SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 12, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED JUNE, 12 2020

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

798/18

KA 16-00065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. HOLZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LANA M. ULRICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 24, 2015. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree. The judgment was affirmed by order of this Court entered December 21, 2018 in a memorandum decision (167 AD3d 1417 [4th Dept 2018]), and the Court of Appeals on May 7, 2020 reversed the order and remitted the case to this Court for further proceedings (— NY3d —, 2020 NY Slip Op 02682 [May 7, 2020]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, 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 seized from defendant on October 3, 2014 is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Holz*, — NY3d —, 2020 NY Slip Op 02682 [May 7, 2020], *revg* 167 AD3d 1417 [4th Dept 2018]). We previously affirmed a judgment convicting defendant, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]) as charged in count one in full satisfaction of a two-count indictment. A majority of this Court concluded that " 'the judgment of conviction on appeal here did not *ensue* from the denial of the motion to suppress [relating solely to count two] and the latter [wa]s, therefore, not reviewable' pursuant to CPL 710.70 (2)" (*Holz*, 167 AD3d at 1418). One Justice dissented and would have reached the merits of defendant's challenge to the suppression ruling (*id*. at 1424 [Whalen, P.J., dissenting]). The Court of Appeals reversed, stating that "the Appellate Division may review an order denying a motion to suppress evidence where, as

here, the contested evidence pertained to a count—contained in the same accusatory instrument as the count defendant pleaded guilty to—that was satisfied by the plea" (*Holz*, — NY3d at —, 2020 NY Slip Op 02682, *2). The Court of Appeals remitted the matter to this Court to rule on defendant's suppression contention.

Upon remittitur, we now agree with defendant that Supreme Court erred in refusing to suppress physical evidence seized as a result of his unlawful detention on October 3, 2014 (*see Holz*, 167 AD3d at 1424-1428 [Whalen, P.J., dissenting]). We further agree with defendant that such error was not harmless under the circumstances (*see id.* at 1424). We therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress the physical evidence seized from defendant on October 3, 2014, and remit the matter to Supreme Court, Monroe County, for further proceedings on the indictment.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

992

CA 18-02349

PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

BRENDA J. NORDENSTAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK COLLEGE OF ENVIRONMENTAL SCIENCE & FORESTRY, DEFENDANT-RESPONDENT.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 9, 2018. The order granted defendant's motion for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff, a tenured associate professor employed by defendant, State University of New York College of Environmental Science & Forestry, commenced this action alleging, inter alia, that defendant discriminated against her on the basis of sex and disability and retaliated against her after she complained of discrimination. Plaintiff now appeals from an order granting defendant's motion for summary judgment dismissing the complaint.

Contrary to plaintiff's contention, Supreme Court properly granted the motion with respect to the seventh through ninth causes of action, alleging disparate treatment and disability discrimination that was based on defendant's purported refusal to provide reasonable accommodations for her disability in violation of the Americans with Disabilities Act ([ADA] 42 USC § 12101 *et seq.*), Rehabilitation Act of 1973 (29 USC § 701 *et seq.*), and Human Rights Law ([NYSHRL] Executive Law § 290 *et seq.*), respectively. Those statutes provide that, to establish a prima facie case of discrimination based upon the denial of a reasonable accommodation, plaintiff "must prove that he or she is a person with a disability, that the employer had notice of the disability, that he or she could perform the essential functions of the job with a reasonable accommodation and that the employer refused

that reasonable accommodation" (*Graham v New York State Off. of Mental Health*, 154 AD3d 1214, 1217-1218 [3d Dept 2017]; *see Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1473 [4th Dept 2010]; *Stone v City of Mount Vernon*, 118 F3d 92, 96-97 [2d Cir 1997], *cert denied* 522 US 1112 [1998]). Here, defendant met its initial burden on the motion with respect to those causes of action by establishing that an essential function of plaintiff's job was teaching and that plaintiff's requested accommodation, i.e., that she be allowed to work part time without teaching any courses, was unreasonable (*see generally Pimentel v Citibank, N.A.*, 29 AD3d 141, 146, 151 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]). In opposition, plaintiff failed to raise a triable issue of fact with respect thereto (*see McCarthy v St. Francis Hosp.*, 41 AD3d 794, 794 [2d Dept 2007], *lv denied* 9 NY3d 813 [2007]; *see also Pimentel*, 29 AD3d at 149; *see generally Warren v Volusia County, Fla.*, 188 Fed Appx 859, 862-863 [11th Cir 2006], *cert denied* 549 US 1207 [2007]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the second cause of action, alleging violations of the Equal Pay Act of 1963 ([EPA] 29 USC § 206 [d], as added by Pub L 88-38, 77 US Stat 56), and with respect to the first and third causes of action, alleging gender discrimination in violation of Title VII of the Civil Rights Act of 1964 ([Title VII] 42 USC, ch 21, § 2000e *et seq.*) and the NYSHRL, respectively. We therefore modify the order accordingly.

With respect to the cause of action alleging violations of the EPA, defendant failed to establish as a matter of law that the difference in pay between plaintiff and a less senior male colleague who performed similar work under similar conditions "is due to a factor other than sex" (*Beck-Wilson v Principi*, 441 F3d 353, 365 [6th Cir 2006]; *see also U.S. Equal Empl. Opportunity Commn. v Maryland Ins. Admin.*, 879 F3d 114, 121 [4th Cir 2018]; *see generally Tenkku v Normandy Bank*, 348 F3d 737, 741 n 2 [8th Cir 2003]). Although defendant contends that the pay disparity was the result of a merit system (*see* 29 USC § 206 [d] [1]), the evidence it submitted in support of the motion failed to demonstrate as a matter of law that there was " 'an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria' " and that the employees were aware of the purported merit system (*Ryduchowski v Port Auth. of New York and New Jersey*, 203 F3d 135, 142-143 [2d Cir 2000], *cert denied* 530 US 1276 [2000]). The second cause of action should therefore be reinstated.

With respect to the causes of action for sexual discrimination under Title VII and the NYSHRL, we conclude that issues of fact exist whether defendant's challenged actions were "based upon nondiscriminatory reasons," and thus summary judgment is precluded on those causes of action (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). Indeed, defendant offered inconsistent and shifting justifications for the pay disparity (*see generally Morse v Wyoming County Community Hosp. & Nursing Facility* [appeal No. 2], 305 AD2d

1028, 1029 [4th Dept 2003]). We therefore conclude that the first and third causes of action should also be reinstated (*see generally Ferrante*, 90 NY2d at 631).

Additionally, we agree with plaintiff that the court erred in granting the motion with respect to the sixth cause of action, alleging violations of the NYSHRL based on unlawful retaliation, and we further modify the order accordingly. To establish a claim for unlawful retaliation under the NYSHRL, a plaintiff must show that "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest*, 3 NY3d at 313). Insofar as relevant here, a defendant may establish entitlement to summary judgment in a retaliation case if the defendant " 'demonstrate[s] that the plaintiff cannot make out a prima facie claim of retaliation' " (*Calhoun v County of Herkimer*, 114 AD3d 1304, 1306 [4th Dept 2014]). Contrary to plaintiff's contention, defendant's denial of plaintiff's request to return to work part time without any teaching duties and its requirement that she retain an administrative role that fell " 'within the duties of [her] position' " were not adverse employment actions (*Grant v New York State Off. for People with Dev. Disabilities*, 2013 WL 3973168, *7 [ED NY 2013]; *see Sirota v New York City Bd. of Educ.*, 283 AD2d 369, 370 [1st Dept 2001]), and thus plaintiff " 'cannot make out a prima facie claim of retaliation' " with respect to those allegations (*Calhoun*, 114 AD3d at 1306; *see generally Forrest*, 3 NY3d at 305). However, issues of fact exist whether defendant unlawfully retaliated against plaintiff after she complained of gender discrimination when it required her to retain her position as the undergraduate coordinator while at the same time maintaining her regular course load (*see Vega v Hempstead Union Free Sch. Dist.*, 801 F3d 72, 88 [2d Cir 2015]; *see also Kelleher v Wal-Mart Stores, Inc.*, 817 F3d 624, 631 [8th Cir 2016]; *Sellers v Deere & Co.*, 791 F3d 938, 944 [8th Cir 2015]). While defendant met its initial burden on the motion with respect to that allegation by submitting evidence that plaintiff's supervisor was unaware of plaintiff's discrimination complaint at the time this action was taken and that there was no causal connection between the action and that complaint, we conclude that plaintiff raised a triable issue of fact with respect to those two elements of her prima facie case (*see Calhoun*, 114 AD3d at 1306). The sixth cause of action must therefore be reinstated.

Finally, contrary to plaintiff's contention, the court properly granted the motion with respect to the fifth cause of action, alleging violations of Title VII based on unlawful retaliation, because plaintiff failed to exhaust her administrative remedies with respect thereto (*see Sydnor v Fairfax County, Va.*, 681 F3d 591, 593-594 [4th Cir 2012]; *see generally Patrowich v Chemical Bank*, 98 AD2d 318, 323-324 [1st Dept 1984], *affd* 63 NY2d 541 [1984]; *Jones v Needham*, 856

F3d 1284, 1290 [10th Cir 2017]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1012

CA 18-01322

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

WILLIAM HOWARD, SUING IN THE RIGHT OF ARCHER RD. VISTA LLC, WILLIAM HOWARD, INDIVIDUALLY, AND WESTSIDE DEVELOPMENT OF ROCHESTER, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GARY L. POOLER, DEFENDANT-APPELLANT, ARCHER RD. VISTA LLC, AND GARY L. POOLER, AS MANAGER OF ARCHER RD. VISTA LLC, INTERVENORS-APPELLANTS.
(APPEAL NO. 1.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MARTHA A. CONNOLLY OF COUNSEL), AND MORGANSTERN DEVOESICK PLLC, PITTSFORD, FOR DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR INTERVENORS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 1, 2018. The order, among other things, awarded plaintiff William Howard, suing in the right of Archer Rd. Vista LLC and plaintiff William Howard, individually, damages against defendant.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the tenth ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, defendant, Gary L. Pooler, and intervenors, Archer Rd. Vista LLC (the LLC) and Gary L. Pooler, as manager of Archer Rd. Vista LLC, appeal from an order that, inter alia, awarded William Howard, suing in the right of Archer Rd. Vista LLC, and William Howard, individually (plaintiff), damages totaling more than $1.2 million against defendant. In appeal No. 2, defendant and the intervenors appeal from an order that appointed a receiver for the dissolution of the LLC. Inasmuch as the parties raise no contentions concerning that order, we dismiss appeal No. 2 (*see Golf Glen Plaza Niles, Il. L.P. v Amcoid USA, LLC*, 160 AD3d 1375, 1376 [4th Dept 2018]). In appeal No. 3, defendant and the intervenors appeal from an order and judgment that awarded plaintiff attorneys' fees and

disbursements against defendant.

Plaintiff and defendant founded the LLC for the purpose of furthering the development of a residential subdivision. The LLC purchased approximately 300 acres of land in the Town of Chili, which plaintiff and defendant intended to develop into approved real estate lots and sell to builders. Pursuant to the operating agreement of the LLC, defendant owned 60% of the membership interests and 50% of the voting interests in the LLC, and was designated as the manager of the LLC. Plaintiff owned the remaining 40% membership interests and 50% voting interests in the LLC, and was primarily responsible, under the operating agreement, for the sale of the lots to builders. Plaintiff is one of the owners of plaintiff Westside Development of Rochester, Inc. (Westside), and the operating agreement provides that Westside would have a sewer easement and the use of certain land owned by the LLC for wetland mitigation. In addition, the operating agreement provides that plaintiff's real estate company, which is a nonparty to this action, would serve as the exclusive listing agent for each of the LLC lots, provided that it met a minimum sales quota of 15 lots per year.

Approximately five years after the LLC was founded, defendant, acting in his role as manager of the LLC, removed plaintiff and plaintiff's real estate company from their respective roles under the operating agreement of overseeing lot sales and serving as the exclusive listing agent. Subsequently, plaintiffs commenced this action, asserted thirteen causes of action for, inter alia, breach of contract and breach of fiduciary duty, and sought, inter alia, monetary damages, injunctive relief, removal of defendant as manager of the LLC, and dissolution of the LLC. The intervenors filed a verified complaint against plaintiffs seeking injunctive relief and cancellation of the notice of pendency.

Plaintiffs moved for partial summary judgment against defendant with respect to liability on three derivative causes of action on behalf of the LLC, specifically the first cause of action, for breach of contract, the seventh, for breach of fiduciary duty, and the eighth, for an accounting. In a March 2016 order from which defendant did not timely appeal, Supreme Court granted the motion with respect to the first and eighth causes of action, and also granted the motion with respect to the seventh cause of action insofar as that cause of action is based on the allegations of defendant's self-dealing, commingling of assets, and misappropriation of the LLC revenue.

Thereafter, the court conducted a bench trial on damages for those causes of action as well as on liability and damages for the remaining causes of action. In the resulting order, which is the subject of appeal No. 1, the court ordered, as relevant here, defendant to pay damages to plaintiff individually in connection with the fourth cause of action, alleging a breach of the covenant of good faith and fair dealing on behalf of plaintiff individually. The court further awarded damages on those derivative causes of action for which liability had been previously established in the March 2016 order. The court ordered that the LLC would be dissolved and that an

independent receiver would be appointed to oversee the dissolution of the LLC. Finally, the court ordered defendant "to pay damages to [plaintiff] in connection with attorneys' fees incurred by [plaintiff] as a derivative plaintiff acting on the [LLC's] behalf" and the court directed plaintiffs' counsel to submit an affirmation establishing the amount of attorneys' fees incurred. As noted above, the court subsequently entered the order that is the subject of appeal No. 2, which appointed an independent receiver, and the order and judgment that is the subject of appeal No. 3, which awarded plaintiff $249,312.75 in attorneys' fees and $38,905.68 in disbursements, with leave to seek additional attorneys' fees and costs incurred in enforcement of the judgment.

Contrary to the contentions of defendant and the intervenors at oral argument and in their post-argument submissions, the order in appeal No. 1 is not "one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" (*Burke v Crosson*, 85 NY2d 10, 15 [1995]; *see Abasciano v Dandrea*, 83 AD3d 1542, 1544 [4th Dept 2011]). Here, "[a]lthough all of the substantive issues between the parties were resolved, the order was facially nonfinal, since it left pending the assessment of attorneys' fees--a matter that plainly required further judicial action of a nonministerial nature" (*Burke*, 85 NY2d at 17). Further, plaintiffs' "request for attorneys' fees was an integral part of each of the asserted causes of action rather than a separate cause of action of its own," and therefore that issue cannot be implicitly severed from the other issues (*id.*). Thus, the order in appeal No. 1 does not constitute a " 'final order' " within the meaning of CPLR 5501 (a) (1) and does not bring up for our review any prior non-final order, including the March 2016 order (*Abasciano*, 83 AD3d at 1544). Contrary to the intervenors' contention in their post-argument submission that the order in appeal No. 1 is final with respect to their complaint, the causes of action asserted therein arise out of "the same . . . continuum of facts [and] out of the same legal relationship as the unresolved causes of action" (*Burke*, 85 NY2d at 16). Similarly, we cannot construe either the subsequent order in appeal No. 2, which appointed a receiver and directed certain actions "until the [LLC] is dissolved" (*cf. Matter of FR Holdings, FLP v Homapour*, 154 AD3d 936, 936 [2d Dept 2017]), or the order and judgment in appeal No. 3, which was limited to awarding attorneys' fees and disbursements to plaintiff in his individual capacity, as final judgments within the meaning of CPLR 5501 (a) (1).

Thus, our review of these appeals is limited to addressing only those contentions addressed to the merits of the orders and the order and judgment from which timely appeals have been taken. With respect to the merits of those contentions in appeal No. 1, inasmuch as this is a determination after a nonjury trial, our scope of review is as broad as that of the trial court. Nonetheless, " 'the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of

fact rest in large measure on considerations relating to the credibility of witnesses' " (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *see Cianchetti v Burgio*, 145 AD3d 1539, 1540-1541 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]).

Contrary to the contentions of defendant and the intervenors, the court properly concluded that plaintiff's alleged failure to make an initial capital contribution to the LLC in the manner required by the LLC's operating agreement did not preclude plaintiff from pursuing the breach of contract claims asserted in his individual capacity. We find no reason to disturb the court's factual determination, based in part on the court's consideration of defendant's credibility, that defendant and the LLC waived any alleged non-compliance with the operating agreement's requirement that plaintiff's initial contribution be in cash (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., LP*, 7 NY3d 96, 104 [2006]; *Town of Mexico v County of Oswego*, 175 AD3d 876, 878 [4th Dept 2019]).

Defendant further contends that the court erred in the amount of damages awarded in connection with the derivative breach of fiduciary duty cause of action, on which liability had previously been imposed, because there was no showing that the LLC was harmed by his misconduct. We reject that contention. Disgorgement of profit is an appropriate remedy for a breach of fiduciary duty even where the corporation has not been damaged directly by the misconduct (*see Diamond v Oreamuno*, 24 NY2d 494, 498 [1969]; *Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 [1st Dept 1990]). Further, we see no reason to disturb the court's credibility determination to give more weight to plaintiffs' expert construction consultant on overpayments rather than defendant's expert (*see generally Cianchetti*, 145 AD3d at 1540-1541).

Contrary to defendant's further contention, the court did not err in concluding that defendant breached the implied covenant of good faith and fair dealing as alleged in the fourth cause of action. "Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included . . . . This embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks omitted]; *see Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 940-941 [4th Dept 2019]).

Here, the LLC's operating agreement provides that plaintiff "shall be primarily responsible for the Property lot sales and [LLC] relations with builders" and that defendant, individually and as manager, would "cause" the LLC to engage plaintiff's personal company as "the exclusive listing agent for each of the Property's lots" for as long as that company produced sales of a minimum of 15 lots per year. The record supports the court's determination that defendant "demonstrate[d] a lack of good faith and a breach of []regard for his

obligations under the [o]perating [a]greement" by refusing to allow plaintiff to procure a new builder, denying plaintiff's request to reduce the lot prices, and terminating plaintiff's responsibilities with builder and lot sales before defendant himself entered into a contract with another builder for the sale of lots at an even lower price than that proposed by plaintiff. Thus, defendant breached the implied covenant of good faith and fair dealing by "act[ing] in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Frankini v Landmark Constr. of Yonkers, Inc.*, 91 AD3d 593, 595 [2d Dept 2012]). Further, inasmuch as the court found that defendant acted in bad faith, defendant cannot claim immunity from personal liability under section 5.6 (g) of the operating agreement, which, absent such misconduct, would preclude personal liability for damages for actions taken by defendant in his managerial capacity (*see* Limited Liability Company Law § 417 [a]).

We also reject defendant's contention that the court erred in awarding damages to plaintiff on the fourth cause of action in the amount of plaintiff's lost commissions. The deprivation of those commissions was the "natural and probable consequence" of defendant's breach of the covenant of good faith and fair dealing (*Shmueli v Whitestar Dev. Corp.*, 148 AD3d 1814, 1814 [4th Dept 2017]; *see generally Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]).

In appeal Nos. 1 and 3, we agree with defendant that the court erred in determining that plaintiff is entitled to attorneys' fees and disbursements in his status as a derivative plaintiff acting on the LLC's behalf and in awarding such fees and disbursements, and we therefore modify the order in appeal No. 1 accordingly and reverse the order and judgment in appeal No. 3. "The basis for an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf . . . . *Those costs should be paid by the corporation*, which has benefited from the plaintiff's efforts and which would have borne the costs had it sued in its own right" (*Glenn v Hoteltron Sys.*, 74 NY2d 386, 393 [1989] [emphasis added]). Thus, plaintiff's success as a derivative plaintiff is not an acceptable basis for an award of attorneys' fees and disbursements against defendant individually. We have reviewed plaintiffs' alternative grounds for affirming and conclude that none warrants deviation from the general rule that "a litigant [may not] recover damages for the amounts expended in the successful prosecution or defense of its rights" (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21-22 [1979]).

Finally, the remaining contentions of defendant and the intervenors are not reviewable on appeal from the orders or the order and judgment appealed from in appeal Nos. 1-3.

All concur except CURRAN, J., who dissents and votes to further modify the order in appeal No. 1 in accordance with the following memorandum: I respectfully dissent from the majority's conclusion in appeal No. 1 that defendant may be held individually liable to William Howard (plaintiff) under the fourth cause of action in plaintiffs'

complaint. That cause of action is based on allegations that defendant breached the implied covenant of good faith and fair dealing contained in the operating agreement of intervenor Archer Rd. Vista LLC (the LLC) when he purportedly violated a provision of that operating agreement to plaintiff's detriment. Supreme Court ordered that defendant individually shall pay damages to plaintiff in an amount exceeding $500,000 under the complaint's fourth cause of action. In my view, that is error because the implied obligation purportedly breached by defendant individually under the operating agreement was owed to plaintiff by the LLC—not defendant.

The contractual obligation, and any implied duty thereunder, alleged to have been breached by the fourth cause of action, existed between plaintiff and the LLC and concerned the right of plaintiff and plaintiff's real estate company to be the exclusive listing agent for the LLC with respect to lot sales. The agreement setting forth that obligation expressly stated that *the LLC* is the party covenanting to honor the obligation to plaintiff—not defendant. Thus, the LLC, not defendant, is liable to plaintiff for any breach of that obligation. Although defendant is a party to the agreement, he did not undertake to perform the subject covenant and, in any event, could not do so individually because the real property was owned by the LLC. Thus, I conclude that plaintiff is not entitled to relief on the fourth cause of action because there is a lack of a contractual obligation between the relevant parties, i.e., defendant and plaintiff, regarding the exclusive listing agent for the property owned by the LLC—a fundamental requirement to sustain such a claim (*see Square Max LLC v Trickey*, 138 AD3d 1511, 1511 [4th Dept 2016]; *Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc.*, 77 AD3d 474, 474-475 [1st Dept 2010]). I further note that "[a] claim for breach of the implied covenant of good faith and a fair dealing cannot substitute for an unsustainable breach of contract claim" (*Skillgames, LLC v Brody*, 1 AD3d 247, 252 [1st Dept 2003]).

Although not alleged in plaintiffs' fourth cause of action, it is conceivable that defendant could be held liable individually to *the LLC* for a breach of his obligation under the operating agreement to ensure that the LLC honored its pledge that plaintiff and plaintiff's real estate company would be the LLC's exclusive listing agent. In short, the claim would be that defendant breached his duty to ensure that the LLC complied with its obligations under the operating agreement. I also note, however, the operating agreement's requirement that, before personal liability may be imposed, there must be "clear and convincing evidence" that defendant's "action or failure to act was not in good faith." Here, the court did not find defendant individually liable to the LLC under such a theory, and I see no basis for us to do so now.

In short, the majority has overlooked the LLC's corporate form to conclude that defendant is individually liable to plaintiff on an obligation owed to him *only by the LLC*. I would therefore further modify the order in appeal No. 1 by vacating the first and second ordering paragraphs, which awarded damages with respect to plaintiffs' fourth cause of action. I otherwise concur with the majority on the

remaining issues, particularly as it pertains to its vacatur of the award of attorneys' fees in appeal No. 3. By ordering defendant to pay attorneys' fees to plaintiff in his individual capacity, rather than via the LLC, the court again completely ignored the corporate form—a point on which, in this instance, the majority and I agree.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1013

CA 18-02140

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

WILLIAM HOWARD, SUING IN THE RIGHT OF ARCHER RD. VISTA LLC, WILLIAM HOWARD, INDIVIDUALLY, AND WESTSIDE DEVELOPMENT OF ROCHESTER, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GARY L. POOLER, DEFENDANT-APPELLANT, ARCHER RD. VISTA LLC, AND GARY L. POOLER, AS MANAGER OF ARCHER RD. VISTA LLC, INTERVENORS-APPELLANTS. (APPEAL NO. 2.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MARTHA A. CONNOLLY OF COUNSEL), AND MORGANSTERN DEVOESICK PLLC, PITTSFORD, FOR DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR INTERVENORS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 18, 2018. The order, among other things, appointed a receiver for the dissolution of Archer Rd. Vista LLC.

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

Same memorandum as in *Howard v Pooler* ([appeal No. 1] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1014

CA 18-02142

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

WILLIAM HOWARD, SUING IN THE RIGHT OF ARCHER RD. VISTA LLC, WILLIAM HOWARD, INDIVIDUALLY, AND WESTSIDE DEVELOPMENT OF ROCHESTER, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GARY L. POOLER, DEFENDANT-APPELLANT, ARCHER RD. VISTA LLC, AND GARY L. POOLER, AS MANAGER OF ARCHER RD. VISTA LLC, INTERVENORS-APPELLANTS.
(APPEAL NO. 3.)

ERNSTROM & DRESTE, LLP, ROCHESTER (MARTHA A. CONNOLLY OF COUNSEL), AND MORGENSTERN DEVOESICK PLLC, PITTSFORD, FOR DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR INTERVENORS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR PLAINITFFS-RESPONDENTS.

Appeals from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 18, 2018. The order and judgment, among other things, granted plaintiff William Howard, attorneys' fees and disbursements as against defendant Gary L. Pooler.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, and the award of attorneys' fees and disbursements is vacated.

Same memorandum as in *Howard v Pooler* ([appeal No. 1] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1019

KA 18-02434

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

MARZEL S. SIMMONS, DEFENDANT-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (ZAKARY I. WOODRUFF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered August 29, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, promoting prison contraband in the first degree and aggravated unlicensed operation of a motor vehicle in the third degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of promoting prison contraband in the first degree (Penal Law § 205.25 [1]) under count four of the indictment to promoting prison contraband in the second degree (§ 205.20 [1]) and vacating the sentence imposed on that count, and as modified the judgment is affirmed and the matter is remitted to Jefferson County Court for sentencing on that conviction.

Opinion by TROUTMAN, J.:

On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and promoting prison contraband in the first degree (§ 205.25 [1]), defendant contends that the evidence is legally insufficient to establish that the three baggies of cocaine found on his person constituted dangerous contraband. We agree. Although defendant failed to preserve that contention for our review (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note, in any event, that we must " 'necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Cartagena*, 149 AD3d 1518, 1518 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017], *reconsideration denied* 30 NY3d 1018 [2017]).

"A person is guilty of promoting prison contraband in the first degree when . . . [that person] knowingly and unlawfully introduces any dangerous contraband into a detention facility" (Penal Law § 205.25 [1]). "Dangerous contraband" is defined as any contraband that is "capable of such use as may endanger the safety or security of a detention facility or any person therein" (§ 205.00 [4]). "[T]he test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (*People v Finley*, 10 NY3d 647, 657 [2008]). " '[W]eapons, tools, explosives and similar articles likely to facilitate escape or cause disorder, damage or physical injury are examples of dangerous contraband,' " whereas an " 'alcoholic beverage is an example of [ordinary] contraband' " (*id.* at 656-657). Drugs, unlike weapons, are not inherently dangerous, and thus general penological concerns about the drug possessed that "are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband" (*People v Flagg*, 167 AD3d 165, 169 [4th Dept 2018]).

In reviewing a defendant's challenge to the legal sufficiency of the evidence, we view the evidence in the light most favorable to the People and ask whether "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Acosta*, 80 NY2d 665, 672 [1993] [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*Danielson*, 9 NY3d at 349; *see People v Li*, 34 NY3d 357, 363 [2019]). In other words, our role "is simply to determine whether enough evidence has been presented so that the resulting verdict was lawful" (*Acosta*, 80 NY2d at 672; *see Li*, 34 NY3d at 363). Here, the only evidence of the dangerousness of the cocaine is the testimony of one of the correction officers who strip-searched defendant: "Drugs in the facility can cause overdoses, fights and trips to the hospital that are unnecessary." There is no material distinction between that testimony and the evidence that we found to be legally insufficient in *Flagg*, and thus we conclude that the evidence is legally insufficient to establish that the cocaine was dangerous contraband (*see* 167 AD3d at 168).

Central to our dissenting colleague's analysis is a distinction between narcotic and non-narcotic controlled substances. The unstated premise is that cocaine is classified as a narcotic because it is inherently dangerous. We respectfully disagree with that premise. Cocaine may be unhealthy, but it is not a narcotic, at least not from a scientific, medical, or pharmacological viewpoint (*see* Carl B. Schultz, Note, *Statutory Classification of Cocaine as a Narcotic: An Illogical Anachronism*, 9 Am J L & Med 225, 226-227 [1983]). Cocaine is classified by law as a narcotic for economic reasons, not because

of any specific danger to users (*see People v McCarty*, 86 Ill 2d 247, 255, 427 NE2d 147, 151 [1981] ["Cocaine and heroin are by far the most expensive and most profitable of the illicit drugs . . . (O)ne of the primary purposes of the Act is to 'penalize most heavily the illicit traffickers or profiteers of controlled substances' . . . The State urges that these facts provide a rational basis for treating cocaine more severely than . . . (other) nonnarcotic(s)"]; *see generally People v Broadie*, 37 NY2d 100, 112 [1975], *cert denied* 423 US 950 [1975]).

Nevertheless, most Americans still think of all illegal drugs as "narcotics," even though narcotics are properly defined in a pharmacological sense as opium, its derivatives such as heroin, and its synthetic substitutes such as fentanyl (*see* United States Drug Enforcement Administration, http://www.dea.gov/taxonomy/term/331 [last accessed March 27, 2020]). " 'Old drug myths apparently die remarkably hard' " (Schultz at 230). Americans have all kinds of ideas about what certain drugs are and what those drugs do. Those ideas are informed by the news, television, Hollywood films, personal experience, politics, parental advice, and the anecdotes of friends. We must be careful not to leave determinations of dangerousness to the preconceptions of the fact-finder. That is why evidence of the "specific use and effects of the particular drug" must be required (*Flagg*, 167 AD3d at 169).

Our dissenting colleague highlights testimony that correction officers were concerned that defendant might swallow the cocaine, but that serves only to underscore our point. It is common knowledge that drugs or alcohol, if consumed, have the potential to cause overdose resulting in death. Certainly, a person can die from an excessive dose of cocaine. But, here, the People offered no evidence of the specific quantity of the cocaine found on defendant's person, much less the effect that cocaine in such a quantity would have on defendant's health. Quite the contrary. The record casts doubt on whether the cocaine would have had any effect at all on defendant's health because the cocaine was bagged and not necessarily in consumable form. How dangerous would it have been for defendant to have swallowed cocaine in the quantity and the form that the police recovered? How likely is it that he would have suffered a medical emergency? We cannot say.

One last point is worth emphasizing. Anyone caught possessing cocaine in prison is already subject to criminal liability and rather severe penalties for possession under Penal Law article 220. A charge of promoting prison contraband in the first degree under those circumstances is largely superfluous. In contrast, such a charge is truly important in cases involving weapons. Outside prison, the possession of blades, knives, and so forth is generally lawful. In prison, they have a more pernicious use—to kill.

We therefore agree with defendant that the evidence is legally insufficient to support a conviction of promoting prison contraband in the first degree. We nevertheless conclude that the evidence is legally sufficient to support a conviction of the lesser included

offense of promoting prison contraband in the second degree (Penal Law § 205.20 [1]). Accordingly, we modify the judgment by reducing the conviction of promoting prison contraband in the first degree under count four of the indictment to promoting prison contraband in the second degree (*see* CPL 470.15 [2] [a]) and vacating the sentence imposed on that count, and we remit the matter to County Court for sentencing on that conviction (*see Flagg*, 167 AD3d at 170).

In light of our determination, we do not address defendant's contention that the court erred in failing to charge promoting prison contraband in the second degree as a lesser included offense. We address defendant's remaining contentions below.

Defendant contends that the verdict with respect to the count of promoting prison contraband in the first degree is against the weight of the evidence inasmuch as the People failed to establish his "intent" to introduce contraband into a detention facility. We reject that contention because intent is not an element of promoting prison contraband in either degree (*see* Penal Law §§ 205.20, 205.25).

Defendant further contends that the court committed reversible error in failing to assign him new counsel because his assigned counsel had a conflict of interest, counsel's office having previously represented a prosecution witness. We reject that contention. Although defense counsel had a potential conflict of interest, defendant failed to establish that "his defense was in fact affected by the operation of the conflict of interest" (*People v Pandajis*, 147 AD3d 1469, 1470 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017] [internal quotation marks omitted]; *see People v Alicea*, 61 NY2d 23, 31 [1983]). We note that the witness in question testified exclusively about matters related to counts of the indictment with respect to which defendant was acquitted.

We reject defendant's contention that certain evidence was admitted in evidence in violation of *People v Molineux* (168 NY 264 [1901]). The evidence tended to prove that defendant sold drugs within the two weeks before the cocaine was found in his possession, and thus the evidence was probative of defendant's intent to sell (*see People v Brown*, 148 AD3d 1547, 1548 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]; *People v Morman*, 145 AD3d 1435, 1437 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]).

Defendant's challenge to the trial testimony of a police detective is not preserved for our review because his objections to that testimony were general in nature (*see People v Wright*, 34 AD3d 1274, 1275 [4th Dept 2006], *lv denied* 8 NY3d 886 [2007]). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), and it must therefore be amended to reflect that he was convicted of criminal possession of a controlled substance in the third degree (§ 220.16

[1]; *see People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]).

NEMOYER, J., concurs with TROUTMAN, J.; CARNI, J., concurs in the result in the following opinion in which LINDLEY, J., concurs: We concur with Justices Troutman and NeMoyer that the People failed to introduce sufficient evidence to establish that the cocaine possessed by defendant was dangerous contraband (*see People v Flagg*, 167 AD3d 165, 168 [4th Dept 2018]). In reaching that conclusion, we do not address or rely on a distinction between narcotic and non-narcotic controlled substances or the characteristics or dangerousness of cocaine generally; we rely instead on the insufficiency of the People's proof of dangerousness in this specific case. We agree with the analysis by Justices Troutman and NeMoyer of each of defendant's remaining contentions.

PERADOTTO, J.P., dissents in part and votes to affirm in the following opinion: I respectfully dissent in part and would affirm the judgment in its entirety. Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that the cocaine found on his person constituted dangerous contraband, as required for a conviction of promoting prison contraband in the first degree (Penal Law § 205.25 [1]; *see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]), and I would not review that contention as a matter of discretion in the interest of justice. If I were to review defendant's contention, I would reject it on the merits for the reasons that follow.

