASBESTOS CORPORATION, LTD., ET AL., DEFENDANTS, AND HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.

CAROLYN L. BROWN, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM D. BROWN, DECEASED, AND INDIVIDUALLY AND AS THE SURVIVING SPOUSE OF WILLIAM D. BROWN, DECEASED, PLAINTIFF-RESPONDENT,

V

ASBESTOS CORPORATION, LTD., ET AL., DEFENDANTS, AND HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.

ORDER

CLYDE & CO US LLP, NEW YORK CITY (JOHN J. BURBRIDGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 9, 2021. The order, among other things, denied the motion of defendant Hedman Resources Limited to vacate prior orders.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 15, 2021,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

144

CA 21-00346

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

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V ORDER

TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON TOWN BOARD, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS TOWN OF BRIGHTON PLANNING BOARD, TOWN OF BRIGHTON TOWN BOARD, AND TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, MARDANTH ENTERPRISES, INC., AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered February 4, 2021. Petitioner-plaintiff "appeals from that part of the . . . [o]rder that did not enjoin the Town of Brighton from issuing any more permits/certificates until the traffic mitigation measures were complete."

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see e.g. Matter of Hool v Collins*, 34 NY2d 617, 617 [1974]; *Matter of Samantha WW. v Gerald XX.*, 107 AD3d 1313, 1315 [3d Dept 2013]; *Matter of Harper v Fischer*, 67 AD3d 1279, 1280 n [3d Dept 2009]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

146

CA 21-01018

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

IN THE MATTER OF POWIS CONTRACTING, INC.,
PETITIONER-APPELLANT,

V ORDER

JEFFERSON COMMUNITY COLLEGE AND
JL EXCAVATION, LLC, RESPONDENTS-RESPONDENTS.

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

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN, FOR RESPONDENT-RESPONDENT JEFFERSON COMMUNITY COLLEGE.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (MEGAN S. KENDALL OF COUNSEL), FOR RESPONDENT-RESPONDENT JL EXCAVATION, LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered June 15, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

149

CA 21-00460

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

BOND, SCHOENECK & KING, PLLC,
PLAINTIFF-RESPONDENT,

V ORDER

V & J HOLDING COMPANIES, INC., V & J NATIONAL ENTERPRISES, LLC, V & J UNITED ENTERPRISES, LLC, AND V & J EMPLOYMENT SERVICES, INC.,
DEFENDANTS-APPELLANTS.

SCHRODER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND SCHOENECK & KING, PLLC, BUFFALO (MITCHELL J. BANAS, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered February 16, 2021. The order, among other things, denied in part defendants' motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 4, 2022,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

152

TP 21-01385

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

IN THE MATTER OF CHRISTIAN HILL, PETITIONER,

V ORDER

A. LAMANNA, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

CHRISTIAN HILL, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Barry L. Porsch, A.J.], entered September 28, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

155

KA 20-00242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO TERRY, ALSO KNOWN AS TONE, ALSO KNOWN AS TONY, ALSO KNOWN AS LORENZO A. TERRY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered November 14, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude his challenges to the severity of the sentence (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

158

KA 19-00069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE R. ANDERSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER 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 convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

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

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]). As we previously determined on the appeal of a codefendant, Supreme Court erred in denying that part of the omnibus motion seeking to suppress physical evidence seized by the police (*see People v Fitts*, 188 AD3d 1676, 1677-1678 [4th Dept 2020]). We therefore reverse the judgment, grant that part of the motion, and dismiss the indictment against defendant.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

160

CAF 21-00465

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

IN THE MATTER OF SCOTT C. HAGADONE,
PETITIONER-RESPONDENT,

V ORDER

CASSANDRA L. CANSDALE, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered March 23, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to petitioner.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

164

CA 21-00773

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

LISA ANN GRAHAM, AS ADMINISTRATRIX OF
THE ESTATE OF FRANCES R. MCCOLLOUGH, DECEASED,
CLAIMANT-APPELLANT,

V ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DEFENDANT-RESPONDENT.

