SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 11, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

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KA 18-00336
PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

TIMOTHY WISNIEWSKI, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 19, 2017. The judgment convicted defendant upon a jury verdict of criminally negligent homicide, operating a vessel while under the influence of alcohol or drugs (two counts), endangering the welfare of a child and unlawful possession of marihuana.

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 reducing the mandatory surcharge imposed under counts two and three of the indictment to $175 with a crime victim assistance fee of $25, vacating that part of the sentence revoking defendant's driver's license for one year, and vacating the fine, and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminally negligent homicide (Penal Law § 125.10) and two counts of operating a vessel while under the influence of alcohol or drugs (Navigation Law § 49-a [2] [a], [d]). This case arises from an incident in which a 16-year-old girl died after she struck her head on a bridge while riding as a passenger in a motor boat passing underneath it. The evidence presented at defendant's trial established that defendant owned the boat and, just prior to the incident, had allowed his 17-year-old codefendant to pilot it, with defendant and the victim as passengers. The codefendant had spent the previous night at defendant's home, among other things, drinking alcohol, and both defendant and the codefendant were intoxicated at the time the victim struck her head on the morning in question. The evidence further established that, once defendant allowed the codefendant to take control of the boat, he began piloting the boat in a dangerous manner and well above the speed limit for the creek on which it traveled.

Witnesses described the boat's excessive speed and how it swerved from one side of the creek to the other just before the accident occurred.

Although defendant contends on appeal that the conviction of criminally negligent homicide is not supported by legally sufficient evidence for multiple reasons, defendant's contention is preserved for our review only with respect to the issue of defendant's accessorial liability (*see People v Ange*, 37 AD3d 1143, 1144 [4th Dept 2007], *lv denied* 9 NY3d 839 [2007]). Contrary to defendant's contention with respect to that issue, " 'there is a[ ] valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial' " (*People v Cahill*, 2 NY3d 14, 57 [2003]). Specifically, the evidence is legally sufficient to establish that defendant "importune[d]" or "intentionally aid[ed]" the codefendant in his commission of the offense while defendant himself acted "with the mental culpability required for the commission thereof" (Penal Law § 20.00; *see generally People v Kaplan*, 76 NY2d 140, 145 [1990]; *People v Flayhart*, 72 NY2d 737, 741 [1988]; *People v Abbott*, 84 AD2d 11, 14-15 [4th Dept 1981]). In addition, viewing the evidence in light of the elements of the crime of criminally negligent homicide as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, County Court did not abuse its discretion in allowing the People to elicit expert testimony from an accident reconstructionist regarding the stance typically taken by motor boat passengers in order to keep their balance in a moving watercraft. That testimony was "helpful in aiding a lay jury reach a verdict" (*People v Brown*, 97 NY2d 500, 505 [2002]). Defendant further contends that the court erred in allowing the codefendant to testify on redirect examination by the People that there had been prior occasions in which the codefendant purchased marihuana from defendant's son while defendant was present. By objecting solely on the ground that the testimony lacked relevance, defendant failed to preserve his contention that such testimony should have been precluded under *People v Molineux* (168 NY 264 [1901]) (*see generally People v Garcia-Santiago*, 60 AD3d 1383, 1383 [4th Dept 2009], *lv denied* 12 NY3d 915 [2009]). In any event, defendant opened the door to that testimony by eliciting testimony on cross-examination regarding those marihuana purchases (*see generally People v Stoutenger*, 121 AD3d 1496, 1497 [4th Dept 2014], *lv denied* 25 NY3d 1077 [2015]) and, contrary to defendant's contention, the testimony in question was relevant to establish why the codefendant was at defendant's home on the evening before the victim's death, to establish the nature of the relationship between defendant and the codefendant, and to complete the narrative of events leading up to the victim's death (*see generally People v Ray*, 63 AD3d 1705, 1706 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]).

By failing to object to certain remarks made by the prosecutor

during summation, defendant failed to preserve his further contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see People v Mahoney*, 175 AD3d 1034, 1035 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]). By failing to request different jury instructions or object to the charge as given, defendant likewise failed to preserve his challenge to the jury instructions given by the court (*see People v Washington*, 173 AD3d 1644, 1645 [4th Dept 2019], *lv denied* 34 NY3d 985 [2019]). Defendant also failed to preserve his contention that he was convicted on the basis of an uncharged theory of guilt (*see People v Hursh*, — AD3d —, — [Feb. 11, 2021] [4th Dept 2021]).

Contrary to defendant's additional contention, viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v White*, 179 AD3d 1444, 1444-1445 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *People v Wallace*, 259 AD2d 978, 978-979 [4th Dept 1999], *lv denied* 93 NY2d 981 [1999]).

We agree with defendant, however, that the court committed various errors at sentencing that require modification of the judgment. With respect to the two counts of operating a vessel while under the influence of alcohol or drugs, the court imposed, in addition to concurrent one-year terms of imprisonment, what it believed was a mandatory $1,500 fine. However, defendant's conviction of each of those counts was punishable by up to one year of imprisonment "or by a fine of not less than five hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment" (Navigation Law § 49-a [2] [f] [1]). We therefore modify the judgment by vacating the fine, and we remit the matter to County Court to determine whether to impose a fine and, if so, to fix a legal amount therof (*see People v Butler*, 46 AD3d 1333, 1334 [4th Dept 2007]; *see also People v Smith*, 309 AD2d 1282, 1283 [4th Dept 2003]). Regarding those same counts, in addition to the fine, the court imposed $395 in surcharges and fees. By law, the court should have imposed a $175 surcharge and a $25 crime victim assistance fee with respect to those counts (*see* Penal Law § 60.35 [1] [a] [ii]; [2]; Navigation Law § 49-a [2] [f] [1]). Although defendant failed to preserve for our review his contention regarding the proper surcharge and crime victim assistance fee to be imposed with respect to those counts, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we further modify the judgment by reducing the mandatory surcharge imposed under counts two and three of the indictment to $175 with a $25 crime victim assistance fee (*see generally People v Smith*, 57 AD3d 1410, 1411 [4th Dept 2008]). Additionally, the court lacked the authority to revoke defendant's driver's license as part of his sentence pursuant to Vehicle and Traffic Law § 510 (2) because the victim's death did not result from the operation of "a motor vehicle or motorcycle" (§ 510 [2] [a] [i]), and we therefore further modify the judgment accordingly.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

749
TP 20-00184
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND BANNISTER, JJ.

IN THE MATTER OF VICTORIA R. UNDERWOOD,
PETITIONER,

V MEMORANDUM AND ORDER

HOWARD ZUCKER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF HEALTH, RESPONDENT.

HINMAN, HOWARD & KATTELL, LLP, SYRACUSE (DEREK S. UNDERWOOD OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Scott J. DelConte, J.], entered January 30, 2020) to review a determination of respondent. The determination, among other things, adjudged that petitioner is not eligible for nursing home care and services for a period of 22 months.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling the determination insofar as it found that petitioner was ineligible for nursing facility services for a penalty period of 22 months and that uncompensated transfers were made for amounts related to the unpaid balance of a loan to Yogurt Gone Wild, Inc., gifts to the daughter that predate 2016, that portion of a car loan to the son that was repaid, and funds that respondent stipulated should not affect petitioner’s eligibility, and as modified the determination is confirmed without costs and the matter is remitted to the New York State Department of Health to recalculate the penalty period and the amount of retroactive Medicaid payments owed to petitioner.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the New York State Department of Health (DOH), which upheld after a fair hearing the findings of the Onondaga County Department of Social Services (DSS) that petitioner had excess resources and was not Medicaid-eligible for nursing facility services for a period of 22 months on the ground that she had made uncompensated transfers during the look-back period (*see* Social Services Law § 366 [5] [a], [e] [1] [vi]). We now modify that determination.