"Dangerous contraband" is defined as "contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein" (Penal Law § 205.00 [4]). "[T]he test for determining whether an item is *dangerous* contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" (*People v Finley*, 10 NY3d 647, 657 [2008]). "Drugs, unlike other contraband such as weapons, are not inherently dangerous and the dangerousness is not apparent from the nature of the item," and thus general penological concerns about the drug possessed that "are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband" (*People v Flagg*, 167 AD3d 165, 169 [4th Dept 2018]).

Here, "[v]iewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference," as I am obligated to do (*People v Bay*, 67 NY2d 787, 788 [1986]; *see People v Delamota*, 18 NY3d 107, 113 [2011]), I conclude that the evidence is "legally sufficient to establish that the cocaine discovered during a search of defendant's [person] constituted dangerous contraband" (*People v Louder*, 74 AD3d 1845, 1846 [4th Dept 2010]). The evidence established that defendant was found with, inter alia, three baggies containing cocaine, which, like heroin, is classified *by law* as a narcotic drug (*see* Penal Law § 220.00 [7];

Public Health Law § 3306 [Schedule I (c) (11)]; [Schedule II (b) (4)]; *see generally Finley*, 10 NY3d at 657; *People v Harmon*, 173 AD3d 502, 502 [1st Dept 2019], *lv denied* 34 NY3d 951 [2019]; *People v Watson*, 162 AD2d 1015, 1015 [4th Dept 1990], *appeal dismissed* 77 NY2d 857 [1991]). The plurality's interpretation of the pharmacological and societal views of cocaine and the relevance thereof, if any, to the analysis in this case improperly relies on matters not briefed by the parties on this appeal (*see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). Indeed, defendant does not present any such argument and, instead, repeatedly refers to cocaine in a manner consistent with its legal classification, i.e., as a narcotic.

The evidence—considered in its entirety—also established that the correction officers who conducted a strip search of defendant feared that he would swallow the drugs in his possession, which they explained was conduct that, in addition to causing the destruction of evidence, would present a medical concern and could harm defendant. Indeed, the testimony demonstrated that defendant, instead of complying with certain commands, reached for his buttocks area where he had secreted the drugs and then quickly brought his hand to his mouth, at which point the correction officers tried to prevent him from swallowing the drugs; although nothing was found in his clenched fist, the drugs were eventually retrieved from his buttocks area. Moreover, the evidence was "focus[ed] on the dangerousness of the *use* of the particular drug at issue" (*Flagg*, 167 AD3d at 169) inasmuch as a correction officer explained that ingestion of a drug such as cocaine can cause an overdose (*see Harmon*, 173 AD3d at 502). While the plurality poses several speculative questions with respect to the dangerousness of the cocaine to defendant, the legal question that must be answered is whether "there is any valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt" (*Delamota*, 18 NY3d at 113). As this Court previously held upon review of similar proof in *Louder* (74 AD3d at 1846)—which neither the plurality nor the concurrence addresses, thereby apparently distinguishing or overturning it sub silentio—the evidence here permitted the jury to rationally conclude that the cocaine discovered during the search of defendant constituted dangerous contraband.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1025

CA 19-00402

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

IN THE MATTER OF JAMES D. DUSCH,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER AND ERIE COUNTY
MEDICAL CENTER CORPORATION,
RESPONDENTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR CLAIMANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (JAMES EAGAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered August 20, 2018. The order denied the application of claimant for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is reversed in the exercise of discretion without costs and the application is granted upon condition that claimant shall serve the proposed notice of claim within 30 days of the date of entry of the order of this Court.

Memorandum: Claimant appeals from an order that denied his application for leave to serve a late notice of claim alleging that respondents' negligence in failing to properly monitor him following a surgical skin graft procedure to treat burns resulted in the need to amputate his right leg below the knee. Claimant contends that we should reverse the order and grant his application because his medical records, despite being submitted in reply to respondents' opposition, demonstrate that respondents had actual knowledge of the essential facts constituting the claim during his hospitalization and respondents will not be substantially prejudiced by the delay in service of the notice of claim. We agree.

"Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation . . . must serve a notice of claim on the prospective [respondent] 'within ninety days after the claim arises' " (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "General Municipal Law § 50-e (5) permits a court, in its discretion, to [grant leave] extend[ing] the time for a [claimant] to serve a notice of

claim" (*id.* at 460-461). "The decision whether to grant such leave 'compels consideration of all relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5)" (*Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013], quoting *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [public corporation] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [public corporation] in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). "The presence or absence of any given factor is not determinative of the application and, moreover, the factors are 'directive rather than exclusive' " (*Matter of Gumkowski v Town of Tonawanda*, 156 AD3d 1481, 1481 [4th Dept 2017]). "While the discretion of Supreme Court [in considering the application] will generally be upheld absent demonstrated abuse[,] . . . such discretion is ultimately reposed in [the Appellate Division]" (*Matter of Kressner v Town of Malta*, 169 AD2d 927, 928 [3d Dept 1991]; *see Matter of Stowe v City of Elmira*, 31 NY2d 814, 815 [1972]; *Rechenberger v Nassau County Med. Ctr.*, 112 AD2d 150, 153 [2d Dept 1985]; *Matter of Febles v City of New York*, 44 AD2d 369, 372 [1st Dept 1974]; *Matter of Crume v Clarence Cent. School Dist. No. 1*, 43 AD2d 492, 495 [4th Dept 1974]).

Preliminarily, we note that "the failure of claimant to offer a reasonable excuse for [his] delay in serving a notice of claim . . . is not necessarily 'fatal to the application' " (*Matter of Lindstrom v Board of Educ. of Jamestown City School Dist.*, 24 AD3d 1303, 1304 [4th Dept 2005]).

As a further preliminary matter, we reject the contention of respondents and the dissent that it is inappropriate under the circumstances of this case to consider the medical records submitted by claimant for the first time in his reply papers. In general, " '[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion [or application]' " (*Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006]). "This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (*id.* at 381-382; *see Bayly v Broomfield*, 93 AD3d 909, 910-911 [3d Dept 2012]).

Here, as claimant correctly contends, although he submitted the medical records for the first time in his reply papers, the record establishes that respondents "had ample opportunity to respond to [that submission] during oral argument on the [application] before [the court]" (*Bayly*, 93 AD3d at 910). Indeed, respondents' counsel

argued at length that the medical records were insufficient to establish that respondents had actual knowledge of the essential facts constituting the claim and declined to request permission to submit a surreply despite the repeated suggestion by claimant's counsel that the court could afford respondents such relief if they considered their ability to respond to be inadequate. Thus, under the circumstances of this case, "respondent[s] suffered no prejudice as a result of [claimant's] belated evidentiary submission," and we exercise our discretion to consider it (*Kennelly*, 33 AD3d at 382).

Upon consideration of the medical records, we agree with claimant that respondents had actual knowledge of the essential facts constituting the claim during his hospitalization. The actual knowledge requirement of General Municipal Law § 50-e (5) "contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" (*Williams*, 6 NY3d at 537; *see Wally G. v New York City Health & Hosps. Corp. [Metro Hosp.]*, 27 NY3d 672, 677 [2016], *rearg denied* 28 NY3d 905 [2016]). "A medical provider's mere possession or creation of medical records does not ipso facto establish that it had 'actual knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury' " (*Wally G.*, 27 NY3d at 677, quoting *Williams*, 6 NY3d at 537).

Here, however, "the medical records . . . 'evince that [respondents'] medical staff, by its acts or omissions, inflicted an[ ] injury on [claimant]' " (*id.*; *see Matter of Khan v New York City Health & Hosps. Corp.*, 135 AD3d 940, 942 [2d Dept 2016], *lv denied* 28 NY3d 902 [2016]). The medical records indicate that, following the surgical skin graft procedure, claimant developed swelling beneath the dressings that became constrictive of blood flow to the leg and ultimately caused necrosis, and that respondents' medical staff, for various reasons, had failed to recognize the ischemic nature of the leg and claimant's development of compartment syndrome, thereby eventually necessitating partial amputation of the leg (*see Khan*, 135 AD3d at 942). We thus conclude that respondents timely acquired actual knowledge of the essential facts constituting the claim (*see id.*).

We also conclude that claimant met his initial burden of showing that the late notice would not substantially prejudice respondents and, in opposition, respondents failed to make a "particularized showing" of substantial prejudice caused by the late notice (*Newcomb*, 28 NY3d at 468; *see Khan*, 135 AD3d at 942).

Based on the foregoing, we exercise our discretion to grant the application (*see e.g. Matter of Rudloff v City of Rochester*, 303 AD2d 1052, 1052-1053 [4th Dept 2003]; *Matter of Battaglia v Medina Cent. School Dist.*, 204 AD2d 997, 997-998 [4th Dept 1994]) upon condition that claimant shall serve the proposed notice of claim within 30 days of the date of the entry of the order of this Court.

All concur except CARNI and LINDLEY, JJ., who dissent and vote to

affirm in the following memorandum: We respectfully dissent and would affirm the order inasmuch as we conclude that Supreme Court did not abuse its discretion in denying claimant's application for leave to serve a late notice of claim and we perceive no basis for exercising our discretion to reach a different result.

On an application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5), the claimant bears the initial burden of demonstrating that he or she had a reasonable excuse for failing to serve a timely notice of claim, that the respondent had actual knowledge of the essential facts constituting the claim within the first 90 days or a reasonable time thereafter, and that the late notice would not substantially prejudice the respondent's interests (*see Tate v State Univ. Constr. Fund*, 151 AD3d 1865, 1865-1866 [4th Dept 2017]; *see generally Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016], *rearg denied* 29 NY3d 963 [2017]; *Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]).

Although we agree with the majority that claimant's proffered excuse was insufficient but not fatal to the application (*see Shane v Central N.Y. Regional Transp. Auth.*, 79 AD3d 1820, 1821 [4th Dept 2010]), we do not agree that claimant met his burden of demonstrating respondents' actual knowledge of the essential facts. In his application, claimant contended that "[i]t has long been held that by virtue of its possession of a Claimant's medical record, a health care provider has 'actual notice' of the essential facts constituting the claim and cannot show any prejudice as a result of a delay in filing a Notice of Claim," and thus "the hospital must be deemed to have possessed actual notice by reason of its possession of the records of its treatment of claimant for the matter in dispute." However, as the majority notes, the Court of Appeals has specifically held that "[m]erely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *see Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672, 677 [2016], *rearg denied* 28 NY3d 905 [2016]). Claimant did not attach his medical records to his application and submitted no evidence regarding what material within those records provided notice to respondents. Indeed, claimant did not identify any specific facts within the medical records that might provide actual knowledge and instead relied on the rejected rationale that respondents' mere possession of the records was sufficient (*see Williams*, 6 NY3d at 537). Claimant thus failed to meet his burden of establishing that respondents possessed the requisite actual knowledge.

Although claimant subsequently contended that specific facts reflected in his medical records established respondents' actual knowledge, that contention was improperly raised for the first time in reply submissions before the motion court and thus is not properly before us (*see Jackson v Vatter*, 121 AD3d 1588, 1589 [4th Dept 2014]). Additionally, claimant attached his medical records for the first time

to his reply papers, and we conclude that the court properly declined to consider those records rather than grant respondents an opportunity to submit papers in surreply (*cf. Ferrari v National Football League*, 153 AD3d 1589, 1590 [4th Dept 2017]; *see generally Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015]), especially in light of the fact that those records were in claimant's possession at the time of his application and counsel offered no excuse as to why they were not submitted with the application.

Thus, even assuming, arguendo, that respondents suffered no prejudice from the delay, we conclude that the court did not abuse its discretion in denying the application for leave to serve a late notice of claim inasmuch as claimant failed to establish either a reasonable excuse for the failure to serve a timely notice of claim or that the respondents had actual knowledge of the essential facts constituting the claim within the first 90 days or a reasonable time thereafter (*see Matter of Candino v Starpoint Cent. Sch. Dist.*, 115 AD3d 1170, 1172 [4th Dept 2014], *affd* 24 NY3d 925 [2014]). Moreover, under the circumstances of this case, we are not persuaded that we should exercise our discretion to grant the application for leave to serve a late notice of claim.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1049

CA 18-01943

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

IN THE MATTER OF BARRETT PAVING MATERIALS, INC., BOTHAR CONSTRUCTION, LLC, CCI COMPANIES, INC., COLD SPRING CONSTRUCTION CO., HANSON AGGREGATES NEW YORK LLC, SLATE HILL CONSTRUCTORS, INC., TIOGA CONSTRUCTION CO., INC., AND VECTOR CONSTRUCTION CORP., PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE THRUWAY AUTHORITY, JOANNE M. MAHONEY, IN HER OFFICIAL CAPACITY AS CHAIR OF NEW YORK STATE THRUWAY AUTHORITY BOARD OF DIRECTORS, BILL FINCH, IN HIS OFFICIAL CAPACITY AS ACTING EXECUTIVE DIRECTOR OF NEW YORK STATE THRUWAY AUTHORITY, AND D.A. COLLINS CONSTRUCTION CO., INC., RESPONDENTS-DEFENDANTS-RESPONDENTS.

COUCH WHITE, LLP, ALBANY (JENNIFER KAVNEY HARVEY OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS NEW YORK STATE THRUWAY AUTHORITY, JOANNE M. MAHONEY, IN HER OFFICIAL CAPACITY AS CHAIR OF NEW YORK STATE THRUWAY AUTHORITY BOARD OF DIRECTORS, AND BILL FINCH, IN HIS OFFICIAL CAPACITY AS ACTING EXECUTIVE DIRECTOR OF NEW YORK STATE THRUWAY AUTHORITY.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (THOMAS F. GLEASON OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT D.A. COLLINS CONSTRUCTION CO., INC.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered September 28, 2018 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the amended petition-complaint.

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

Memorandum: In 2017, respondent-defendant New York State Thruway Authority (NYSTA) solicited bids for a project that included the replacement of eight highway bridges throughout central New York

(project) and, in conjunction therewith, elected to include a project labor agreement (PLA) in the project's bid specifications. Petitioners-plaintiffs (petitioners) elected not to submit a bid on the project because of the inclusion of the PLA, which they alleged effectively excluded "open-shop" construction firms, such as themselves, from bidding on the project. Instead, petitioners, et al., commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul NYSTA's determination to include the PLA in the bid specifications, alleging, among other things, that the inclusion of the PLA violated various provisions of the New York State Constitution, the Labor Law, the State Finance Law, and the Legislative Law. Supreme Court, sua sponte, dismissed the petition-complaint (petition) for lack of standing. This Court reversed, concluding that lack of standing did not constitute extraordinary circumstances justifying the court's sua sponte dismissal of the petition (*Matter of Associated Gen. Contrs. of NYS, LLC v New York State Thruway Auth.*, 159 AD3d 1560, 1560-1561 [4th Dept 2018]), and reinstated the petition.

Subsequently, petitioners moved to amend the petition to include respondent-defendant D.A. Collins Construction Co., Inc.—the firm ultimately selected for the contract via the bid solicitation process. The court granted that motion, and petitioners filed an amended petition-complaint (amended petition). Respondents-defendants answered and, inter alia, asserted affirmative defenses and objections in point of law that petitioners lacked standing and failed to exhaust their administrative remedies. Petitioners now appeal from a judgment dismissing the amended petition based on, inter alia, petitioners' lack of standing and failure to exhaust administrative remedies. We affirm.

Contrary to petitioners' contentions on appeal, we conclude that the court properly determined that petitioners lacked standing to commence this proceeding. To establish traditional common-law standing, petitioners were required to show that they "suffered an injury in fact, distinct from that of the general public," and that their alleged injury "falls within the zone of interests" sought to be protected by the provisions in question (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587 [1998]; *see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-774 [1991]). Here, petitioners failed to establish an injury in fact because the alleged harm occurred, not by their failure to secure the winning bid, but via their voluntary decision to *entirely forego* the bid solicitation process (*see Lancaster Dev., Inc. v McDonald*, 112 AD3d 1260, 1261-1262 [3d Dept 2013], *lv denied* 22 NY3d 866 [2014]; *see also Transactive Corp.*, 92 NY2d at 587). Even assuming, arguendo, that petitioners suffered an injury in fact, we further conclude that any "economic injury or lost business opportunity" that petitioners suffered "does not fall within the zone of interests to be protected by the competitive bidding statutes" (*Lancaster Dev., Inc.*, 112 AD3d at 1262). "[T]he fact that certain nonunion contractors may be disinclined to submit bids where, as here, a PLA is included in the contract specifications does not preclude competition such that the

competitive bidding mandate [of the statutes] is offended" (*id.* [internal quotation marks omitted]). Notably, petitioners did not allege that NYSTA precluded or impeded their ability to submit a bid on the project (*see Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, 54 AD2d 337, 341-342 [4th Dept 1976]).

We further conclude that petitioners did not establish that they had citizen taxpayer standing pursuant to State Finance Law § 123-b. Petitioners are precluded from asserting citizen taxpayer standing against NYSTA because, as a public authority (*see* Public Authorities Law § 352 [1]), NYSTA "enjoys an existence separate and apart from the State, even though it exercises a governmental function" (*Matter of Plumbing, Heating, Piping & A.C. Contrs. Assn. v New York State Thruway Auth.*, 5 NY2d 420, 424 [1959]; *see generally John Grace & Co. v State Univ. Constr. Fund*, 44 NY2d 84, 88 [1978]; *E.W. Howell Co., LLC v City Univ. Constr. Fund*, 149 AD3d 479, 480 [1st Dept 2017], *lv denied* 29 NY3d 914 [2017]). Even assuming, arguendo, that State Finance Law § 123-b applies to NYSTA, petitioners are not entitled to assert citizen taxpayer standing because they merely seek to challenge the contract's PLA requirement, "not the unlawful expenditure of any [state] funds distributed pursuant thereto" (*Lancaster Dev., Inc.*, 112 AD3d at 1263; *see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 803, 813-814 [2003], *cert denied* 540 US 1017 [2003]; *Transactive Corp.*, 92 NY2d at 589; *E.W. Howell Co., LLC*, 149 AD3d at 480). Petitioners are also unable to assert common-law taxpayer standing because they "do not seek review of any legislative action" (*Transactive Corp.*, 92 NY2d at 589) and, in any event, they are unable to show that "the failure to accord such standing would be in effect to erect an impenetrable barrier" to judicial review of the PLA requirement (*Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410 [2000] [internal quotation marks omitted]).

Moreover, contrary to petitioners' further contention, we conclude that the court properly determined that dismissal of the amended petition was warranted because petitioners failed to exhaust their administrative remedies before commencing this proceeding (*see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57-58 [1978]; *Matter of Pilot Travel Ctrs., LLC v Town Bd. of Town of Bath*, 163 AD3d 1409, 1411 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]). Petitioners did not engage in the detailed formal protest process laid out by the bid specifications that served as a condition precedent to commencing litigation. Merely alleging a constitutional violation, as petitioners did here, does not excuse a litigant's duty to exhaust administrative remedies where, as here, the " 'constitutional claim . . . may require the resolution of factual issues reviewable at the administrative level' " (*Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012], *cert denied* 568 US 1213 [2013], quoting *Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]; *see Griffiss Local Dev. Corp. v Gardner*, 103 AD3d 1276, 1277 [4th Dept 2013], *lv denied* 21 NY3d 856 [2013]). Additionally, we conclude that petitioners' failure to exhaust their administrative remedies should not be excused on the ground that pursuing them would have been futile (*see generally Lehigh Portland Cement Co. v New York*

State Dept. of Envtl. Conservation, 87 NY2d 136, 140 [1995]). The evidence submitted by petitioners demonstrated, at most, that they merely had "some reason to doubt" that pursing such remedies would have been successful (*Matter of Pfaff v Columbia-Greene Community Coll.*, 99 AD2d 887, 887 [3d Dept 1984]).

In light of the foregoing, we do not address petitioners' remaining contentions.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1050

CA 19-00507

PRESENT: CENTRA, J.P., CARNI, CURRAN, AND TROUTMAN, JJ.

TINA KNAPP AND MICHAEL KNAPP,
PLAINTIFFS-APPELLANTS,

V OPINION AND ORDER

FINGER LAKES NY, INC., DOING BUSINESS AS
DIVERSIFIED CONTRACTING COMPANY, AND JOEL S.
SMITH, DEFENDANTS-RESPONDENTS.

MICHAEL KNAPP, PLAINTIFF-APPELLANT PRO SE.

TREVETT CRISTO P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 3, 2019. The order denied the motion of plaintiffs to set aside a jury verdict.

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

Opinion by TROUTMAN, J.:

Plaintiffs commenced this action to recover damages for, inter alia, diversion of trust funds in violation of Lien Law article 3-A. Following a jury trial, the jury found, inter alia, that plaintiffs sustained no damages as a result of defendants' admitted Lien Law violation. Plaintiffs moved pursuant to CPLR 4404 to set aside the verdict with respect to the Lien Law cause of action and for judgment in their favor, or, alternatively, for a new trial. A final judgment was entered August 21, 2018, and an order denying the CPLR 4404 motion was entered January 3, 2019. Plaintiffs appeal from the order, but not the judgment.

I

As a preliminary matter, we must consider whether a party may appeal directly from an order denying a CPLR 4404 motion when that order was entered after entry of a final judgment. In some of our previous cases, we have concluded that such an order is "subsumed in the judgment and the right to appeal directly therefrom terminated" (*Paul Revere Life Ins. Co. v Campagna*, 233 AD2d 954, 955 [4th Dept 1996]; *see Taylor v Birdsong*, 158 AD3d 1281, 1282 [4th Dept 2018]). We now conclude that the rule set forth in *Paul Revere Life Ins. Co.*

is inconsistent with the statutory framework and with Court of Appeals precedent, and should no longer be followed. Accordingly, we hold that an order otherwise appealable as of right (*see* CPLR 5701 [a]) entered after the entry of a final judgment is not subsumed in the judgment, but is independently appealable.

An appeal may be taken as of right from an order that, inter alia, "involves some part of the merits," "affects a substantial right," or "refuses a new trial" (CPLR 5701 [a] [2] [iii]-[v]). If, however, a court enters an "intermediate order" and subsequently enters a final judgment, the Court of Appeals has held that the entry of the judgment terminates the right to appeal from the order (*Matter of Aho*, 39 NY2d 241, 248 [1976]). In other words, the intermediate order merges into the final judgment (*see e.g. Irvin v Schardt*, 259 App Div 474, 476 [4th Dept 1940], *affd* 286 NY 668 [1941]; *Frank v Rowland & Shafto, Inc.*, 169 App Div 918, 918 [1st Dept 1915]; *Bates v Holbrook*, 89 App Div 548, 551 [1st Dept 1904], *appeal dismissed* 178 NY 568 [1904]). Although the right of appeal terminates, the order is not beyond review. There is a statutory remedy. An appeal from the final judgment "brings up for review," inter alia, "any non-final judgment or order which necessarily affects the final judgment" or "any order denying a new trial" (CPLR 5501 [a] [1], [2]). Thus, CPLR 5501 (a) salvages the ability of aggrieved parties to seek review of the intermediate order on appeal.

On the other hand, orders entered after the entry of a final judgment cannot conceptually merge into the judgment. The rule in *Aho* applies only to an "intermediate order" (39 NY2d at 248; *see O'Neill v O'Neill*, 174 AD3d 1526, 1527 [4th Dept 2019]), which the Court of Appeals has defined as an order "made after the commencement of the action and before the entry of judgment" (*Fox v Matthiessen*, 155 NY 177, 179 [1898]). Consequently, inasmuch as the right of appeal from a post-judgment order remains in effect, we conclude that the appeal from the order here is properly before us.

II

Nevertheless, we are unable to address the merits of plaintiffs' contentions because the record does not include a full trial transcript, and therefore we dismiss the appeal (*see Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]; *see also Bouchey v Claxton-Hepburn Med. Ctr.*, 117 AD3d 1216, 1216-1217 [3d Dept 2014]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1072

CA 19-00740

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

MATTHEW GOLDEN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE DIOCESE OF BUFFALO, NY, DEFENDANT-RESPONDENT.

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

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered January 10, 2019. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action against defendant, the Diocese of Buffalo, NY (Diocese), seeking injunctive relief and damages for personal injuries arising from alleged sexual abuse committed by a Roman Catholic priest in the parish of Our Lady of Perpetual Help between 1996 and 1999, when plaintiff was approximately 10 to 13 years old. In his complaint, plaintiff asserted a single cause of action for public nuisance premised on the common law and Penal Law § 240.45. Plaintiff alleged, inter alia, that the Diocese knew or should have known, both before and after the priest's abuse of plaintiff took place, that the priest was a danger to children. By transferring the priest to other parishes and placing him on administrative leave without informing the parishioners of the multiple reports that had been received regarding child sexual abuse committed by him, plaintiff alleged, the Diocese affirmatively concealed the priest's history of sexually abusing children and placed the public at risk of being victimized by him. The Diocese moved to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (7), and Supreme Court granted the motion. We affirm.

Contrary to plaintiff's contention, the complaint fails to state a cause of action for common-law public nuisance. Accepting as true the facts alleged in the complaint and according plaintiff the benefit of every possible favorable inference (*see Southwestern Invs. Group, LLC v JH Portfolio Debt Equities, LLC*, 169 AD3d 1510, 1510-1511 [4th

Dept 2019]; *see generally Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]), we conclude that the complaint fails to allege the requisite "substantial interference with the exercise of a common right of the public" (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 [2001], *rearg denied* 96 NY2d 938 [2001]; *see New York Trap Rock Corp. v Town of Clarkstown*, 299 NY 77, 80 [1949]; *see also Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977], *rearg denied* 42 NY2d 1102 [1977]). "Conduct does not become a public nuisance merely because it interferes with . . . a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured" (Restatement [Second] of Torts § 821B, Comment *g*). Here, the complaint alleges the infringement of, at most, a common right of a particular subset of the community, i.e., a group of Roman Catholic parishioners in the area of the Diocese who attended or were active in the priest's parishes. The complaint does not allege that the general public was exposed to the priest's conduct, nor does it otherwise allege interference with a collective right belonging to all members of the public (*see Monaghan v Roman Catholic Diocese of Rockville Ctr.*, 165 AD3d 650, 653 [2d Dept 2018], *lv dismissed* 32 NY3d 1192 [2019]).

Contrary to plaintiff's further contention, we conclude that Penal Law § 240.45 does not imply a private right of action under the circumstances presented here. "Where a penal statute does not expressly confer a private right of action on individuals pursuing civil relief, recovery under such a statute 'may be had only if a private right of action may fairly be implied' " (*Hammer v American Kennel Club*, 1 NY3d 294, 299 [2003]; *see Cruz v TD Bank, N.A.*, 22 NY3d 61, 70 [2013]). Three essential factors are considered in determining whether a private right of action may fairly be implied: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]; *see also Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 329-331 [1983]).

Even assuming, arguendo, that Penal Law § 240.45 was enacted to protect a class of people, including plaintiff, from the dangers posed by sexual predators (*see Sheehy*, 73 NY2d at 633), and further assuming, arguendo, that the recognition of a private right of action would promote that legislative purpose (*see id.*), we nevertheless conclude that the third, and "most important," factor (*Cruz*, 22 NY3d at 70; *see Burns Jackson Miller Summit & Spitzer*, 59 NY2d at 325) militates against recognizing such an implied private right of action under these circumstances. First, in the event that there is a judgment of conviction establishing guilt, the Sex Offender Registration Act prescribes a classification and notification system (*see* Correction Law § 168 *et seq.*), and permitting plaintiff to seek

the injunctive relief requested here through a private right of action under Penal Law § 240.45 would effectively implement a similar notification system, but without any classifications and without any due process protections for the accused (*see generally Sheehy*, 73 NY2d at 635-636). Second, it is well settled that "a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature" (*id.* at 634-635; *see Cruz*, 22 NY3d at 70-71), and recognizing a private right of action under these circumstances would not be consistent with the existing mechanism for enforcing the statute, i.e., criminal prosecution. Third, to the extent that plaintiff seeks compensatory damages for the alleged sexual offenses perpetrated against him by the priest, plaintiff may bring any legally viable claims under the Child Victims Act, which extended the relevant statute of limitations period to enable victims of child sexual abuse to seek civil redress against any party whose intentional or negligent acts or omissions are alleged to have resulted in sexual abuse (*see* CPLR 208 [b]).

In light of our determination, we need not reach plaintiff's remaining contentions.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1118

CA 18-02124

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

BRADLEY WINDNAGLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA TARNACKI AND ESTATE OF LAWRENCE TARNACKI, DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, BUFFALO, CHELUS, HERDZIK, SPEYER & MONTE, P.C. (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 24, 2018. The order granted the motion of defendants insofar as it sought to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion insofar as it seeks to dismiss the complaint is denied, the complaint is reinstated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this personal injury action, plaintiff failed to complete discovery and file a note of issue and statement of readiness in accordance with the scheduling order issued by Supreme Court, and defendants moved pursuant to CPLR 3126 for an order dismissing the complaint or, in the alternative, compelling, inter alia, plaintiff's deposition. Defendants requested oral argument on the motion, but the court issued a decision on the motion prior to the return date dismissing the complaint with prejudice based on plaintiff's failure to comply with the scheduling order. In appeal No. 1, plaintiff appeals from an order granting defendants' motion insofar as it sought to dismiss the complaint and dismissing the complaint with prejudice. In appeal No. 2, plaintiff appeals from an order denying his motion for leave to renew and reargue defendants' motion in appeal No. 1.

In appeal No. 1, we agree with plaintiff that the court abused its discretion in dismissing the complaint with prejudice as a sanction for plaintiff's noncompliance with the scheduling order. "Although the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the drastic remedy of striking [a pleading] is inappropriate absent a showing that the failure to comply

is willful, contumacious, or in bad faith" (*Green v Kingdom Garage Corp.*, 34 AD3d 1373, 1374 [4th Dept 2006]; *see Petersen v New York Cent. Mut. Fire Ins. Co.*, 174 AD3d 1386, 1387-1388 [4th Dept 2019]; *WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619 [4th Dept 2011]).

Here, defendants made no showing that plaintiff's noncompliance with the court's scheduling order was willful, contumacious, or in bad faith, and the court made no such finding (*see Integrated Voice & Data Sys., Inc. v Groh*, 147 AD3d 1302, 1304 [4th Dept 2017]). Defendants merely alleged that plaintiff's failure to comply with the discovery deadlines set forth in the scheduling order was due to the representations of plaintiff's attorney that he was engaged in settlement negotiations with a claims adjuster. Plaintiff's attorney apparently believed that settlement of the case was imminent and, thus, that depositions would not be necessary. There is also nothing in the record to indicate that plaintiff ignored any warnings from the court that continued noncompliance with discovery orders could lead to the court striking the complaint (*see generally M & C Bros., Inc. v Torum*, 101 AD3d 1329, 1330 [3d Dept 2012]), or that defendants were prejudiced by the delay in conducting discovery (*see Chris Keefe Bldrs., Inc. v Hazzard*, 71 AD3d 1599, 1601-1602 [4th Dept 2010]; *see also Matter of SDR Holdings v Town of Fort Edward*, 290 AD2d 696, 697 [3d Dept 2002]).

Although plaintiff's dilatory conduct may have reasonably prompted defendants to seek the court's guidance, the drastic sanction of dismissing the complaint with prejudice provided more relief than was necessary to protect defendants' interests (*see Integrated Voice & Data Sys., Inc.*, 147 AD3d at 1304). In short, plaintiff's conduct was not the type of "deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay" that would justify the penalty of dismissal of the complaint (*Chris Keefe Bldrs., Inc.*, 71 AD3d at 1602 [internal quotation marks omitted]; *see Thomas v Benedictine Hosp.*, 296 AD2d 781, 784-785 [3d Dept 2002]; *Matter of Beauregard v Millwood-Beauregard*, 207 AD2d 633, 633-634 [3d Dept 1994]). We therefore reverse the order in appeal No. 1, deny the motion insofar as it seeks to dismiss the complaint, reinstate the complaint, and remit the matter to Supreme Court for a determination of the alternative relief sought by defendants in the motion.

Insofar as the order in appeal No. 2 denied that part of plaintiff's motion seeking leave to reargue, no appeal lies from the order (*see JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]) and, insofar as the order in appeal No. 2 denied that part of the motion seeking leave to renew, the appeal is moot in view of our determination in appeal No. 1 (*see id.*; *McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151 [4th Dept 2006]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1119

CA 18-02125

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

BRADLEY WINDNAGLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA TARNACKI AND ESTATE OF LAWRENCE TARNACKI, DECEASED, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, BUFFALO, CHELUS, HERDZIK, SPEYER & MONTE, P.C. (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 10, 2018. The order denied the motion of plaintiff for leave to renew and reargue his opposition to defendants' motion to dismiss the complaint.

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

Same memorandum as in *Windnagle v Tarnacki* ([appeal No. 1] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1164

CA 19-01197

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

JOSEPH P. DANIEL, AS ADMINISTRATOR OF THE ESTATE OF SAMARA L. DANIEL, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, VIVEK PRASAD, M.D., MEDICAL SEARCH INTERNATIONAL, INC., DEFENDANTS, AND WONHOON PARK, M.D., DEFENDANT-APPELLANT.

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (TOMAS J. CALLOCCHIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANT ERIE COUNTY MEDICAL CENTER CORPORATION.

FELDMAN KIEFFER, LLP, BUFFALO (GORDON TRESCH OF COUNSEL), FOR DEFENDANTS VIVEK PRASAD, M.D. AND MEDICAL SEARCH INTERNATIONAL, INC.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 3, 2019. The order denied the motion of defendant Wonhoon Park, M.D. for summary judgment dismissing plaintiff's second amended complaint against him.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 25, 2020, and filed in the Erie County Clerk's Office on March 18, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1208

CA 18-01365

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

DAVID IMPELLIZZERI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CINDY CAMPAGNI, DENISE BARBER, LORI FEENEY, SHARON KLAIBER, MAXINE THOMPSON, AND LISA BRACKETT, DEFENDANTS-RESPONDENTS.

UPSTATE UNIVERSITY HOSPITAL, RESPONDENT.

COTE & VAN DYKE, LLP, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALE GALE & HUNT, LLC, SYRACUSE (KEVIN T. HUNT OF COUNSEL), FOR DEFENDANT-RESPONDENT CINDY CAMPAGNI.