KRAMER, DILLOF, LIVINGSTON & MOORE, NEW YORK CITY (MATTHEW GAIER OF COUNSEL), FOR CLAIMANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CRAIG R. WATSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered April 7, 2021. The order, inter alia, granted the motion of defendant to dismiss the notice of claim and claim with respect to personal injury claims.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

166

CA 20-01656

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF EDWARD T., FROM CENTRAL NEW YORK PSYCHIATRIC
CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL
HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Oneida County Court (Gregory J. Amoroso, A.J.), entered November 16, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued petitioner's commitment to a secure treatment facility.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

169

CA 21-00225

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

LINDA SMITH, AS ADMINISTRATRIX OF THE ESTATE OF MARY SMITH, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

SISTERS OF CHARITY HOSPITAL, ET AL., DEFENDANTS, WILLIAMSVILLE SUBURBAN NURSING HOME, WILLIAMSVILLE SUBURBAN, LLC, GOLDEN LIVING CENTERS, LLC, SAFIRE CARE LLC, SAFIRE REHABILITATION OF AMHERST, LLC, SOLOMON ABRAMCZYK, JUDY LANDA, ARYEH RICHARD PLATSCHEK, ROBERT SCHUCK AND MOSHE STEINBERG, DEFENDANTS-APPELLANTS.

CAITLIN ROBIN & ASSOCIATES PLLC, BUFFALO (MARK A. LAUGHLIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered January 8, 2021. The order granted the motion of plaintiff to compel defendant Williamsville Suburban Nursing Home to disclose a copy of decedent’s certified chart at no cost to plaintiff.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

173

KA 19-01120

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN L. LEE, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 14, 2019. The appeal was held by this Court by order entered November 13, 2020, decision was reserved, and the matter was remitted to Cayuga County Court for further proceedings (188 AD3d 1685 [4th Dept 2020]).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). When the appeal was previously before us, we held the case, reserved decision, and remitted the matter to County Court "for the assignment of new counsel and a de novo determination of defendant's motion and request to withdraw the guilty plea" (*People v Lee*, 188 AD3d 1685, 1686 [4th Dept 2020]). Upon remittal, new counsel was assigned, but defendant then withdrew his motion and request to withdraw the plea. We now affirm.

Contrary to defendant's contention, the agreed-upon sentence is not unduly harsh or severe.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

174

TP 21-01289

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

IN THE MATTER OF JAMES JONES, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered September 14, 2021) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

175

KA 20-01642

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD MAYNOR, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered November 18, 2020. 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.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, therefore we conclude that the colloquy was insufficient to ensure that defendant's waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

176

KA 21-00365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY MOYE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 1, 2021. The judgment convicted defendant, upon a plea of guilty, 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 his plea of guilty, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The sentence, however, is not unduly harsh or severe.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

181

CAF 20-01430

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

IN THE MATTER OF ANGELIQUE JACKSON,
PETITIONER-APPELLANT,

V ORDER

RAYMOND JACKSON, RESPONDENT-RESPONDENT.

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 22, 2020 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

186

CA 21-00050

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

KAREN S. SHELDON AND VERNON R. SHELDON,
PLAINTIFFS-RESPONDENTS,

V ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered January 4, 2021. The order denied in part defendant's motion for summary judgment.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

187

CA 20-01503

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

STEVEN PATTERSON AND ADRIENNE PATTERSON,
AS GUARDIANS OF THE PERSON OF TERRANCE
PATTERSON, PLAINTIFFS-RESPONDENTS,

V ORDER

COUNTY OF ERIE, ET AL., DEFENDANTS,
GATEWAY-LONGVIEW FOUNDATION,
GATEWAY-LONGVIEW, INC., AND FRANCENIA REED,
DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

WILLIAM D. MALDOVAN, PUBLIC ADMINISTRATOR OF
ERIE COUNTY, AS ADMINISTRATOR OF THE ESTATE
OF TERRELL PARKER, DECEASED,
PLAINTIFF-RESPONDENT,

V

COUNTY OF ERIE, ET AL., DEFENDANTS,
GATEWAY-LONGVIEW FOUNDATION,
GATEWAY-LONGVIEW, INC., AND FRANCENIA REED,
DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE BELTZ RIMMLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 19, 2020. The order, among other things, denied in part the motion of defendants Gateway-Longview Foundation, Gateway-Longview, Inc., and Francenia Reed seeking summary judgment.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

196

KA 19-01856

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSHUA STEWART, 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 Supreme Court, Monroe County (Victoria M. Argento, J.), entered July 19, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in *People v Stewart* (199 AD3d 1479 [4th Dept 2021]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

211

CA 21-00681

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

ELIZABETH BRITTON, ON BEHALF OF HERSELF AND
ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SENECA MEADOWS, INC., DEFENDANT-APPELLANT.