"In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual or the individual's spouse for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services" for a certain penalty period (Social Services Law § 366 [5] [e] [3]). The look-back period is the "[60]-month period immediately preceding the date that an institutionalized individual is both institutionalized and has applied for medical assistance" (§ 366 [5] [e] [1] [vi]). Where a Medicaid applicant has transferred during the relevant look-back period "assets for less than fair market value, he or she must rebut the presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical assistance" (*Matter of Burke*, 145 AD3d 1588, 1589 [4th Dept 2016] [internal quotation marks omitted]).

When "reviewing a Medicaid eligibility determination made after a fair hearing, 'the court must review the record, as a whole, to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law' " (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823 [4th Dept 2009], *lv denied* 13 NY3d 712 [2009]). Substantial evidence is "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]), and " '[t]he petitioner bears the burden of demonstrating eligibility' " (*Matter of Albino v Shah*, 111 AD3d 1352, 1354 [4th Dept 2013]; *see Matter of Peterson v Daines*, 77 AD3d 1391, 1393 [4th Dept 2010]).

Here, as a preliminary matter, respondent correctly concedes that the decision after the fair hearing failed to account for stipulated reductions in the total amount of uncompensated transfers. At the hearing, the DSS stipulated to the removal of three transfers, totaling $14,759.68, finding that petitioner had adequately documented the use of those funds. In its decision, however, the DOH erred in failing to account for any of the stipulated reductions, and thus the total amount of uncompensated transfers must be reduced by $14,759.68.

Contrary to petitioner's contention, the DOH did not err in determining that the value of vacant property owned by petitioner and her spouse was $79,000, of which $39,500 was deemed to be an excess resource for petitioner. Although petitioner submitted a letter from a real estate agent opining that the property was unusable and worth only $6,800, petitioner's spouse admitted that they paid $60,000 for the property and had never challenged the assessed value of that property, which was $79,000. We thus conclude that the determination of the DOH regarding the value of petitioner's share of that property is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc.*, 45 NY2d at 180).

With respect to numerous transfers to her children, petitioner contends that the DOH erred in determining that they were made for less than fair market value and were "motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical

assistance" (*Burke*, 145 AD3d at 1589 [internal quotation marks omitted]). We agree with respect to some of those transfers.

As the decision after the fair hearing noted, petitioner was diagnosed with Parkinson's disease in 2016. In December 2017, petitioner, who was suffering from delirium, was taken to the emergency room. She was transferred to a short-term care facility and, in February 2018, she was transferred to a long-term care facility. She applied for Medicaid services on February 27, 2018. As a result, the look-back period extends back to February 27, 2013 (*see* Social Services Law § 366 [5] [e] [1] [vi]).

Contrary to respondent's speculative assertion that petitioner was in ill health before 2016, the medical, documentary and testimonial evidence at the hearing established that petitioner was in good health with no serious medical issues until the 2016 diagnosis (*cf. Matter of Corcoran v Shah*, 118 AD3d 1473, 1474 [4th Dept 2014]). We thus conclude that the record establishes that, before her diagnosis, petitioner did not suffer from any major health issues that would have caused her to anticipate a need for future long-term care (*see e.g. Matter of Sandoval v Shah*, 131 AD3d 1254, 1256 [2d Dept 2015]; *Matter of Rivera v Blass*, 127 AD3d 759, 763 [2d Dept 2015]; *cf. Burke*, 145 AD3d at 1589-1590). Respondent's speculation that petitioner's dementia may have begun years before her diagnosis has no support in the record and is directly refuted by medical notes in September 2017 that petitioner had suffered only "[s]light worsening" in her cognitive abilities. "[S]ubstantial evidence does not arise from bare surmise, conjecture, speculation, or rumor . . . , or from the absence of evidence supporting a contrary conclusion" (*Rivera*, 127 AD3d at 762).

In any event, "the relevant standard is not whether [petitioner] could or should have foreseen that nursing home placement might eventually become necessary, but whether she made the requisite showing that the transfers were made 'exclusively for a purpose other than to qualify for medical assistance' (Social Services Law § 366 [5] [e] [4] [iii] [B]). The fact that a future need for nursing home care may be foreseeable for a person of advanced age with chronic medical conditions is not dispositive of the question whether a transfer by such a person was made for the purpose of qualifying for such assistance" (*Matter of Collins v Zucker*, 144 AD3d 1441, 1444 [3d Dept 2016]).

Addressing first the transfers to petitioner's daughter, we conclude that petitioner established that there was a clear history or pattern of providing financial assistance to the daughter that predated the look-back period (*cf. Burke*, 145 AD3d at 1589; *Corcoran*, 118 AD3d at 1474). We nevertheless conclude that there is substantial evidence to support the determination that those monetary gifts significantly increased after 2016, i.e., when petitioner was diagnosed with her chronic medical condition. Petitioner was unable to explain the reason for the significant increase, and we therefore conclude that petitioner failed to rebut the presumption that the transfers in 2016 and thereafter were " 'motivated, in part if not in

whole, by . . . anticipation of future need to qualify for medical assistance' " (*Matter of Donvito v Shah*, 108 AD3d 1196, 1198 [4th Dept 2013]). We do, however, agree with petitioner that she rebutted the presumption with respect to those transfers before 2016, i.e., before petitioner could have anticipated a need to qualify for medical assistance. Those transfers were part of petitioner's consistent pattern of gift-giving to her daughter, were made at a time when petitioner was financially solvent and were made before the sudden deterioration of her health (*see Collins*, 144 AD3d at 1442-1444; *cf. Burke*, 145 AD3d at 1589-1590; *Corcoran*, 118 AD3d at 1474; *Donvito*, 108 AD3d at 1198).

Petitioner further contends that a transfer of $10,000 to one of her sons in August 2014 was a loan made to assist him in purchasing a vehicle and was not motivated by any anticipation of a future need to qualify for medical services. "Assets conveyed through a note or a mortgage during the look-back period are considered to be transfers for full market value when the underlying loan is actuarially sound based upon the lender's life expectancy, provides for equal payments throughout the life of the loan—with no deferrals or balloon payments—and includes a provision prohibiting cancellation upon the lender's death" (*Matter of Wellner v Jablonka*, 160 AD3d 1261, 1263 [3d Dept 2018], citing Social Services Law § 366 [5] [e] [3] [iii]; and 42 USC § 1396p [c] [1] [I]). In our view, petitioner established that the loan was actuarially sound inasmuch as it had a three-year repayment plan, called for monthly payments, and had no provision to cancel the debt upon petitioner's death. We therefore conclude that, at the time the transfer of funds was made, it was made for fair market value (*cf. Rivera*, 127 AD3d at 762). We also note that the loan was made more than a year before petitioner's diagnosis (*cf. Wellner*, 160 AD3d at 1262-1264). Nevertheless, it is undisputed that the son failed to make consistent payments and did not make any payments on the loan after January 2016, i.e., the year in which petitioner was diagnosed with her chronic medical condition. In our view, the amount of the unpaid balance of the loan became a transfer for less than fair market value, and petitioner failed to rebut the presumption that the loan forgiveness was motivated, at least in part, by an anticipation of a future need to qualify for medical assistance (*see Wellner*, 160 AD3d at 1263-1264; *cf. Collins*, 144 AD3d at 1443-1444). According to the handwritten ledger submitted by petitioner as an exhibit at the hearing, the son repaid $2,400 of the loan. We thus conclude that substantial evidence supports a determination that the remaining balance of the loan be considered an uncompensated transfer and be included in calculating petitioner's Medicaid penalty period.

In February 2014, petitioner's spouse loaned the parties' other son $150,000 to fund a yogurt business, Yogurt Gone Wild, Inc. (YGW), that the son was opening. The spouse and the son, as president of YGW, executed loan documents pursuant to which YGW agreed to a particular interest rate and agreed to repay the loan in monthly installments. Ultimately, YGW failed and declared bankruptcy. In order to provide petitioner's spouse with some measure of repayment, the son, as president of YGW, executed an asset sale agreement pursuant to which petitioner's spouse was assigned the proceeds of the

sale of YGW's equipment. Petitioner's spouse received $55,195.40 from the sale of that equipment. Inasmuch as YGW had no further assets, petitioner's spouse testified at the fair hearing that there was no way to seek redress for the remaining balance of the loan (*see generally Rivera*, 127 AD3d at 763).