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

Appeal from an amended order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered April 5, 2018. The amended order resolved disputes over document production.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motions seeking to quash a judicial subpoena duces tecum and seeking a protective order with respect to the documents having pages Bates stamped 000214-000222, 000303-000313, 000346-000349, 000375-000382, 000403-000406, 000417-000421 and 000426-000427 and granting that part of the cross motion seeking to compel production of those documents, and as modified the amended order is affirmed without costs.

Memorandum: In this defamation action, plaintiff obtained a judicial subpoena duces tecum directing nonparty Upstate University Hospital (Upstate) to produce, among other things, certain documents relating to Cindy Campagni (defendant). Defendant and Upstate separately moved to quash the subpoena and for a protective order with respect to numerous documents, and plaintiff cross-moved seeking, inter alia, to compel production of the documents. Plaintiff appeals from an amended order that effectively granted the motions in part and denied the cross motion in part, and contends that he is entitled to discovery of all of the subpoenaed documents.

CPLR 3101 (a) (4) permits a party to obtain from a nonparty “full

disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof[,] . . . upon notice stating the circumstances or reasons such disclosure is sought or required" (*see Matter of Kapon v Koch*, 23 NY3d 32, 36 [2014]; *Matter of Barber v BorgWarner, Inc.*, 174 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 34 NY3d 986 [2019]; *Snow v DePaul Adult Care Communities, Inc.*, 149 AD3d 1573, 1574 [4th Dept 2017]). The Court of Appeals has repeatedly explained that the words " 'material and necessary' " are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 461 [1983]). "It is well settled that a court is vested with broad discretion to control discovery and that the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion" (*Voss v Duchmann*, 129 AD3d 1697, 1698 [4th Dept 2015]; *see generally* CPLR 3103 [a]).

Based upon our in camera inspection of the contested documents, we conclude that the court erred in granting the motions and denying the cross motion with respect to the documents with pages Bates stamped 000214-000222, 000303-000313, 000346-000349, 000375-000382, 000403-000406, 000417-000421, and 000426-000427, and we therefore modify the amended order accordingly. Plaintiff met his burden on the cross motion by establishing that those documents were "material and necessary" for the prosecution of his action (CPLR 3101 [a]; *see John Mezzalingua Assoc., LLC v Travelers Indem. Co.*, 178 AD3d 1413, 1415 [4th Dept 2019]), and defendant and Upstate did not establish that those documents were protected by attorney-client privilege or constituted attorney work product (*see generally Forman v Henkin*, 30 NY3d 656, 662 [2018]). We therefore conclude that those documents should be disclosed to plaintiff (*see* CPLR 3101 [a], [b], [c]; 4503 [a]; *Colantonio v Mercy Med. Ctr.*, 102 AD3d 649, 650 [2d Dept 2013]).

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1216

KA 19-00307

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY BORCYK, DEFENDANT-APPELLANT.

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered January 22, 2019. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is reversed on the law, the motion is granted, the judgment of conviction is vacated, and a new trial is granted.

Memorandum: Defendant was previously convicted after a jury trial of murder in the second degree (Penal Law § 125.25 [1]). He appealed, and this Court affirmed (*People v Borcyk*, 60 AD3d 1489 [4th Dept 2009], *lv denied* 12 NY3d 923 [2009]). Defendant thereafter moved to vacate the judgment of conviction. County Court denied the motion without a hearing. This Court reversed that order and remitted the matter for a hearing on the motion insofar as it sought to vacate the judgment of conviction on the grounds of ineffective assistance of counsel and actual innocence (*People v Borcyk*, 161 AD3d 1529, 1530 [4th Dept 2018]). Defendant now appeals by permission of this Court from an order denying his motion after a hearing.

Initially, we reject defendant's contention that he established his claim of actual innocence by clear and convincing evidence (*see People v Hamilton*, 115 AD3d 12, 26-27 [2d Dept 2014]; *see generally* CPL 440.10 [1] [h]; *People v Conway*, 118 AD3d 1290, 1290 [4th Dept 2014]).

We agree with defendant, however, that the court erred in denying the motion with respect to defendant's claim that he received ineffective assistance of counsel, and we therefore reverse the order, grant the motion to vacate the judgment of conviction on the ground of

ineffective assistance of counsel, and grant defendant a new trial.

"What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation" (*People v Baldi*, 54 NY2d 137, 146 [1981]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). "The core of the inquiry is whether defendant received 'meaningful representation' " (*Benevento*, 91 NY2d at 712). "[T]o prevail on a claim of ineffective assistance, [a] defendant[] must demonstrate that [he or she was] deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*id.* at 713 [internal quotation marks omitted]). Thus, "it is incumbent on [a] defendant to demonstrate the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013] [internal quotation marks omitted]; *see People v Bank*, 124 AD3d 1376, 1377 [4th Dept 2015], *affd* 28 NY3d 131 [2016]; *People v Young*, 167 AD3d 1448, 1449 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019]). It is well settled that "[t]he failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel" (*People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]; *see People v Pottinger*, 156 AD3d 1379, 1380 [4th Dept 2017]).

In support of his motion, defendant contended that defense counsel was ineffective because he failed to secure the presence of a witness who had potentially exculpatory information. In particular, defendant contended that defense counsel spoke, prior to trial, with a witness who represented that she would testify, among other things, that her former boyfriend had admitted to her that he killed the victim. According to defendant, although the witness's testimony would have supported the defense presented at trial and although defense counsel stated his intent to call the witness, when the witness did not appear at trial, defense counsel inexplicably failed to pursue available means for securing her attendance.

Under the circumstances of this case, we conclude that defendant met his burden of establishing that defense counsel's failure to secure the presence of the witness constituted ineffective assistance of counsel inasmuch as the record before us reflects "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*Atkins*, 107 AD3d at 1465 [internal quotation marks omitted]; *see generally* CPL 440.30 [6]). Importantly, this is not a case where we must speculate about defense counsel's trial strategy. Throughout defendant's trial, defense counsel pursued a theory that one or more members of a group of three men, which included the witness's former boyfriend, killed the victim and moved her body to the wooded area in which it was ultimately discovered. Indeed, evidence at trial included the statement of a man who saw the three men, who appeared to be engaged in a drug sale, enter the victim's home. He later saw two of the men emerge with an item that appeared to be the victim's body, which they placed into the trunk of the car that they drove away. Additionally, the sperm of the

witness's former boyfriend was recovered from a shirt inside of the victim's home, and it was stipulated at trial that, at the time of the murder, the witness's former boyfriend was dating the victim.

Consistent with the theory defendant presented at trial, the witness testified at the CPL article 440 hearing that, although she did not know the victim, her former boyfriend told her prior to defendant's trial that he was a suspect in the victim's murder but did not believe that he would be charged. The witness explained that some time later, but also prior to defendant's trial, that boyfriend broke into her home and attempted to strangle her and that, during this incident, he recorded himself on a tape recorder, stating his name, date of birth, and social security number, and saying, "yeah, I killed that bitch," although the witness did not know what happened to the tape recorder. She further testified that the boyfriend stated that he killed the victim and left her body in a wooded area.

Moreover, at the time of the trial, defense counsel explicitly informed the court, on the record, that his strategy was to call the witness and present her exculpatory testimony. In this regard, defense counsel stated, "[t]here's one other issue that may or may not come up . . . [that has] to do with [the witness]. [The witness] had a conversation with her then-boyfriend . . . who had been the boyfriend of [the victim] where [the boyfriend] made a tape recording of his voice, identifying his name, his date of birth and his social security number, and indicated there that he killed [the victim]. His words were 'I killed the bitch. I killed the bitch. I killed the bitch.' And that is the substance of a police report that I received from [the prosecutor]." When the court asked how defense counsel intended to introduce this testimony, he responded, "[w]ell, I intend to call [the witness], should she appear in court. She was subpoenaed. She appeared on Thursday pursuant to the subpoena as well and told me this information for the first time. I don't know whether she's going to be here when we need to call her, which is why I thought maybe we'd wait and see if she showed up and not take the Court's time to do extra research on this issue. But since you've asked me to bring up any possible issues, I would put her on the witness stand and make an offer of proof to the Court and attempt to prove her reliability of the information that she's giving under the Settles case relating to a statement against [the boyfriend's] penal interest." When the court then asked whether "[the witness's] testimony would relate to this particular homicide," defense counsel responded, "Oh yes. Yes." Nevertheless, and consistent with defense counsel's representation that he would pursue the testimony only if the witness appeared as directed, defense counsel took no further action to secure the witness's presence when she did not appear (*see Borcyk*, 161 AD3d at 1531). We agree with defendant that the failure to secure the witness's attendance was deficient conduct and that the record discloses no tactical reason for defense counsel's actions (*see generally People v Dombrowski*, 94 AD3d 1416, 1417 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]).

In so holding, we reject the determination of the court, following the CPL article 440 hearing, that defense counsel may have

legitimately decided against calling the witness because he deemed her incredible. To the contrary, the record affirmatively establishes that, even after meeting with and speaking to the witness, defense counsel stated that he intended to call her as a witness. We note that defense counsel could not be located to testify at the CPL article 440 hearing, although the record reflects that he previously informed the parties that he could no longer recall defendant's trial.

The dissent's focus on the court's determination that the witness was not credible is misplaced. The hearing on defendant's CPL article 440 motion took place years after both the events described by the witness and the alleged instance of ineffective assistance of counsel. Whether the witness appeared credible at the hearing years after the trial does not answer the question whether defense counsel, at the time of the trial, possessed a strategic reason not to call her. To the contrary and unique to this case, the record reflects that defense counsel, at the time of the trial, spoke with the witness, believed that the witness possessed relevant testimony, considered her testimony helpful to the defense, and stated that his trial strategy was to call her as a witness. Simply put, the court's assessment of the witness's credibility after a lengthy passage of time does not alter the fact that defense counsel, at the time of the trial and the alleged ineffective assistance, believed the witness to be credible enough to present to the jury.

Further, the record belies the conclusion of the court and the dissent that defense counsel may have had a strategic reason for failing to call the witness. Defense counsel explicitly informed the court that his strategy was to call the witness if she was "here when we need to call her." Thus, this Court need not speculate why defense counsel failed to call the witness because defense counsel placed his reasoning on the record: he failed to call the witness because she did not appear—a failure that this Court has recognized could support a claim of ineffective assistance (*see Borcyk*, 161 AD3d at 1531). Nothing in the record indicates that defense counsel amended that plan, that he failed to call the witness for any reason other than her nonappearance, or that he altered his belief that her testimony would be helpful to the defense.

The mere absence of a legitimate strategy in failing to secure the witness's presence at trial does not end the inquiry. A single error may qualify as ineffective assistance only if it is "sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Baker*, 14 NY3d 266, 270 [2010] [internal quotation marks omitted]). Under the circumstances of this case, however, we conclude that the error was sufficiently egregious to constitute ineffective assistance of counsel.

At defendant's trial, the prosecution relied primarily on evidence that material containing defendant's DNA was recovered from underneath the victim's fingernails and that his sperm was found inside her vagina, although the victim's body showed no sign of rape. At his CPL article 440 hearing, however, defendant explained that, although he did not recognize the victim, he had exchanged sex for

drugs with various prostitutes around the time of the victim's death, and it was undisputed at defendant's trial that the victim was a prostitute and drug user. In opposition to the People's evidence, the defense largely relied on the statement of the man who had seen the witness's former boyfriend near the victim's home and later near what appeared to be her body; evidence that the former boyfriend's sperm was found in the victim's home; and evidence that blood from an unidentified person was found on the threshold. Critically, the witness's testimony would have corroborated the defense's theory by providing evidence that a direct admission was made by the very person the defense suggested had committed the murder and was in proximity to the victim's body after her death.

Notably, this is not a case where defense counsel simply chose to pursue a different trial strategy that did not implicate the witness's testimony (*see e.g. Baldi*, 54 NY2d at 146). Instead, throughout the trial, defense counsel argued and presented proof that the witness's former boyfriend or his associates killed the victim. Indeed, this was defendant's sole theory of the victim's death. It was thus vital for defendant to corroborate the evidence placing the witness's former boyfriend at the scene of the murder, and this corroboration was precisely what the witness's testimony offered.

All concur except CURRAN and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent because we disagree with the majority's conclusion that defendant carried his burden of establishing, by a preponderance of the evidence, "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013] [internal quotation marks omitted]; *see* CPL 440.30 [6]; *People v Bank*, 124 AD3d 1376, 1377 [4th Dept 2015], *affd* 28 NY3d 131 [2016]; *People v Young*, 167 AD3d 1448, 1449 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019]), i.e., defense counsel's failure to secure the presence of a witness who had potentially exculpatory information. Although a close call, on the record before us, we conclude that defendant did not meet his burden, and we would therefore affirm the order denying defendant's motion to vacate the judgment.

It is well settled that, to be entitled to vacatur of a judgment under CPL 440.10 (1) (h) based on a claim of ineffective assistance of counsel, a defendant is required " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Baker*, 14 NY3d 266, 270-271 [2010]). Absent evidence that no reasonable strategy animated defense counsel's allegedly deficient conduct, it is presumed that defense counsel acted competently (*see People v Wells*, 187 AD2d 745, 745-746 [2d Dept 1992], *lv denied* 81 NY2d 894 [1993]; *see generally People v Flores*, 84 NY2d 184, 187 [1994]). Simple disagreement with strategies or tactics "does not suffice" to satisfy a defendant's burden of establishing ineffective assistance of counsel (*Flores*, 84 NY2d at 187) because as long as the evidence, the law, and the circumstances of a case, "viewed in totality and as of the time of

the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v McDaniel*, 13 NY3d 751, 752 [2009]).

Although what constitutes effective assistance of counsel varies according to the unique circumstances of each case, the consistent core of our inquiry is whether the defendant received meaningful representation (*see Baldi*, 54 NY2d at 146-147). "The phrase 'meaningful representation' does not mean 'perfect representation' " (*People v Ford*, 86 NY2d 397, 404 [1995], quoting *People v Modica*, 64 NY2d 828, 829 [1985]), and defense counsel's representation need not be completely error-free. Thus, courts are "properly skeptical" when "disappointed [defendants] try their former lawyers on charges of incompetent representation" (*Benevento*, 91 NY2d at 712 [internal quotation marks omitted]; *see People v Brown*, 7 NY2d 359, 361 [1960], *cert denied* 365 US 821 [1961], *rearg denied* 12 NY2d 1022 [1963]; *see also People v Satterfield*, 66 NY2d 796, 798-800 [1985]).

Here, we conclude that defendant failed to demonstrate that defense counsel's decision not to procure trial testimony from the witness was not strategic. In our view, County Court properly concluded that the witness's testimony implicating her former boyfriend in the victim's death was not credible. The witness provided the purportedly exculpatory information to the police and an assistant district attorney (ADA) as a justification for her alleged stabbing of her former boyfriend, and the court properly determined that the witness's statement that the former boyfriend verbally admitted to her that he killed the victim was entirely self-serving because it was offered only in an attempt to ameliorate the charges pending against her. The witness did not come forward with the information until *after* she was charged in the stabbing—almost 18 months after the victim was killed—and, although she claimed that she told the police and the ADA that her former boyfriend recorded some of his statements about the victim's death, there was no mention of any such recordings in the reports of the officers who spoke to her. The witness's credibility was further diminished by her inability to explain why she used an alias when she gave her statement to the police and the ADA. Given the issues surrounding the witness's credibility, defense counsel could have reasonably concluded that presenting the witness's testimony would have strained the jury's credulity.

Moreover, defense counsel could have made the strategic decision not to call the witness in light of the other available evidence that supported the theory that someone other than defendant killed the victim. To that end, we note that at trial, defense counsel and the prosecutor stipulated to the admission in evidence of the statement of a man who told police that, at approximately 11:00 p.m. on the night before the victim's body was discovered, he saw three men enter the victim's home, one of whom was the witness's former boyfriend, and later saw two of those men carrying the victim's body out of her home and placing it in the trunk of a vehicle. Defense counsel also

procured from the prosecutor a stipulation that a shirt was taken from the victim's home, and the forensic biologist's testimony at trial established that a semen stain found on the shirt matched the DNA profile of the witness's former boyfriend. The two stipulations that defense counsel obtained allowed him to argue that the credible evidence identified the witness's former boyfriend as the killer without exposing the witness herself to cross-examination. This permitted defense counsel to blunt the effect of the DNA evidence, which was the strongest evidence against defendant, and to argue to the jury that the DNA evidence proved only that defendant had sex with the victim, not that he was also her killer.

In our view, the majority places undue emphasis on defense counsel's statement at trial that he "intended to call" the witness. Viewed in context, defense counsel's statement actually indicated his doubts about the witness's reliability—particularly with respect to whether she would honor the subpoena—and, separately, whether the relevant portion of her testimony was even admissible. It follows that, in a close case based primarily on DNA evidence and where there was other evidence to support defendant's theory of the case, defense counsel could have reasonably strategized that it was inadvisable to delay the trial to procure and execute a material witness order with respect to such a witness, despite his prior statement that he intended to call her.

In reaching this conclusion, we are mindful that the court's credibility determinations in evaluating witness testimony at a hearing on a CPL 440.10 motion are entitled to great weight based on the court's superior opportunity to see the witnesses, hear the testimony, and observe demeanor (*see People v Parsons*, 169 AD3d 1425, 1426 [4th Dept 2019], *lv denied* 33 NY3d 980 [2019]). The majority rejects the court's credibility determinations regarding the witness's testimony, despite the great weight that they should be accorded. The court characterized parts of the witness's testimony as "neither persuasive or convincing" and "problematic." Additionally, the court could not "find a rationale that vindicates the veracity of critical components of her testimony" and was "unable to conclude her account is of convincing quality." Based on those observations, the court determined that "[t]he only logical conclusion is that [defense counsel] determined her testimony was not of significant value to the defense." In light of those clearly elucidated credibility determinations, we are unable to agree with the majority that the court did not appropriately weigh the evidence in denying defendant's motion.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1234

CA 19-00753

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

DESIREE NICOTRA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CNY FAMILY CARE, LLP, ET AL., DEFENDANTS,
ST. JOSEPH'S HOSPITAL HEALTH CENTER, MARTIN
WALDRON, M.D., AND EMERGENCY CARE SERVICES
OF NY, P.C., DEFENDANTS-APPELLANTS.

ST. JOSEPH'S IMAGING ASSOCIATES, PLLC, EMERGENCY CARE
SERVICES OF NY, P.C., MARTIN WALDRON, M.D., AND
JOSEPH MARKHAM, M.D., THIRD-PARTY PLAINTIFFS,

V

CHIROPRACTIC WELLNESS, PLLC AND FREDERICK GARDNER,
THIRD-PARTY DEFENDANTS.

CHIROPRACTIC WELLNESS, PLLC, AND FREDERICK GARDNER,
FOURTH-PARTY PLAINTIFFS-APPELLANTS,

V

CNY FAMILY CARE, LLP, ET AL., FOURTH-PARTY DEFENDANTS,
ST. JOSEPH'S HOSPITAL HEALTH CENTER, MARTIN
WALDRON, M.D., AND EMERGENCY CARE SERVICES OF
NY, P.C., FOURTH-PARTY DEFENDANTS-RESPONDENTS.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (MARK J. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT, THIRD-PARTY PLAINTIFF AND FOURTH-PARTY DEFENDANT-RESPONDENT EMERGENCY CARE SERVICES OF NY, P.C.

MAGUIRE CARDONA, P.C., ALBANY (PATRICK A. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT AND FOURTH-PARTY DEFENDANT-RESPONDENT ST. JOSEPH'S HOSPITAL HEALTH CENTER.

GALE GALE & HUNT, LLC, SYRACUSE (KATHERINE A. BUCKLEY OF COUNSEL), FOR DEFENDANT-APPELLANT, THIRD-PARTY PLAINTIFF AND FOURTH-PARTY DEFENDANT-RESPONDENT MARTIN WALDRON, M.D.

MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C., NEW YORK CITY (JAMES M. SKELLY OF COUNSEL), FOR THIRD-PARTY DEFENDANTS AND FOURTH-PARTY PLAINTIFFS-APPELLANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (ROBIN C. ZIMPEL-FONTAINE OF

COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from a second amended order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered October 12, 2018. The second amended order, among other things, granted the motion of defendant-fourth-party defendant St. Joseph's Hospital Health Center, and the motions of defendants-third-party plaintiffs-fourth-party defendants Martin Waldron, M.D. and Emergency Care Services of NY, P.C. for summary judgment dismissing the fourth-party complaint against them.

It is hereby ORDERED that the second amended order so appealed from is unanimously modified on the law by denying in part the motion of defendant-fourth-party defendant St. Joseph's Hospital Health Center for summary judgment dismissing the fourth-party complaint against it and reinstating the cause of action for contribution against it, and by denying in part the motions of defendants-third-party plaintiffs-fourth-party defendants Martin Waldron, M.D. and Emergency Care Services of NY, P.C., for summary judgment dismissing the fourth-party complaint against them and reinstating the cause of action for contribution against them, and converting that cause of action against them to a third-party counterclaim, and as modified the second amended order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice and negligence action seeking damages for injuries that she sustained as a result of the alleged negligent failure of, among others, defendants-third-party plaintiffs-fourth-party defendants Martin Waldron, M.D. and Emergency Care Services of NY, P.C. (ECS) and defendant-fourth-party defendant St. Joseph's Hospital Health Center (St. Joseph's) (collectively, hospital defendants), and third-party defendants-fourth-party plaintiffs Frederick Gardner and Chiropractic Wellness, PLLC (collectively, chiropractic defendants) to timely diagnose and treat the compression of plaintiff's spinal cord. In two complaints, which were consolidated into a single action, plaintiff asserted, inter alia, causes of action against the hospital defendants and the chiropractic defendants for professional negligence, medical malpractice and failure to obtain informed consent. The complaints included allegations that the negligence of those defendants caused plaintiff to sustain injuries to her spine after she received chiropractic treatment for neck pain from Gardner on June 6 and 7, 2012 and, after her condition worsened, she received additional treatment at St. Joseph's by Waldron on June 8, 2012. The hospital defendants and the chiropractic defendants appeal from a second amended order that denied the hospital defendants' respective motions for summary judgment dismissing plaintiff's complaints against them and granted the hospital defendants' respective motions for summary judgment dismissing the fourth-party complaint of the chiropractic defendants.

After the action was commenced against the chiropractic defendants, plaintiff and the chiropractic defendants entered into an arbitration stipulation, which provided that they agreed to "arbitrate

all issues between them." Subsequently, a panel of arbitrators determined that Gardner was negligent and that his negligence was a substantial factor in causing plaintiff's injury, and they awarded plaintiff damages against Gardner.

Following the arbitration, in an order entered March 27, 2018, Supreme Court, inter alia, granted plaintiff's motion to discontinue her action against the chiropractic defendants, granted Waldron's cross motion to convert his cross claims against the chiropractic defendants to a third-party action, and converted ECS's cross claims against the chiropractic defendants to "third-party claims." The court denied the chiropractic defendants' cross motion for, inter alia, leave to amend their answer to assert cross claims against the hospital defendants, but the court granted the chiropractic defendants "leave to commence a Fourth-Party action." The chiropractic defendants, who had thus been removed from the first-party action and had become third-party defendants, then filed a fourth-party complaint against the hospital defendants and others seeking, inter alia, contribution.

Now, in their respective appeals, the hospital defendants contend that the court erred in denying their respective motions for summary judgment dismissing plaintiff's complaints against them. Specifically, the hospital defendants contend that the doctrine of collateral estoppel precludes plaintiff from relitigating the issue of damages because that issue was previously decided during plaintiff's arbitration proceeding with the chiropractic defendants. We reject that contention. The doctrine of collateral estoppel, which bars the relitigation of "an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018] [internal quotation marks omitted]), "comes into play when four conditions are fulfilled: '(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits' " (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015], *rearg denied* 25 NY3d 1193 [2015]).

Although we agree with the hospital defendants that the doctrine of collateral estoppel may be invoked based upon an arbitration award (*see Hagopian v Karabatsos*, 157 AD3d 1020, 1022 [3d Dept 2018]; *Rozewski v Trautmann*, 151 AD3d 1945, 1946 [4th Dept 2017]), we conclude that the hospital defendants, as the party seeking to invoke that doctrine, failed to meet their initial burden of establishing that the issues addressed during the arbitration proceeding are identical to the issues in the litigation involving the hospital defendants (*see generally Matter of Dunn*, 24 NY3d 699, 704 [2015]). The hospital defendants failed to establish that plaintiff's causes of action against the chiropractic defendants and the hospital defendants arise from the same facts and resulted in the same damages, and they failed to establish that plaintiff had a full and fair opportunity to litigate the issue of damages with respect to the hospital defendants

during the arbitration with the chiropractic defendants (*cf. Bell v New York State Dormitory Auth.*, 183 AD2d 530, 531 [1st Dept 1992]).

We also reject the contentions of the hospital defendants that the arbitration stipulation entered into by plaintiff and the chiropractic defendants and the related arbitration documents, including plaintiff's motion to discontinue the action against the chiropractic defendants, constitute a release or covenant under General Obligations Law § 15-108. Section 15-108 provides that "[a] release or covenant not to sue between a plaintiff or claimant and a person who is liable in tort shall be deemed a release or covenant for the purposes of this section only if: (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar; (2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and (3) such release or covenant is provided prior to entry of judgment" (§ 15-108 [d]). Here, plaintiff did not receive monetary consideration greater than one dollar for entering into the arbitration stipulation or the related arbitration documents (*see* § 15-108 [d] [1]), and the arbitration stipulation and related arbitration documents did not "completely or substantially terminate[] the dispute" between plaintiff and the chiropractic defendants (§ 15-108 [d] [2]). Rather, they resulted in a continuation of plaintiff's litigation against the chiropractic defendants in a different forum, i.e., arbitration.

Inasmuch as the hospital defendants failed to meet their respective burdens of establishing their entitlement to summary judgment on the basis of collateral estoppel (*see Zayatz v Collins*, 48 AD3d 1287, 1290 [4th Dept 2008]), and the arbitration stipulation and related arbitration documents do not constitute a covenant or release pursuant to General Obligations Law § 15-108, we reject the further contentions of the hospital defendants that the doctrine of collateral estoppel and section 15-108, operating together, preclude plaintiff from recovering damages against the hospital defendants.

In their appeal, the chiropractic defendants contend that the court erred in granting those parts of the motions of Waldron and ECS for summary judgment dismissing the cause of action against them in the fourth-party complaint for contribution. A contribution cause of action "may be asserted in a separate action or by cross-claim, counterclaim, or third-party claim in a pending action" (CPLR 1403). The chiropractic defendants were named as third-party defendants in the third-party action commenced by St. Joseph's Imaging Associates, PLLC, which is a different entity than St. Joseph's, and, although Waldron and ECS were not initially named as parties in the third-party action, they asserted cross claims for contribution against the chiropractic defendants. In the order entered March 27, 2018, the court converted those cross claims into third-party claims, and Waldron and ECS were added to the caption in the third-party action as third-party plaintiffs. Inasmuch as the chiropractic defendants, Waldron and ECS are all parties in the third-party action, the proper mechanism for the chiropractic defendants to seek contribution from Waldron and ECS would be asserting a counterclaim in the third-party

action (*see* CPLR 1008). Furthermore, because Waldron and ECS were already parties in the third-party action, the chiropractic defendants were precluded from bringing a fourth-party action against them (*see generally* CPLR 1007; *McNamara v Banney*, 227 AD2d 892, 892 [4th Dept 1996]). Here, however, it appears that the chiropractic defendants brought the fourth-party action against Waldron and ECS, instead of asserting a counterclaim in the third-party action, in order to comply with the order entered March 27, 2018. Under these circumstances, we therefore modify the second amended order by denying in part the motions of Waldron and ECS for summary judgment dismissing the fourth-party complaint, reinstating the cause of action against them for contribution, and converting that cause of action against them into counterclaims against them in the third-party action.

We also agree with the chiropractic defendants that the court erred in granting that part of St. Joseph's motion for summary judgment seeking to dismiss the cause of action for contribution against St. Joseph's in the fourth-party complaint. St. Joseph's, unlike Waldron and ECS, was not a party to the third-party action, and thus the chiropractic defendants are not precluded from bringing a fourth-party action against St. Joseph's (*see generally* CPLR 1007; *cf. McNamara*, 227 AD2d at 892). We therefore further modify the second amended order by denying in part the motion of St. Joseph's for summary judgment dismissing the fourth-party complaint against it and reinstating the cause of action against it for contribution.

We have considered the chiropractic defendants' remaining contentions and conclude that they do not require reversal or further modification of the second amended order.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1251

CA 19-00824

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

ELAINE GOLIMOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA AND MICHAEL J. SLIWINSKI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 2, 2018. The order denied defendants' motion to set aside a jury verdict.

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

Same memorandum as in *Golimowski v Town of Cheektowaga* ([appeal No. 2] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1252

CA 19-00825

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

ELAINE GOLIMOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA AND MICHAEL J. SLIWINSKI,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 29, 2018. The judgment, among other things, awarded plaintiff money damages as against defendants.

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

Memorandum: This case arises out of an incident where a motor vehicle struck a pedestrian at the intersection of Borden Road and French Road in defendant Town of Cheektowaga (Town). At the time of the accident, defendant Michael J. Sliwinski, a police officer employed by the Town, was driving on Borden Road and approached the intersection with French Road, where the traffic light was a steady red. When the light changed and displayed a green left-turn arrow, Sliwinski started to make a left turn on French Road, where he collided with plaintiff, a pedestrian located in the crosswalk on French Road, causing the then 69-year-old plaintiff to sustain, inter alia, injuries to her knee and back.

In appeal No. 1, defendants appeal from an order that denied their motion pursuant to CPLR 4404 (a) seeking to set aside the jury verdict. In appeal No. 2, defendants appeal from a judgment entered upon the jury verdict that, inter alia, apportioned liability for the accident 75% to defendants and 25% to plaintiff and awarded plaintiff $600,000 for past pain and suffering and $600,000 for future pain and suffering, plus interest.

Inasmuch as the appeal from the final judgment in appeal No. 2 brings up for review the propriety of the order in appeal No. 1, we conclude that appeal No. 1 must be dismissed (*see Matter of State of*

New York v Daniel J., 180 AD3d 1347, 1348 [4th Dept 2020]; *Reid v Levy* [appeal No. 2], 148 AD3d 1800, 1801 [4th Dept 2017]; *see generally* CPLR 5501 [a] [2]; *Matter of Aho*, 39 NY2d 241, 248 [1976]).

We conclude that defendants' contention challenging parts of Supreme Court's ruling on plaintiff's motion in limine is partially unpreserved and, to the extent that it is preserved for our review, is without merit. Just before jury selection, and on a motion in limine that had previously been served and argued, the court expressly precluded defendants from introducing the following evidence at trial: (1) plaintiff's statement concerning her use of alcohol before the accident; (2) plaintiff's prior conviction of driving while intoxicated; (3) part of a police department memorandum referencing plaintiff's pre-accident alcohol use; and (4) expert testimony referring to or relying upon plaintiff's pre-accident alcohol use. The court also granted that part of plaintiff's motion in limine seeking to permit introduction in evidence of a letter of suspension, which was signed by Sliwinski and in which Sliwinski consented to a three-day suspension from work upon his admission that he had violated a police department rule regarding safe operation of a motor vehicle. Defendants promptly objected to those trial-related evidentiary rulings and we therefore conclude that they are preserved for our review.

To the extent that defendants' contentions on appeal concern issues outside the specific evidentiary rulings made by the court, they are unpreserved because, during trial, defendants did not make an offer of proof or an objection with respect to those issues (*see generally* CPLR 4017; *Oakes v Patel*, 20 NY3d 633, 648 [2013]; *Community Network Serv., Inc. v Verizon N.Y., Inc.*, 63 AD3d 547, 547 [1st Dept 2009], *lv dismissed* 13 NY3d 813 [2009]; *Stiglianese v Vallone*, 255 AD2d 167, 167 [1st Dept 1998]). For example, the court did not fully preclude defendants from using any part of the police department memorandum or calling their expert as a witness on issues other than plaintiff's pre-accident use of alcohol and defendants made no efforts to introduce such evidence at trial, and therefore any issue in connection therewith is unpreserved (*see generally* CPLR 4017; *Oakes*, 20 NY3d at 648).

On the merits, we conclude that, in its ruling on the motion in limine, the court did not abuse its discretion (*see generally Dischiavi v Calli*, 125 AD3d 1435, 1436 [4th Dept 2015]). In the absence of foundational testimony describing plaintiff's actions at the time of the accident, which occurred approximately eight hours after she consumed her last alcoholic beverage, or drawing a connection between plaintiff's alcohol use and her alleged comparative fault, any evidence regarding her pre-accident use of alcohol was of no probative value and highly prejudicial (*see Blanchard v Lifegear, Inc.*, 45 AD3d 1258, 1260 [4th Dept 2007]; *cf. Siemucha v Garrison*, 111 AD3d 1398, 1400 [4th Dept 2013]). In addition, we conclude that defendants' contention with respect to Sliwinski's letter of suspension goes solely to that document's weight rather than its admissibility (*see generally Madden v Dake*, 30 AD3d 932, 937 [3d Dept 2006]).

Defendants' challenge to the propriety of a comment made by plaintiff's counsel during his opening statement was preserved by defendants' objection (*see* CPLR 4017). Even assuming, arguendo, that the challenged comment was inappropriate because it concerned facts not substantiated by the evidence (*see Acosta v City of New York*, 153 AD3d 765, 768 [2d Dept 2017]; *Stangl v Compass Transp.*, 221 AD2d 909, 909-910 [4th Dept 1995]), we conclude that the isolated comment does not require reversal because it cannot be said to have "divert[ed] the attention of the jurors from the issues at hand" or to have "had any likely effect on the jury's verdict" (*Short v Daloia*, 70 AD3d 1384, 1385 [4th Dept 2010] [internal quotation marks omitted]; *see Backus v Kaleida Health*, 91 AD3d 1284, 1287 [4th Dept 2012]; *Kmiotek v Chaba*, 60 AD3d 1295, 1296 [4th Dept 2009]).