BEVERIDGE & DIAMOND, P.C., NEW YORK CITY (MICHAEL G. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIDDLE SHEETS COULSON P.C., DETROIT, MICHIGAN (LAURA L. SHEETS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered April 20, 2021. The order denied the motion of defendant to disqualify the law firm of Liddle & Dubin, P.C. and to revoke the pro hac vice admissions of Laura L. Sheets, Esq., and Brandon T. Brown, Esq.

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

Memorandum: Defendant appeals from an order that denied its motion seeking to disqualify the out-of-state law firm retained by plaintiff in this matter and to revoke the pro hac vice admissions of plaintiff's attorneys with that law firm. We affirm for reasons stated in the decision at Supreme Court. We write only to note that, contrary to the court's determination, the May 4, 2017 letters and contingent fee agreements sent by plaintiff's counsel violated Rules of Professional Conduct (22 NYCRR 1200.0) rule 7.3 (g) (*see* Rules of Professional Conduct rule 7.3 [b]). We nonetheless conclude that the court did not abuse its discretion in denying the motion (*see generally S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 443-445 [1987]; *Harris v Erie County Med. Ctr. Corp.*, 175 AD3d 1104, 1106-1107 [4th Dept 2019]; *J.G. Wentworth S.S.C. Ltd. Partnership v Serio*, 33 AD3d 761, 761-762 [2d Dept 2006]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

216

KA 16-00980

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHARYE JARVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 2, 2016. The appeal was held by this Court by order entered August 20, 2020, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (186 AD3d 1086 [4th Dept 2020]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*People v Jarvis*, 186 AD3d 1086, 1087 [4th Dept 2020]). In that prior decision, we rejected defendant's remaining contentions. Upon remittal, with all parties present, the court determined that defendant, although eligible, should not be afforded youthful offender status. Defendant raises no contentions on resubmission, and we therefore affirm the judgment.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

217

KA 20-01579

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CALEB E. ROSS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Ontario County Court (Brian D. Dennis, J.), entered September 15, 2020. 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.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

222

KA 20-01684

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEY ZADUL, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered October 20, 2020. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). To the extent that defendant's contentions are not forfeited by his plea of guilty (*see People v Leary*, 70 AD3d 1394, 1395 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]; *People v Jimenez*, 277 AD2d 956, 956 [4th Dept 2000], *lv denied* 96 NY2d 784 [2001]), our review of them is precluded by defendant's valid waiver of the right to appeal (*see People v Richardson*, 173 AD3d 1859, 1860 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019], *reconsideration denied* 34 NY3d 1081 [2019]; *People v Caldwell*, 71 AD3d 1515, 1515-1516 [4th Dept 2010], *lv denied* 15 NY3d 772 [2010]; *People v Oliveri*, 49 AD3d 1208, 1209 [4th Dept 2008]; *People v Vega*, 24 AD3d 1260, 1260 [4th Dept 2005], *lv denied* 7 NY3d 764 [2006]). We note only that the uniform sentence and commitment form erroneously reflects that defendant was convicted of criminal possession of a weapon in the second degree under Penal Law § 265.03 (2) and must be amended to reflect that he was convicted under Penal Law § 265.03 (3) (*see People v Ealahan*, 198 AD3d 1376, 1377 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

223

KA 21-00192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEMAR GARCIA, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered October 21, 2020. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]). We agree with defendant that his waiver of the right to appeal is invalid because Supreme Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *see People v Rodriguez*, 199 AD3d 1458, 1458 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]; *People v Wright*, 193 AD3d 1348, 1349 [4th Dept 2021], *lv denied* 37 NY3d 969 [2021]) and, therefore, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Consequently, the waiver of the right to appeal does not preclude our review of defendant's challenge to the severity of the sentence. Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Defendant did not move to withdraw the plea or to vacate the judgment of conviction, and thus he failed to preserve for our review his challenge to the voluntariness of his plea (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). We reject defendant's contention that this case falls within the rare exception to the preservation doctrine inasmuch as nothing in the plea colloquy "casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see People v Davis*, 193 AD3d 1352, 1352-1353 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]). Furthermore, even assuming, arguendo, that the court's duty to make