We agree with petitioner that the determination that the unpaid balance of the loan was a transfer for less than fair market value is not supported by substantial evidence. The loan documents comport with section 6016 (c) of the Deficit Reduction Act of 2005, which amended the Social Security Act (Pub L 109-171, 120 US Stat 4 [109th Cong, 2d Sess, Feb. 8, 2006]; *see* 42 USC § 1396p [c] [1] [I]; *see also* NY Dept of Health Directive No. 06 OMM/ADM-5 at 24 [July 20, 2006]). Even assuming, arguendo, that the loan constituted a transfer for less than fair market value, we conclude that petitioner rebutted the presumption that it was made for purposes of qualifying for medical assistance. The loan was made long before petitioner was diagnosed with her chronic medical condition (*cf. Wellner*, 160 AD3d at 1262, 1264). To conclude that the loan was in any way made for the purpose of qualifying for medical assistance for some as yet undiagnosed and unknown medical problem is not " 'reasonable and plausible' " (*Matter of Miller v DeBuono*, 90 NY2d 783, 793 [1997]).

Contrary to petitioner's contention, we conclude that the same cannot be said for a loan made to both sons after petitioner was diagnosed with her chronic medical condition (*see Wellner*, 160 AD3d at 1262). That loan, which was used to fund the purchase of another corporation, did not comply with the Deficit Reduction Act of 2005 (*see* 42 USC § 1396p [c] [1] [I]) or Social Services Law § 366 (5) (e) (3) (iii) inasmuch as the loan called for balloon payments. We thus conclude that the transfer of those funds was not made for fair market value (*see Wellner*, 160 AD3d at 1263). Additionally, petitioner failed to rebut the presumption that the transfer was motivated, at least in part, by anticipation of a future need to qualify for medical assistance (*see Burke*, 145 AD3d at 1589).

We therefore modify the determination by granting the petition in part and annulling the determination insofar as it found that petitioner was ineligible for nursing facility services for a penalty period of 22 months and that uncompensated transfers were made for amounts related to the unpaid balance of a loan to Yogurt Gone Wild, Inc., gifts to the daughter that predate 2016, that portion of a car loan to the son that was repaid, and funds that respondent stipulated should not affect petitioner's eligibility. We further remit the matter to the DOH to recalculate the penalty period and the amount of retroactive Medicaid payments owed to petitioner.

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

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CA 20-00405
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

DREAMCO DEVELOPMENT CORPORATION AND ROSANNE DIPIZIO, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EMPIRE STATE DEVELOPMENT CORPORATION, ERIE CANAL HARBOR DEVELOPMENT CORPORATION, PHILLIPS LYTLE LLP, DEFENDANTS-APPELLANTS,
TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, DEFENDANT,
ET AL., DEFENDANTS.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM J. BRENNAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICES OF DANIEL W. ISAACS, PLLC, EAST ROCKAWAY (DANIEL W. ISAACS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered February 5, 2020. The order, insofar as appealed from, denied in part the motion of defendants Empire State Development Corporation, Erie Canal Harbor Development Corporation and Phillips Lytle LLP to dismiss the complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and the complaint against defendants-appellants is dismissed.

Memorandum: As we set forth in earlier related appeals, nonparty DiPizio Construction Company, Inc. (DiPizio) and defendant Erie Canal Harbor Development Corporation (Erie) entered into a construction agreement pursuant to which DiPizio was to provide construction services for a revitalization project along the waterfront in Buffalo (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 151 AD3d 1750 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418 [4th Dept 2015]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905 [4th Dept 2014]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909 [4th Dept 2014]; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 911 [4th Dept 2014]). Plaintiff Dreamco Development Corporation (Dreamco), owned by Rosanne DiPizio (plaintiff), was retained by DiPizio to provide management and consulting services and construction materials for the project. Erie

subsequently terminated DiPizio from the project, and DiPizio no longer needed Dreamco's services. Plaintiffs commenced this action seeking money damages allegedly resulting from the termination, and Empire State Development Corporation, Erie, and Phillips Lytle LLP (collectively, defendants), among others, moved to dismiss the complaint against them. Defendants now appeal from an order insofar as it denied the motion with respect to the first and ninth causes of action.

Defendants contend that Supreme Court erred in denying that part of the motion seeking to dismiss the first cause of action, for fraud, against them. We agree. "The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Morrow v MetLife Invs. Ins. Co.*, 177 AD3d 1288, 1289 [4th Dept 2019]). Furthermore, "a fraud claim requires the plaintiff to have relied upon a misrepresentation by a defendant to his or her detriment" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 829 [2016], *rearg denied* 28 NY3d 956 [2016]; *see Warren v Forest Lawn Cemetery & Mausoleum*, 222 AD2d 1059, 1059 [4th Dept 1995]). Here, we conclude that the complaint "failed to adequately allege that the misrepresentations were made for the purpose of being communicated to . . . plaintiff[s] in order to induce [their] reliance thereon or that the[ ] misrepresentations were relayed to . . . plantiff[s], who then relied upon them" (*Robles v Patel*, 165 AD3d 858, 860 [2d Dept 2018]; *see New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1353-1354 [2d Dept 2017]).

In addition, "[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)" (*Eurycleia Partners, LP*, 12 NY3d at 559). Inasmuch as the complaint contained only generic allegations that defendants made misrepresentations, omissions, and concealments in their pleadings and communications, we further conclude that the complaint failed to adequately set forth with particularity the alleged misrepresentations of material fact made by defendants (*see Scialdone v Stepping Stones Assoc., L.P.*, 148 AD3d 953, 955 [2d Dept 2017], *appeal dismissed* 29 NY3d 1113 [2017]; *cf. Pike Co., Inc. v Jersen Constr. Group, LLC*, 147 AD3d 1553, 1556 [4th Dept 2017]). Furthermore, to the extent that it is based on alleged omissions by defendants, the first cause of action fails to state a claim because "an omission does not constitute fraud unless there is a fiduciary or 'special' relationship between the parties" (*Golub v Tanenbaum-Harber Co., Inc.*, 88 AD3d 622, 622 [1st Dept 2011], *lv denied* 19 NY3d 806 [2012]; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400, 402 [1st Dept 2007], *affd* 12 NY3d 553 [2009]) and the complaint failed to allege the requisite fiduciary or special relationship between plaintiffs and defendants.

We also agree with defendants that the first cause of action is time-barred. Although fraud claims are generally governed by a six-year statute of limitations (*see* CPLR 213 [8]), "courts will not apply the fraud [s]tatute of [l]imitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a

means to litigate stale claims" (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1st Dept 1985], *affd* 67 NY2d 981 [1986]; *see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). "In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance" (*Rutzinger v Lewis*, 302 AD2d 653, 654 [3d Dept 2003]; *see Matter of Foley v Masiello*, 38 AD3d 1201, 1201-1202 [4th Dept 2007]). Inasmuch as the gravamen of plaintiffs' fraud claim is that plaintiffs suffered reputational damages and a loss of goodwill as a result of defendants' conduct and that Dreamco lost its contract with DiPizio as a result of defendants' fraudulent scheme, we conclude that the fraud allegation is incidental to the injurious falsehood and tortious interference claims, which were dismissed by the court as time-barred.

We likewise agree with defendants that the court erred in denying that part of the motion seeking to dismiss the ninth cause of action, for violations of Judiciary Law § 487, against Phillips Lytle LLP. Under section 487 (1), an attorney who "[i]s guilty of any deceit or collusion . . . with intent to deceive the court or any party," is guilty of a misdemeanor and is potentially liable for treble damages to be recovered in a civil action. A violation of the statute may be established by evidence of the defendant's alleged deceit (*see Scarborough v Napoli, Kaiser & Bern, LLP*, 63 AD3d 1531, 1533 [4th Dept 2009] [internal quotation marks omitted]; *Izko Sportswear Co., Inc. v Flaum*, 25 AD3d 534, 537 [2d Dept 2006]), but "alleged deceit that is not directed at a court must occur in the course of 'a pending judicial proceeding' " (*Hansen v Caffry*, 280 AD2d 704, 705 [3d Dept 2001], *lv denied* 97 NY2d 603 [2001]; *see Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [1st Dept 2012]; *Henry v Brenner*, 271 AD2d 647, 647-648 [2d Dept 2000]).