Furthermore, we reject defendants' contention that the verdict is against the weight of the evidence with respect to the jury's apportionment of liability. "It is well settled that a verdict may be set aside as against the weight of the evidence only if 'the evidence so preponderate[d] in favor of [defendants] that [the verdict] could not have been reached on any fair interpretation of the evidence' " (*Killian v Captain Spicer's Gallery, LLC*, 170 AD3d 1587, 1588 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019], quoting *Lolik v Big V Supermarkets, LLC*, 86 NY2d 744, 746 [1995]). In our view, a fair interpretation of the evidence adduced at trial supports the jury's apportionment of fault between the parties (*see Stevens v Maimone*, 6 AD3d 1222, 1223 [4th Dept 2004], *lv denied* 3 NY3d 605 [2004]). The evidence supports the conclusion that defendants bore a greater proportion of fault in causing the accident because of undisputed evidence that Sliwinski did not see plaintiff in the crosswalk and thus violated his "duty to see what should be seen and to exercise reasonable care under the circumstances" (*Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015] [internal quotation marks omitted]).

Finally, we reject defendants' contention that the award of damages for past and future pain and suffering deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Lai Nguyen v Kiraly* [appeal No. 2], 82 AD3d 1579, 1580 [4th Dept 2011]; *see e.g. Hernandez v Ten Ten Co.*, 102 AD3d 431, 433 [1st Dept 2013]; *Ferrer v City of New York*, 49 AD3d 396, 397 [1st Dept 2008]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1257

CA 19-00218

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

DERRICK GREEN, MILES GREEN, CYNTHIA GREEN, CORA GREEN, GLORIA GREEN, AND LINDA CLOUD, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

FRANK B. IACOVANGELO, AS PUBLIC ADMINISTRATOR FOR COUNTY OF MONROE, COUNTY OF MONROE, GALLO & IACOVANGELO, LLP, CAROLINE R. DIGNAN, M.D., AS MEDICAL EXAMINER FOR COUNTY OF MONROE, DEFENDANTS-RESPONDENTS, UNIVERSITY OF ROCHESTER, UNIVERSITY OF ROCHESTER MEDICAL CENTER, AND STRONG MEMORIAL HOSPITAL, DEFENDANTS-APPELLANTS.

BROWN, GRUTTADARO AND PRATO, LLC, ROCHESTER (JEFFREY S. ALBANESE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE WRIGHT LAW FIRM, LLC, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT DERRICK GREEN.

BURKWIT LAW FIRM, PLLC, ROCHESTER (CHARLES F. BURKWIT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS MILES GREEN, CYNTHIA GREEN, CORA GREEN, GLORIA GREEN AND LINDA CLOUD.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (MALLORIE C. RULISON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FRANK B. IACOVANGELO, AS PUBLIC ADMINISTRATOR FOR COUNTY OF MONROE AND COUNTY OF MONROE.

Appeal and cross appeals from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 5, 2018. The order granted the motion of defendants Frank B. Iacovangelo, as Public Administrator for County of Monroe, County of Monroe, and Caroline R. Dignan, M.D., as Medical Examiner for County of Monroe for summary judgment dismissing the complaint against them, granted the motion of defendant Gallo & Iacovangelo, LLP for summary judgment dismissing the complaint against it, and denied the motion of defendants University of Rochester, University of Rochester Medical Center and Strong Memorial Hospital for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiffs commenced this action seeking damages based on, inter alia, allegations that defendants failed to take reasonable efforts to inform them, as next of kin, of the death of plaintiffs' relative (decedent). Defendant Strong Memorial Hospital (Strong), defendant University of Rochester and defendant University of Rochester Medical Center (collectively, hospital defendants), and defendant Frank B. Iacovangelo, as Public Administrator for County of Monroe (PA), defendant County of Monroe (County), and defendant Caroline R. Dignan, M.D., as Medical Examiner for County of Monroe (collectively, County defendants) moved separately for summary judgment dismissing the complaint against them. Now, the hospital defendants appeal and plaintiffs cross-appeal from an order that, inter alia, denied the hospital defendants' motion and granted the County defendants' motion. We affirm.

On January 19, 2012, a then-unidentified woman—decedent—was found unresponsive in her place of residence. She was transported to the emergency room at Strong. After decedent was admitted for treatment, social workers employed by Strong began the process of attempting to identify decedent and locate any next of kin. The process of locating decedent's next of kin, which continued after decedent's death, was ultimately unsuccessful. Decedent died later the same day that she was admitted to Strong; no next of kin were present.

The day after decedent's death, Strong referred the investigation into locating decedent's next of kin to the office of the PA. After several days, the PA's investigation also proved unsuccessful. The PA arranged an indigent burial for decedent, which occurred in late January or early February 2012. Shortly thereafter, plaintiffs learned about decedent's death and contacted Strong, which referred them to the PA. Decedent's body was exhumed and a memorial service conducted for plaintiffs, at the PA's expense.

The common-law right of sepulcher "affords the decedent's next of kin an absolute right to immediate possession of a decedent's body for preservation and burial . . . , and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body" (*Shipley v City of New York*, 25 NY3d 645, 653 [2015] [internal quotation marks omitted]). "To establish a cause of action for interference with the right of sepulcher, [a] plaintiff must establish that: (1) plaintiff is the decedent's next of kin; (2) plaintiff had a right to possession of the remains; (3) defendant interfered with plaintiff's right to immediate possession of the decedent's body; (4) the interference was unauthorized; (5) plaintiff was aware of the interference; and (6) the interference caused plaintiff mental anguish" (*Shepherd v Whitestar Dev. Corp.*, 113 AD3d 1078, 1080 [4th Dept 2014] [internal quotation marks omitted]; *see* 2A NY PJI2d 3:6 at 82 [2020]).

As relevant here, interference with next of kin's right to immediate possession of decedent's body may arise through a defendant's "failure to notify next of kin of the death" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 39 [1st Dept 2009]; *see Duffy v City of New York*, 178 AD2d 370, 371 [1st Dept 1991], *lv dismissed* 80 NY2d 924

[1992], *lv denied* 81 NY2d 702 [1993]). Generally, "[a] hospital's efforts to notify a decedent's next-of-kin must be 'reasonable and sufficient under the circumstances' " (*Coto v Mary Immaculate Hosp.*, 26 Misc 3d 1205[A], 2009 NY Slip Op 52665[U], *2 [Sup Ct, Queens County 2009]; *see Torres v State of New York*, 34 Misc 2d 488, 490 [Ct Cl 1962]).

Here, we conclude that the hospital defendants met their initial burden on their motion of establishing that they engaged in reasonable and sufficient efforts to locate decedent's next of kin following her admission into the hospital. Specifically, deposition testimony from two social workers employed by Strong established that they undertook multiple avenues of investigation to locate decedent's family. Although those efforts were unsuccessful, we note that a defendant has to show merely that it conducted a reasonable and sufficient inquiry, not a perfect one. Thus, the hospital defendants met their initial burden (*see generally* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We conclude, however, that plaintiffs' submissions in opposition, viewed in the light most favorable to plaintiffs (*see Nichols v Xerox Corp.*, 72 AD3d 1501, 1502 [4th Dept 2010]), raise a triable issue of fact with respect to whether the hospital defendants' efforts to locate decedent's next of kin were reasonable and sufficient (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Specifically, plaintiffs identified certain records of the hospital defendants, which indicated that decedent had resided, on some occasions, at a local homeless shelter. Those documents were available to the hospital defendants at the time they conducted their search for decedent's next of kin, and there is no dispute that the hospital defendants did not attempt to contact that homeless shelter during their search.

Plaintiffs also submitted deposition testimony from a person employed by the homeless shelter, who testified that decedent was a frequent resident there and that she knew members of decedent's family and could have contacted them if she had been notified of decedent's death. When that deposition testimony is taken together with Strong's records, we conclude that plaintiffs' submissions raise a question of fact with respect to whether it was reasonable and sufficient for the hospital defendants to fail to contact the homeless shelter that they knew, or should have known, was recently a residence of decedent.

We reject the hospital defendants' contention that plaintiffs were required to submit an expert affidavit in opposition to their motion. An expert opinion is beneficial where it would "help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v County of Erie*, 60 NY2d 296, 307 [1983]). We conclude, however, that evaluating whether the hospital defendants engaged in reasonable and sufficient efforts to locate decedent's next of kin lies within the common knowledge and experience of a layperson, and does not require any specialized or technical knowledge (*see generally Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 147-148 [1976]; Jerome

Prince, Richardson on Evidence § 7-301 at 456 [Farrell 11th ed 1995]).

The hospital defendants contend that plaintiffs did not raise an issue of fact with respect to causation because plaintiffs did not become aware of decedent's death until three weeks after her death—when the hospital defendants no longer had decedent's body and could no longer interfere with plaintiffs' right to her remains. We reject that contention, and conclude that plaintiffs' submissions, as discussed above, raise a question of fact with respect to the element of causation (*see Estate of Finn v City of New York*, 76 Misc 2d 388, 390-391 [App Term, 1st Dept 1973]; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]).

With respect to plaintiffs' cross appeals, we conclude that Supreme Court did not err in granting that part of the County defendants' motion seeking summary judgment dismissing the complaint against the PA. Specifically, we conclude that the County defendants established, as a matter of law, that the PA is entitled to governmental function immunity inasmuch as he was engaged in a governmental function when he was attempting to locate decedent's next of kin. The office of PA was specifically created to protect the public, i.e., to "conserve the assets of decedents who had died intestate and to locate heirs of the deceased," and it possesses an "independent official status" and performs duties that "require a high degree of independent judgment" (*People v Insalaco*, 142 Misc 2d 371, 372-373 [Sup Ct, Erie County 1989]; *see Matter of Richmond*, 187 Misc 2d 872, 875 [Sur Ct, Broome County 2001]; *see generally Matter of Wyche*, 96 Misc 2d 324, 326 [Sur Ct, Albany County 1978]). In our view, the PA's investigation of decedent's next of kin constituted "quintessentially a governmental role" (*Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 713 [2017]).

Thus, because the PA was engaged in a governmental function, "liability may be imposed for the negligent performance of that function only if [the PA] owed a special duty to" plaintiffs (*Drever v State of New York*, 134 AD3d 19, 25 [3d Dept 2015]; *see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). Here, we conclude that plaintiffs did not raise a question of fact with respect to whether the PA owed them a special duty. Although the statutes empowering the PA may have been intended to benefit people such as plaintiffs, under those statutes a private right of action is not available (*see generally Pelaez v Seide*, 2 NY3d 186, 200 [2004]). There is also no evidence in the record that the PA owed plaintiffs a special duty by virtue of the PA voluntarily assuming a duty to them beyond what was owed to the public generally (*see generally Cuffy v City of New York*, 69 NY2d 255, 260 [1987]), or that the PA's actions affirmatively placed plaintiffs in harm (*see generally Szydlowski v Town of Bethlehem*, 162 AD3d 1188, 1190 [3d Dept 2018]). Because the PA did not owe plaintiffs a special duty, it is unnecessary to consider whether the PA's actions were "ministerial or discretionary under the 'governmental function immunity defense' " (*Tara N.P.*, 28 NY3d at 716; *see Full v Monroe County Sheriff's Dept.* [appeal No. 3], 152 AD3d

1237, 1239 [4th Dept 2017]).

In light of our determination, plaintiffs' remaining contention is academic.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1265

KA 17-00835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY RAMOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 26, 2017. The judgment convicted defendant upon a plea of guilty of strangulation in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a plea of guilty of strangulation in the second degree (Penal Law § 121.12), defendant contends that Supreme Court abused its discretion in denying him a reasonable opportunity to advance his contentions in support of his motion to withdraw the plea. We agree.

Defendant entered his plea of guilty in satisfaction of a four-count indictment and waived his right to appeal. The court convened for sentencing, at which time defense counsel stated that defendant wanted to withdraw the plea, explaining that defendant had done his own legal research and determined that the appeal waiver encompassed issues that he wanted to raise on appeal. Defense counsel asked to be relieved due to an unspecified conflict of interest. Defense counsel, speaking in hypothetical terms, argued that withdrawal of the plea may be justified if defendant did not receive meaningful representation. The court questioned defendant directly. Defendant confirmed that he wanted to withdraw his plea. The prosecutor then asked the court to inquire into defendant's grounds for the motion. Defense counsel objected, and the court ruled in defense counsel's favor, apparently on the ground that such questioning might impermissibly intrude on privileged conversations. "[T]hat's something you'd have to talk to a lawyer about," the court explained, "[b]ut I'm going to deny that request." The court added that defendant had executed a written appeal waiver. Defendant began to explain why he had executed the waiver, but the court stopped him from doing so, stating, "It's not

your turn to talk right now."

When a defendant who has previously entered a plea of guilty expresses the desire to withdraw his or her plea, the court must exercise discretion in affording the defendant a "reasonable opportunity" to advance his or her contentions (*People v Frederick*, 45 NY2d 520, 525 [1978]; *see People v Days*, 125 AD3d 1508, 1508-1509 [4th Dept 2015]). If the defendant challenges the action or inaction of defense counsel, the court may have to afford defense counsel the opportunity to explain his or her performance with respect to the plea (*see People v Mitchell*, 21 NY3d 964, 967 [2013]). A conflict of interest arises only if defense counsel takes a position adverse to his or her client, in which event the court must assign new counsel to represent defendant (*see id.*; *People v Caputo*, 163 AD3d 983, 984 [2d Dept 2018]).

Although we agree with our dissenting colleagues that defense counsel did not take a position adverse to defendant, under the circumstances of this case, we conclude that the court erroneously deprived defendant of a reasonable opportunity to present his contentions in support of his motion to withdraw the plea (*see Caputo*, 163 AD3d at 984; *Days*, 125 AD3d at 1509). Indeed, the court specifically precluded defendant from explaining the basis for his motion, and it is unclear from the record whether the motion was based on a contention of ineffective assistance of counsel or a different ground. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to afford defendant a reasonable opportunity to present contentions in support of his motion to withdraw his plea (*see Days*, 125 AD3d at 1509).

All concur except SMITH, J.P., and BANNISTER, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent. The majority concludes that defendant was not given a "reasonable opportunity" to advance his contentions in support of his motion to withdraw his guilty plea (*People v Frederick*, 45 NY2d 520, 525 [1978]; *see People v Caputo*, 163 AD3d 983, 984 [2d Dept 2018]). We conclude, however, that Supreme Court gave defendant ample opportunity to present the grounds for his motion, but defendant failed to do so, and that "no further inquiry [by the court] was necessary" (*People v Bucci*, 137 AD3d 1744, 1744 [4th Dept 2016]).

It is not contested by the majority that the court conducted an adequate initial colloquy, appeal waiver colloquy, and factual colloquy before accepting defendant's guilty plea. Defendant acknowledged at that time that he was satisfied with defense counsel's services. Defendant also informed the court that he was pleading guilty because he did not want to put his family through a trial and because he wanted to avoid a potentially longer sentence.

At sentencing, a month later, defense counsel informed the court that defendant was requesting to withdraw his guilty plea because defendant had done some legal research of his own and had determined that his appeal waiver did not "leave him with sufficient options." Defense counsel further stated that he could not represent defendant

on his motion to withdraw his plea because defense counsel would have to take a position adverse to defendant, and defense counsel asked to be relieved from his representation of defendant. The court asked defense counsel to state the grounds for withdrawal of the plea, but defense counsel refused. The prosecutor asked the court to inquire into the general grounds for defendant's request, but defense counsel immediately objected, and the court effectively sustained the objection and then denied defendant's request to withdraw his plea.

Based on the above facts, we conclude that defendant "was afforded the requisite opportunity to present his contentions" (*Bucci*, 137 AD3d at 1744). It is well settled that a guilty plea is meant to be "the end of a criminal case, not a gateway to further litigation" (*People v Taylor*, 65 NY2d 1, 5 [1985]), and in our view that principle should be particularly true of litigation stemming from grounds that the defense refuses to state.

Although the majority relies on *Caputo* (163 AD3d at 984), that case is distinguishable. Here, defense counsel did not take a position adverse to defendant. Indeed, even if defense counsel had informed the court that ineffective assistance of counsel was a ground for defendant's request to withdraw his plea, we note that merely stating a ground for such a request does not amount to taking an adverse position with respect to that request (*see People v Mitchell*, 21 NY3d 964, 967 [2013]). Unlike in *Caputo* (163 AD3d at 983-984), the court here encouraged an explanation from defendant regarding his request to withdraw his plea, and the defense had already been given at least three opportunities to state the grounds for the request before the court denied it.

Inasmuch as we have considered defendant's remaining contentions and conclude that they do not require reversal or modification of the judgment, we would affirm.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1274

CA 18-02259

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

RAND CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COWBOYS SALOON SYRACUSE, LLC, ET AL.,
DEFENDANTS,
AND ROBERT GENOVESE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MELVIN & MELVIN, PLLC, SYRACUSE (ELIZABETH A. GENUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 8, 2018. The order, insofar as appealed from, granted that part of plaintiff's motion seeking a default judgment against defendant Robert Genovese.

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

Same memorandum as in *Rand Constr. Corp. v Cowboys Saloon Syracuse, LLC* ([appeal No. 2] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1275

CA 19-01160

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

RAND CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COWBOYS SALOON SYRACUSE, LLC, ET AL.,
DEFENDANTS,
AND ROBERT GENOVESE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MELVIN & MELVIN, PLLC, SYRACUSE (ELIZABETH A. GENUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 28, 2018. The judgment awarded plaintiff money damages as against defendant Robert Genovese.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and that part of the motion seeking a default judgment against defendant Robert Genovese is denied.

Memorandum: In this action seeking to recover damages for diversion of Lien Law trust fund assets, Robert Genovese (defendant) appeals, in appeal No. 1, from that part of an order granting the motion of plaintiff for a default judgment against him. In appeal No. 2, defendant appeals from the ensuing judgment, entered upon the order in appeal No. 1, which granted a default judgment against him.

Initially, we note that the appeal from the judgment in appeal No. 2 brings up for review the propriety of the order in appeal No. 1 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]), and thus the appeal from the order in appeal No. 1 must be dismissed (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]). We also note that, under the circumstances presented, defendant's challenge to the judgment is properly before us despite the fact that the order and judgment were entered upon his default. "Where, as here, a party appears and contests an application for entry of a default judgment, CPLR 5511, prohibiting an appeal from an order or judgment entered upon default, is inapplicable, and the

judgment predicated upon the party's default is therefore appealable" (*Spatz v Bajramoski*, 214 AD2d 436, 436 [1st Dept 1995]; *see Spano v Kline*, 50 AD3d 1499, 1499 [4th Dept 2008], *lv denied* 11 NY3d 702 [2008]).

We agree with defendant that Supreme Court erred in granting plaintiff's motion insofar as it sought a default judgment against defendant, and we therefore reverse the judgment in appeal No. 2 and deny that part of the motion. "On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting [the] claim, and proof of the defaulting party's default in answering or appearing" (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011]; *see* CPLR 3215 [f]). With respect to the proof of the facts constituting the claim, "[a] verified complaint may be submitted instead of [an] affidavit when the complaint has been properly served" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70 [2003]; *see* CPLR 3215 [f]), and "defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson*, 100 NY2d at 71). A plaintiff's "failure to submit the proof required by CPLR 3215 (f) should lead a court to deny an application for a default judgment" (*Manhattan Telecom. Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013]).

Here, the sole cause of action in the complaint asserted against defendant is the fifth cause of action, seeking damages for diversion of trust fund assets. In that cause of action, plaintiff alleged that all defendants "received sums due for the subject construction," and that those funds were trust funds for the benefit of plaintiff and others who supplied labor or materials for the construction project. With respect to the source of the funds described in the fifth cause of action, plaintiff alleged only that "those funds included more than Two Million, Two Hundred Fifty Thousand Dollars ($2,250,000) from [defendant] and entities that he controls." Those statements are insufficient to state a claim for diversion of trust assets under article 3-A of the Lien Law. "Pursuant to Lien Law § 70 (5), an owner of real property becomes a trustee of funds for the benefit, inter alia, of laborers and material suppliers, only as to funds specifically designated [as trust funds by the statute]" (*Pellic Dev. Corp. v Whitestone Equities Farmingdale Corp.*, 199 AD2d 483, 483 [2d Dept 1993]). In this case, the record establishes that "the [$2,250,000] that [plaintiff] contends was a trust asset was actually a capital contribution of the owner. Therefore, [those] funds were not trust assets" (*id.*). Thus, inasmuch as the fifth cause of action alleges only that defendant possessed his own funds, rather than trust funds, and inasmuch as plaintiff did not allege any other facts from which the court could conclude that defendant possessed trust assets, plaintiff's "failure to submit the proof required by CPLR 3215 (f) should [have led the] court to deny [plaintiff's] application for a

default judgment" (*Manhattan Telecom. Corp.*, 21 NY3d at 203).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1294

CA 18-01758

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

IN THE MATTER OF THE APPLICATION OF HSBC
BANK USA, N.A. TRUSTEE,
PETITIONER-APPELLANT-RESPONDENT,

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE AND FINAL ACCOUNTS AS TRUSTEES OF TRUST BY GRACE M. KNOX, DATED DECEMBER 26, 1934, GRANTOR, FOR THE BENEFIT OF GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER), FOR THE PERIOD FROM AUGUST 15, 1971 TO JUNE 15, 2012.
(PROCEEDING NO. 1.)

ORDER

IN THE MATTER OF THE APPLICATION OF MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., AND HSBC BANK USA, N.A., CO-TRUSTEES, PETITIONERS-APPELLANTS-RESPONDENTS,

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT AS TRUSTEES OF TRUST BY MARJORIE KNOX CAMPBELL, DATED DECEMBER 29, 1934, GRANTOR, FOR THE BENEFIT OF HAZARD K. CAMPBELL, SR., MARJORIE K. CAMPBELL AND GRACIA M. CAMPBELL, FOR THE PERIODS FROM DECEMBER 29, 1934 TO NOVEMBER 5, 1972 AND NOVEMBER 5, 1972 TO SEPTEMBER 24, 2011.
(PROCEEDING NO. 2.)

IN THE MATTER OF THE APPLICATION OF MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., AND HSBC BANK USA, N.A., CO-TRUSTEES, PETITIONERS-APPELLANTS-RESPONDENTS,

FOR THE JUDICIAL SETTLEMENT OF THE FIRST INTERMEDIATE ACCOUNT AS TRUSTEES OF TRUST BY MARJORIE K.C. KLOPP, DATED OCTOBER 11, 1961, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER) FOR THE PERIOD FROM OCTOBER 11, 1961 TO MAY 9, 2012
(PROCEEDING NO. 3.)

GRACIA E. CAMPBELL, CLARISSA L. VAIDA AND
HEATHER B. BYRNE,
RESPONDENTS-RESPONDENTS-APPELLANTS.

(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 12, 2018. The order, inter alia, allocated attorneys' fees and costs among the various trusts.

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

1295

CA 19-01162

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

IN THE MATTER OF THE APPLICATION OF HSBC
BANK USA, N.A. TRUSTEE,
PETITIONER-APPELLANT-RESPONDENT,

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE AND FINAL ACCOUNTS AS TRUSTEES OF TRUST BY GRACE M. KNOX, DATED DECEMBER 26, 1934, GRANTOR, FOR THE BENEFIT OF GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER), FOR THE PERIOD FROM AUGUST 15, 1971 TO JUNE 15, 2012.
(PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

IN THE MATTER OF THE APPLICATION OF MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., AND HSBC BANK USA, N.A., CO-TRUSTEES, PETITIONERS-APPELLANTS-RESPONDENTS,

FOR THE JUDICIAL SETTLEMENT OF THE INTERMEDIATE ACCOUNT AS TRUSTEES OF TRUST BY MARJORIE KNOX CAMPBELL, DATED DECEMBER 29, 1934, GRANTOR, FOR THE BENEFIT OF HAZARD K. CAMPBELL, SR., MARJORIE K. CAMPBELL AND GRACIA M. CAMPBELL, FOR THE PERIODS FROM DECEMBER 29, 1934 TO NOVEMBER 5, 1972 AND NOVEMBER 5, 1972 TO SEPTEMBER 24, 2011.
(PROCEEDING NO. 2.)

IN THE MATTER OF THE APPLICATION OF MELISSA C. ENGLAND AND BENJAMIN K. CAMPBELL, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF HAZARD K. CAMPBELL, SR., AND HSBC BANK USA, N.A., CO-TRUSTEES, PETITIONERS-APPELLANTS-RESPONDENTS,

FOR THE JUDICIAL SETTLEMENT OF THE FIRST INTERMEDIATE ACCOUNT AS TRUSTEES OF TRUST BY MARJORIE K.C. KLOPP, DATED OCTOBER 11, 1961, GRANTOR, FOR THE BENEFIT OF THE ISSUE OF GRACIA M. CAMPBELL (FORMERLY KNOWN AS GRACIA C. FLICKINGER) FOR THE PERIOD FROM OCTOBER 11, 1961 TO MAY 9, 2012
(PROCEEDING NO. 3.)

GRACIA E. CAMPBELL, CLARISSA L. VAIDA AND
HEATHER B. BYRNE,
RESPONDENTS-RESPONDENTS-APPELLANTS.

(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR PETITIONERS-APPELLANTS-RESPONDENTS.

LAWRENCE J. KONCELIK, JR., EAST HAMPTON, FOR RESPONDENTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 4, 2019. The order, inter alia, allocated attorneys' fees and costs among the various trusts.

It is hereby ORDERED that said appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioners appeal and respondents cross-appeal from an order of Supreme Court that, inter alia, clarified a prior order awarding attorneys' fees to petitioners' counsel and allocated its award of attorneys' fees and costs among the three subject trusts.

Petitioners' appeal must be dismissed. Only an aggrieved party may appeal from an order (*see generally* CPLR 5511), and we conclude that it is petitioners' attorneys rather than petitioners themselves who are aggrieved by the court's award of attorneys' fees (*see Matter of Gottschen*, 256 AD2d 519, 519 [2d Dept 1998]; *Matter of Lenk*, 218 AD2d 802, 802 [2d Dept 1995]; *Matter of Sold*, 215 AD2d 566, 566 [2d Dept 1995]). There is no support in the record for petitioners' contention that they will be responsible to pay any portion of the attorneys' fees charged by their attorneys that is not awarded by the court.

With respect to respondents' cross appeal, we conclude that respondents have raised no contention warranting either the elimination of or a reduction in the award of attorneys' fees and costs. We reject respondents' contention that petitioners' attorneys purposefully interfered with settlement efforts in a manner that would warrant forfeiture of their fee (*cf. Dagny Mgt. Corp. v Oppenheim & Meltzer*, 199 AD2d 711, 711-714 [3d Dept 1993]). We further conclude that our decision in a prior appeal, *Matter of HSBC Bank USA, N.A. (Campbell)* (150 AD3d 1661, 1663 [4th Dept 2017]), did not preclude the court from addressing attorneys' fees incurred after May 2015. To the extent respondents contend that the court erred in allocating attorneys' fees and costs in excess of $20,000 and $10,000, respectively, in each trust, we conclude that this issue was previously resolved in petitioners' favor (*see HSBC Bank USA, N.A.*, 150 AD3d at 1662). Finally, contrary to respondents' contention, the award of attorneys' fees is not excessive (*see generally Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

28

KA 17-02215

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRELL ALLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered November 8, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree, obstructing governmental administration in the second degree, reckless endangerment in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), obstructing governmental administration in the second degree (§ 195.05), reckless endangerment in the second degree (§ 120.20), and resisting arrest (§ 205.30), defendant contends that Supreme Court erred in refusing to suppress evidence obtained following a traffic stop of a vehicle in which defendant was a passenger.

The evidence at the suppression hearing established that, on the night in question, defendant was seated in the passenger seat of his cousin’s vehicle, which was parked in the parking area of a public housing complex. At around that same time, two experienced Syracuse Police Department police officers driving an unmarked vehicle entered the parking area to conduct a routine property check. As the police officers drove through the parking area, they saw the cousin’s vehicle start to back out of its parking space. The manner in which the backing-out maneuver occurred led the officers to believe that the cousin’s vehicle had engaged in unsafe backing in violation of the Vehicle and Traffic Law, causing them to initiate a vehicle stop. After the driver exited the vehicle to speak with one of the police officers, defendant slid into the driver’s seat and started to drive

the vehicle away, even as the other police officer scrambled to enter the vehicle. After crashing into some nearby shrubs, defendant exited the vehicle and fled on foot, allegedly discarding a handgun as he ran.

The court denied that part of defendant's omnibus motion seeking to suppress certain evidence and statements, holding, as relevant here, that the initial vehicle stop was justified by the officers' observation of a violation of the Vehicle and Traffic Law and that defendant's escalation of the encounter by driving off and discarding the gun provided justification for the police officers to pursue and arrest him. Shortly thereafter, defendant agreed to plead guilty to the full indictment in exchange for a sentence promise of no more than eight years in prison.

Defendant contends that the court should have suppressed the evidence because the provision of the Vehicle and Traffic Law that prohibits unsafe backing did not apply to the housing complex's parking area, which is not a "parking lot" as defined by Vehicle and Traffic Law § 129-b. That specific contention is unpreserved for our review because defense counsel did not make that argument before the suppression court (*see People v Simpson*, 173 AD3d 1617, 1619 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]; *People v Poole*, 55 AD3d 1354, 1355 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]). Defendant further contends, however, that defense counsel's failure to raise that argument at the suppression hearing deprived him of effective assistance of counsel. We agree.

The prohibition in Vehicle and Traffic Law § 1211 (a) against unsafe backing applies to "public highways, private roads open to public motor vehicle traffic and any other *parking lot*, except where a different place is specifically referred to in a given section" of the Vehicle and Traffic Law (§ 1100 [a] [emphasis added]). Vehicle and Traffic Law § 129-b defines a "parking lot" as "[a]ny area or areas of private property near or contiguous to and provided in connection with premises having one or more *stores or business establishments*, and *used by the public* as a means of access to and egress from such stores and business establishments and for the parking of motor vehicles of customers and patrons of such stores and business establishments" (emphasis added).

It is undisputed that the parking area in question belonged to a public housing complex consisting of several buildings divided into apartment units. On the record before us, there is no evidence that there were any stores or business establishments located in the housing complex or that the parking area was open to people who were not tenants of the complex. Thus, defendant had a valid argument that the initial vehicle stop was unlawful because the parking area in which the police purportedly observed unsafe backing was not a "parking lot" within the meaning of Vehicle and Traffic Law § 129-b (*see People v Williams*, 66 NY2d 659, 660 [1985]; *Surace v Kersten*, 278 AD2d 226, 227 [2d Dept 2000]; *see also Hernandez v Hagans*, 21 AD3d 335, 336-337 [1st Dept 2005]; *Stevens v Calspan-Corp.*, 292 AD2d 809,

810 [4th Dept 2002]; *Berk v Hill*, 126 AD2d 920, 921 [3d Dept 1987], *lv denied* 70 NY2d 602 [1987]).

Defendant also had a valid argument that the initial vehicle stop could not be justified due to the police officers' objectively reasonable, yet mistaken, belief that the parking area was a "parking lot" as defined by Vehicle and Traffic Law § 129-b (*see generally People v Guthrie*, 25 NY3d 130, 134 [2015], *rearg denied* 25 NY3d 1191 [2015]). The reasonable mistake of law doctrine applies only where "the statute at issue . . . [is] susceptible of multiple interpretations and [has] not been definitively construed by . . . appellate courts" (*Guthrie*, 25 NY3d at 135; *cf. People v Turner*, 176 AD3d 1623, 1624 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]). We conclude that Vehicle and Traffic Law § 129-b provides a clear definition of what constitutes a "parking lot" and is a provision that appellate courts have definitively construed as not encompassing parking areas like the one here (*see generally Williams*, 66 NY2d at 660; *Surace*, 278 AD2d at 227). Thus, it would not be an objectively reasonable mistake of law for the police officers to conclude that the initial vehicle stop was justified by an observed traffic violation because the unsafe backing did not occur in a "parking lot" within the meaning of the Vehicle and Traffic Law.

It is well settled that even a single error or failure to make an argument may amount to ineffective assistance of counsel, despite otherwise competent representation, where that error is sufficiently egregious or prejudicial (*see generally People v McGee*, 20 NY3d 513, 518 [2013]; *People v Turner*, 5 NY3d 476, 480 [2005]; *People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016]). "To rise to that level, the [failure to make a particular argument] must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it" and it must be evident that the failure to advance that argument could not be grounded in legitimate strategy (*McGee*, 20 NY3d at 518; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Here, we conclude that the aforementioned arguments in favor of suppression were so clear-cut and dispositive that defense counsel's failure to make them rendered the representation ineffective.

Although contentions that defense counsel was ineffective survive only to the extent that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that . . . defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]; *see People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]), the court's consideration of the aforementioned arguments here would likely have resulted in suppression of the handgun and, concomitantly, dismissal of some or all of the indictment (*see Carter*, 142 AD3d at 1343). We therefore conclude that defendant demonstrated that "there is a reasonable probability that, but for counsel's error[], [defendant] would not have pleaded guilty" (*Yates*, 173 AD3d at 1850 [internal quotation marks omitted]).

We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the suppression application. On remittal, the court is directed to allow additional legal argument by both parties and, if necessary, to reopen the suppression hearing (*see People v Corchado*, 175 AD3d 705, 705, 708 [2d Dept 2019]; *People v Aguasvivas*, 158 AD3d 540, 540 [1st Dept 2018]; *Carter*, 142 AD3d at 1343; *see generally People v Clermont*, 22 NY3d 931, 934 [2013]).

In light of our determination, we do not address defendant's remaining contention.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

31

CAF 19-00792

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

IN THE MATTER OF OLIVIA W., RANDY F., AND REILEY F.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

COURTNEY W., RESPONDENT-RESPONDENT.

WILLIAM L. KOSLOSKY, ESQ., ATTORNEY FOR THE CHILDREN, APPELLANT.

WILLIAM L. KOSLOSKY, UTICA, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 27, 2019 in a proceeding pursuant to Family Court Act article 10. The order dismissed the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition is granted insofar as it relates to respondent Courtney W., respondent Courtney W. is adjudicated to have neglected the subject children and the matter is remitted to Family Court, Oneida County, for a dispositional hearing.