further inquiry was triggered by defendant's statements during sentencing (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *see generally People v Delorbe*, 35 NY3d 112, 121 [2020]) and thus that the rare exception applies here due to the court's failure to inquire into those statements (*see Lopez*, 71 NY2d at 666), we nonetheless reject defendant's challenge to the voluntariness of his plea inasmuch as defendant's contention that he was coerced into accepting the plea is "belied by his statements during the plea proceeding[]" and his "conclusory and unsubstantiated claim[s] of innocence [were] belied by his admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]; *see People v Shanley*, 189 AD3d 2108, 2109 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]).

Defendant further contends that the court erred in calculating the duration of the order of protection issued against him without taking into account the jail time credit to which he is entitled (*see People v Bradford*, 61 AD3d 1419, 1421 [4th Dept 2009], *affd* 15 NY3d 329 [2010]). Defendant raises that contention for the first time on appeal and has thus failed to preserve it for our review (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]; *People v Davis*, 153 AD3d 1617, 1618 [4th Dept 2017], *lv denied* 30 NY3d 1059 [2017]). In any event, we reject defendant's contention "inasmuch as a period of postrelease supervision may be included in calculating the maximum legal expiration date of an order of protection" (*People v Gonyeau*, 144 AD3d 1574, 1574 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]; *see* CPL 530.12 [5] [A] [ii]; *People v Cooke*, 119 AD3d 1399, 1401 [4th Dept 2014], *affd* 24 NY3d 1196 [2015], *cert denied* 577 US 1011 [2015]; *People v Williams*, 19 NY3d 100, 101-102 [2012]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

229

CA 21-00241

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

MARIO NORRIS, PLAINTIFF-APPELLANT,

V ORDER

GEORGE R. WILLIAMS, DONALD M. BAUER AND NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., ALSO KNOWN AS NIAGARA FRONTIER TRANSPORTATION AUTHORITY, DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (RICHARD A. NICOTRA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DONALD M. BAUER AND NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., ALSO KNOWN AS NIAGARA FRONTIER TRANSPORTATION AUTHORITY.

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-RESPONDENT GEORGE R. WILLIAMS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 12, 2021. The order, insofar as appealed from, granted the cross motion of defendants Donald M. Bauer and Niagara Frontier Transit Metro System, Inc., also known as Niagara Frontier Transportation Authority seeking summary judgment dismissing the complaint against them.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

232

CA 20-01698

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

KENNETH TRBOVICH, AS EXECUTOR OF THE ESTATE OF NICHOLAS D. TRBOVICH, SR., DECEASED, PLAINTIFF-APPELLANT,

V ORDER

JOSEPH G. MAKOWSKI, DEFENDANT-RESPONDENT.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (STEPHEN J. STACHOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

APRIL J. ORLOWSKI, PLLC, BUFFALO (APRIL J. ORLOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered December 11, 2020. The order, among other things, granted the motion of defendant for leave to renew and reargue, and upon renewal and reargument, dismissed the action.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

233

CA 21-00009

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

FRACTIONAL STRATEGIES, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

DAVID GENECCO AND SMECCO, LLC,
DEFENDANTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (KRISTINE N. CELESTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered December 1, 2020. The order denied defendants' motion for summary judgment and granted plaintiff's cross motion for leave to amend its complaint.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

235

CA 21-01401

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

JAMES MASSEY, PLAINTIFF-RESPONDENT,

V ORDER

KEITH WHITTLINGER, DEFENDANT-APPELLANT.