The complaint alleged that Phillips Lytle LLP "actively participated in the preparation and distribution of [a certain memorandum] and preparation and filing of multiple court submissions to the New York State Supreme and Appellate Courts that included false and misleading statements" and "knowingly caused these misstatements to be filed with the intent of deceiving the Courts." The complaint failed to allege, however, that Phillips Lytle LLP engaged in egregious misconduct or made a material false statement in the course of a judicial proceeding. The allegedly deceitful memorandum was not directed at the court, and the complaint failed to allege that it was promulgated during a pending judicial proceeding (*see Costalas v Amalfitano*, 305 AD3d 202, 203-204 [1st Dept 2003]; *Hansen*, 280 AD2d at 705). Furthermore, it is evident from the face of the complaint that plaintiffs were not parties to a judicial proceeding when the memorandum was prepared. The complaint also failed to identify the "multiple court submissions" that allegedly contained false and misleading statements by Phillips Lytle LLP, and it thus failed to adequately allege that deceitful statements were directed at a court (*see Hansen*, 280 AD2d at 705).

Finally, even assuming, arguendo, that the statement of an attorney from Phillips Lytle LLP to a law clerk that, according to

defendant Travelers Casualty and Surety Company of America (Travelers), DiPizio's surety, DiPizio's "paperwork was a mess and . . . the subcontractors didn't know what to build," was directed at the court, we nevertheless conclude that "the complaint fail[ed] to show . . . a deceit that reaches the level of egregious conduct" on the part of Phillips Lytle LLP (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015] [internal quotation marks omitted]; *see Englert v Schaffer*, 61 AD3d 1362, 1363 [4th Dept 2009]; *cf. Papa v 24 Caryl Ave. Realty Co.*, 23 AD3d 361, 361-362 [2d Dept 2005], *lv denied* 6 NY3d 705 [2006], *cert denied* 547 US 1207 [2006]). Moreover, defendants submitted, as part of their motion, documentary evidence in the form of email communications and deposition testimony establishing, inter alia, that consultants for Travelers did, in fact, express the belief that DiPizio's paperwork was in disarray.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

816
CA 19-01874
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

SVETLANA BELLAMY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN S. BARON, D.M.D., DORON KALMAN, D.D.S.,
DORON KALMAN, D.D.S., P.C., DOING BUSINESS AS
KALMAN ORAL SURGERY & IMPLANT CENTER,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LUTFY & SANTORA, STATEN ISLAND (JAMES L. LUTFY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANT-RESPONDENT STEVEN S. BARON, D.M.D.

CUOMO LLC, NEW YORK CITY (ROBERT A. ROSENFELD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DORON KALMAN, D.D.S. AND DORON KALMAN, D.D.S., P.C., DOING BUSINESS AS KALMAN ORAL SURGERY & IMPLANT CENTER.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered September 19, 2019. The order, insofar as appealed from, granted in part the motion of defendant Steven S. Baron, D.M.D. for summary judgment dismissing the amended complaint against him and granted in its entirety the motion of Doron Kalman, D.D.S., and Doron Kalman, D.D.S., P.C., doing business as Kalman Oral Surgery & Implant Center for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of Doron Kalman, D.D.S. and Doron Kalman, D.D.S., P.C., doing business as Kalman Oral Surgery & Implant Center, is denied, the motion of Steven S. Baron, D.M.D. is denied in its entirety, and the amended complaint against them is reinstated in its entirety.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she allegedly sustained while in the care of Doron Kalman, D.D.S. (Kalman), Doron Kalman, D.D.S., P.C., doing business as Kalman Oral Surgery & Implant Center (collectively, Kalman defendants), and Steven S. Baron, D.M.D. (collectively, defendants). Plaintiff first saw Baron in July 2007 seeking relief from pain in three quadrants of her jaw, including the upper left. Baron referred plaintiff to Kalman's office, and Kalman, in accordance with a

treatment plan of disputed origin, extracted several of plaintiff's teeth and replaced them with dental implants. Plaintiff thereafter returned to Baron, who, in accordance with the treatment plan, placed crowns on the implants. Defendants were aware beginning in July 2007 that plaintiff was also treating with a neurologist and taking prescription medication for neuropathic pain in her mouth. After undergoing the initial treatment, plaintiff continued to treat with defendants for nearly four years, complaining of recurrent pain in the upper left quadrant of her jaw. She last treated with Kalman on May 5, 2011, and subsequently sought treatment from a third dentist, who informed her that the implants were failures and removed them. Plaintiff commenced this action on March 12, 2013, asserting causes of action for dental malpractice and lack of informed consent. Plaintiff's amended complaint, as amplified by her amended bills of particulars, alleged, inter alia, that the Kalman defendants were negligent in extracting nine specific teeth throughout three quadrants of her jaw even though those teeth could have been saved, in failing to recommend root canal retreatment or to refer plaintiff to an endodontist, and in performing unnecessary extractions without a reasonable basis in dentistry, and that Baron was negligent in recommending a treatment plan calling for the extraction of teeth and installment of implants, although he lacked the expertise to develop such a plan.

We agree with plaintiff that Supreme Court erred in granting the Kalman defendants' motion for summary judgment dismissing the amended complaint against them and that the court erred insofar as it granted that part of Baron's motion for summary judgment dismissing the dental malpractice cause of action against him. We therefore reverse the order insofar as appealed from, deny the motion of the Kalman defendants, deny Baron's motion in its entirety, and reinstate the amended complaint against defendants in its entirety.

We note at the outset that, to the extent that plaintiff seeks a ruling that defendants are jointly and severally liable or engaged in a joint venture, her contention is not properly before us because she failed to move for summary judgment on either of those grounds (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Plaintiff contends that the court erred in granting the Kalman defendants' motion on the ground that the complaint is time-barred (*see* CPLR 214-a). We agree. By demonstrating that the action was not commenced until March 12, 2013, the Kalman defendants met their burden of establishing entitlement to judgment as a matter of law dismissing any claims arising before September 12, 2010 (*see Miccio v Gerdis*, 120 AD3d 639, 640 [2d Dept 2014]). The burden then shifted to plaintiff to establish the applicability of the continuous treatment toll (*see Nailor v Oberoi*, 237 AD2d 898, 898 [4th Dept 1997]; *see also Clifford v Kates*, 169 AD3d 1375, 1377-1378 [4th Dept 2019]). Continuous treatment "tolls the 2½-year statute of limitations for bringing an action for medical or dental malpractice until the end of a course of treatment for a particular condition" (*Rudolph v Jerry Lynn, D.D.S., P.C.*, 16 AD3d 261, 262 [1st Dept 2005]). The rationale is that "the best interests of a patient warrant continued treatment with an

existing provider, rather than stopping treatment, as 'the [existing provider] not only is in a position to identify and correct his or her malpractice, but is best placed to do so' " (*id.*, quoting *McDermott v Torre*, 56 NY2d 399, 408 [1982]; *see Lohnas v Luzi*, 30 NY3d 752, 755-756 [2018]).

Plaintiff raised an issue of fact whether the continuous treatment toll applies (*see Clifford*, 169 AD3d at 1377-1378). Plaintiff's deposition testimony was before the court because it was submitted by the Kalman defendants in support of their motion. Therein, plaintiff testified that she first presented to Baron's office complaining of mouth pain and that she was sent to Kalman's office, which she visited immediately. She then returned to Baron to confirm Kalman's opinion that certain teeth should be extracted. After the extractions, plaintiff called Kalman on the phone "many times complaining about the pain." On two subsequent occasions, Kalman removed crowns that Baron had placed in plaintiff's mouth, the last such occasion being on May 5, 2011. Kalman's ostensible reason for removing the crowns was to treat pain, irritation, and inflammation in plaintiff's mouth. Plaintiff testified that, despite the removal of the crowns, her mouth pain persisted. Furthermore, in opposition to the motion, plaintiff submitted the affidavit of her expert periodontist, who opined that Kalman's act of extracting plaintiff's teeth and replacing them with implants exacerbated the neuropathic pain in the upper left quadrant of her jaw. Plaintiff's submissions thus established that she continued to treat with Kalman until May 5, 2011, in order to address pain for which she initially presented to Kalman's office and which was made worse by Kalman's initial treatment of her (*see generally Miccio*, 120 AD3d at 640; *Krzesniak v New York Univ.*, 22 AD3d 378, 379 [1st Dept 2005]; *Rudolph*, 16 AD3d at 262).