Memorandum: In this proceeding pursuant to Family Court Act article 10, the Attorney for the Children (AFC) appeals from an order following a fact-finding hearing that dismissed the amended petition alleging, inter alia, that respondent mother neglected the subject children. Inasmuch as we agree with the AFC that Family Court's determination that the mother did not neglect the children lacks a sound and substantial basis in the record, we reverse the order, grant the amended petition insofar as it relates to the mother, and remit the matter to Family Court for a dispositional hearing (*see generally Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1277 [4th Dept 2014]).

A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a

minimum degree of care . . . in supplying the child with adequate . . . medical . . . care, though financially able to do so" (Family Ct Act § 1012 [f] [i] [A]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011] [internal quotation marks omitted]).

The AFC contends that petitioner Oneida County Department of Social Services (DSS) established by a preponderance of the evidence that the mother medically neglected her oldest daughter. We agree. "A parent's 'failure to provide medical care as required by [Family Court Act § 1012 (f) (i) (A)] may be interpreted to include psychiatric medical care where it is necessary to prevent the impairment of the child's emotional condition' " (*Matter of Dustin P.*, 57 AD3d 1480, 1481 [4th Dept 2008]). Here, upon our review of the record, we conclude that DSS established a prima facie case of medical neglect by presenting evidence that the mother failed to follow mental health treatment recommendations upon the daughter's discharges from psychiatric hospitalizations for suicidal and homicidal ideation and that the mother failed to rebut DSS's prima facie case (*see Matter of Dayshaun W. [Jasmine G.]*, 133 AD3d 1347, 1348 [4th Dept 2015]; *Dustin P.*, 57 AD3d at 1481).

We further agree with the AFC that the evidence of neglect with respect to the daughter " 'demonstrates such an impaired level of . . . judgment as to create a substantial risk of harm for any child in [the mother's] care,' " thus warranting a finding of derivative neglect with respect to the younger children (*Dayshaun W.*, 133 AD3d at 1348).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01350

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

WILMINGTON SAVINGS FUND SOCIETY FSB, DOING BUSINESS AS CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS A TRUSTEE FOR HILLDALE TRUST,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DENNIS G. DELIBERTO, ALSO KNOWN AS DENNIS DELIBERTO, MICHAEL G. DELIBERTO, KEITH DELIBERTO,
DEFENDANTS-RESPONDENTS,
AGNES J. DELIBERTO, ALSO KNOWN AS AGNES DELIBERTO, ET AL., DEFENDANTS.

FRIEDMAN VARTOLO LLP, NEW YORK CITY (ZACHARY GOLD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF T. PADRIC MOORE, PLLC, CLIFTON PARK (T. PADRIC MOORE OF COUNSEL), AND BOSMAN & ASSOCIATES PLLC, ALBANY, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 24, 2019. The order, among other things, granted the cross motion of defendant Dennis G. Deliberto, also known as Dennis Deliberto, defendant Keith Deliberto, and the estate of Michael G. Deliberto for summary judgment dismissing the complaint against them.

It is hereby ORDERED that said appeal insofar as it concerns defendant Agnes J. Deliberto, also known as Agnes Deliberto, defendant Michael G. Deliberto, and the estate of Michael G. Deliberto is unanimously dismissed, the complaint against defendant Agnes J. Deliberto, also known as Agnes Deliberto, and defendant Michael G. Deliberto is dismissed, and the parts of the order concerning those defendants and the estate of Michael G. Deliberto are vacated, and the order is otherwise modified on the law by denying the cross motion in part and reinstating the complaint against defendants Dennis G. Deliberto, also known as Dennis Deliberto, and Keith Deliberto to the extent that it seeks recovery of amounts due within six years prior to the commencement of the action, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: On August 10, 2007, defendant Michael G. Deliberto (decedent) executed a note in favor of a lender for a $30,000 line of credit, to be paid in monthly installments with the final payment on

August 10, 2032. Defendant Dennis G. Deliberto, also known as Dennis Deliberto, and defendant Keith Deliberto (collectively, defendants) and decedent secured payment of the note with a mortgage encumbering certain real property in which each had a one-third interest as a tenant-in-common. Defendant Agnes J. Deliberto, also known as Agnes Deliberto (Agnes), had a life estate in the property. Agnes died on June 8, 2008 and decedent died on October 14, 2009.

In 2016, the mortgage was assigned to plaintiff. Plaintiff sent a default letter to decedent on May 26, 2017, stating that $3,244.78 was owed to cure the default. When decedent did not respond, plaintiff commenced this foreclosure action on September 15, 2017, accelerating the entire debt. Plaintiff thereafter filed a motion to amend the complaint to add, among others, the unknown heirs-at-law of decedent's estate as defendants in the action, and the appointment of a guardian ad litem on their behalf. Defendants and the estate of decedent cross-moved for summary judgment dismissing the complaint against them on the grounds of the statute of limitations, laches, and estoppel. Supreme Court granted the cross motion and consequently denied plaintiff's motion, and plaintiff appeals.

At the outset we note that, "[s]ince [a] party may not commence a legal action or proceeding against a dead person . . . , the action [against decedent and Agnes] was a nullity from its inception" (*Schaffer v Jaskowiak*, 140 AD3d 1748, 1748-1749 [4th Dept 2016], *lv denied* 28 NY3d 906 [2016] [internal quotation marks omitted]). Thus, we must dismiss the appeal insofar as it concerns decedent and Agnes because "the order appealed from, insofar as it purports to affect [decedent and Agnes], [is] a nullity and this Court has no jurisdiction to hear and determine that purported appeal" (*Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]; *see Schaffer*, 140 AD3d at 1749). Furthermore, inasmuch as the estate of decedent was not substituted as a defendant, the court " 'lacked jurisdiction to rule on the [cross] motion' " insofar as the cross motion purports to affect the estate of decedent (*Matter of Leopold*, 32 AD3d 1227, 1228 [4th Dept 2006]; *see generally Wood v Dolloff*, 52 AD3d 1190, 1190 [4th Dept 2008]), and this Court consequently lacks jurisdiction to review the order on appeal insofar as it concerns the estate of decedent (*see Wood*, 52 AD3d at 1190).

With respect to the merits, we agree with plaintiff that the court erred in analyzing the cross motion as if plaintiff had moved for summary judgment based on decedent's default on the note, thereby placing the prima facie burden on plaintiff rather than on the proponents of the cross motion for summary judgment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and that the court erred in sua sponte raising issues such as the validity of the mortgage and whether the mortgage secured the note (*see Daimler Chrysler Ins. Co. v Keller*, 164 AD3d 1209, 1210 [2d Dept 2018]; *see also Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691, 1693 [4th Dept 2009]).

We further agree with plaintiff that defendants failed to meet

their prima facie burden on their cross motion of establishing that the entire foreclosure action is barred by the statute of limitations. An action to foreclose a mortgage is subject to a six-year statute of limitations (*see* CPLR 213 [4]). Here, the note provided that decedent agreed to repay the loan in monthly installments from September 2007 to August 2032. "[W]ith respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the [s]tatute of [l]imitations [begins] to run, on the date each installment [becomes] due" (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753, 754 [2d Dept 2011] [internal quotation marks omitted]; *see United States of Am. v Quaintance*, 244 AD2d 915, 915-916 [4th Dept 1997], *lv dismissed* 91 NY2d 957 [1998]). Plaintiff commenced this foreclosure action on September 15, 2017. Therefore, recovery for the installments due within the six years prior to that date, i.e., September 15, 2011, is not barred by the statute of limitations. To the extent that plaintiff seeks recovery for installments due before that date, recovery is barred by the statute of limitations (*see EMC Mtge. Corp. v Suarez*, 49 AD3d 592, 593 [2d Dept 2008]; *Esther M. Mertz Trust v Fox Meadow Partners*, 288 AD2d 338, 340 [2d Dept 2001], *lv dismissed* 97 NY2d 714 [2002], *lv dismissed* 99 NY2d 532 [2002]).

We also conclude that defendants did not establish that the debt was accelerated at any time prior to the commencement of this foreclosure action. When plaintiff filed its complaint on September 15, 2017, it elected at that time to accelerate the entire debt (*see generally Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604, 605 [2d Dept 2001]). Consequently, at that time, the entire debt became due—less any amounts for installments that became due outside of the six-year limitations period, i.e., before September 15, 2011 (*see EMC Mtge. Corp.* 49 AD3d at 593; *Esther M. Mertz Trust*, 288 AD2d at 340). We therefore modify the order by denying the cross motion in part and reinstating the complaint against defendants to the extent that it seeks recovery of amounts due within six years prior to the commencement of the action.

Contrary to the contention of defendants, because any amount that became due after September 15, 2011 is within the limitations period, laches is not an available defense with respect to those amounts (*see Janian v Barnes*, 294 AD2d 787, 789 [3d Dept 2002]; *New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses*, 191 AD2d 151, 152 [1st Dept 1993]; *Schmidt's Wholesale v Miller & Lehman Constr.*, 173 AD2d 1004, 1005 [3d Dept 1991]).

We reject defendants' contention that the debt accelerated automatically upon decedent's death. The mortgage provides that there is a default upon decedent's death, but it does not provide that the death of decedent would automatically accelerate the debt. Rather, the mortgage provides that the lender may accelerate the debt upon a default and, here, defendants did not establish that plaintiff chose to accelerate the debt at any time before the complaint was filed (*see Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980, 983-984 [2d Dept 2012]; *Esther M. Mertz Trust*, 288 AD2d at 340). We likewise reject

defendants' contention that they are entitled to summary judgment dismissing the complaint based on equitable estoppel. A valid defense of equitable estoppel must be based on "evidence that [defendants] 'prejudicially changed their position in reliance upon' an assurance by plaintiff" (*PHH Mtge. Corp. v Davis*, 111 AD3d 1110, 1112 [3d Dept 2013], *lv dismissed* 23 NY3d 940 [2014]). Defendants failed to submit in support of their cross motion any evidence that plaintiff made such an assurance, or that defendants relied upon any such assurance.

Defendants contend that "[p]laintiff offers no documentary evidence of loan statements and the record is void of any payments tendered by the obligor." We note, however, that defendants cannot meet their burden on their cross motion by pointing out gaps in plaintiff's proof (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911 [2d Dept 2013], *lv dismissed* 21 NY3d 1068 [2013]; *see generally Nick's Garage, Inc. v Geico Indem. Co.*, 165 AD3d 1621, 1622 [4th Dept 2018]).

In light of our determination, we remit the matter to Supreme Court to determine the merits of plaintiff's motion.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01300

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

IN THE MATTER OF KIM A. KIRSCH AND MICHAEL A. STARVAGGI, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF WILLIAMSVILLE CENTRAL SCHOOL DISTRICT AND WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER P. MAUGANS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 13, 2018. The order, among other things, granted petitioners' motion to deny respondents' imposition of costs related to petitioners' request pursuant to the Freedom of Information Law.

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

Memorandum: Respondents appeal from an order that, among other things, granted petitioners' motion seeking to deny the imposition of costs related to petitioners' request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) and denied without prejudice petitioners' motion seeking attorney's fees and other litigation costs. We affirm.

Contrary to respondents' contention, Supreme Court properly determined that respondents failed to demonstrate sufficient justification for the costs sought to be imposed under Public Officers Law § 87 (1). "Where, as here, an agency conditions disclosure upon the prepayment of costs or refuses to disclose records except upon prepayment of costs, it has the burden of 'articulating a particularized and specific justification' for the imposition of those fees" (*Matter of Weslowski v Vanderhoef*, 98 AD3d 1123, 1129 [2d Dept 2012], *lv dismissed* 20 NY3d 995 [2013], quoting *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *see Matter of Ripp v Town of Oyster Bay*, 140 AD3d 775, 775-776 [2d Dept 2016]). "Specifically, the agency must demonstrate that the fees to be imposed are authorized by the cost provisions of FOIL" (*Weslowski*, 98 AD3d at 1129), and respondents failed to meet that burden here (*see generally* § 87 [1] [c] [iii], [iv]).

Respondents' further contention that the court should have denied with prejudice petitioners' motion seeking attorney's fees and other litigation costs is without merit. Even without deciding whether the former or amended provisions of Public Officers Law § 89 (4) (c) are applicable here, we conclude that the court properly determined that it remained an open question at this stage in the litigation whether petitioners would fulfill the statutory requirement of "substantially prevail[ing]" in the proceeding. Respondents' related contention that the law of the case doctrine precludes the court from granting attorney's fees and other litigation costs to petitioners also lacks merit. "[T]he doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision," and that is not the case here (*Pettit v County of Lewis*, 145 AD3d 1650, 1651 [4th Dept 2016] [internal quotation marks omitted]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 17-00935

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEMENT G. HILL, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered April 11, 2016. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]). We affirm.

We reject defendant's contention that a new trial is warranted because the People failed to disclose *Brady* material in a timely manner. "Untimely or delayed disclosure will not prejudice a defendant or deprive him or her of a fair trial where[, as here,] the defense is provided with a meaningful opportunity to use the allegedly exculpatory [or impeaching] material to cross-examine the People's witnesses or as evidence during his [or her] case" (*People v Thomas*, 158 AD3d 1135, 1135 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018] [internal quotation marks omitted]; *see People v Cortijo*, 70 NY2d 868, 870 [1987]). Contrary to defendant's contention, there is no "reasonable possibility that the outcome of the trial would have differed had the [information] been [disclosed sooner]" (*People v Scott*, 88 NY2d 888, 891 [1996]; *see Thomas*, 158 AD3d at 1135-1136).

We also reject defendant's contention that Supreme Court erred in precluding him from presenting evidence with respect to the victim's sexual history pursuant to the Rape Shield Law (*see* CPL 60.42). We conclude that the court did not abuse its discretion in refusing to apply the exception set forth in CPL 60.42 (5) (*see People v Williams*,

61 AD3d 1383, 1383 [4th Dept 2009], *lv denied* 13 NY3d 751 [2009]).

Defendant further contends that reversal is required because pretrial publicity deprived him of a fair trial. We conclude that defendant's contention lacks merit inasmuch as the record "does not support the conclusion that pretrial publicity rendered it impossible to select impartial jurors" (*People v Keefer*, 197 AD2d 915, 915 [4th Dept 1993], *lv denied* 82 NY2d 897 [1993]; *see People v Pepper*, 59 NY2d 353, 358 [1983]; *People v Taylor*, 151 AD2d 1029, 1029 [4th Dept 1989], *lv denied* 74 NY2d 900 [1989]).

Defendant failed to preserve for our review all but one of his present claims with respect to alleged instances of prosecutorial misconduct on summation (*see* CPL 470.05 [2]) and, in any event, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Resto*, 147 AD3d 1331, 1333 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]).

Finally, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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CAF 18-01194

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

IN THE MATTER OF STACY COMMON, NOW KNOWN AS
STACY COSTELLO, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN PIRRO, RESPONDENT-APPELLANT.

IN THE MATTER OF JOHN PIRRO,
PETITIONER-APPELLANT,

V

STACY COMMON, NOW KNOWN AS STACY COSTELLO,
RESPONDENT-RESPONDENT.

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

RANDY S. MARGULIS, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

KEVIN C. CONDON, EDEN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, A.J.), entered May 17, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition of John Pirro seeking primary physical residence of the parties' three children.

It is hereby ORDERED that said appeal from the order insofar as it concerns the parties' oldest child is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner father appeals from an order that, inter alia, denied his petition seeking to modify a prior custody agreement by granting him primary physical residence of the parties' three children and otherwise continued joint custody and primary physical residence with petitioner-respondent mother. We note at the outset that, while this appeal was pending, Family Court entered an order upon consent of the parties that modified the custody and visitation arrangement by, inter alia, granting the father primary physical residence of the parties' oldest child. That order renders the appeal moot insofar as it concerns the oldest child (*see Matter of*

Smith v Cashaw, 129 AD3d 1551, 1551 [4th Dept 2015]).

The father contends that the court erred in denying his petition with respect to the parties' two other children because the record demonstrates that the mother is unfit to act as a custodial parent. " 'Even assuming, arguendo, that the father met his threshold burden of demonstrating a change in circumstances sufficient to justify a best interests analysis' " (*Matter of Latray v Hewitt*, 181 AD3d 1175, 1176 [4th Dept 2020]), we reject the father's contention. Although "[a] concerted effort by one parent to interfere with the other parent's contact with the child[ren] is so inimical to the best interests of the child[ren] . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127 [4th Dept 2004] [internal quotation marks omitted]), we conclude that the record in this case does not establish that the mother engaged in such an effort (*cf. Matter of Ballard v Piston*, 178 AD3d 1397, 1398 [4th Dept 2019]; *Amanda B.*, 13 AD3d at 1127). Contrary to the father's further contention, the court properly considered the appropriate factors in making its custody determination (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-173 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). The court's determination with respect to the children's best interests "is entitled to great deference and will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]; *see Fox*, 177 AD2d at 211-212).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-00925

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

IN THE MATTER OF GLENN H. WALLACE,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF GRAND ISLAND, TOWN BOARD OF TOWN OF GRAND ISLAND AND ZONING BOARD OF APPEALS OF TOWN OF GRAND ISLAND,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

HOGANWILLIG, PLLC, AMHERST (SCOTT MICHAEL DUQUIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 5, 2019 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment, among other things, granted respondents-defendants' motion for summary judgment dismissing the petition-complaint and for summary judgment on their counterclaim for injunctive relief.

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

Memorandum: In 2012, petitioner-plaintiff (plaintiff) purchased a single-family residence (subject premises) located in respondent-defendant Town of Grand Island (Town) for the purpose of renting it out on a short-term basis, i.e., for periods of less than 30 days. Plaintiff never resided at the subject premises. In 2015, the Town enacted Local Law 9 of 2015 (Local Law 9), which amended the Town Zoning Code to prohibit short-term rentals in certain zoning districts, except where the owner also resided on the premises. The Town enacted the law in response to significant adverse impacts to the community that it found were caused by permitting short-term rental of residential properties to occur. Local Law 9 contained a one-year amortization period—which could be extended up to three times upon application—during which preexisting short-term rental properties could cease operation.

Following the enactment of Local Law 9, plaintiff unsuccessfully applied for an extension of the amortization period and for a use

variance permitting him to continue operating the subject premises as a short-term rental despite Local Law 9. He thereafter commenced this hybrid CPLR article 78 proceeding and declaratory judgment action. As relevant on appeal, plaintiff sought in his second cause of action a declaration that Local Law 9 is unconstitutional because it effected a regulatory taking of the subject premises. Respondents-defendants (defendants) moved for summary judgment dismissing the petition-complaint and for summary judgment on their counterclaim, which sought to enjoin plaintiff from using the subject premises as a short-term rental property in violation of Local Law 9. Plaintiff appeals from an order and judgment that, inter alia, granted defendants' motion. On appeal, plaintiff contends that Supreme Court erred in granting the motion with respect to the second cause of action. We affirm.

Initially, plaintiff contends that the court applied the wrong legal standard in determining that Local Law 9 did not effect a regulatory taking of the subject premises because it did not consider, in addition to the factors set forth in *Penn Cent. Transp. Co. v New York City* (438 US 104, 124 [1978]), whether Local Law 9 "substantially advance[s a] legitimate State interest[]" (*Seawall Assoc. v City of New York*, 74 NY2d 92, 107 [1989], *cert denied* 493 US 976 [1989]; *see generally Agins v City of Tiburon*, 447 US 255, 260 [1980], *abrogated by Lingle v Chevron U.S.A. Inc.*, 544 US 528 [2005]; *Matter of Smith v Town of Mendon*, 4 NY3d 1, 9 [2004]). We reject that contention because, in *Lingle v Chevron U.S.A. Inc.*, the United States Supreme Court held "that the 'substantially advances' formula . . . *is not a valid method* of identifying regulatory takings for which the Fifth Amendment requires just compensation" (544 US at 545 [emphasis added]; *see Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 357 [2005]).

Where, as here, "the contested regulation falls short of eliminating all economically viable uses of the encumbered property" (*Smith*, 4 NY3d at 9), "a court must consider the factors identified in *Penn Cent[.] Transp. Co.*" in determining whether there has been a regulatory taking (*Consumers Union of U.S., Inc.*, 5 NY3d at 357; *see Lingle*, 544 US at 539). Those factors "includ[e] the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action" (*Smith*, 4 NY3d at 9 [internal quotation marks omitted]; *see generally Palazzolo v Rhode Island*, 533 US 606, 617 [2001]; *Penn Cent. Transp. Co.*, 438 US at 124).

In general, a property owner who challenges a land use regulation bears a heavy burden of "demonstrating that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adaptable to other suitable private use" (*Spears v Berle*, 48 NY2d 254, 263 [1979]; *see Putnam County Natl. Bank v City of New York*, 37 AD3d 575, 577 [2d Dept 2007], *lv denied* 8 NY3d 815 [2007]). To meet that burden, a property owner must "produce 'dollars and cents' evidence as to the economic return that could be realized under each permitted use" of the property (*Spears*, 48 NY2d at 263; *see de St. Aubin v Flacke*, 68 NY2d 66, 77 [1986]). Once the property owner

has met his or her burden, the burden shifts to the municipality to rebut that evidence or "otherwise justify application of the" regulation (*Spears*, 48 NY2d at 263).

Contrary to plaintiff's contention, defendants established their entitlement to summary judgment dismissing the regulatory taking cause of action and, as noted, they were not required to show that Local Law 9 "substantially advance[d a] legitimate State interest[]" (*Seawall Assoc.*, 74 NY2d at 107; *see Lingle*, 544 US at 545). In opposition, plaintiff failed to raise a triable issue of fact. Specifically, plaintiff did not submit evidence establishing that, due to the prohibition under Local Law 9 on short-term rentals, the subject premises was not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use. Instead, plaintiff's submissions showed a "mere diminution in the value of the property, . . . [which] is insufficient to demonstrate a [regulatory] taking" (*Concrete Pipe & Products of Cal., Inc. v Construction Laborers Pension Trust for Southern Cal.*, 508 US 602, 645 [1993]; *see Penn Cent. Transp. Co.*, 438 US at 124). Indeed, plaintiff's submissions demonstrated that he had some economically viable uses for the subject premises, i.e., selling it at a profit or renting it on a long-term basis. It is immaterial that plaintiff cannot use the property for the *precise* manner in which he intended because a property owner "is not constitutionally entitled to the most beneficial use of his [or her] property" (*Lubelle v Rochester Preserv. Bd.*, 158 AD2d 975, 976 [4th Dept 1990], *lv denied* 75 NY2d 710 [1990]; *see Penn Cent. Transp. Co.*, 438 US at 130; *Goldblatt v Town of Hempstead, N.Y.*, 369 US 590, 592 [1962]). Inasmuch as plaintiff did not submit "dollars and cents" proof that there was no permissible use of the property that would enable him to produce a reasonable return on his investment, he did not raise an issue of fact with respect to the second cause of action regarding whether Local Law 9 effects a regulatory taking (*see generally de St. Aubin*, 68 NY2d at 77; *Spears*, 48 NY2d at 263). Although plaintiff sought declaratory relief in the second cause of action, we note that, "even if [Local Law 9] effected a regulatory taking, the appropriate relief would be a hearing to determine 'just compensation,' not a declaration that the law is invalid" (*Jones v Town of Carroll*, 122 AD3d 1234, 1239 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015]). Based on the above, we therefore conclude that the court properly granted that part of defendants' summary judgment motion seeking dismissal of the second cause of action.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 19-00216

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY COON, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara Sheldon, J.), entered February 7, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting an upward departure from his recalculated presumptive classification as a level two risk to a level three risk. We reject that contention.

It is well settled that when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines," a court "must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure" from a sex offender's presumptive risk level (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Sincerbeaux*, 27 NY3d 683, 689-690 [2016]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]).

Here, the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the risk assessment guidelines, including the quantity and nature of the child pornography found in defendant's possession that underlies his current offense, i.e., images and videos depicting sadomasochistic acts and bestiality (*see People v Tatner*, 149 AD3d 1595, 1595-1596

[4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016]), and his prior history of sexual misconduct with at least one child (*see People v Zimmerman*, 101 AD3d 1677, 1678 [4th Dept 2012]). 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 (Correction Law § 168-n [3]; *see People v Mingo*, 12 NY3d 563, 572-573 [2009]; *People v Tidd*, 128 AD3d 1537, 1537-1538 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]). Finally, defendant failed to identify a mitigating factor not adequately taken into account by the risk assessment guidelines and, in any event, the purported mitigating factor is outweighed by the aggravating factors (*see People v Mangan*, 174 AD3d 1337, 1339 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *People v Sczerbaniewicz*, 126 AD3d 1348, 1349-1350 [4th Dept 2015]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

216

CA 19-01225

PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THERESA CANGEMI, INDIVIDUALLY AND AS TRUSTEE
OF THE THERESA CANGEMI REVOCABLE LIVING TRUST,
PLAINTIFF-APPELLANT,

V ORDER

TIMOTHY E. KISSANE, DEFENDANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (JAMES J. GASCON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS & PANELS, SYRACUSE (MICHAEL W. HARRIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 10, 2019. The order denied the motion of plaintiff for a preliminary injunction and temporary restraining order against defendant.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 17 and 20, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

250

CA 19-00184

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

GARY D. WYSOCKI AND MICHELLE WYSOCKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

STEVEN J. GODINHO AND TIA LAPP,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS, LLC, BUFFALO (MICHAEL T. SZCZYGIEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered January 16, 2019. The order, insofar as appealed from, conditionally struck the answer of defendant Steven J. Godinho.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 9, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

251

CA 19-00673

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

GARY D. WYSOCKI AND MICHELLE WYSOCKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

STEVEN J. GODINHO AND TIA LAPP,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS, LLC, BUFFALO (MICHAEL T. SZCZYGIEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered April 8, 2019. The order, among other things, granted the motion of plaintiff for a default judgment against defendant Steven J. Godinho and for partial summary judgment against defendant Tia Lapp.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 9, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 18-01349

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENDELL FUQUA, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW, FOR DEFENDANT-APPELLANT.

WENDELL FUQUA, DEFENDANT-APPELLANT PRO SE.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 31, 2018. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant contends in his main brief that meaningful appellate review is precluded inasmuch as no audibility hearing was conducted with respect to audio and video recordings that were received in evidence at trial, the jury was not provided with transcripts of those recordings that may be reviewed on appeal, and the court reporter did not transcribe those recordings when they were played for the jury. That contention is unpreserved for our review (*see People v Morris*, 32 AD3d 561, 561-562 [3d Dept 2006], *lv denied* 7 NY3d 869 [2006]; *People v Hickey*, 284 AD2d 929, 930 [4th Dept 2001], *lv denied* 97 NY2d 656 [2001]; *see also People v Votra*, 173 AD3d 1643, 1644 [4th Dept 2019]). Here, defendant did not object to the audibility of the recordings or request an audibility hearing, nor did he request that the jury be provided with transcripts of the recordings or that the stenographer transcribe them when they were played at trial. We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We conclude that defendant's claim of actual innocence in his pro

se supplemental brief is not properly before us on defendant's direct appeal. "A claim of actual innocence must be based upon reliable evidence which was not presented at the [time of trial] . . . , and thus must be raised by a motion pursuant to CPL article 440" (*People v Alsaifullah*, 162 AD3d 1483, 1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018] [internal quotation marks omitted]; *see People v Hamilton*, 115 AD3d 12, 23 [2d Dept 2014]).

Defendant also contends in his pro se supplemental brief that his arrest was not supported by probable cause and that County Court therefore erred in refusing to suppress the physical evidence seized incident to his arrest. We reject that contention. " 'Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief tha[t] an offense has been committed by the person arrested' " (*People v Scott*, 174 AD3d 1049, 1050 [3d Dept 2019]). Here, we conclude that probable cause was established by the independent observations of the police officer working with the confidential informant, which that officer relayed to the arresting officers (*see People v Shulman*, 6 NY3d 1, 25-26 [2005], *cert denied* 547 US 1043 [2006]; *People v Farrow*, 98 NY2d 629, 631 [2002]; *People v Folk*, 44 AD3d 1095, 1096-1097 [3d Dept 2007], *lv denied* 9 NY3d 1006 [2007]).

We reject defendant's further contention in his pro se supplemental brief that his conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction with respect to each count (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant also challenges the weight of the evidence in his pro se supplemental brief. 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 Bleakley*, 69 NY2d at 495).

Defendant further contends in his pro se supplemental brief that he was denied effective assistance of counsel based upon several acts or omissions on the part of defense counsel. Defendant's allegation that defense counsel failed to object to prosecutorial misconduct is without merit, inasmuch as the prosecutor did not engage in prosecutorial misconduct (*see People v Graham*, 174 AD3d 1486, 1489 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]). To the extent that we are able to review defendant's remaining allegations of ineffective assistance on the record before us, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). To the extent that defendant's contention is based upon matters outside the record on appeal, his contention must be raised by way of a motion pursuant to CPL 440.10 (*see People v Wilcher*, 158 AD3d 1267, 1268-1269 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]).

We have reviewed the remaining contentions raised in defendant's

pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

290

CA 19-01966

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

IRMA STRAUS REALTY CORP., AND FLAMBEAU REALTY, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, DEFENDANT-APPELLANT.

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

BARCLAY DAMON, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered April 2, 2019. The order denied the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the complaint is dismissed insofar as it seeks damages, and judgment is granted in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant is not obligated to pay the attorneys' fees and costs associated with an action brought by plaintiffs to quiet title.

Memorandum: Plaintiffs commenced this breach of contract and declaratory judgment action to recover under a title insurance policy (policy) that defendant issued to plaintiffs. Plaintiffs alleged that, after purchasing their property, they determined that an adjacent property owner (property owner) was using a portion of plaintiffs' property that used to be a common stairwell for the two adjoining buildings (disputed property). Plaintiffs gave the property owner notice that it was using plaintiffs' property, and the property owner responded by asserting that it owned the disputed property. After defendant denied plaintiffs' request to take action against the property owner, plaintiffs commenced an action against the property owner to quiet title. Plaintiffs then commenced this action against defendant alleging a single cause of action, for breach of contract, and seeking a monetary judgment for attorneys' fees and costs incurred to date in the action against the property owner and a declaration that defendant was obligated to pay such attorneys' fees and costs necessary to prosecute that action in the future. Defendant appeals

from an order effectively denying its motion pursuant to, inter alia, CPLR 3211 (a) (1) to dismiss the complaint, and we reverse.

Initially, we note that, inasmuch as the documentary evidence establishes that no questions of fact exist with respect to this controversy, we treat the motion to dismiss the complaint as one to dismiss the complaint insofar as it sought damages for attorneys' fees and costs already incurred and for a declaration in defendant's favor regarding future attorneys' fees and costs (*see generally Kaplan v State of New York*, 147 AD3d 1315, 1316 [4th Dept 2017]; *11 King Ctr. Corp. v City of Middletown*, 115 AD3d 785, 787 [2d Dept 2014], *lv denied* 24 NY3d 904 [2014]).

We agree with defendant that Supreme Court erred in denying its motion. A dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Plaintiffs alleged that defendant breached section 5 (b) of the policy, which provides, in relevant part, that defendant "shall have the right . . . to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured." Defendant's "right" to prosecute an action is not equivalent to an "obligation" (*see Eliopoulos v Nation's Tit. Ins. of N.Y., Inc.*, 912 F Supp 28, 31 [ND NY 1996]). Inasmuch as the policy submitted by defendant on the motion did not require defendant to prosecute the action against the property owner, defendant is entitled to dismissal of the complaint insofar as it sought attorneys' fees and costs that plaintiffs had already incurred for the prosecution of that action (*see Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982, 984 [2d Dept 2012]; *Cohn v Commonwealth Land Tit. Ins. Co.*, 254 AD2d 241, 241-242 [2d Dept 1998]). We further conclude that defendant is entitled to a declaration that it is not obligated to pay for the attorneys' fees and costs necessary to prosecute that action in the future (*see Cohn*, 254 AD2d at 241; *see generally Certified Envtl. Servs., Inc. v Endurance Am. Ins. Co.*, 158 AD3d 1209, 1211 [4th Dept 2018]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

297

CA 19-00249

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

MARILYN Y. HUBBARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEMETRIUS D. ROBINSON, COLLEEN K. MALONEY, TOWN OF CHEEKTOWAGA, CHEEKTOWAGA POLICE DEPARTMENT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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

MCCABE, COLLINS, MCGEOUGH, FOWLER, LEVINE & NOGAN, LLP, HAMBURG (TAMARA M. HARBOLD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DEMETRIUS D. ROBINSON AND COLLEEN K. MALONEY.

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TOWN OF CHEEKTOWAGA AND CHEEKTOWAGA POLICE DEPARTMENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 15, 2019. The order granted the motion of defendants Town of Cheektowaga and Cheektowaga Police Department for summary judgment dismissing the complaint against them.

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 that she sustained when her parked vehicle, from which she was removing her great grandson, was struck by a vehicle operated by defendant Demetrius D. Robinson. Prior to the accident, Robinson had been pulled over for a seatbelt violation by two officers of defendant Cheektowaga Police Department (CPD). The officers approached the vehicle and requested that Robinson produce his driver's license and registration. Instead of producing those documents, Robinson drove off suddenly, almost hitting one of the officers with his vehicle, and then fled from the police at a high rate of speed while ignoring traffic control devices. The officers pursued the vehicle driven by Robinson up until it struck plaintiff's vehicle.

After plaintiff commenced this action, defendant Town of Cheektowaga and the CPD (collectively, defendants) moved for summary

judgment dismissing the complaint against them on the grounds that the CPD officers' conduct and their operation of the police vehicle was not reckless pursuant to Vehicle and Traffic Law § 1104 as a matter of law and, in the alternative, that the actions of Robinson were the sole proximate cause of the accident. Plaintiff appeals from an order granting the motion, and we affirm.