HAGELIN SPENCER, LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PARISI & BELLAVIA LAW, LLP, ROCHESTER (ALBERT L. PARISI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered April 1, 2021. The order, among other things, granted the cross motion of plaintiff for partial summary judgment.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

237.1

CA 21-00464

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

JOHN B. FELDMEIER, INDIVIDUALLY AND DERIVATIVELY AS A PARTNER OF 6800 TOWNLINE ROAD PARTNERSHIP, PLAINTIFF-APPELLANT,

V ORDER

6800 TOWNLINE ROAD PARTNERSHIP, ROBERT E. FELDMEIER, JEANNE C. JACKSON AND LISA F. CLARK, DEFENDANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered March 10, 2021. The order, among other things, granted defendants' cross motion for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 23, 2021,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

244

KA 14-01315

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAT L. JONES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 11, 2014. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). For reasons stated in its decision, we conclude that County Court properly denied defendant's motion to dismiss the indictment on constitutional speedy trial grounds. We note only that, although the evidence from the hearing does not support the court's determination that the delay from April 2008 to June 2012 occurred because the investigating officer and the prosecutor "agreed not to proceed with this matter until after Defendant's initial appearance before the parole board . . . in December 2011," we nevertheless agree with the court that the delay in prosecuting this case does not "rise to the level of a constitutional violation" (*People v Ramlall*, 34 NY3d 1154, 1155 [2020]; *see generally People v Wiggins*, 31 NY3d 1, 9-10 [2018]; *People v Taranovich*, 37 NY2d 442, 445 [1975]).

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

250

CA 21-00339

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

LISA ANN HARMEL, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE
ESTATE OF JEAN M. HARMEL, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

MERCY HOSPITAL OF BUFFALO ORCHARD PARK
DIVISION, ALSO KNOWN AS MERCY AMBULATORY
CARE CENTER, ET AL., DEFENDANTS,
AND ASHOK KAUSHAL, M.D., DEFENDANT-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMPBELL & ASSOCIATES, LLP, EDEN, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered February 9, 2021. The order denied in part the motion of defendant Ashok Kaushal, M.D. for summary judgment.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

251

CA 21-01023

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

JULIO LICINIO, M.D., PHD, MBA, MS,
CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

ROMANO LAW PLLC, NEW YORK CITY (SIDDARTHA RAO OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered January 8, 2021. The order granted the motion of defendant to dismiss the claim and denied the cross motion of claimant for leave to amend the claim.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

264

CA 20-01372

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

IN THE MATTER OF ALAN J. HOROWITZ,
PETITIONER-APPELLANT,

V ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CNYPC,
AND ANN MARIE SULLIVAN, COMMISSIONER OMH,
RESPONDENTS-RESPONDENTS.

ALAN J. HOROWITZ, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 14, 2020 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of defendants to dismiss the proceeding.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

266

CA 21-00036

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

LORI J. OLIVIERI, PLAINTIFF-APPELLANT,

V ORDER

BARNES & NOBLE, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

CAITLIN ROBIN & ASSOCIATES, PLLC, BUFFALO (MARK A. LAUGHLIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 4, 2021. The order dismissed plaintiff's complaint upon the motion of defendant Barnes & Noble, Inc.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

269

CA 21-00689

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

ORISKA INSURANCE COMPANY, PLAINTIFF-APPELLANT,

V ORDER

AVALON GARDENS REHABILITATION & HEALTH CARE CENTER, LLC, DOING BUSINESS AS BROOKSIDE MULTICARE NURSING CENTER, AND SENTOSACARE, LLC, DEFENDANTS-RESPONDENTS.
(AND 24 OTHER ACTIONS).

HITZKE & FERRAN, LLP, NEW YORK CITY (FRANK POLICELLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPSIUS BENHAIM LAW, LLP, KEW GARDENS (IRA S. LIPSIUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered October 27, 2020. The order, among other things, denied plaintiff's motion for leave to renew its opposition to defendants' prior motion for summary judgment.

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

273

CA 21-00230

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

TRASON ELM, LLC, PLAINTIFF-RESPONDENT,

V ORDER

BUFFALO STATE VENTURES, LLC, AND DHD VENTURES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

DAVIDSON FINK LLP, ROCHESTER (RICHARD N. FRANCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (F. SCOTT MOLNAR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 10, 2021. The order, among other things, granted the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 31, 2021,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

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

274

CA 21-01004

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

TRASON ELM, LLC, PLAINTIFF-RESPONDENT,

V ORDER

BUFFALO STATE VENTURES, LLC, AND DHD VENTURES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

DAVIDSON FINK LLP, ROCHESTER (RICHARD N. FRANCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (F. SCOTT MOLNAR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 12, 2021. The order, inter alia, granted the motion of plaintiff for the appointment of a temporary receiver.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 31, 2021,

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

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court