We reject the Kalman defendants' assertion that, for the continuous treatment toll to apply, plaintiff was required to establish that she and Kalman "reasonably intended plaintiff's uninterrupted reliance upon [Kalman's] observation, directions, concern, and responsibility for overseeing plaintiff's progress" (*Lohnas*, 30 NY3d at 755 [internal quotation marks omitted]). The instant case does not involve gaps in treatment longer than the 2½-year statute of limitations (*cf. id.*; *Shumway v DeLaus*, 152 AD2d 951, 951 [4th Dept 1989]), and "a discharge by a physician [or dentist] does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier treatment" (*Gomez v Katz*, 61 AD3d 108, 113 [2d Dept 2009]; *see McDermott*, 56 NY2d at 406).

Plaintiff further contends that defendants failed to meet their respective burdens of establishing that they did not deviate from the standard of care. We agree. Where, as here, an expert's affidavit "fails to address each of the specific factual claims of negligence raised in plaintiff's bill of particulars, that affidavit is insufficient to support a motion for summary judgment as a matter of law" (*Larsen v Banwar*, 70 AD3d 1337, 1338 [4th Dept 2010]; *see Gagnon*

v St. Joseph's Hosp., 90 AD3d 1605, 1605 [4th Dept 2011]; *James v Wormuth*, 74 AD3d 1895, 1895 [4th Dept 2010]). Additionally, insofar as Baron denies any involvement in recommending the treatment plan, his denials contradict the deposition testimony of Kalman, who stated that Baron told him which of plaintiff's teeth were to be extracted and that Baron participated in creating the treatment plan and consented to the plan. Baron submitted Kalman's deposition in support of Baron's motion, thereby raising issues of fact whether he deviated from the standard of care in recommending the treatment plan and whether any such deviation was a proximate cause of plaintiff's injuries (*see Giancarlo v Kurek*, 160 AD3d 1368, 1369 [4th Dept 2018]). In any event, by submitting the affidavits of her experts, plaintiff raised issues of fact whether defendants deviated from the standard of care and whether such deviation was a proximate cause of plaintiff's injuries (*see Chavis v Syracuse Community Health Ctr., Inc.*, 96 AD3d 1489, 1490 [4th Dept 2012]).

Plaintiff also contends that the court erred in granting the Kalman defendants' motion with respect to the informed consent cause of action against them. We agree. Even assuming, arguendo, that the Kalman defendants met their initial burden, we conclude that plaintiff raised an issue of fact whether she would have opted for extraction of several teeth and placement of implants had she been fully informed (*see generally Angelhow v Chahfe*, 174 AD3d 1285, 1287-1288 [4th Dept 2019]). Plaintiff's expert periodontist stated within a reasonable degree of certainty that sequential extraction of teeth was a reasonable alternative procedure that would have reduced the adverse effect of surgery on plaintiff's neuropathic pain. Kalman, however, failed to inform plaintiff of the risks and benefits of such a procedure, and a reasonable patient informed of the risks of the procedure performed here by defendants would not have consented to it in the presence of longstanding neuropathic pain.

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

817
CA 19-01155
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

GLENN GOULD AND AMY GOULD, PLAINTIFFS-APPELLANTS,

V ORDER

93 NYRPT, LLC, RONALD BENDERSON 1995 TRUST AND
RIDGE MAINTENANCE CORP., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW CONNELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT A. CRAWFORD, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS 93 NYRPT, LLC AND RONALD BENDERSON 1995 TRUST.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANT-RESPONDENT RIDGE MAINTENANCE CORP.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered June 12, 2019. The order, insofar as appealed from, granted the motion of defendant Ridge Maintenance Corp. for summary judgment dismissing the complaint against it and denied the cross motion of plaintiffs for summary judgment.

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

818
CA 19-01283
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

GLENN GOULD AND AMY GOULD, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

93 NYRPT, LLC, RONALD BENDERSON 1995 TRUST AND
RIDGE MAINTENANCE CORP., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW CONNELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT A. CRAWFORD, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS 93 NYRPT, LLC AND RONALD BENDERSON 1995 TRUST.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANT-RESPONDENT RIDGE MAINTENANCE CORP.

Appeal from an amended order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered June 28, 2019. The amended order granted the motion of defendant Ridge Maintenance Corp. and the cross motion of defendants 93 NYRPT, LLC and Ronald Benderson 1995 Trust for summary judgment dismissing the complaint and denied the cross motion of plaintiffs for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Glenn Gould (plaintiff) when he allegedly slipped and fell on ice in a parking lot on property owned by defendants 93 NYRPT, LLC and Ronald Benderson 1995 Trust (collectively, Benderson defendants). The Benderson defendants contracted with defendant Ridge Maintenance Corp. (Ridge) to perform snow removal at the property. Plaintiffs appeal from an amended order that, inter alia, granted Ridge’s motion for summary judgment dismissing the complaint against it and granted the cross motion of the Benderson defendants insofar as it sought summary judgment dismissing the complaint against them. We affirm.

“Although a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he will not be held liable in negligence for a plaintiff’s injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable

time thereafter" (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016] [internal quotation marks omitted]; *see Perez v Grecian Garden Apts., LLC*, 67 AD3d 1411, 1412 [4th Dept 2009]). Contrary to plaintiffs' contention, we conclude that defendants met their respective initial burdens on their motion and cross motion for summary judgment. Defendants submitted the affidavit of an expert meteorologist, which detailed the weather conditions in the area where the slip and fall occurred and thereby established that "a storm was in progress at the time of the [slip and fall] and, thus, that [defendants] had no duty to remove the snow and ice until a reasonable time ha[d] elapsed after cessation of the storm" (*Gilbert v Tonawanda City School Dist.*, 124 AD3d 1326, 1327 [4th Dept 2015] [internal quotation marks omitted]; *see Glover v Botsford*, 109 AD3d 1182, 1183 [4th Dept 2013]). Although defendants also submitted the deposition testimony of plaintiff stating his observations of the conditions at the scene of the slip and fall, that testimony established, at most, a possible lull or break in the storm that did not afford defendants a reasonable amount of time in which to correct the hazardous conditions (*see Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1542 [4th Dept 2015]; *Gilbert*, 124 AD3d at 1327; *Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1153-1154 [4th Dept 2006]).

We further conclude that, in opposition, plaintiffs failed to "raise a triable issue of fact whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant[s] had actual or constructive notice of the preexisting condition" (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [4th Dept 2014] [internal quotation marks omitted]; *see Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624 [4th Dept 2009]). The opinions contained in the affidavit of the meteorological expert submitted by plaintiffs constitute "mere speculation based on general weather conditions that were prevailing in the region" (*Greco v Grande*, 160 AD3d 1345, 1346 [4th Dept 2018]). The affidavit is also conclusory and speculative with respect to whether the ice existed prior to the storm and whether there was a storm in progress. It is therefore insufficient to raise a triable issue of fact (*see Menear v Kwik Fill*, 174 AD3d 1354, 1356 [4th Dept 2019]; *Moran v Muscarella*, 87 AD3d 1299, 1300 [4th Dept 2011]; *O'Donnell v Buffalo-DS Assoc., LLC*, 67 AD3d 1421, 1423 [4th Dept 2009], *lv denied* 14 NY3d 704 [2010]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

883
KA 16-00067
PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHARY HURSH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 3, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of robbery in the third degree (Penal Law § 160.05), defendant contends that the evidence at trial, coupled with County Court's jury instructions, created the possibility that he was convicted of the crime upon a different theory from the one charged in the indictment as supplemented by the bill of particulars, and that the indictment was therefore rendered duplicitous.