Contrary to plaintiff's contention, Supreme Court properly determined that defendants met their initial burden of establishing as a matter of law that the CPD officers' conduct did not "rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (*Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *see* Vehicle and Traffic Law § 1104 [e]), and that plaintiff failed to raise a triable issue of fact with respect thereto (*see Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373 [4th Dept 2012]). Defendants' submissions on their motion included the officers' dashboard camera video, which recorded the initial stop and subsequent pursuit of Robinson, and the deposition testimony of the officers and Robinson. We conclude that those submissions establish that the officers acted "swiftly and resolutely" but prudently in pursuing Robinson at reasonable speeds under the circumstances (*Saarinen v Kerr*, 84 NY2d 494, 502 [1994]). Inasmuch as Robinson's driving posed a threat to the public safety, the officers "w[ere] duty-bound to investigate" and had "the right to use whatever means [were] necessary, short of the proscribed recklessness, to overtake and stop the offending driver" (*id.* at 502-503; *see Cavigliano v County of Livingston*, 254 AD2d 817, 818 [4th Dept 1998]; *Dibble v Town of Rotterdam*, 234 AD2d 733, 735-736 [3d Dept 1996], *lv denied* 89 NY2d 811 [1997]; *Powell v City of Mount Vernon*, 228 AD2d 572, 573 [2d Dept 1996], *lv denied* 89 NY2d 807 [1997]). While the nature of the police action "is relevant in determining whether a responding officer's conduct was in reckless disregard for the safety of others" (*Allen v Town of Amherst*, 8 AD3d 996, 997 [4th Dept 2004]), the pursuit here was warranted inasmuch as the officers, although initially stopping Robinson for failing to wear a seatbelt, did not pursue him until he abruptly left the scene, nearly hit one of the officers with his vehicle, and began driving erratically. Moreover, the fact that the officers "exceeded the posted speed limit . . . certainly cannot alone constitute a predicate for liability, since it is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3)" (*Saarinen*, 84 NY2d at 503).

As plaintiff correctly asserts, a violation of internal policy, if in fact it occurred, is "an important, although not dispositive, factor in determining whether [the officers] ha[ve] acted recklessly" (*id.* at 503 n 3; *see Allen*, 8 AD3d at 997-998). Here, however, the alleged violation by the officers of CPD's internal guidelines "failed to establish that [their] conduct was reckless" (*Martinez v City of Rochester*, 164 AD3d 1655, 1656 [4th Dept 2018]; *see Cavigliano*, 254 AD2d at 817; *Dibble*, 234 AD2d at 735 n 2). Additionally, the expert affidavit submitted by plaintiff in opposition to defendants' motion, "which was premised on the internal guidelines, was conclusory" (*Teitelbaum v City of New York*, 300 AD2d 649, 650 [2d Dept 2002], *lv denied* 100 NY2d 513 [2003]) and, at times, inconsistent with the

evidence in the record, including the dashboard camera video (*cf. Spalla v Village of Brockport*, 295 AD2d 900, 900-901 [4th Dept 2002]).

We have reviewed plaintiff's remaining contention and conclude that it does not warrant reversal or modification of the order.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

300

KA 15-01173

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN ADDISON, II, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., 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 (Russell P. Buscaglia, A.J.), rendered September 15, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]). The conviction arises out of an incident in which defendant stabbed the victim during a violent confrontation over a traffic dispute. The victim suffered life-threatening injuries, including a collapsed lung. At trial, the jury rejected defendant's justification defense. We affirm.

A person is guilty of assault in the first degree under Penal Law § 120.10 (1) when he or she intentionally causes serious physical injury to another person by means of a deadly weapon or dangerous instrument. Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant further contends that the verdict is against the weight of the evidence with respect to the defense of justification, the element of serious physical injury, and the element of intent. Viewing the evidence in light of the jury instructions concerning the elements of the crime and the defense of justification (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention.

Given the proof that the victim suffered a collapsed lung, the jury reasonably found that he sustained a serious physical injury within the meaning of Penal Law § 10.00 (10) (*see People v Wright*, 105

AD2d 1088, 1088-1089 [4th Dept 1984]; *see also People v Barbuto*, 126 AD3d 1501, 1502 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]; *People v Thompson*, 224 AD2d 646, 647 [2d Dept 1996], *lv denied* 88 NY2d 970 [1996]). Moreover, defendant's intent to cause such injury may readily be inferred from the fact that he said, "I'm going to fucking kill you" while chasing the victim with a knife (*see People v Pearson*, 93 AD3d 1343, 1343 [4th Dept 2012], *lv denied* 19 NY3d 866 [2012]).

With respect to justification, "the Penal Law provides that a defendant is never justified in using deadly physical force if that defendant is the 'initial aggressor': the first person in an altercation who uses or threatens the imminent use of deadly physical force" (*People v Brown*, 33 NY3d 316, 320 [2019], quoting Penal Law § 35.15 [1] [b]; *see generally People v McWilliams*, 48 AD3d 1266, 1267 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008]). The aggressive brandishing of a knife may reasonably constitute an implied threat of imminent deadly physical force (*see People v Hagi*, 169 AD2d 203, 211 [1st Dept 1991], *lv denied* 78 NY2d 1011 [1991]) and, here, three of the People's eyewitnesses testified that defendant accosted the victim with a knife *before* the victim reacted by throwing beer bottles at defendant. The defense's eyewitnesses, by contrast, arrived during the middle of the incident, did not observe defendant getting out of his truck, and could not identify the initial aggressor in the incident. Moreover, the evidence demonstrated that defendant never withdrew from the encounter (*see generally* § 35.15 [1] [b]). To the contrary, the evidence shows that defendant continued pursuing the fleeing victim throughout the incident. The jury was therefore justified in finding, beyond a reasonable doubt, that defendant was the initial aggressor and was thus not entitled to use deadly physical force against the victim (*see People v Lewis*, 46 AD3d 943, 945-946 [3d Dept 2007]; *People v Young*, 240 AD2d 974, 975-977 [3d Dept 1997], *lv denied* 90 NY2d 1015 [1997]; *see also People v Contreras*, 154 AD3d 1320, 1320-1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *People v Williams*, 112 AD2d 176, 177 [2d Dept 1985]; *see generally People v Delamota*, 18 NY3d 107, 116-117 [2011]).

Defendant further contends that the prosecutor abused his discretion and deprived defendant of a fair trial by refusing to confer immunity on the victim for any crimes that the victim may have allegedly committed in having a sexual relationship with a 15-year-old female. The prosecutor's refusal to confer such immunity, defendant reasons, deprived him of the ability to effectively cross-examine the victim. We reject that contention. A prosecutor's decision to confer or withhold immunity "is discretionary and not reviewable unless [the prosecutor] acts with bad faith to deprive a defendant of his or her right to a fair trial" (*People v Cotton*, 162 AD3d 1638, 1638 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018] [internal quotation marks omitted]; *see generally* CPL 50.20 [2]). A prosecutor acts in bad faith or compromises the fairness of a trial where "witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not, or . . . where the failure to grant immunity deprives the defendant of vital exculpatory testimony" (*People v Shapiro*, 50 NY2d 747, 760 [1980]; *see*

People v Owens, 63 NY2d 824, 825-826 [1984]; *People v Whitfield*, 115 AD3d 1181, 1183 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]). Nothing of that sort occurred here; the prosecutor did not selectively confer immunity only on witnesses favorable to his case, nor was the collateral allegation of statutory rape related to the underlying events at issue in this case, much less in a fashion that could have exculpated defendant. Moreover, a witness's refusal to answer questions on cross-examination relating to general credibility—such as his or her prior commission of statutory rape—may be remedied by "instructing the jury to consider the testimony in light of the defendant's reduced ability to cross-examine" (*People v Siegel*, 87 NY2d 536, 544 [1995] [internal quotation marks and emphasis omitted]), and Supreme Court gave such an instruction in this case.

We reject defendant's further contention that the court erred in failing to sua sponte question him to ensure the voluntariness of his decision to forgo testifying at trial. "[T]he trial court does not have a *general* obligation to sua sponte ascertain if the defendant's failure to testify was a voluntary and intelligent waiver of his [or her] right" (*People v Pilato*, 145 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017] [internal quotation marks omitted and emphasis added]). Although there are certain " 'exceptional, narrowly defined circumstances . . . [in which] judicial interjection through a direct colloquy with the defendant may be required to ensure that the defendant's right to testify is protected' " (*People v Calkins*, 171 AD3d 1475, 1476 [4th Dept 2019], *lv denied* 33 NY3d 1067 [2019]; *see People v Madigan*, 169 AD3d 1467, 1469 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019]), no such exceptional circumstances are present in this case (*see Calkins*, 171 AD3d at 1476). Contrary to defendant's assertion, defense counsel never suggested or implied on the record that the choice to testify or not testify was committed to the discretion of counsel.

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation is unpreserved for appellate review, and we decline to review that contention as a matter of discretion in the interest of justice (*see People v Lathrop*, 171 AD3d 1473, 1475 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]). We are nevertheless compelled to emphasize that, contrary to defendant's assertions, there were no racial overtones whatsoever to the prosecutor's summation.

Finally, the sentence is not unduly harsh or severe.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

301

KA 14-00200

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATALIE A. JOHNSON, DEFENDANT-APPELLANT.

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

NATALIE A. JOHNSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 18, 2013. The judgment convicted defendant, upon a jury verdict, of murder 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 her, upon a jury verdict, of two counts of murder in the second degree (Penal Law § 125.25 [1], [3] [intentional murder and felony murder, respectively]). Defendant contends in her main and pro se supplemental briefs that Supreme Court committed reversible error when it discharged three sworn jurors over the objection of defense counsel. Contrary to defendant's contention, however, the court granted the remedy that defense counsel impliedly sought and, because defense counsel failed to object to that remedy or move for a mistrial, that remedy must be deemed to have corrected the error to defendant's satisfaction. Specifically, after the first three jurors were sworn, the prosecutor and defense counsel both advised the court that they believed defendant's right to be present during a material sidebar conference had been violated (*see generally People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). The court asked defense counsel if he wished "to either retain all three jurors despite what [he] deem[ed] to be legal error or to dismiss or discharge one or all of those . . . jurors" and receive an additional peremptory challenge for each juror that he wished to discharge, to which defense counsel responded, "[i]n the event there is legal error, they should be all dismissed." In an effort to remedy the error, the court discharged the three sworn jurors and started over with jury selection. "[B]y consenting to the

procedure employed by the court, defendant waived [her] right to appellate review of the court's allegedly improper discharge of the [three] sworn juror[s]" (*People v Walker*, 96 AD3d 1481, 1482 [4th Dept 2012], *lv denied* 20 NY3d 989 [2012]; *see People v Barner*, 30 AD3d 1091, 1092 [4th Dept 2006], *lv denied* 7 NY3d 809 [2006]).

Defendant also contends in her main brief that the court erred in permitting a police investigator to give testimony at trial identifying defendant's voice on an audio recording. We reject that contention. The record establishes that the investigator had personal experience with defendant and was familiar with her voice, having met with her face to face for a period of approximately 40 minutes during the investigation. Thus, contrary to defendant's contention, we conclude that the investigator's identification of defendant's voice on the audio recording was confirmatory (*see People v King*, 166 AD3d 1562, 1564 [4th Dept 2018], *lv denied* 34 NY3d 1017 [2019]). Contrary to defendant's further contention, there is no requirement that a "testifying officer be qualified as an expert in order to identify the defendant's voice" (*People v Gouveia*, 88 AD3d 814, 815 [2d Dept 2011], *lv denied* 18 NY3d 957 [2012]), and we conclude that the court "properly left to the jury the role of weighing the probative value of the [investigator]'s opinion testimony" regarding the identification of the speaker's voice (*People v Hoffler*, 41 AD3d 891, 893 [3d Dept 2007], *lv denied* 9 NY3d 962 [2007]). To the extent that defendant contends the investigator's voice identification testimony improperly bolstered the testimony of another witness for the prosecution, that contention is unpreserved because defendant failed to object to the evidence on that ground at trial (*see People v Williams*, 163 AD3d 1160, 1164 [3d Dept 2018], *lv denied* 32 NY3d 1179 [2019]).

Defendant also contends in her main brief that the court erred in refusing to preclude certain identification evidence on the ground that the People's second supplemental CPL 710.30 notice was not timely filed within 15 days of defendant's arraignment (*see* CPL 710.30 [2]). Initially, we note that there is no indication in the record that the People adduced any testimony at trial with respect to the photo array identification procedure that was the subject of that notice. In any event, we reject defendant's contention. As relevant here, the People filed a supplemental CPL 710.30 notice dated the same day as defendant's arraignment and a second supplemental CPL 710.30 notice dated 22 days later. The latter notice concerned an identification procedure that occurred more than one week *after* defendant's arraignment, and thus the People could not have included that identification procedure in the prior notice. The People did, however, provide prompt notice to defendant of the post-arraignment identification procedure, and the second supplemental CPL 710.30 notice was served more than two months before the argument of motions, nearly four months before suppression hearings, and more than six months before defendant's trial. Indeed, defense counsel had the opportunity at defendant's *Wade* hearing to cross-examine the police investigator who conducted the relevant identification procedure. Under the circumstances of this case, we conclude that the second supplemental CPL 710.30 notice "was in compliance with the spirit of

[CPL 710.30] and met [the People's] continuing obligation to give prompt notice" (*People v Green*, 127 AD3d 1473, 1476 [3d Dept 2015], *lv denied* 27 NY3d 965 [2016]; *see* CPL 710.30 [1] [b]; [2]).

As defendant correctly concedes, she failed to preserve for our review her contention that the conviction of felony murder is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention in her main brief that the evidence is legally insufficient to support the conviction of intentional murder (*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 conclude that, contrary to the contention of defendant in her main and pro se supplemental briefs, the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant in her main brief that she was denied effective assistance of counsel. Inasmuch as the evidence is legally sufficient to support the conviction of felony murder, defense counsel's failure to move for a trial order of dismissal of that count does not constitute ineffective assistance (*see People v Broomfield*, 134 AD3d 1443, 1444-1445 [4th Dept 2015], *lv denied* 27 NY3d 1129 [2016]). Defense counsel's failure to request an instruction on the affirmative defense to felony murder (Penal Law § 125.25 [3]) does not demonstrate ineffective assistance of counsel because the trial evidence did not support that affirmative defense (*see People v Solomon*, 16 AD3d 701, 702-703 [2d Dept 2005], *lv denied* 5 NY3d 794 [2005]). Contrary to defendant's contention, the police investigator's identification of defendant's voice on an audio recording in this case was not subject to the notice requirement of CPL 710.30 (*see* CPL 710.30 [1] [b]; *People v Johnson*, 150 AD3d 1390, 1394-1395 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]), and therefore a motion to preclude the investigator's testimony on that basis would not have been successful. Contrary to defendant's contention, the record establishes that defense counsel conducted an adequate cross-examination of a certain prosecution witness (*see generally People v Alexander*, 109 AD3d 1083, 1085 [4th Dept 2013]). Indeed, defense counsel effectively highlighted the inconsistencies between that witness's testimony on direct examination, her testimony before the grand jury, and her statement to police. " '[S]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel' " (*People v Lozada*, 164 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). Upon review of the record, we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defendant's] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, contrary to defendant's contention in her main brief,

the sentence is not unduly harsh or severe.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

325

KA 15-00262

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREG GARNO, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered February 3, 2015. The judgment convicted defendant upon a jury verdict of arson in the third degree, menacing a police officer or peace officer (four counts), criminal mischief in the second degree and reckless endangerment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the finding that defendant is a persistent felony offender, reducing the sentence imposed for arson in the third degree under count one of the indictment to an indeterminate term of incarceration of 3 to 6 years, reducing the sentences imposed for menacing a police officer or peace officer under counts two, four, five, and seven of the indictment to determinate terms of incarceration of 7 years followed by 5 years of postrelease supervision, vacating the sentence imposed for criminal mischief in the second degree under count eight of the indictment and imposing an indeterminate term of incarceration of 2 to 4 years, and directing that the sentences on counts two, four, five and seven run concurrently with each other, and that the sentences on counts one and eight run concurrently with each other and consecutively to the sentences imposed on counts two, four, five, and seven, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, arson in the third degree (Penal Law § 150.10 [1]), four counts of menacing a police officer or peace officer (§ 120.18), and one count of criminal mischief in the second degree (§ 145.10). He was sentenced as a persistent felony offender to an indeterminate term of incarceration of 20 years to life. Contrary to the contention of defendant, the warrantless entry into and search of his home did not violate the Fourth Amendment because they were justified by exigent circumstances. The entry and search

occurred immediately after firefighters extinguished the fire that defendant had set during a standoff with police and were undertaken to determine whether there were other individuals present in the home who may have been injured by the fire (*see People v Samuel*, 152 AD3d 1202, 1203-1204 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]; *People v Junious*, 145 AD3d 1606, 1608-1609 [4th Dept 2016], *lv denied* 29 NY3d 1033 [2017], *reconsideration denied* 29 NY3d 1129 [2017]; *People v Klossner*, 145 AD3d 1648, 1649 [4th Dept 2016]).

We reject defendant's contention that the evidence is legally insufficient to support the convictions of menacing a police officer or peace officer. Defendant's intent may be inferred from the totality of his conduct (*see People v Ferguson*, 177 AD3d 1247, 1248 [4th Dept 2019]; *People v Bryant*, 13 AD3d 1170, 1171 [4th Dept 2004], *lv denied* 4 NY3d 884 [2005]), which included making verbal threats to the police officers and brandishing a baseball bat and a large kitchen knife while he was separated from the officers only by a large window from which he had removed the glass with the bat and his head. Thus, contrary to defendant's contention, there is a valid line of reasoning and permissible inferences from which a rational jury could have found that defendant intentionally placed or attempted to place the subject police officers in reasonable fear of physical injury (*see* Penal Law §§ 10.00 [9]; 120.18; *People v Thomas*, 174 AD3d 1430, 1431-1432 [4th Dept 2019]; *People v Roach*, 119 AD3d 1070, 1070-1072 [3d Dept 2014], *lv denied* 24 NY3d 1221 [2015]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime of menacing a police officer or peace officer as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the imposition of persistent felony offender status is unduly harsh and severe. The sentencing court's determination to sentence a defendant as a persistent felony offender "cannot be held erroneous as a matter of law, unless [that] court acts arbitrarily or irrationally" (*People v Rivera*, 5 NY3d 61, 68 [2005], *cert denied* 546 US 984 [2005]). Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, "[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" (*id.*). "A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice without deference to the sentencing court" (*People v Brown*, 174 AD3d 1329, 1333 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019] [internal quotation marks omitted]).

Here, although defendant's criminal record provided a basis for sentencing him as a persistent felony offender, we nevertheless exercise our discretion in the interest of justice to vacate that

finding (*see id.*; *People v Ellison*, 167 AD3d 1552, 1552-1554 [4th Dept 2018]). Despite defendant's frequent involvement with law enforcement, he has only two prior felony convictions: one in 1981 for burglary in the second degree and one in 2002 for driving while intoxicated. Moreover, a sentence of 20 years to life is a particularly harsh penalty in light of the People's final pretrial plea offer of 6 to 9 years' incarceration. Thus, as a matter of discretion in the interest of justice, we modify the judgment by vacating the finding that defendant is a persistent felony offender and we hereby modify the sentences imposed and sentence defendant as a second felony offender by reducing the sentence imposed for arson in the third degree under count one of the indictment to an indeterminate term of incarceration of 3 to 6 years and reducing the sentences imposed for menacing a police officer or peace officer under counts two, four, five, and seven of the indictment to determinate terms of incarceration of 7 years followed by 5 years of postrelease supervision. We further note that the court did not include the sentence on defendant's conviction for criminal mischief in the second degree in the persistent felony offender sentence, and it thus imposed a sentence on that count that is illegal whether defendant is sentenced as a persistent felony offender or a second felony offender. 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]). We therefore further modify the judgment by vacating the sentence imposed for criminal mischief in the second degree under count eight of the indictment and imposing an indeterminate term of incarceration of 2 to 4 years, and we direct that the sentences on counts two, four, five and seven run concurrently with each other and that the sentences on counts one and eight run concurrently with each other and consecutively to the sentences imposed on counts two, four, five, and seven.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

398

CA 19-01971

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

IN THE MATTER OF ARBITRATION BETWEEN
CITY OF JAMESTOWN, PETITIONER-APPELLANT,

AND ORDER

KENDALL CLUB POLICE BENEVOLENT ASSOCIATION, INC.,
RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, GARDEN CITY (TERRY M. O'NEIL OF COUNSEL), FOR PETITIONER-APPELLANT.

FESSENDEN LAUMER & DEANGELO, PLLC, JAMESTOWN (CHARLES S. DEANGELO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JOHN A. MANCINI, ALBANY, FOR NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, AMICUS CURIAE.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered April 3, 2019 in a proceeding pursuant to CPLR article 75. The order and judgment denied the petition to vacate an arbitration award and granted the cross motion to confirm an arbitration award.

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

403

KA 19-02061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUSTYN LIEPKE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 17, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). By failing to move to withdraw the guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution as well as his contention that his plea was not voluntarily, knowingly, and intelligently entered (*see People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *People v Jones*, 175 AD3d 1845, 1845-1846 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]; *People v Yates*, 173 AD3d 1849, 1849-1850 [4th Dept 2019]). Defendant also contends that he was deprived of a speedy trial pursuant to CPL 30.30. Defendant forfeited that contention inasmuch as he pleaded guilty before County Court issued a determination with respect to that part of his omnibus motion seeking to dismiss the indictment on that ground (*see* CPL 30.30 [6]; *see generally People v Fernandez*, 67 NY2d 686, 688 [1986]).

Defendant’s contention that he was denied effective assistance of counsel because of defense counsel’s failure to challenge the validity of the subject search warrants also does not survive the guilty plea because defendant made “ ‘no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney[’s] allegedly poor

performance' " (*People v Russell*, 55 AD3d 1314, 1314 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009]; *see People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019]; *People v Smith*, 122 AD3d 1300, 1301 [4th Dept 2014], *lv denied* 35 NY3d 1172 [2015]). In any event, that contention lacks merit because any such challenge had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]). Contrary to defendant's contention, even assuming, arguendo, that the police officers failed to comply with the inventory provisions of CPL 690.50 (5), we conclude that noncompliance with that subdivision "does not undermine the validity of the search warrant or the search" (*People v Fernandez*, 61 AD3d 891, 891 [2d Dept 2009], *lv denied* 13 NY3d 744 [2009]; *see People v Nelson*, 144 AD2d 714, 716 [3d Dept 1988], *lv denied* 73 NY2d 894 [1989]). Although defendant's remaining claims of ineffective assistance of counsel survive his guilty plea, we conclude that they are without merit. Defendant failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We agree with defendant and the People correctly concede, however, that the sentence and commitment form should be amended because it incorrectly reflects that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug offender (*see People v Ortega*, 175 AD3d 1810, 1811 [4th Dept 2019]; *People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]). Finally, although not raised by the parties, we conclude that the certificate of conviction should be amended as well because it does not clearly provide that defendant was sentenced as a second felony drug offender (*see generally People v Dehoyos*, 166 AD3d 1576, 1577-1578 [4th Dept 2018], *lv denied* 33 NY3d 1068 [2019]; *People v Carducci*, 143 AD3d 1260, 1263 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

407

CAF 19-00790

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

IN THE MATTER OF NAJUAN W.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

LYNNE M. BLANK, WEBSTER, FOR RESPONDENT-APPELLANT.

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

JUSTIN F. BROTHERTON, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered April 9, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, insofar as appealed from, determined that respondent had abandoned the subject child.

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

Same memorandum as in *Matter of Najuan W. (Stephon W.)* ([appeal No. 2] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

408

CAF 19-00860

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

IN THE MATTER OF NAJUAN W.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

LYNNE M. BLANK, WEBSTER, FOR RESPONDENT-APPELLANT.

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

JUSTIN F. BROTHERTON, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered April 26, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In appeal No. 1, respondent father appeals from a fact-finding order determining that he had abandoned the subject child. In appeal No. 2, he appeals from a final order of disposition that, inter alia, terminated his parental rights on the ground of abandonment.

Initially, appeal No. 1 must be dismissed because the appeal from the dispositional order in appeal No. 2 "brings up for review the propriety of a fact-finding order" (*Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]; *see generally Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1401 [4th Dept 2019]).

In appeal No. 2, we reject the father's contention that Family Court erred in determining that he abandoned the child. The evidence at the fact-finding hearing established that, in 2009, the mother failed to return the child to the father's home in Pennsylvania after a weekend visit. That was the last time the father saw the child. Although the mother thereafter contacted the father from blocked telephone numbers and through social media, she only allowed the father to speak with the child occasionally. The father's last conversation with the child was in 2015. Around that time, he filed a petition in Pennsylvania seeking modification of the existing joint

custody arrangement between him and the mother. A bench warrant was issued for the mother's arrest, and the father was informed that the child was residing in Jefferson County, New York. The father, however, never initiated a proceeding to modify custody in that county and testified that he was told that there was nothing he could do to obtain custody of the child until after the mother was arrested. In 2016, the child was removed from the mother's care after a neglect petition was filed against her. The father was initially unaware of that petition because petitioner was only able to serve him by publication. He did not learn that the child had been placed in foster care until the filing of the instant termination petition in August 2018.

Pursuant to Social Services Law § 384-b (5) (a), "a child is 'abandoned' by his [or her] parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." A child is deemed abandoned when the parent engages in such behavior "for the period of six months immediately prior to the date on which the petition [was] filed" (§ 384-b [4] [b]). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (§ 384-b [5] [a]; *see Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1693 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785 [4th Dept 2017]). Here, the father does not dispute that he failed to maintain contact with the child for the statutory period. Instead, he asserts that contact with the child was infeasible or discouraged by the agency, and that the court failed to consider the mother's limitation of his contact with the child and petitioner's failure to personally serve him with the neglect petition against the mother. We reject those contentions.

"In the abandonment context, 'the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in' " Social Services Law § 384-b (5) (a) (*Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003], quoting § 384-b [5] [b]; *see Madelynn T.*, 148 AD3d at 1785). Rather, it is the parent's burden to establish that circumstances existed that prevented his or her contact with the child or agency or that the agency discouraged such contact (*see Madelynn T.*, 148 AD3d at 1785; *see also Gabrielle HH.*, 1 NY3d at 550).

We conclude that the father failed to meet that burden. Indeed, although the mother removed the child from the father's care and took the child to an undisclosed location in violation of the custody arrangement, the father did not report that violation, make any attempt thereafter to locate the child, or attempt to file a modification petition after his unsuccessful filing in Pennsylvania about six years after the mother left with the child (*cf. Matter of John F. [John F., Jr.]*, 149 AD3d 1581, 1582 [4th Dept 2017]). Additionally, the father's assertion that he paid for the child's Medicare is unsupported by the record.

Moreover, petitioner's "alleged failure to give the father notice that the child was placed in foster care is also insufficient to demonstrate that" contact with the child was infeasible (*Matter of Chartasia Delores H. [Charles H.]*, 88 AD3d 460, 460 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]). Even assuming, arguendo, that petitioner was required to do more than serve the father by publication with the neglect petition that resulted in the child's placement in foster care, we conclude that the father's lack of awareness of that petition was not the reason that the father failed to communicate with the child (*see Matter of Annette B.*, 4 NY3d 509, 514-515 [2004], *rearg denied* 5 NY3d 783 [2005]). Indeed, even after the father was served with the termination petition, he failed to contact the child even though petitioner told him that he could write letters to the child. Although the father contacted the foster parents and spoke with petitioner about the petition, those minimal efforts do not preclude a finding of abandonment (*see Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469, 1470 [4th Dept 2014]; *Matter of Michael B.*, 284 AD2d 946, 946 [4th Dept 2001]; *Matter of Elizabeth S.*, 275 AD2d 952, 953 [4th Dept 2000], *lv denied* 95 NY2d 769 [2000]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

416

CA 19-01098

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

JULIE RITCHIE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN M. RITCHIE, DEFENDANT-RESPONDENT.

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

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered May 16, 2019. The order, among other things, awarded sole custody of the subject children to defendant for a period of 60 days.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in their entirety those parts of defendant's motion seeking modification of the parties' custody and visitation arrangement and vacating the second through sixth and eighth ordering paragraphs, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff mother commenced this matter pursuant to Family Court Act article 8, seeking an order of protection against defendant father based on allegations that he committed the family offenses of harassment in the first or second degree and stalking. Pursuant to their existing custody and visitation arrangement, the parties had joint legal custody of the children with the mother having primary residential custody. After a temporary order of protection was entered ex parte, the father filed a motion by order to show cause seeking, inter alia, removal of the matter to Supreme Court, vacatur of the temporary order of protection, modification of the parties' custody and visitation arrangement by awarding the father sole custody of the children with the "suspen[sion]" of the mother's "visitation," and an award of attorney's fees. The matter was removed to Supreme Court, which conducted a fact-finding hearing on the mother's family offense petition but treated the matter as though it was a post-divorce action. The mother appeals from an order entered after the hearing that, inter alia, effectively denied the petition and granted the motion in part by vacating the temporary order of protection, awarding sole custody of the children to the father for a period of 60 days with limited visitation to the mother, and directing the mother to pay $3,500 to the father for his attorney's fees. The order also,

sua sponte, granted certain additional relief, i.e., it directed the mother to pay $2,500 to the father for her purported perjury in this matter, prohibited either party from filing a petition seeking an order of protection without prior permission from the court, and prohibited the older child from using any electronic device or participating in extracurricular activities within the 60-day period unless the father allowed the same. By order of this Court, the order on appeal was stayed in part pending appeal.

Contrary to the mother's contention, we conclude that the court did not err in effectively denying the family offense petition and granting that part of the motion seeking vacatur of the temporary order of protection. "The determination whether [the father] committed a family offense was a factual issue for the court to resolve, and '[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 Martin v Flynn*, 133 AD3d 1369, 1370 [4th Dept 2015]; *see Cunningham v Cunningham*, 137 AD3d 1704, 1704-1705 [4th Dept 2016]). Here, we find no reason to disturb the court's credibility determinations or its conclusion that the father did not commit any of the family offenses alleged in the petition (*see Matter of Teanna P. v David M.*, 134 AD3d 654, 655 [1st Dept 2015]; *Matter of Krisztina K. v John S.*, 103 AD3d 724, 724 [2d Dept 2013]).

We reject the mother's related contention that we are unable to intelligently review the merits of the family offense petition because the recordings of the father's cell phone conversations with the older child, on which the court based some of its findings, were not included in the record on appeal. We note that it is the responsibility of the mother, as the appellant, to furnish an adequate record on appeal (*see Matter of Unczur v Welch*, 159 AD3d 1405, 1405 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]). Nevertheless, we conclude that the record is sufficient for intelligent appellate review inasmuch as the contents of the cell phone recordings can be gleaned from the record. Further, there was no dispute during the hearing as to the accuracy of the recordings (*cf. Matter of Trombley v Payne* [appeal No. 2], 144 AD3d 1551, 1552 [4th Dept 2016]).

We agree with the mother, however, that the court erred in granting in part the father's motion insofar as it sought to modify the parties' custody and visitation arrangement, by awarding him sole custody of the children for 60 days and restricting the mother's visitation and contact with the children during that period. We therefore modify the order accordingly. The father did not allege, let alone establish, "a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]" (*Matter of James D. v Tammy W.*, 45 AD3d 1358, 1358 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]; *Matter of Wawrzynski v Goodman*, 100 AD3d 1559, 1559 [4th Dept 2012]). Additionally, even assuming, arguendo, that the father established a change in circumstances, we conclude that the court in its custody and visitation determination failed to adequately address the "factors that could impact the best

interests of the child[ren]" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]), and thus that determination lacks the requisite sound and substantial basis in the record (*see generally Fox v Fox*, 177 AD2d 209, 211-212 [4th Dept 1992]).

As the mother correctly contends, the court also erred in sua sponte directing that the parties' older child be deprived of a cell phone and other electronic devices and be barred from attending all extracurricular and "outside-the-home activities" for 60 days. No party requested such relief, and the court had no legal basis upon which to grant it. We therefore further modify the order by vacating the eighth ordering paragraph.

We agree with the mother that the court erred in sua sponte directing her to "pay a $2,500 fine to the [f]ather for her perjury in this matter . . . and if the fine is not permitted by law, [directing that] . . . the fine [be converted] into an award of damages." The court did not state whether it was sanctioning the mother for frivolous conduct or for civil or criminal contempt. A court of record may impose punishment for criminal contempt under Judiciary Law § 750 where, insofar as relevant here, the person at issue engages in "[d]isorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority" (§ 750 [A] [1]). Additionally, a court may summarily punish a party for contempt only where "the offense is committed in the immediate view or presence of the court" (§ 755). Here, the court summarily punished the mother by sanctioning her after it determined that she committed perjury during her testimony before a Judicial Hearing Officer in Family Court with respect to the temporary order of protection and during her testimony at the hearing on the petition before Supreme Court. Assuming, arguendo, that perjury would support a finding of contempt, we conclude that the court could not properly find the mother in criminal contempt based on her testimony in Family Court, nor could the court summarily punish the mother for civil or criminal contempt based on that testimony, inasmuch as it occurred out of the court's "immediate view and presence" (*id.*; *see* § 750 [A] [1]; *cf. Matter of Mitchell v Wiggins*, 195 AD2d 1069, 1069 [4th Dept 1993]). Insofar as the order may be deemed to sanction the mother for civil or criminal contempt that occurred in the presence of Supreme Court, we conclude that, because "due process requires that . . . the contemnor be afforded 'an opportunity to be heard at a meaningful time and in a meaningful manner' " (*Matter of Mosso v Mosso*, 6 AD3d 827, 829 [3d Dept 2004]; *see Delijani v Delijani*, 73 AD3d 972, 973 [2d Dept 2010]), and the court failed to provide notice that it was considering finding the mother in contempt or an opportunity to be heard thereon, the court erred in imposing such sanction (*see generally Matter of Jung [State Commn. on Jud. Conduct]*, 11 NY3d 365, 373 [2008]).

We further conclude that the court had no authority to sanction the mother on the ground that she engaged in frivolous conduct. Assuming, arguendo, that sanctions for frivolous conduct may be based on a party's perjury, we conclude that the regulation permitting the imposition of such sanctions specifically provides that it "shall not

apply to . . . proceedings in the Family Court commenced under article . . . 8 of the Family Court Act" (22 NYCRR 130-1.1 [a]; *see also Matter of Ellen Z. v Isaac D.*, 47 Misc 3d 389, 392-393 [Fam Ct, Queens County 2015]). This matter was commenced in Family Court under article 8 of the Family Court Act, and thus no such sanction was authorized. Moreover, even were we to assume that a different rule applies to matters commenced under article 8 of the Family Court Act, such as this, that are removed to Supreme Court, "[a]n award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard" (22 NYCRR 130-1.1 [d]). Here, as noted, the mother was not provided with an opportunity to be heard before sanctions were imposed. Therefore, we further modify the order by vacating the fifth ordering paragraph.