We note that, as the Court of Appeals recognized in *People v Allen* (24 NY3d 441, 449 [2014]), this Court had previously "held that duplicity created by trial evidence violates a defendant's right to be tried and convicted only of the crimes and theories charged in the indictment, which is a fundamental and non-waivable right, and that such error also violates a defendant's right under CPL 310.80 to a unanimous verdict, and that preservation is unnecessary." In *Allen*, however, the Court of Appeals ruled that any such "uncertainty could have easily been remedied with an objection during opening statements or the witness testimony, or to the jury charge," and that "[r]equiring preservation will prevent unnecessary surprise after the conduct of a complete trial" (*id.*). "Accordingly, [the Court of Appeals held] that issues of non-facial duplicity, like those of facial duplicity, must be preserved for appellate review" (*id.* at 449-450). We therefore conclude here that defendant was required to preserve his challenge for our review (*see id.*; *see also People v Zeman*, 156 AD3d 1460, 1461 [4th Dept 2017], *lv denied* 31 NY3d 988

[2018]; *People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]). Insofar as several cases from this Court issued after *Allen* indicate that a defendant need not preserve an "issue[] of non-facial duplicity" that is based wholly or partially on a jury charge (24 NY3d at 449; *see e.g. People v Barber*, 155 AD3d 1543, 1544 [4th Dept 2017]; *People v Graves*, 136 AD3d 1347, 1348 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]), they are no longer to be followed.

Here, defendant failed to preserve his contention for our review (*see People v Tirado*, 175 AD3d 970, 971 [4th Dept 2019], *lv denied*, 34 NY3d 984 [2019], *reconsideration denied* 34 NY3d 1133 [2020]; *People v Vail*, 174 AD3d 1365, 1366 [4th Dept 2019]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

888
KA 18-02406
PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEAN A. JUDY, II, DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 17, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: 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]), defendant contends that his waiver of the right to appeal is invalid and that his plea was not voluntarily entered. Because defendant's challenge to the voluntariness of his plea would survive even a valid waiver of the right to appeal (*see People v Burney*, 41 AD3d 1221, 1221 [4th Dept 2007], *lv denied* 9 NY3d 863 [2007]), we need not address the validity of that waiver. We note, however that the better practice is for Supreme Court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020], citing NY Model Colloquies, Waiver of Right to Appeal).

Defendant's contention that his plea was not voluntarily entered is not preserved for our review "inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see 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]). In any event, we reject that contention. We conclude that defendant's "plea was not rendered involuntary by the court's failure to advise him that as a consequence of [the] plea he may receive an enhanced sentence for any crime that he may commit in the future" (*People v Taylor*, 60 AD3d 708, 709 [2d Dept 2009], *lv*

denied 12 NY3d 860 [2009]). In addition, contrary to defendant's contention, the record establishes that he understood the nature and consequences of the plea, and that he agreed to plead guilty to criminal possession of a weapon in the second degree in full satisfaction of the charges against him (*cf. People v Hector*, 172 AD3d 1913, 1914 [4th Dept 2019]; *see generally People v Alicea*, 148 AD3d 1662, 1663 [4th Dept 2017], *lv denied* 29 NY3d 1122 [2017]). Finally, "[t]he fact that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion" that would render the plea involuntary (*People v Russell*, 55 AD3d 1314, 1315 [4th Dept 2008], *lv denied* 11 NY3d 930 [2009] [internal quotation marks omitted]; *see People v Freeman*, 159 AD3d 1337, 1338 [4th Dept 2018], *lv denied* 31 NY3d 1147 [2018]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

891
KA 19-00978
PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

MAURICE OWENS, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER 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 September 21, 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 reversed on the law, the indictment is dismissed, and the People are granted leave to apply for an order permitting resubmission of the charge to another grand jury.

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]). We agree with defendant that the People failed to seek leave pursuant to CPL 210.20 (4) to resubmit the matter to a second grand jury after County Court granted that part of defendant's omnibus motion seeking to dismiss the original indictment as against him on the ground that the evidence before the first grand jury was legally insufficient. "[T]he failure to obtain leave of court to present a matter to a second grand jury, where required, deprives the grand jury of jurisdiction to hear the matter, thereby rendering the indictment void . . . , which, in turn, deprives the court of jurisdiction" (*People v Carr*, 128 AD3d 1402, 1403 [4th Dept 2015], *affd* 30 NY3d 945 [2017]; *see People v McCoy*, 109 AD3d 708, 710 [1st Dept 2013]; *People v Dinkins*, 104 AD3d 413, 415 [1st Dept 2013]). Although, here, defendant failed to make a motion to dismiss the indictment issued by the second grand jury pursuant to CPL 210.20 (1), the failure of the People to obtain from the court authorization to submit the matter to the second grand jury deprived the second grand jury of jurisdiction to hear the matter, thereby rendering void the indictment issued by the second grand jury and depriving the court of jurisdiction, and the right to challenge a lack of jurisdiction cannot be waived by defendant (*see Carr*, 128 AD3d at 1403). Under

these circumstances, we must dismiss the indictment issued by the second grand jury that is at issue on this appeal (*see* CPL 210.35 [5]; *People v Wilkins*, 68 NY2d 269, 276-277 and n 6 [1986]; *see generally People v Tomaino*, 248 AD2d 944, 947 [4th Dept 1998]). We note that there is no limit to the number of times that the People may resubmit a charge to a grand jury with leave pursuant to CPL 210.20 (4) (*see People v Morris*, 93 NY2d 908, 910 [1999]). We therefore grant leave to the People to apply to the court for an order permitting their resubmission of the charge to another grand jury (*see Tomaino*, 248 AD2d at 948; *see also McCoy*, 109 AD3d at 709-710; *Dinkins*, 104 AD3d at 413).

We have considered defendant's remaining contentions and conclude that they do not require a different result.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

920

CA 19-02128

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

ALYSA OCASIO, ANDREW OCASIO AND JAHAIRA HOLDER, AS ADMINISTRATRIX OF THE ESTATE OF SANDY GUARDIOLA, CLAIMANTS-APPELLANTS,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 132102.)

BELDOCK LEVINE & HOFFMAN LLP, NEW YORK CITY (LUNA DROUBI OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

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

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered May 9, 2019. The order granted defendant's motion to dismiss the amended claim.

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

Memorandum: We affirm for reasons stated in the decision and order at the Court of Claims (Martin, J.) insofar as the court granted defendant's pre-answer motion to dismiss the amended claim on the ground that the notice of intention to file a claim and the amended notice of intention to file a claim "did not 'provide a sufficiently detailed description of the particulars of the claim to enable [defendant] to investigate and promptly ascertain the existence and extent of its liability' " (*Flemming v State of New York*, 120 AD3d 848, 848 [3d Dept 2014]; *see Cendales v State of New York*, 2 AD3d 1165, 1167 [3d Dept 2003]). Although claimants state in their notice of appeal that they appeal from each and every part of the decision and order, claimants do not raise in their brief any contentions concerning that part of the order dismissing the individual claims of claimants Alysa Ocasio and Andrew Ocasio. We therefore deem any issues with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

In light of our determination, we do not address claimants' remaining contentions.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

936
CAF 20-00306
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF FREDERICK A. LABELLA,
PETITIONER-RESPONDENT,

V   MEMORANDUM AND ORDER

GABRIELLE M. ROBERTACCIO, RESPONDENT-APPELLANT.

KIMBERLY M. SEAGER, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT;

AND SHARON P. O'HANLON, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

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

KIMBERLY M. SEAGER, FULTON, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

COHEN & COHEN, UTICA (RICHARD A. COHEN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered December 17, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted primary physical residence of the older subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother and each appellate Attorney for the Child (AFC) assigned to the two subject children appeal from an order that modified the custody and visitation provisions of a judgment of divorce, pursuant to which the mother had primary physical residence of both children, by, inter alia, awarding petitioner father primary physical residence of the older child. We affirm.