We also agree with the mother that the court erred in granting that part of the father's motion seeking an award of attorney's fees. " 'Under the general rule, attorneys' fees . . . are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule' " (*The Wharton Assoc., Inc. v Continental Indus. Capital LLC*, 137 AD3d 1753, 1755 [4th Dept 2016]; *see Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012]). In awarding attorney's fees to the father, the court did not state, and we cannot determine on this record, whether it did so based upon the custodial stipulation between the parties or pursuant to statute. Consequently, we are unable " 'to determine whether the award was within the proper exercise of the court's discretion' " (*Ciura v Muto*, 24 AD3d 1209, 1210 [4th Dept 2005], *lv denied* 7 NY3d 701, 702 [2006]; *see also Matter of JPMorgan Chase Bank, N.A. [Roby]*, 158 AD3d 1224, 1225-1226 [4th Dept 2018]; *see generally Murphy v Murphy*, 126 AD3d 1443, 1447 [4th Dept 2015]). We therefore modify the order by vacating the sixth ordering paragraph, and we remit the matter to Supreme Court to determine and place on the record the basis for the award of attorney's fees and whether those fees are reasonable.

We reject the mother's contention that the court erred in sua sponte imposing conditions restricting her from filing new petitions seeking an order of protection against the father. Although it is well settled that "[p]ublic policy mandates free access to the courts" (*Matter of Shreve v Shreve*, 229 AD2d 1005, 1006 [4th Dept 1996]), " 'a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will' " (*Matter of McNelis v Carrington*, 105 AD3d 848, 849 [2d Dept 2013], *lv denied* 21 NY3d 861 [2013]; *see Matter of Otrosinka v Hageman*, 144 AD3d 1609, 1611 [4th Dept 2016]; *Shreve*, 229 AD2d at 1006). Here, we conclude that the court properly precluded the mother from filing new petitions without permission of the court inasmuch as "the record establishes that [she] has abused the judicial process by engaging in meritless, frivolous or vexatious litigation" (*Carney v Carney*, 160 AD3d 218, 228 [4th Dept 2018]; *see Matter of Pignataro v Davis*, 8 AD3d 487, 489 [2d Dept 2004]). We further note that the mother "is not without recourse should she actually be the victim of spousal abuse, as the order appealed from does not restrict her from obtaining police

assistance or from [filing for] an order of protection" with permission of the court (*Matter of Taub v Taub*, 94 AD3d 901, 902 [2d Dept 2012], *lv denied* 19 NY3d 809 [2012]; *see generally Matter of Mueller v Mueller*, 96 AD3d 948, 949 [2d Dept 2012], *lv denied* 19 NY3d 815 [2012]). The father did not cross-appeal from the order, and thus we do not address the order insofar as it placed a similar restriction on his filing of future petitions seeking an order of protection.

We have considered the mother's remaining contention and conclude that it does not require reversal or further modification of the order.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

418

CA 19-01790

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

BRYAN MERRY, AS ADMINISTRATOR OF THE ESTATE OF
NANCY MERRY, DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

FRANK J. EDWARDS, M.D., ET AL., DEFENDANTS,
ALICIA S. CALAGIOVANNI, AS PUBLIC ADMINISTRATRIX
OF THE ESTATE OF DONALD L. JACKSON, M.D., AND
THE MEMORIAL HOSPITAL OF WILLIAM F. AND GERTRUDE F.
JONES, INC., DEFENDANTS-RESPONDENTS-APPELLANTS.

RICHARD P. VALENTINE, ESQ., P.C., BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered February 8, 2019. The order, inter alia, denied in part the motion of defendants Alicia S. Calagiovanni, as public administratrix of the estate of Donald L. Jackson, M.D., and the Memorial Hospital of William F. and Gertrude F. Jones, Inc., for summary judgment dismissing the complaint against them and denied the 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: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

428

KA 16-02102

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK THOMAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 10, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, reckless endangerment in the first degree and menacing a police officer or peace officer.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing those parts convicting defendant of reckless endangerment in the first degree and menacing a police officer or peace officer and dismissing counts three and four of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), reckless endangerment in the first degree (§ 120.25), and menacing a police officer or peace officer (§ 120.18). Defendant argues that the verdict is against the weight of the evidence with respect to the reckless endangerment and menacing counts.

"A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person" (Penal Law § 120.25). "In cases involving a discharged weapon, the firing of a gun, without more, is insufficient to support a reckless endangerment conviction; there must be evidence demonstrating that the discharge created a grave risk of death to a person" (*People v Durham*, 146 AD3d 1070, 1073 [3d Dept 2017], *lv denied* 29 NY3d 997 [2017], *reconsideration denied* 29 NY3d 1078 [2017]).

Insofar as relevant here, a "person is guilty of menacing a

police officer . . . when[, inter alia,] he or she intentionally places or attempts to place a police officer . . . in reasonable fear of physical injury, serious physical injury or death by *displaying* a deadly weapon" (Penal Law § 120.18 [emphasis added]). Supreme Court instructed the jury, without objection, that the display element required a "visual display" of the weapon.

At trial, the People's evidence on the menacing and reckless endangerment charges consisted entirely of the testimony of the two police officers upon whom defendant allegedly fired during a foot chase. One officer claimed to have heard a gunshot from about 10 feet away, but he never saw a gun brandished at him or anyone fire a gun; nor did he identify the trajectory or direction of the purported shot. The other officer heard a shot "from his northwest" and "believed" that it had been fired "at [the officers]" by defendant, but the officer also told his superior at the time that the shot could have been accidental. No bullets or spent shell casings were recovered from the scene, there was no physical evidence indicating the direction from which the bullet was allegedly fired, and there was no physical evidence indicating where any such bullet landed.

Given the evidence adduced by the People, the jury would have had to resort to sheer speculation to find that defendant displayed or fired a weapon, much less that he fired a weapon intentionally. The officers' testimony that they "heard" a gunshot from some distance away does not prove beyond a reasonable doubt, for purposes of the menacing charge, that defendant *visually* displayed the weapon that discharged the shot. Nor does such testimony prove beyond a reasonable doubt, for purposes of the reckless endangerment charge, that the shot was fired toward the officers and thereby created a grave risk of death to them. Indeed, the second officer's testimony that he "believed" that defendant had shot at the officers is speculative and is contradicted by his contemporaneous statement that the gun might have discharged accidentally.

In light of the foregoing, and in the absence of any eyewitness testimony that defendant brandished a gun at the officers and fired toward them (*cf. People v Williams*, 98 AD3d 1279, 1279-1280 [4th Dept 2012], *lv denied* 20 NY3d 1066 [2013]), a video recording of defendant brandishing a gun at the officers and firing toward them, physical evidence of a bullet or spent shell casing in the vicinity of either officer (*cf. Durham*, 146 AD3d at 1073-1074), or an admission of guilt (*cf. generally People v Ullah*, 130 AD3d 759, 760 [2d Dept 2015], *lv denied* 26 NY3d 1043 [2015]), we agree with defendant that the People failed to prove, at a minimum, either the display element of the menacing count or the grave risk element of the reckless endangerment count beyond a reasonable doubt. Consequently, sitting, in effect, as a second jury (*see generally People v Gonzalez*, 174 AD3d 1542, 1544-1545 [4th Dept 2019]) and viewing the evidence in light of the elements of the crimes of reckless endangerment in the first degree and menacing a police officer or peace officer as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]), we conclude that the verdict as to those crimes is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495

[1987]). As we recently observed in analogous circumstances, "[a]lthough the People may have proved that defendant is probably guilty, the burden of proof in a criminal action is, of course, much higher than probable cause; the prosecution is required to prove a defendant's guilt beyond a reasonable doubt, and the evidence in this case does not meet that high standard" (*People v Carter*, 158 AD3d 1105, 1106 [4th Dept 2018]). We therefore modify the judgment accordingly.

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or further modification of the judgment.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

431

KA 18-02400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BROCK HYDE, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROCK HYDE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered August 14, 2018. The judgment convicted defendant upon a plea of guilty of reckless assault of a child and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by directing that the periods of postrelease supervision imposed shall run concurrently and by amending the order of protection, and as modified the judgment is affirmed, and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of reckless assault of a child (Penal Law § 120.02) and assault in the second degree (§ 120.05 [9]). As defendant correctly contends in his main brief and as the People correctly concede, County Court erred in imposing consecutive periods of postrelease supervision in violation of Penal Law § 70.45 (5) (c) (*see People v Riley*, 181 AD3d 1192, 1192 [4th Dept 2020]). Although defendant failed to preserve that contention for our review, the lack of preservation "is of no moment, inasmuch as we cannot allow an illegal sentence to stand" (*People v March*, 89 AD3d 1496, 1498 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]). We therefore modify the judgment by directing that the periods of postrelease supervision imposed shall run concurrently.

In his main brief, defendant further contends, and the People correctly concede, that the court erred in setting the expiration date of the order of protection. Although that contention is unpreserved (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]), we exercise our power to review it as a matter of discretion in the interest of

justice (*see* CPL 470.15 [3] [c]). In view of our determination that the court improperly imposed consecutive periods of postrelease supervision and because the court did not account for defendant's jail time credit, we agree with defendant that the court erred in calculating the duration of the order of protection (*see Riley*, 181 AD3d at 1192). We therefore further modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify an expiration date in accordance with CPL 530.12 (5) (A) (*see People v Richardson*, 143 AD3d 1252, 1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]).

We have considered the contentions of defendant in his pro se supplemental brief and conclude that none warrants further modification or reversal of the judgment.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

459

CAF 19-00859

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF NOVALEIGH B.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JENNIFER B., RESPONDENT-RESPONDENT.
(PROCEEDING NO. 1.)

IN THE MATTER OF DARREN B., PETITIONER-RESPONDENT,

V

JENNIFER B., RESPONDENT-RESPONDENT.
(PROCEEDING NO. 2.)

MARY S. HAJDU, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 1.)

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered April 15, 2019 in proceedings pursuant to Family Court Act articles 6 and 10. The order, among other things, denied the motion of the attorney for the child to vacate an order of fact-finding and disposition.

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

Memorandum: In these proceedings pursuant to Family Court Act articles 6 and 10, the attorney for the child (AFC) appeals in appeal No. 1 from an order that, inter alia, denied the AFC's motion seeking, among other things, to vacate an order of fact-finding and disposition that, inter alia, adjudged the subject child to be neglected and returned the child to the care of respondent mother under the supervision of petitioner Chautauqua County Department of Health and Human Services. In appeal No. 2, the AFC appeals from the order of fact-finding and disposition. We dismiss as moot the AFC's appeals from both orders inasmuch as her contentions involve only a challenge to the dispositional part of the order of fact-finding and disposition, and "the order has expired by its terms" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1546 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Matter of Jaime D. [James N.]* [appeal

No. 2], 170 AD3d 1524, 1525 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1136 [4th Dept 2013]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

460

CAF 19-01963

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF NOVALEIGH B.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JENNIFER B., RESPONDENT-RESPONDENT.

MARY S. HAJDU, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 2.)

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered April 26, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that the subject child was neglected by respondent and returned the child to the care of respondent with a dispositional plan.

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

Same memorandum as in *Matter of Novaleigh B. (Jennifer B.)* ([appeal No. 1] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

469

CA 19-01872

PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

BRITTNEY BAILEY, PLAINTIFF-APPELLANT,

V ORDER

AMERICAN FLEET MAINTENANCE, INC. AND
CHARLES MONACHINO, DEFENDANTS-RESPONDENTS.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered September 24, 2019. The order and judgment, among other things, granted defendants' motion for summary judgment and dismissed the complaint insofar as it alleged that plaintiff sustained a serious injury under Insurance Law § 5012 (d).

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

472

KA 17-00073

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. SAMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 6, 2016. The judgment convicted defendant upon a jury verdict of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). Defendant contends that County Court erred in determining that the testimony of a State Trooper regarding statements made by the other occupants of the vehicle was admissible in evidence under the present sense impression and excited utterance exceptions to the rule against hearsay. Specifically, when the Trooper first approached the window of the vehicle, about 20 seconds after pulling it over, he observed defendant attempting to settle himself between two occupants of the vehicle who were sitting in the back seat, and the Trooper heard the other occupants of the vehicle spontaneously state, among other things, that defendant was the driver of the vehicle. Under those circumstances, the court properly admitted in evidence the spontaneous statements of the other occupants of the vehicle as excited utterances (*see People v Hernandez*, 28 NY3d 1056, 1057 [2016]). The court also properly admitted those statements as present sense impressions, inasmuch as the statements described an unfolding situation and were independently verified by the Trooper's own observations (*see People v Eves*, 28 AD3d 1231, 1231 [4th Dept 2006], *lv denied* 7 NY3d 755 [2006]; *see generally People v Vasquez*, 88 NY2d 561, 574 [1996]). Defendant also contends that the admission in

evidence of those statements violated his right to confront witnesses against him. We reject that contention because the spontaneous statements of the other occupants were not testimonial in nature (*see generally People v Garcia*, 25 NY3d 77, 85 [2015]).

We reject defendant's contention that his conviction of driving while intoxicated is not supported by legally sufficient evidence with respect to the element of operation of a motor vehicle, inasmuch as "there is a valid line of reasoning and permissible inferences from which a rational jury could have found [that] element[] of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Courteau*, 154 AD3d 1317, 1318 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

We also reject defendant's contention that the court improperly aided the prosecution during an evidentiary hearing by asking additional questions of the testifying State Trooper. The court did not take on " 'either the function or appearance of an advocate' " (*People v Pham*, 178 AD3d 1438, 1439 [4th Dept 2019]) and instead merely sought to " 'clarify [the Trooper's] testimony and to facilitate the progress of the [hearing] and to elicit relevant and important facts' " (*id.* at 1438).

Contrary to defendant's further contention, defense counsel was not ineffective for failing to object to the testimony of the Trooper regarding statements made by defendant on the ground that defendant's statements were hearsay. Certain of those statements were not admitted for their truth, and thus were not hearsay (*see generally People v Patterson*, 28 NY3d 544, 551-552 [2016]), the remaining statements of defendant were admissible as declarations against defendant's interest (*see People v Soto*, 26 NY3d 455, 457 [2015]), and defense counsel's performance was not rendered ineffective by an alleged failure to " 'make an objection or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]). Defendant further contends that defense counsel was ineffective for failing to object to the Trooper's testimony when the Trooper read aloud a portion of defendant's chemical test refusal form. Defense counsel, however, initially objected to the admission in evidence of the chemical test refusal form, and defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' " for defense counsel's failure to make additional objections to that part of the Trooper's testimony (*People v Benevento*, 91 NY2d 708, 712-713 [1998]). Lastly, the sentence is not unduly harsh or severe.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

476

KA 15-01202

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DON WILLIAMS, 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 (Alex R. Renzi, J.), rendered July 8, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Defendant contends that Supreme Court erred in denying his challenge for cause to a prospective juror. We reject that contention. The prospective juror's statements did not demonstrate "a state of mind that is likely to preclude" rendering an impartial verdict (CPL 270.20 [1] [b]), or a " 'preexisting opinion[] that might indicate bias' " (*People v Patterson*, 34 NY3d 1112, 1113 [2019], quoting *People v Arnold*, 96 NY2d 358, 363 [2001]). Thus, we agree with the People that the court "was not required to seek an assurance that [the prospective juror] could decide the case impartially" (*People v Hall*, 169 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 33 NY3d 976 [2019] [internal quotation marks omitted]; *see Patterson*, 34 NY3d at 1113). Moreover, even if the prospective juror's statements " 'cast a serious doubt on [her] ability to render an impartial verdict,' " the record establishes that she gave an " 'unequivocal assurance that [she could] set aside any bias and render an impartial verdict based on the evidence' " (*People v Wright* [appeal No. 2], 104 AD3d 1327, 1328 [4th Dept 2013], *lv denied* 21 NY3d 1012 [2013]; *see People v Chambers*, 97 NY2d 417, 419 [2002]).

Defendant next contends that the court erred when, in response to a jury note, it projected a portion of the court's final instructions on a screen in view of the jury and simultaneously reread that portion of the charge to the jury. We note that the jury had specifically requested that the court project that portion of the instructions on a screen while rereading it to them. We also note that the jury was not supplied with a physical copy of the court's instructions. Under these circumstances, we conclude that the court did not err inasmuch as "[t]he projected charge was substantially the same as the oral charge, and the process took place entirely in the courtroom under the court's supervision and guidance. In short, there was no danger that the jurors would be left to interpret the law themselves" (*People v Laracuente*, 21 AD3d 1389, 1392 [4th Dept 2005], *lv denied* 6 NY3d 777 [2006] [internal quotation marks omitted]; *see generally People v Williams*, 8 AD3d 963, 965 [4th Dept 2004], *lv denied* 3 NY3d 683 [2004], *cert denied* 543 US 1070 [2005]).

Defendant contends that he was deprived of a fair trial by a remark made by the court and by comments of the prosecutor on summation and during cross-examination. Defendant, however, did not object to any of the alleged improprieties, and we therefore conclude that defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *see generally People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [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]).

Finally, defendant contends that the court erred in refusing to suppress physical evidence based on its determination following a *Darden* hearing with respect to the confidential informant relied upon by the police. We reject that contention (*see generally People v Edwards*, 95 NY2d 486, 493-494 [2000]; *People v Darden*, 34 NY2d 177, 181-182 [1974], *rearg denied* 34 NY2d 995 [1974]). Having reviewed the sealed transcript of the *Darden* hearing and the summary report made available to defendant and the People, we conclude that the court properly determined that the confidential informant existed and provided the information to the police (*see People v Brown* [appeal No. 1], 93 AD3d 1231, 1231 [4th Dept 2012], *lv denied* 19 NY3d 958 [2012]), and that the informant was reliable and had a basis for his or her knowledge that defendant was in possession of a gun and drugs or drug paraphernalia (*see People v Mitchum*, 130 AD3d 1466, 1468 [4th Dept 2015]; *People v Henry*, 74 AD3d 1860, 1861-1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

479

CAF 19-00845

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

IN THE MATTER OF NICHOLAS COIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARINA SAAVEDRA, RESPONDENT-RESPONDENT.

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

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

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

Appeal from an order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered March 29, 2019 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petitions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the petitions, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that granted respondent mother's motion seeking to dismiss his petitions for, inter alia, modification of a prior order of custody on the ground that New York is an inconvenient forum under Domestic Relations Law § 76-f. The father filed the petitions after the mother moved to California with the parties' five-year-old child without informing the father, who was incarcerated at the time.

We reject the father's contention that Family Court erred in declining to exercise its jurisdiction in this matter. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a court having jurisdiction to make a child custody determination "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances" (Domestic Relations Law § 76-f [1]). "Before determining whether it is an inconvenient forum, [the] court . . . shall consider whether it is appropriate for a court of another state to exercise jurisdiction" (§ 76-f [2]). In making that determination, the court must consider the following factors: "(a) whether domestic violence or mistreatment or abuse of a child or

sibling has occurred and is likely to continue in the future and which state could best protect the parties and the child; (b) the length of time the child has resided outside this state; (c) the distance between the court in this state and the court in the state that would assume jurisdiction; (d) the relative financial circumstances of the parties; (e) any agreement of the parties as to which state should assume jurisdiction; (f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child; (g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and (h) the familiarity of the court of each state with the facts and issues in the pending litigation" (*id.*).

Here, the court impliedly found that California is the more appropriate forum and that New York would be inconvenient. Although the record does not reflect that the court considered each of the factors required by Domestic Relations Law § 76-f (2), we need not remit the matter because the record is sufficient to allow this Court to consider those factors (*see Matter of Luis F.F. v Jessica G.*, 127 AD3d 496, 497 [1st Dept 2015]; *Matter of Sutton v Sutton*, 74 AD3d 1838, 1839 [4th Dept 2010]; *cf. Matter of Beyer v Hofmann*, 161 AD3d 1536, 1537 [4th Dept 2018]), and we likewise conclude that, under the circumstances of this case, California is an appropriate forum and New York is an inconvenient forum.

As the court noted with respect to the first factor, evidence that the father abused the mother in front of the child, that an order of protection had previously been entered against the father in New York for domestic violence, and that the mother moved to California to avoid any further abuse weighs heavily in favor of California being the more appropriate forum to protect the safety of the mother and the child (*see Matter of Peiyi Wang v Christensen*, 165 AD3d 1269, 1270 [2d Dept 2018]).

With respect to the amount of time the child has resided outside of New York, we note that the father filed the modification petition just two weeks after the mother relocated to California and that "the additional time that it took to dispose of [this] proceeding does not militate in favor of finding that New York is an inconvenient forum" (*Matter of Helmeyer v Setzer*, 173 AD3d 740, 743 [2d Dept 2019]).

With respect to the distance between the relevant forums and the financial situations of the parties, although California is a great distance from New York, we agree with the court's determination that the greater financial burden that would be placed on the mother by requiring her to travel to New York with the child weighs in favor of finding New York to be an inconvenient forum (*see Matter of Renaldo R. v Chanice R.*, 131 AD3d 885, 886 [1st Dept 2015]). Moreover, we note that either party could appear by telephone, video, or other electronic means (*see* Cal Rules of Court, Rule 5.9; *see also Helmeyer*, 173 AD3d at 744; *Matter of Snow v Elmer*, 143 AD3d 1217, 1219 [3d Dept 2016]).

The location of relevant evidence and, to some extent, the

ability of the court in each state to decide matters expeditiously also favor California as the appropriate forum. The majority of the evidence pertaining to the best interests analysis in this custody matter is located in California. Although evidence relating to certain domestic violence incidents is, as noted above, more readily available in New York, most other relevant information regarding the child's best interests, such as her school performance, response to therapy, the indigenous tribe she belongs to, and her relationship with her extended family, is in California (*see Clark v Clark*, 21 AD3d 1326, 1327 [4th Dept 2005]; *see also Matter of Balde v Barry*, 108 AD3d 622, 623 [2d Dept 2013]; *Matter of Mercado v Frye*, 104 AD3d 1340, 1341 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]). It does not appear that the child has any connection with New York other than the father and a paternal grandmother. Further, the Attorney for the Child in New York was having trouble providing effective representation to the child inasmuch as it was difficult to communicate with the child by telephone (*see generally Matter of Dei v Diew*, 56 AD3d 1212, 1212-1213 [4th Dept 2008], *lv denied* 12 NY3d 703 [2009]).

Regarding the existence of any agreement between the parties, we note that there was no agreement between them that New York would have jurisdiction, let alone any agreement that the mother would stay in New York. The custody order preserved the father's option to refile for modification of custody upon his release from prison but did not specify where he must file. We also conclude that there is no reason that the California courts cannot handle the case expeditiously and that it cannot be said that New York courts are more familiar than the California courts with the facts and issues in this case (*see Clark*, 21 AD3d at 1328). Although evidence of the father's criminal history is available in New York and the court here is familiar with the parties and the allegations of domestic violence due to the prior custody order, the circumstances have changed sufficiently that it would not be of more value to have New York rather than California hear the case (*see Luis F.F.*, 127 AD3d at 497).

Thus, weighing all of the factors, we conclude that California is the more appropriate forum for resolving the underlying custody dispute, and the record supports a determination that New York is an inconvenient forum (*see Matter of Swain v Vogt*, 206 AD2d 703, 704-705 [3d Dept 1994]).

We agree with the father, however, that the court erred in dismissing the father's petitions instead of staying the proceedings pending the commencement of proceedings in California (*see* Domestic Relations Law § 76-f [3]; *Matter of McCarthy v Brittingham-Bank*, 117 AD3d 1060, 1061 [2d Dept 2014]; *see also Renaldo R.*, 131 AD3d at 886). We therefore modify the order by reinstating the petitions, and we remit the matter to Family Court for further proceedings pursuant to Domestic Relations Law § 76-f (3), including the entry of an order staying the proceedings upon the condition that a child custody proceeding be promptly commenced in California.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

481

CAF 18-00422

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

IN THE MATTER OF SIVASUBRAMANIAM THURARAJAH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KANDASAMY MANJULA, RESPONDENT-RESPONDENT.

IN THE MATTER OF KANDASAMY MANJULA,
PETITIONER-RESPONDENT,

V

SIVASUBRAMANIAM THURARAJAH, RESPONDENT-APPELLANT.

PAMELA THIBODEAU, BUFFALO, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

LEAH A. BOUQUARD, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered January 31, 2018 in proceedings pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the subject children to respondent-petitioner Kandasamy Manjula.

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

Memorandum: Petitioner-respondent father appeals from an order that, inter alia, awarded sole custody of the subject children to respondent-petitioner mother and directed that the father shall have no access to the children. Initially, contrary to the father's contention, the gaps in the hearing transcript caused by inaudible portions of the audio tape recording "are not so significant as to preclude meaningful review of the order" (*Matter of Bibbes-Turner v Bibbes*, 174 AD3d 1506, 1507 [4th Dept 2019]; *see Matter of Savage v Cota*, 66 AD3d 1491, 1492 [4th Dept 2009]).

Contrary to the father's further contention, the record provides no basis for concluding that Supreme Court deprived him of due process by directing that the same interpreter be used for both parties (*see*

generally 22 NYCRR 217.1 [a]; *People v Robles*, 72 AD3d 1520, 1521 [4th Dept 2010], *lv denied* 15 NY3d 777 [2010]; *People v Rivera*, 298 AD2d 120, 120 [1st Dept 2002], *lv denied* 99 NY2d 563 [2002]).

The father also contends that the court erred in denying him any visitation or contact with the children. Contrary to the father's contention, we conclude that there is a sound and substantial basis in the record to support the court's determination. The record establishes that the father committed acts of domestic violence against the mother in the presence of the children, and the court found that the father's testimony denying such behavior was not credible (*see generally Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]). In addition, the testimony of a licensed trauma therapist established that the children suffered ongoing stress as a result of attending supervised visitation with the father, which had a harmful effect on their emotional and mental well-being (*see Matter of MacEwen v MacEwen*, 214 AD2d 572, 572 [2d Dept 1995]). While we agree with the father that the court erred in failing to record the in camera interviews with the children (*see* CPLR 4019 [a]), we conclude that the error does not require reversal under the circumstances of this case (*see Ladizhensky v Ladizhensky*, 184 AD2d 756, 758 [2d Dept 1992]).

Finally, we note that, although the court's order states that it "shall be deemed a change in circumstances to allow the filing of a [p]etition for visitation by [the father] upon the completion of a 52 week domestic violence program and . . . a mental health evaluation," the order does not require the father to complete such a program and evaluation as a prerequisite to filing a future petition (*see Matter of Cramer v Cramer*, 143 AD3d 1264, 1264-1265 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017]; *cf. Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [4th Dept 2015]). Indeed, nothing in the order prevents the father from supporting a future petition with a showing of a different change in circumstances (*see Cramer*, 143 AD3d at 1265).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

483

CA 19-00355

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

IN THE MATTER OF THE APPLICATION OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEDEDIAH H., RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW.

SARAH M. FALLON, DIRECTOR, MENTAL HEALTH LEGAL SERVICE, ROCHESTER (NEIL T. CAMPBELL OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered November 14, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). Contrary to respondent's contention, viewing the evidence in the light most favorable to petitioner (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we conclude that there is sufficient evidence to support the finding that respondent is a dangerous sex offender requiring confinement, i.e., that he has "a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]; *see Matter of State of New York v Jamaal A.*, 167 AD3d 1526, 1527 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of State of New York v Edward T.*, 161 AD3d 1589, 1589 [4th Dept 2018]; *see generally Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455 [2015]).

We further conclude that the determination that respondent is a dangerous sex offender requiring confinement is not against the weight of the evidence. The evidence at the hearing established that

respondent had been determined to pose a high risk of reoffending based on the Static-99R assessment tool; that respondent had failed to fully engage in sex offender treatment; that he had committed multiple SIST violations that bore on his risk of sexually reoffending, including possession of a smart phone containing, among other things, sexually suggestive videos of young children; and that he had violated other conditions of SIST that, although not sexual in nature, nevertheless also bore on his risk of recidivism (*see generally Jamaal A.*, 167 AD3d at 1526; *Edward T.*, 161 AD3d at 1589).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

486

CA 19-00496

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF WAYNE J., CONSECUTIVE NO. 127873, FROM CENTRAL
NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL
HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Oneida County Court (Walter W. Hafner, Jr., A.J.), entered January 10, 2019. The order, inter alia, continued the commitment of petitioner to a secure treatment facility.

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

Memorandum: In appeal No. 1, petitioner appeals from an order of County Court, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). In appeal No. 2, petitioner appeals from an order of the same court that denied his posttrial motion pursuant to CPLR 4404 (b).

Initially, we note that the appeal from the final order in appeal No. 1 brings up for review the propriety of the order in appeal No. 2 (*see* CPLR 5501 [a]; *see generally Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020]). We therefore dismiss the appeal from the order in appeal No. 2 (*see generally* CPLR 5501 [a]; *Daniel J.*, 180 AD3d at 1348).

We reject petitioner’s contention that the court improperly

allowed the admission of expert witness testimony that was based on certain records containing hearsay regarding uncharged conduct with respect to which petitioner did not admit his guilt. The court properly concluded that the Administrative Law Judge's determination to revoke petitioner's parole based on the uncharged conduct was an "adjudication of guilt," and thus the alleged hearsay "is inherently reliable and may be admitted through expert testimony without offending due process" (*Matter of State of New York v John S.*, 23 NY3d 326, 343 [2014], *rearg denied* 24 NY3d 933 [2014] [internal quotation marks omitted]; *see Matter of State of New York v James R.C.*, 165 AD3d 1612, 1614-1615 [4th Dept 2018]). We further conclude that the court properly determined that the hearsay evidence was more probative than prejudicial on the issue of petitioner's current mental diagnosis and his current dangerousness.

We further reject petitioner's contention that his due process rights were violated by a prolonged delay in holding a hearing in this case. The record reflects that petitioner consented to certain adjournments and was responsible for other delays, and thus the periods of time attributable thereto "are not chargeable" to respondent State of New York (State) (*Matter of State of New York v Keith F.*, 149 AD3d 671, 672 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017], *appeal dismissed* 30 NY3d 1032 [2017]). Specifically, the delays caused by petitioner's appeal in his initial article 10 proceeding and the completion of his expert's report were not chargeable to the State (*see id.*; *see also Matter of State of New York v Kerry K.*, 157 AD3d 172, 182 [2d Dept 2017]). Additionally, the delays caused by the court's congested calendar and the reassignment to a new judge were "occasioned not by the State's unreadiness . . . and did not deprive [petitioner] of due process of law" under these circumstances (*Kerry K.*, 157 AD3d at 182). Although the annual review hearing was further delayed because the court reassigned counsel to petitioner, that delay was not attributable to the State; the reassignment was based on petitioner's conduct of threatening to kill his assigned counsel.

We reject petitioner's contention that the evidence is legally insufficient to establish that he is a dangerous sex offender requiring confinement. Pursuant to the Mental Hygiene Law, a person is classified as a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). The State established that petitioner's narcissistic personality disorder (NPD) "manifests with a strong sexual component, and linked [his] NPD diagnosis to his predisposition to commit sex offenses. Thus, 'the State established by clear and convincing evidence the predisposition

prong of the mental abnormality test' " (*Matter of State of New York v Anthony B.*, 180 AD3d 688, 690-691 [2d Dept 2020]; *see also Matter of State of New York v Horowitz*, 176 AD3d 1404, 1404-1405 [3d Dept 2019], *lv denied* 34 NY3d 913 [2020]). The State also established by clear and convincing evidence that petitioner has "serious difficulty in controlling" his sexual conduct (§ 10.03 [i]; *see James R.C.*, 165 AD3d at 1613; *see generally Matter of Allan M. v State of New York*, 163 AD3d 1493, 1494 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]). The State established that petitioner has made little to no progress in his sex offender treatment program because he, inter alia, continues to deny that he is a sex offender and refuses to admit that he has engaged in sex offending behavior. Contrary to petitioner's contention, the evidence is likewise legally sufficient to support the determination that he requires continued confinement. The State's expert witness opined that petitioner is a dangerous sex offender requiring confinement based on, inter alia, his high scores on risk assessment instruments and his insufficient progress in sex offender treatment (*see Matter of State of New York v Scott W.*, 160 AD3d 1424, 1426 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). We further conclude that the court's determination is not against the weight of the evidence (*see id.*).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

487

CA 19-00497

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF WAYNE J., CONSECUTIVE NO. 127873, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Oneida County Court (Walter W. Hafner, Jr., A.J.), entered February 13, 2019. The order denied the motion of petitioner pursuant to CPLR 4404.

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

Same memorandum as in *Matter of Wayne J. v State of New York* ([appeal No. 1] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

488

CA 19-02020

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

RONALD KENNICK, JR. AND ANNEMARIE KENNICK,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

PATRICK DEVELOPMENT, INC., DEFENDANT,
AND CANNON DESIGN, INC.,
DEFENDANT-APPELLANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JEFFREY F. BAASE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered April 22, 2019. The order, among other things, denied in part the motion of defendant Cannon Design, Inc. for summary judgment and denied plaintiffs' cross motion for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 24, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

493

CA 19-00770

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

IN THE MATTER OF SARA KIELLY,
PETITIONER-RESPONDENT,

V ORDER

LAURINE JONES, FIVE POINTS CORRECTIONAL FACILITY SUPERINTENDENT, AND DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BRUCE C. ENTELISANO, ROME, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered October 4, 2018. The order, inter alia, held respondents in contempt of court.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 17 and May 2, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

494

CA 19-01792

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

IN THE MATTER OF SARA KIELLY,
PETITIONER-RESPONDENT,

V ORDER

LAURINE JONES, FIVE POINTS CORRECTIONAL FACILITY SUPERINTENDENT, DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENTS-APPELLANTS,
AND MENTAL HYGIENE LEGAL SERVICE, NONPARTY APPELLANT.
(APPEAL NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BRUCE C. ENTELISANO, ROME, FOR PETITIONER-RESPONDENT.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR NONPARTY APPELLANT.

Appeals from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 25, 2019. The order, insofar as appealed from, found respondents and nonparty Mental Hygiene Legal Service in contempt of court.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 13 and 17, and May 2, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

495

CA 19-02031

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

IN THE MATTER OF SARA KIELLY,
PETITIONER-RESPONDENT,

V ORDER

LAURINE JONES, FIVE POINTS CORRECTIONAL FACILITY SUPERINTENDENT, AND DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR, CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BRUCE C. ENTELISANO, ROME, FOR PETITIONER-RESPONDENT.

Appeal from an order of Supreme Court, Oneida County (Erin P. Gall, J.), entered May 15, 2019. The order, inter alia, denied the motion of respondents to dismiss the proceeding.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 17 and May 2, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

502

KA 16-00950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS O'CONNOR, 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 Monroe County Court (Melchor E. Castro, A.J.), rendered October 30, 2015. The judgment convicted defendant upon his plea of guilty of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal mischief in the third degree (Penal Law § 145.05 [2]). We affirm.

To the extent that defendant challenges the amount of the restitution award and argues that his plea was not voluntary, those contentions, although not precluded by his waiver of the right to appeal (*see People v Rodriguez*, 156 AD3d 1433, 1434 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]; *People v Oehler*, 278 AD2d 807, 807 [4th Dept 2000]), are unpreserved (*see People v Lewis*, 114 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *People v Wright*, 288 AD2d 899, 899 [4th Dept 2001], *lv denied* 97 NY2d 689 [2001]). Defendant's further contention that he was denied effective assistance of counsel " 'does not survive his guilty plea or his waiver of the right to appeal because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Rizek* [appeal No. 1], 64 AD3d 1180, 1180 [4th Dept 2009], *lv denied* 13 NY3d 862 [2009]; *see People v Abdulla*, 98 AD3d 1253, 1254 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]).

Finally, defendant contends that his waiver of indictment was jurisdictionally defective because it failed to strictly comply with CPL 195.20 by omitting the approximate time and place of the

underlying offense. Those omissions were of "non-elemental factual information" (*People v Thomas*, 34 NY3d 545, 569 [2019]), and thus defendant's contention is forfeited by his plea inasmuch as defendant does not assert that he lacked notice of the precise crime for which he waived prosecution by indictment (*see id.*; *People v Ramirez*, 180 AD3d 1378, 1378-1379 [4th Dept 2020]). In fact, defendant was provided with such notice in other accusatory instruments.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

505

CAF 18-02365

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

IN THE MATTER OF BRYSON M.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VICTORIA M., RESPONDENT-APPELLANT.

ROBERT GALLAMORE, OSWEGO, FOR RESPONDENT-APPELLANT.

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

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered December 11, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order that terminated her parental rights with respect to the subject child on the basis of her intellectual disability (*see* Social Services Law § 384-b [4] [c]). Contrary to the mother's contention, petitioner established by clear and convincing evidence that she was "presently and for the foreseeable future unable, by reason of . . . intellectual disability, to provide proper and adequate care for [the] child" (*id.*; *see generally Matter of Joseph A.T.P. [Julia P.]*, 107 AD3d 1534, 1535 [4th Dept 2013]). Specifically, petitioner presented, inter alia, evidence of the mother's IQ score of 57, which had remained substantially constant and rendered her meaningfully unable to understand the child's significant medical needs and to effectively parent him, and the opinion of a psychologist that the mother was unable to safely care for the child both presently and for the foreseeable future (*see Joseph A.T.P.*, 107 AD3d at 1535).

We reject the mother's further contention that Family Court erred in giving any weight to the testimony of the psychologist. The psychologist interviewed and examined the mother. He also reviewed his earlier psychological evaluation of her, documents from the child's foster parent and the mother's parent educators, and a prior psychological evaluation report of the mother compiled by another professional. Contrary to the mother's contention, the fact that the

psychologist did not review certain of the mother's mental health records "is not, by itself, reason for discrediting his testimony" (*Matter of Tyesha W.*, 259 AD2d 349, 349 [1st Dept 1999]), and the court was entitled to rely upon the opinion of the psychologist, especially in the absence of contradictory expert testimony regarding the mother's intellectual capacity (*see generally Joseph A.T.P.*, 107 AD3d at 1535; *Matter of Allen DD.*, 17 AD3d 740, 743 [3d Dept 2005], *lv denied* 5 NY3d 704 [2005]).

Assuming, arguendo, that the court erred in allowing various lay witnesses to testify regarding the child's medical condition, we conclude that, contrary to the mother's contention, " '[a]ny error in the admission of [that testimony] is harmless because the result reached herein would have been the same even had such [testimony] been excluded' " (*Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *see generally Matter of Ayden W. [John W.]*, 156 AD3d 1389, 1390 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). Here, it was undisputed that the child suffered from certain medical conditions, and testimony regarding the nature of those conditions was properly elicited through the testimony of the child's pediatrician, the admission of which the mother does not dispute on appeal.

The mother failed to preserve for our review her further contention that the court erred in terminating her parental rights absent a finding that petitioner had made "reasonable accommodations" for her pursuant to the Americans with Disabilities Act (*see Matter of Cerenithy B. [Ecksthine B.]*, 149 AD3d 637, 638 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]; *see generally Matter of Emerald L.C. [David C.]*, 101 AD3d 1679, 1680 [4th Dept 2012]). The mother likewise failed to preserve her contention that the court erred in failing to adjourn the termination proceedings (*see generally Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

522

KA 18-01286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SKYLER A. CARLSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 25, 2017. The judgment convicted defendant upon a jury verdict of rape in the first degree, rape in the third degree and 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 after a jury trial of rape in the first degree (Penal Law § 130.35 [1]), rape in the third degree (§ 130.25 [3]), and criminal sexual act in the first degree (§ 130.50 [1]). We affirm.

Defendant preserved for our review his contention that County Court erred in permitting the People to elicit lay testimony about changes in the victim's behavior after the incident (*see* CPL 470.05 [2]). Nevertheless, we reject that contention because such evidence is admissible to prove defendant's guilt, even if it is not particularly strong evidence (*see generally People v Miller*, 78 AD3d 733, 734 [2d Dept 2010], *lv denied* 16 NY3d 833 [2011]; *People v Biavaschi*, 265 AD2d 268, 269 [1st Dept 1999], *lv denied* 94 NY2d 916 [2000]; *People v Jones*, 188 AD2d 364, 364 [1st Dept 1992], *lv denied* 81 NY2d 972 [1993]). Moreover, we conclude that the probative value of the testimony about the victim's post-incident behavior is not outweighed by any undue prejudice to defendant (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]; *People v Inman*, 134 AD3d 1434, 1435-1436 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]).

Defendant's contention that the evidence is legally insufficient to support his conviction is preserved for our review because, in his motion for a trial order of dismissal, he specifically argued that the People did not meet their burden with respect to the elements of the charged crimes that he now challenges on appeal, i.e., the elements of

forcible compulsion, lack of consent, and anal sexual conduct (*see generally People v Gray*, 86 NY2d 10, 19 [1995]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction. With respect to the counts of rape in the first degree and criminal sexual act in the first degree, there is ample evidence in the trial record that defendant used forcible compulsion (*see* Penal Law §§ 130.35 [1]; 130.50 [1]), i.e., that he used physical force to push the victim down and hold her down by the neck as he continued to have sex with her, despite her attempts to get up and leave (*see* § 130.00 [8] [a]; *People v Soto*, 155 AD3d 1066, 1067 [2d Dept 2017], *lv denied* 30 NY3d 1120 [2018]). The evidence of forcible compulsion is also sufficient to establish lack of consent as an element of rape in the third degree (*see* § 130.25 [3]), and therefore it was not necessary for the People to establish that the victim clearly expressed a lack of consent (*see* § 130.05 [2] [a], [d]). In addition, the victim's testimony that defendant inserted his penis in her rectum was sufficient to establish anal sexual conduct as an element of criminal sexual act in the first degree (*see* § 130.50 [1]).

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 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 verdict would not have been unreasonable, we cannot conclude that " 'the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Ultimately the jury was in the best position to assess the victim's credibility (*see generally People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]), and we perceive no reason to reject the jury's credibility determination. Moreover, we "note that [the victim's] testimony was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*Edwards*, 159 AD3d at 1426 [internal quotation marks omitted]).

We conclude that defendant's contention that the court abused its discretion when it permitted the adult victim to testify while accompanied by a dog is unpreserved because defendant did not object to that arrangement (*see* CPL 470.05 [2]; *see generally People v Logan*, 178 AD3d 1386, 1388 [4th Dept 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]). Furthermore, we reject defendant's contention that defense counsel was ineffective for failing to object to that arrangement. Even assuming, arguendo, that defense counsel erred in not objecting to the court's decision to let the victim testify while accompanied by a dog (*see People v Geddis*, 173 AD3d 1724, 1726 [4th Dept 2019]), we conclude that the failure to object did not amount to ineffective assistance because, viewed in the totality of the representation, which resulted in one of the counts in

the indictment being dismissed and defendant's acquittal of another count, that error was not sufficiently egregious as to deprive defendant of a fair trial (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Turner*, 5 NY3d 476, 480 [2005]).

Defendant's contention that he was deprived of a fair trial due to instances of prosecutorial misconduct on summation is unpreserved because defense counsel did not object to any of the purported improper comments (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v Maxey*, 129 AD3d 1664, 1666 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). In any event, defendant's contention is without merit. Although it was improper for the prosecutor on summation to characterize defense counsel's summation as evincing "a Brock Turner mentality"—inflaming the passions of the jury by specifically referring to a recent sexual assault case of nationwide notoriety that involved allegations similar to those made against defendant (*see generally People v Ashwal*, 39 NY2d 105, 110 [1976]; *People v Morgan*, 111 AD3d 1254, 1256 [4th Dept 2013])—that sole comment, viewed in context of the prosecutor's entire summation, was not so egregious as to deprive defendant of a fair trial (*see People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]; *see generally People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]).

Although the improper comment at issue here does not warrant reversal, we nevertheless take this opportunity to remind the People that " '[i]t is not enough for [a prosecutor] to be intent on the prosecution of [the] case. Granted that [the prosecutor's] paramount obligation is to the public, [he or she] must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, [the prosecutor's] mission is not so much to convict as it is to achieve a just result' " (*People v Bailey*, 58 NY2d 272, 276-277 [1983], quoting *People v Zimmer*, 51 NY2d 390, 393 [1980]; *see Morgan*, 111 AD3d at 1256; *see also People v Case*, 150 AD3d 1634, 1637 [4th Dept 2017]). To that end, we emphasize that "[p]rosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities—constitutional, statutory, ethical, personal—to safeguard the integrity of criminal proceedings and fairness in the criminal process" (*People v Santorelli*, 95 NY2d 412, 420-421 [2000]).

Contrary to defendant's further contention, we conclude that defense counsel's failure to object to the challenged comments did not constitute ineffective assistance because none of the challenged comments were so egregious as to deprive defendant of a fair trial (*see People v Hendrix*, 132 AD3d 1348, 1348 [4th Dept 2015], *lv denied* 26 NY3d 1145 [2016]; *People v Black*, 124 AD3d 1365, 1366 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]).

Defendant's contention that he was deprived of a fair trial based on the victim's outburst at defense counsel during cross-examination is unreviewable because, although defense counsel initially moved to

strike that testimony, when the trial proceedings resumed following a break occasioned by the victim's outburst, defense counsel proceeded without requesting any further relief such as a curative instruction or a mistrial, effectively abandoning that contention (*see People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Brown*, 107 AD3d 732, 732 [2d Dept 2013], *lv denied* 22 NY3d 1039 [2013]; *People v Harvin*, 254 AD2d 29, 29-30 [1st Dept 1998], *lv denied* 93 NY2d 899 [1999]). We further conclude that defense counsel's failure to request a curative instruction or mistrial did not constitute ineffective assistance of counsel. Defense counsel referred to the victim's outburst on summation and argued that the victim was angry at being caught in a lie, which suggests that defense counsel had a strategic motivation in not seeking a curative instruction or mistrial. Thus, defendant failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcoming (*see generally People v Hogan*, 26 NY3d 779, 785 [2016]; *Caban*, 5 NY3d at 152).

We reject defendant's contention that the court erred in determining that defendant was not eligible for youthful offender treatment upon his conviction of rape in the first degree and criminal sexual act in the first degree. The court based that determination on its finding that there were no mitigating circumstances that bore directly on the manner in which the crimes were committed, offenses in which defendant was the sole participant (*see* CPL 720.10 [2] [a] [iii]; [3]), and we conclude that the court did not thereby abuse its discretion (*see People v Middlebrooks*, 25 NY3d 516, 526-527 [2015]; *People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]).

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

526

KA 18-01171

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON MARCUS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KATHY E. MANLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 4, 2018. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a plea of guilty, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). At the plea hearing, County Court warned defendant that if she was arrested before sentencing, it would not be bound by the promised sentence and could impose an enhanced sentence. Defendant was subsequently arrested before sentencing. The court found that the arrest had a legitimate basis, and it imposed an enhanced sentence.

On appeal, defendant argues that the enhanced sentence was improper because the conduct underlying her post-plea arrest purportedly occurred before the plea. Preliminarily, we agree with defendant that she did not validly waive her right to appeal (*see People v Thomas*, 34 NY3d 545, 562-563 [2019]). Moreover, contrary to the People's assertion, defendant's argument is preserved for appellate review. Indeed, defendant repeatedly advanced her current argument to the sentencing court in opposition to an enhanced sentence.

We reject defendant's argument on the merits, however. A sentencing court's power to impose an enhanced sentence for violating a no-arrest condition turns on two questions: first, "whether a defendant subject to th[at] condition[] *was arrested*" after the plea (*People v Parker*, 271 AD2d 63, 69 [4th Dept 2000], *lv denied* 95 NY2d

967 [2000] [emphasis added]), and second, whether there was a "legitimate basis" for that arrest (*People v Outley*, 80 NY2d 707, 713 [1993]). As defendant acknowledges, the answer to both of those questions in this case is yes. The enhanced sentence is thus legally permissible, irrespective of whether the conduct underlying the arrest occurred before or after the plea. Defendant cites no authority for the proposition that a legitimate arrest cannot ever serve as the basis for an enhanced sentence if the conduct underlying the arrest occurred before the plea.

Defendant's reliance on *People v Criscitello* (123 AD3d 1235 [3d Dept 2014]) is unavailing. In that case, the defendant was subject to enhanced sentencing only if, insofar as relevant here, he *used* drugs at any point between the plea and sentencing (*id.* at 1236-1237). Notably, the "defendant was not advised, when granted a furlough [after pleading guilty], that if he 'tested positive' for drugs when he returned he would receive an enhanced sentence" (*id.* at 1237). Thus, although the defendant tested positive for drugs on the sentencing date, the imposition of an enhanced sentence was nevertheless improper because the test could not pinpoint whether he had used drugs before or after the plea (*id.* at 1237). Unlike *Criscitello*, however, defendant's exposure to enhanced sentencing in this case was not defined exclusively by her post-plea *conduct.* Rather, defendant was subject to enhanced sentencing if she was legitimately *arrested* after the plea, without regard to whether the conduct underlying that arrest occurred before or after the plea.

Finally, the enhanced sentence is not unduly harsh or severe.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

527

KA 18-00862

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. COTTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 16, 2018. The judgment convicted defendant upon a jury verdict of burglary in the first degree, sexual abuse in the first degree, aggravated criminal contempt, aggravated harassment in the second degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of burglary in the first degree (Penal Law § 140.30 [2]), sexual abuse in the first degree (§ 130.65 [1]), aggravated criminal contempt (§ 215.52 [1]), criminal contempt in the second degree (§ 215.50 [3]), and aggravated harassment in the second degree (§ 240.30 [2]). We affirm.

County Court properly granted the People's *Batson* challenge to defendant's exercise of a peremptory challenge during jury selection. A trial court's determination whether a proffered gender-neutral reason is pretextual is entitled to great deference (*see People v Hernandez*, 75 NY2d 350, 356 [1990], *affd* 500 US 352 [1991]; *People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]), and we perceive no reason to disturb the court's determination that the reasons proffered by defense counsel for the challenge in question were pretextual. Here, the People's showing that defendant had used his 12 prior peremptory challenges to strike only female jurors—especially in the context of a sexual assault trial involving a male defendant and a female victim—constituted strong evidence that defendant's proffered gender-neutral reasons for the strike were pretextual (*see People v Hecker*, 15 NY3d 625, 660 [2010], *cert denied* 563 US 947 [2011]; *People v Murphy*, 79 AD3d 1451, 1452 [3d Dept 2010], *lv denied* 16 NY3d 862 [2011]; *see also People v Jenkins*,

75 NY2d 550, 556 [1990]; *see generally J.E.B. v Alabama*, 511 US 127, 148-149 [1994, O'Connor, J., concurring]).

We reject defendant's contention that the court erred in permitting the People to introduce, as evidence of defendant's consciousness of guilt, evidence that, after the incident, the victim discovered that some of her electronic devices had been damaged. Evidence that defendant may have damaged the victim's electronic devices to prevent her from preserving a record of defendant's conduct is probative of his consciousness of guilt inasmuch as it is akin to evidence of tampering or witness intimidation (*see generally People v Bennett*, 79 NY2d 464, 469-470 [1992]; *People v Larregui*, 164 AD3d 1622, 1623-1624 [4th Dept 2018], *lv denied* 32 NY3d 1126 [2018]), and the probative value of that evidence is not outweighed by its potential for prejudice (*see Larregui*, 164 AD3d at 1624; *People v Case*, 113 AD3d 872, 873 [2d Dept 2014], *lv denied* 23 NY3d 961 [2014]).

Furthermore, we conclude that although it was error for the court to permit the People to elicit testimony describing a statement made by defendant—i.e., his date of birth—that had been suppressed before trial based on a violation of *Payton v New York* (445 US 573, 576 [1980]; *see People v Harris*, 77 NY2d 434, 437 [1991]; *People v Brown*, 152 AD3d 1209, 1211 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]), that error is harmless inasmuch as the remaining, properly admitted evidence of guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant in the absence of that testimony (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]; *Brown*, 152 AD3d at 1211).

Contrary to defendant's contention, the court did not abuse its discretion in fashioning a *Sandoval* compromise. We conclude that the court properly balanced the probative value of allowing the People to inquire about the existence of two of defendant's prior felony convictions against the risk of unfair prejudice (*see People v Lloyd*, 118 AD3d 1117, 1122 [3d Dept 2014], *lv denied* 25 NY3d 951 [2015]; *People v Puff*, 283 AD2d 952, 953 [4th Dept 2001], *lv denied* 96 NY2d 923 [2001]). The fact that the two felony convictions were remote in time does not, standing alone, preclude their admissibility under *Sandoval* (*see People v Walker*, 83 NY2d 455, 459 [1994]; *People v Taylor*, 140 AD3d 1738, 1739 [4th Dept 2016]).

Defendant's contention that the evidence supporting his conviction is legally insufficient is preserved only with respect to unlawful entry as an element of burglary in the first degree, and notice of the order of protection as an element of criminal contempt in the second degree and aggravated criminal contempt (*see generally People v Hines*, 97 NY2d 56, 61-62 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Gray*, 86 NY2d 10, 19 [1995]). To the extent that defendant challenges the sufficiency of the evidence with respect to intent as an element of burglary in the first degree and the lack of consent as an element of sexual abuse in the first degree his contention is unpreserved because he did not specifically advance those arguments in his motion for a trial order of dismissal (*see*

Gray, 86 NY2d at 19).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction. With respect to the count of burglary in the first degree, the victim's testimony that defendant forcibly pushed his way into her apartment without her permission is sufficient to establish that he unlawfully entered the apartment (*see People v Shay*, 85 AD3d 1708, 1709 [4th Dept 2011], *lv denied* 17 NY3d 822 [2011]; *People v Brown*, 74 AD3d 1748, 1749 [4th Dept 2010], *lv denied* 15 NY3d 802 [2010]). With respect to the counts of criminal contempt in the second degree and aggravated criminal contempt, testimony that the order of protection was entered by the court in defendant's presence is sufficient to establish that he had notice of the order of protection (*see People v Nichols*, 163 AD3d 39, 47-49 [4th Dept 2018]; *see generally People v Williams*, 118 AD3d 1295, 1296 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]).

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 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 verdict would not have been unreasonable, we cannot conclude that " 'the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Ultimately the jury was in the best position to assess the victim's credibility (*see generally People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]), and we perceive no reason to reject the jury's credibility determination. Moreover, we "note that [the victim's] testimony was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*Edwards*, 159 AD3d at 1426 [internal quotation marks omitted]).

Additionally, we reject defendant's contention that defense counsel was ineffective in cross-examining the victim about a police report involving defendant where the victim was not the complainant—thereby opening the door for the prosecution to question defendant on cross-examination about an incident where he allegedly stole someone's credit card. That sole tactical error, by itself, did not deprive defendant of meaningful representation inasmuch as the error was not "sufficiently egregious and prejudicial to compromise defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Cummings*, 16 NY3d 784, 785 [2011], *cert denied* 565 US 862 [2011]; *People v Paul*, 171 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 983 [2019]).

Defendant's contention that he was deprived of a fair trial due to instances of prosecutorial misconduct on summation is for the most part unpreserved because defense counsel did not object to the majority of the purported improprieties (*see People v Romero*, 7 NY3d

911, 912 [2006]; *People v Maxey*, 129 AD3d 1664, 1666 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). In any event, any improprieties in the People's summation were not sufficiently egregious to deprive defendant of a fair trial. There was no "obdurate pattern of inflammatory remarks" or pervasive and egregious improper comments warranting a new trial (*People v Whaley*, 70 AD3d 570, 571 [1st Dept 2010], *lv denied* 14 NY3d 894 [2010]). Contrary to defendant's further contention, we conclude that defense counsel's failure to object to the allegedly improper comments did not constitute ineffective assistance because the challenged comments were not so egregious as to deprive defendant of a fair trial (*see People v Hendrix*, 132 AD3d 1348, 1348 [4th Dept 2015], *lv denied* 26 NY3d 1145 [2016]; *People v Black*, 124 AD3d 1365, 1366 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]).

Defendant's contention that the court penalized him for exercising his right to trial by imposing a much greater sentence than was offered as part of a pretrial plea offer is unpreserved (*see People v Meacham*, 151 AD3d 1666, 1669 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

535

CA 19-00751

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

IN THE MATTER OF THE APPLICATION OF STATE OF NEW YORK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO T., RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (EMILY M. NORTH OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 21, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a detained sex offender who has a mental abnormality (*see* §§ 10.03 [g], [i]; 10.07 [d]) and determining, following a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility (*see* §§ 10.03 [e]; 10.07 [f]). We affirm.

Contrary to respondent's contention, we conclude that Supreme Court's determination that he suffers from a mental abnormality within the meaning of the statute is not against the weight of the evidence. Here, "the evidence presented by respondent that conflicted with that presented by petitioner merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its 'opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting expert [opinions]' " (*Matter of State of New York v Stein*, 85 AD3d 1646, 1647 [4th Dept 2011], *affd* 20 NY3d 99 [2012], *cert denied* 568 US 1216 [2013]). Upon our review of the record, we conclude that the evidence does not preponderate so greatly in respondent's favor that the court could not have reached its conclusion on any fair interpretation of the evidence (*see id.*; *see also Matter of State of New York v Trombley*, 98 AD3d 1300, 1301 [4th

Dept 2012], *lv denied* 20 NY3d 856 [2013]; *Matter of State of New York v Timothy EE.*, 97 AD3d 996, 996-998 [3d Dept 2012]).

Contrary to respondent's further contention, we conclude that the court's determination that he requires confinement is not against the weight of the evidence. Here, "[t]he court was 'in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented' " (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]), and we see no reason to disturb the court's decision to credit the testimony of petitioner's expert (*see Trombley*, 98 AD3d at 1301).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 18-00616

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE JENKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 29, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the order of protection issued in favor of the complainant and as modified the judgment is 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]). Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent. At the plea proceeding, defendant acknowledged that he spoke with his attorney about the meaning of the waiver and stated that he understood the rights he was waiving. While the language of the plea colloquy was overbroad, it was coupled with clarifying language in the written waiver stating that certain issues are not covered by the appeal waiver, including the legality of the sentence and plea (*see People v Thomas*, 34 NY3d 545, 564 [2019]). Defendant's valid waiver of the right to appeal encompasses his challenge to Supreme Court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]). To the extent that defendant's claim that he was denied effective assistance of counsel at the suppression hearing survives his guilty plea and valid waiver of the right to appeal (*see People v Wingfield*, 181 AD3d 1253, 1253-1254 [4th Dept 2020]; *see generally People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]), we conclude that it lacks merit (*see People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant further contends that the court erred in issuing an order of protection in favor of the complainant. As a preliminary

matter, we agree with defendant that his waiver of the right to appeal does not preclude us from considering his contention inasmuch as the order of protection was "not a part of the plea agreement" (*People v Lilley*, 81 AD3d 1448, 1448 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]) and is not a part of his sentence (*see People v Nieves*, 2 NY3d 310, 316 [2004]). At the time of the plea, the People indicated that they would not seek an order of protection and the complainant, defendant's girlfriend, did not request such relief. Under the circumstances of this case, we agree with defendant that the court abused its discretion in issuing an order of protection (*see generally People v Monacelli*, 299 AD2d 916, 916 [4th Dept 2002], *lv denied* 99 NY2d 617 [2003]), and we therefore modify the judgment accordingly.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

545

KA 16-00349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NYJEE BOYD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered September 8, 2015. Defendant was resentenced upon his conviction of attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Same memorandum as in *People v Boyd* ([appeal No. 2] — AD3d — [June 12, 2020] [4th Dept 2020]).

All concur except DeJoseph, J., who dissents and votes to hold the case, reserve decision, and remit the matter to Supreme Court, Monroe County, for further proceedings in accordance with the same dissenting memorandum as in *People v Boyd* ([appeal No. 2] — AD3d — [June 12, 2020] [4th Dept 2020]).

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 19-01843

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NYJEE BOYD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered July 7, 2015. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal use of a firearm in the first degree (§ 265.09 [1] [a]) and, in appeal No. 1, he appeals from the resentence imposed on that conviction. The case arose from an incident in which defendant shot the victim, who was seated in a vehicle outside a store.

Contrary to defendant's contention in appeal No. 2, we conclude that Supreme Court properly determined that defendant failed to establish a prima facie case of racial discrimination in support of his application pursuant to *Batson v Kentucky* (476 US 79 [1986]). In order to satisfy his or her burden at step one of the *Batson* inquiry, a defendant must demonstrate that "the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason" (*People v Herrod*, 163 AD3d 1462, 1462 [4th Dept 2018] [internal quotation marks omitted]; *see People v Smocum*, 99 NY2d 418, 421 [2003]). A pattern of strikes made by the prosecutor may give rise to an inference of discrimination (*see Batson*, 476 US at 97; *People v Bolling*, 79 NY2d 317, 324 [1992]). The

defendant is not required to demonstrate a discriminatory pattern, however (*see Herrod*, 163 AD3d at 1462). A defendant may instead satisfy his or her step one burden "by demonstrating that 'members of the cognizable group were excluded while others with the same relevant characteristics were not' or that the People excluded members of the cognizable group 'who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution' " (*id.*, quoting *People v Childress*, 81 NY2d 263, 267 [1993]).

Here, at step one of the *Batson* inquiry, defendant failed to establish a prima facie case inasmuch as he offered "the kind of vague and conclusory assertions" that have been repeatedly rejected by the Court of Appeals (*People v Jones*, 11 NY3d 822, 823 [2008]). Specifically, defense counsel stated that the prospective juror in question was the "only black juror" who had not already been dismissed for cause and there was "no indication" that the juror would be "anything other than fair and impartial to both sides." After considering defendant's argument at step one, the court observed that defendant had failed to demonstrate a discriminatory pattern of strikes and denied his application without prompting the prosecutor to provide a race-neutral reason at step two (*see generally People v Bridgeforth*, 28 NY3d 567, 571 [2016]). Insofar as the court based its reasoning on the erroneous notion that a discriminatory pattern of strikes must be shown, that reasoning was flawed (*see Herrod*, 163 AD3d at 1462). Nevertheless, because defendant failed to establish a prima facie case at step one, the court properly denied his application without further inquiry (*see generally People v Smouse*, 160 AD3d 1353, 1355 [4th Dept 2018]).

Our dissenting colleague concludes that we have a *Concepcion* problem (*see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]), but we respectfully disagree. Whether a defendant has demonstrated a discriminatory pattern of peremptory strikes goes to the issue of whether that defendant has established a prima facie case at step one of the *Batson* inquiry (*see generally Bolling*, 79 NY2d at 324). Because the court relied on that ground in denying the application, *Concepcion* does not preclude us from affirming the judgment on the same ground, i.e., that defendant failed to establish a prima facie case at step one (*see generally People v Patterson*, 28 NY3d 544, 549 [2016]). The dissent cites to our decision in *People v Pescara* (162 AD3d 1772 [4th Dept 2018]), but that case does not compel a different result. Unlike here, the trial court in *Pescara* based its denial of the defendant's *Batson* application on the ground that the prosecutor provided a race-neutral reason at step two, and thus *Concepcion* barred us from affirming on the ground that the defendant failed to establish a prima facie case at step one (*id.* at 1773-1774).

We agree with defendant that the court erred in refusing to instruct the jury with respect to cross-racial identification. Where, as here, "a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final

instructions, a jury charge on the cross-race effect" (*People v Boone*, 30 NY3d 521, 535 [2017]). Nevertheless, we conclude that the error is harmless because the evidence of defendant's guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Defendant and the victim were not strangers to one another. Rather, defendant and the victim had been incarcerated together 3½ years earlier. During that time, they had a violent confrontation, which the victim described in detail during his trial testimony. The victim further testified that the shooting occurred when defendant approached the vehicle in which the victim was sitting, asked the victim how he had been, engaged him in conversation, demanded that the victim exit the vehicle, and shot him five times when he refused to do so. Defendant took the witness stand in his own defense, admitting that he was at the scene of the crime and that he recognized the victim. Shown a surveillance video of the crime, defendant identified himself not as the perpetrator of the crime, but as one of the bystanders. In doing so, defendant acknowledged physical differences between himself and the bystander in the video.

Defendant's contention that he was denied a fair trial due to prosecutorial misconduct during summation is not preserved for our review because he failed to object to any of the alleged improprieties (*see People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

In appeal No. 1, we reject defendant's challenge to the legality of the resentence. With respect to the count of criminal use of a firearm in the first degree, the court was required by statute to "impose an additional consecutive sentence of five years to the sentence imposed on" the count of attempted murder in the second degree (Penal Law § 265.09 [2]).

In light of our determination, defendant's remaining contention in both appeals is academic.

All concur except DeJoseph, J., who dissents and votes to hold the case, reserve decision, and remit the matter to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: I respectfully dissent. In my view, appeal No. 2 presents a textbook *Concepcion* problem. Supreme Court denied defendant's *Batson* application on the sole ground that he had failed to show a discriminatory pattern. Specifically, the court stated: "I have not seen a pattern by either side to try to eliminate ethnic groups. Without that evidence, the *Batson* challenge would not survive." The record could not be any clearer. Nowhere in the court's explanation of its ruling was defendant's burden mentioned, and it is well settled that a defendant making a *Batson* challenge is not required to show a discriminatory pattern in the prosecution's use of peremptory strikes (*see People v Herrod*, 163 AD3d 1462, 1462 [4th Dept 2018]). The court's ruling was simply wrong and, while the majority acknowledges that, they also suggest that the court found

that the defendant did not meet his burden of making a prima facie case at step one of the *Batson* inquiry, a suggestion that finds no support in the record. In my view, since the court did not deny the *Batson* application on the ground that defendant failed to meet his initial burden of proof, we are precluded from affirming the judgment on that ground (*see People v Pescara*, 162 AD3d 1772, 1774 [4th Dept 2018]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). The majority's attempt to distinguish *Pescara* is unavailing. In *Pescara*, we "note[d] that the court did not deny the *Batson* claim on the ground that defendant failed to meet his initial burden of proof, and we are thus precluded from affirming the judgment on that ground" (162 AD3d at 1774). That is precisely the situation here.

Thus, in appeal No. 2, I vote to hold the case, reserve decision, and remit the matter to Supreme Court to conduct a proper *Batson* analysis. Inasmuch as the determination on remittal in appeal No. 2 may render academic defendant's appeal from the resentence, I also vote to hold the case and reserve decision in appeal No. 1, pending resolution of appeal No. 2.

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

554

CA 19-01053

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

IN THE MATTER OF HORVATH COMMUNICATIONS, INC., HORVATH TOWERS V, LLC, AND ATLANTIC MOBILE SYSTEMS OF ALLENTOWN, INC., DOING BUSINESS AS VERIZON WIRELESS, PETITIONERS-RESPONDENTS,

V ORDER

TOWN OF LOCKPORT ZONING BOARD OF APPEALS, TOWN OF LOCKPORT PLANNING BOARD, AND BRIEN BELSON, AS TOWN OF LOCKPORT SENIOR BUILDING INSPECTOR, RESPONDENTS.

DAVID MAROTTA AND GLEN MILLER, INTERVENORS-APPELLANTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR INTERVENORS-APPELLANTS.

THE MURRAY LAW FIRM PLLC, CLIFTON PARK (JACQUELINE PHILLIPS MURRAY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Daniel Furlong, J.), entered October 31, 2018 in a proceeding pursuant to CPLR article 78. The judgment granted the petition in part.

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-00516

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

JAMES KERKHOF, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF RUBIANN KERKHOF, DECEASED, AND ACEA M. MOSEY, ERIE COUNTY PUBLIC ADMINISTRATOR, AS CO-EXECUTOR OF THE ESTATE OF RUBIANN KERKHOF, DECEASED, PLAINTIFFS-APPELLANTS,

V ORDER

LASALLE AMBULANCE INC., DOING BUSINESS AS AMERICAN MEDICAL RESPONSE, DOING BUSINESS AS RURAL/METRO CORP., AND CARLOS R. ROSALES, DEFENDANTS-RESPONDENTS.

FEROLETO LAW, BUFFALO (JILL WNEK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered March 1, 2019. The order, among other things, granted that part of defendants' cross motion seeking partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 28 and May 1, 2020,

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

Entered: June 12, 2020

Mark W. Bennett
Clerk of the Court