We reject the contention of the mother and both appellate AFCs that the father failed to meet his initial burden of demonstrating the requisite change in circumstances warranting an inquiry into the best interests of the children. The father established, inter alia, that there had been a significant deterioration in the relationship between

the mother and the older child, which culminated in a physical altercation between them that was the subject of a police report and an investigation by child protective services (*see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]).

Contrary to the related contention of the mother and both appellate AFCs, we conclude that Family Court did not abuse its discretion in awarding the father primary physical residence of the older child. The court's determination that " 'the best interests of the children warrant their residence with different parents' " is supported by a sound and substantial basis in the record (*Matter of Smith v Smith*, 241 AD2d 980, 980 [4th Dept 1997]; *see generally Cunningham v Cunningham*, 137 AD3d 1704, 1705 [4th Dept 2016]; *Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]).

Both appellate AFCs further contend that the court erred in initially awarding the father temporary physical residence of the older child without a hearing. That contention is moot, however, because the temporary orders granting physical residence of the older child to the father pending trial were superseded by the order on appeal (*see Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696 [4th Dept 2016]; *Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1682 [4th Dept 2015]).

We also reject the contention of the appellate AFC for the older child that the court erred in allowing the attorney who had jointly represented the subject children in the parties' divorce proceeding in 2015 to represent the older child, but not the younger child, at the trial in this case in 2019. The children were entitled to separate counsel in the trial here due to their differing views (*see Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1148 [4th Dept 2016]), and a different trial AFC was appointed to represent the younger child. Moreover, there was no " 'reasonable probability' " that the younger child had revealed confidences to the older child's trial AFC that were "relevant to the subject matter of [the present] litigation" (*Matter of H. Children*, 160 Misc 2d 298, 300-301 [Fam Ct, Kings County 1994], quoting *Greene v Greene*, 47 NY2d 447, 453 [1979]; *cf. Smith*, 241 AD2d at 980). We note that the older child's trial AFC advocated for a position that was consistent with the preferences that the older child expressed to the court at the *Lincoln* hearing.

Finally, we have considered the remaining contention of the older child's appellate AFC and conclude that it does not warrant modification or reversal of the order.

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

977

CA 20-00608

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

CELLINO & BARNES, P.C., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN, LISTER & ALVAREZ, PLC, DEFENDANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 4, 2019. The order denied the motion of defendant to vacate a judgment.

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

Memorandum: This appeal involves a dispute between two law firms over the attorneys' fees earned in a personal injury action arising from a motor vehicle accident. Defendant, Martin, Lister & Alvarez, PLC (MLA), appeals from an order that denied its motion to vacate a judgment that, inter alia, split the attorneys' fees in half between MLA and plaintiff, Cellino & Barnes, P.C. (Cellino & Barnes), and awarded Cellino & Barnes attorneys' fees as a sanction against MLA for frivolous conduct. We conclude that Supreme Court neither abused nor improvidently exercised its discretion in denying the motion.

The sanction imposed against MLA related to a prior motion by MLA to dismiss the instant complaint on the basis of lack of personal jurisdiction and the appeal from the order denying that motion. In support of its motion and on appeal, MLA's attorneys and its principal repeatedly averred that MLA, a Florida law firm, had no contacts with New York and performed no work or services with respect to the personal injury action in New York. Although the court initially granted the motion to dismiss, it later granted the motion of Cellino & Barnes for leave to reargue and, upon reargument, denied the motion to dismiss. On appeal, we affirmed the order denying the motion to dismiss (*Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459 [4th Dept 2014], *lv dismissed* 24 NY3d 928 [2014]).

Subsequently, Cellino & Barnes learned that MLA's principal had, in fact, traveled to New York and performed work with respect to the

personal injury action in New York. As a result, Cellino & Barnes moved for an award of costs, sanctions and attorneys' fees against MLA "and/or" its then-attorney Anthony D. Parone (motion for sanctions). In opposition to the motion for sanctions, MLA asserted that it made no misrepresentations to the courts because it performed no "investigatory" work on the personal injury action in New York. MLA cross-moved to dismiss the instant complaint, alleging that Cellino & Barnes was discharged for cause and, as a result, was not entitled to any portion of the attorneys' fees from the personal injury action.

The court denied MLA's cross motion and directed a hearing on the motion for sanctions. The hearing was twice adjourned from May until June to accommodate the schedule of MLA's principal. At the hearing, when Cellino & Barnes sought to call MLA's principal as a witness, Parone informed the court that, inasmuch as his client was MLA and not MLA's principal, it was the obligation of Cellino & Barnes to subpoena MLA's principal for attendance. After noting that the motion for sanctions "was not just against [MLA] but it was against Mr. Parone," Cellino & Barnes attempted to call Parone to testify. The hearing was adjourned after Parone argued that he was entitled to his own attorney. The court then informed the attorneys that it would hold a hearing on the complaint and the motion for sanctions on the same day. The court also directed MLA's principal to appear at the next court date, stating that "if he fails to appear, it could result in his responses being stricken." A written order to that effect was issued.

MLA's principal failed to appear at the next court date, and the judgment was entered against MLA. It is that failure that forms the basis of MLA's motion to vacate. MLA contends that MLA's principal did not appear because Parone never informed MLA of any hearing related to the motion for sanctions or of the court's directive that MLA's principal appear and never forwarded to MLA the court order containing that information. In addition, MLA contends that Parone told MLA's principal and another MLA attorney that the hearing on the complaint would not go forward because of procedural issues. MLA's attorney on the motion to vacate averred that he had participated in a telephone conversation in which Parone admitted that he had failed to inform MLA of the hearing or the directive that MLA's principal appear at that court proceeding.

Cellino & Barnes opposed the motion to vacate, contending that there was no basis to vacate the judgment under CPLR 5015 and no basis for the court to exercise its inherent power to "vacate its own judgment for sufficient reason and in the interests of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). According to Cellino & Barnes, MLA's "uncorroborated excuse for not appearing" at the hearing was not a sufficient basis to vacate the judgment.

MLA correctly concedes that there is no basis to vacate the judgment under CPLR 5015 (a) and instead focuses on the court's inherent power to vacate a judgment or order (*see generally Woodson*, 100 NY2d at 68). In our view, the court neither abused its discretion nor improvidently exercised its discretion when it denied the motion

to vacate the judgment. MLA's conclusory and unsubstantiated claims of law office failure are insufficient to establish a reasonable basis to vacate a judgment in the interests of substantial justice (*see IndyMac Bank, FSB v Izzo*, 166 AD3d 866, 868 [2d Dept 2018]).

With respect to MLA's allegations that Parone engaged in misconduct, MLA correctly notes that, where a default order or judgment has been entered, an attorney's failure to inform a client about a hearing and an attorney's misconduct have been deemed sufficient grounds to vacate such an order or judgment pursuant to CPLR 5015 (a) (1), i.e., for excusable default (*see Halberstam v Lattimer*, 185 AD3d 555, 557 [2d Dept 2020]; *Corcino v 4303 Baychester LLC*, 147 AD3d 467, 467 [1st Dept 2017]; *Goldenberg v Goldenberg,* 123 AD3d 761, 762 [2d Dept 2014]). Further, "[i]t has long been settled in this State that the Supreme Court has power to relieve a party to a pending action from a judgment or order obtained against him [or her] by reason of the neglect, ignorance or fraud of his [or her] attorney" (*Tomczak v Roetzer*, 283 App Div 851, 852 [4th Dept 1954]; *see generally Matter of Hogan v Supreme Ct. of State of N.Y.*, 295 NY 92, 96 [1946]). Nevertheless, MLA's misconduct allegations against Parone raise credibility issues that are best determined by the motion court (*see generally Cupoli v Nationwide Ins. Co.* [appeal No. 2], 283 AD2d 961, 961 [4th Dept 2001]). We cannot say that the court abused or improvidently exercised its discretion in determining that MLA's accusations against Parone did not warrant vacatur of the judgment (*cf. Shouse v Lyons*, 4 AD3d 821, 822-823 [4th Dept 2004]; *see generally Quinn v Guerra*, 26 AD3d 872, 874 [4th Dept 2006], *appeal dismissed* 7 NY3d 741 [2006]).

We have reviewed MLA's remaining contentions and conclude that they lack merit.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

980
CA 20-00413
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

LYNNE E. MCCARTHY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MAZIN HAMEED AND MAYSAA A. HAMEED,
DEFENDANTS-RESPONDENTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered February 5, 2020. The order granted those parts of the motion of plaintiff seeking summary judgment on the issues of negligence and serious injury, but denied that part of the motion seeking summary judgment on the issue of comparative negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment on the issue of serious injury and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained as she was walking toward her vehicle in a Costco parking lot when a vehicle operated by Maysaa A. Hameed (defendant) struck a flatbed shopping cart on the access lane through the parking lot in front of the store, causing the box on top of the cart to fall off and strike plaintiff. Plaintiff moved for summary judgment on the issues of defendant’s liability, i.e., negligence and serious injury, and plaintiff’s alleged comparative negligence. Supreme Court, inter alia, granted those parts of the motion on the issues of defendant’s negligence and serious injury but denied that part of the motion on the issue of plaintiff’s comparative negligence. Plaintiff now appeals, and defendants cross-appeal.

Contrary to defendants’ contention on their cross appeal, the court properly granted that part of the motion on the issue of defendant’s negligence. Defendant had a “common-law duty to see that which [she] should have seen through the proper use of [her] senses” (*Barbieri v Vokoun*, 72 AD3d 853, 856 [2d Dept 2010]; *see Bush v*

Kovacevic, 140 AD3d 1651, 1653 [4th Dept 2016]; *Gill v Braasch*, 100 AD3d 1415, 1415-1416 [4th Dept 2012]). In support of her motion, plaintiff submitted excerpts from the depositions of herself, her friend, defendant, and a third-party witness. Plaintiff and her friend testified that they exited the store and stopped to look for traffic before crossing the access lane in front of the store. Plaintiff's friend was pushing a flatbed shopping cart with a large box on it containing a recliner, and plaintiff was walking next to and just behind her. A driver of a pickup truck to their right stopped and motioned for them to cross the access lane. As they proceeded across the access lane, a vehicle driven by defendant, which had just backed out of a parking space and drove down a parking lane, turned left in front of them on the access lane and struck the cart, causing the box to fall off and strike plaintiff. Defendant testified that she thought the driver of the pickup truck was waving at her to proceed and that she did not see plaintiff or her friend before striking the cart because a passing vehicle had blocked her view. We conclude that plaintiff met her initial burden of establishing that defendant was negligent in failing to see plaintiff, who was already crossing the access lane when defendant made a left-hand turn into her path, and defendants failed to raise a triable issue of fact in opposition (*see Bush*, 140 AD3d at 1652-1653; *Gill*, 100 AD3d at 1415-1416).

Contrary to plaintiff's contention on appeal, however, the court properly denied that part of her motion on the issue of her comparative negligence (*see Bush*, 140 AD3d at 1653). " '[T]he question of a plaintiff's comparative negligence almost invariably raises a factual issue for resolution by the trier of fact' " (*Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019 [4th Dept 2003]; *see Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]). Here, plaintiff failed to meet her initial burden of establishing "a total absence of comparative negligence as a matter of law" (*Dasher*, 305 AD2d at 1019).

We agree with defendants on their cross appeal that the court erred in granting that part of the motion on the issue of serious injury, and we therefore modify the order accordingly. In support of the motion, plaintiff alleged that she sustained an elbow and a leg fracture as a result of the accident, which would constitute a serious injury under the "fracture" category of Insurance Law § 5102 (d). Plaintiff, however, submitted only an unsworn medical report of a physician who had examined her on behalf of defendants, which did not constitute proof in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 814 [1991]; *Dann v Yeh*, 55 AD3d 1439, 1441 [4th Dept 2008]; *Thousand v Hedberg*, 249 AD2d 941, 941 [4th Dept 1998]). Although plaintiff contends that CPLR 4540-a is applicable here, we reject that contention because the medical report was not "created" by defendants. We therefore conclude that plaintiff is not entitled to summary judgment on the issue of serious injury because she did not submit medical proof in admissible form (*see Sauter v Calabretta*, 90 AD3d

1702, 1704 [4th Dept 2011]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

982
CA 20-00065
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

BROADWAY WAREHOUSE CO., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO BARN BOARD, LLC, DEFENDANT-RESPONDENT.

ROACH, LENNON & BROWN, PLLC, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 20, 2019. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law with costs, the motion is denied and the complaint is reinstated.

Memorandum: In 2012, plaintiff commenced an action against defendant, among others (2012 action), alleging the breach of a lease agreement between plaintiff and defendant and defendant’s improper conveyance of certain personal property in which plaintiff held a security interest pursuant to the lease (secured property). Two months after the 2012 action was dismissed, plaintiff commenced this action asserting causes of action for breach of the lease agreement and fraudulent conveyance of the secured property. Defendant moved to dismiss the instant complaint pursuant to CPLR 3211 (a) (5), contending that the causes of action were time-barred and that the tolling provisions of CPLR 205 (a) did not apply. Supreme Court granted the motion, and we now reverse.

We agree with plaintiff that the tolling provisions of CPLR 205 (a) apply inasmuch as the 2012 action was not dismissed for neglect to prosecute. CPLR 205 (a) provides, in relevant part, that “[i]f an action is timely commenced and is terminated in any other manner than by . . . a dismissal of the complaint for neglect to prosecute the action . . . , the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination,” even though the new action would otherwise be barred by the statute of limitations. “Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct

shall demonstrate *a general pattern of delay* in proceeding with the litigation" (*id.* [emphasis added]).

Here, it is undisputed that the 2012 action was timely commenced and that the instant action was commenced within six months of the termination of the 2012 action. Further, this action is based upon the same transactions and occurrences underlying the 2012 action, i.e., it is based upon "the same operative facts" (*Acquest Wehrle, LLC v Town of Amherst*, 129 AD3d 1644, 1646 [4th Dept 2015], *appeal dismissed* 26 NY3d 1020 [2015]). Thus, the appeal turns on whether the 2012 action was terminated for neglect to prosecute. In the decision attached to the court's order dismissing the 2012 action, the court noted that *defendant* had failed to answer the initial complaint, the amended complaint or the second amended complaint and that *plaintiff* had failed to move for a default judgment within one year as required by CPLR 3215 (c). The court noted no other delays by plaintiff before dismissing the second amended complaint against defendant "as abandoned."

The Court of Appeals has written that "the 'neglect to prosecute' exception in CPLR 205 (a) applies not only where the dismissal of the prior action is for '[w]ant of prosecution' pursuant to CPLR 3216, but whenever neglect to prosecute is in fact the basis for dismissal" (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 520 [2005]). A dismissal of a complaint on grounds other than CPLR 3216 could therefore be deemed a dismissal for neglect to prosecute in certain circumstances (*see Marrero v Crystal Nails*, 114 AD3d 101, 109-110 [2d Dept 2013]). The overall determination is based on whether the court, in the initial action, "adequately set forth the conduct of the plaintiff that constituted the neglect and demonstrated a *general pattern of delay* in proceeding" (*Webb v Greater N.Y. Auto. Dealers Assn., Inc.*, 123 AD3d 1111, 1112 [2d Dept 2014] [emphasis added]; *see* CPLR 205 [a]).

Here, the court did not outline a general *pattern* of delay *by plaintiff* in its order dismissing the 2012 complaint or in the attached decision (*see U.S. Bank Trust, N.A. v Moomey-Stevens*, 168 AD3d 1169, 1170-1171 [3d Dept 2019]; *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 198-199 [2d Dept 2017], *appeal dismissed* 29 NY3d 1023 [2017]; *cf. Webb*, 123 AD3d at 1112; *Zulic v Persich*, 106 AD3d 904, 905 [2d Dept 2013], *lv denied* 22 NY3d 860 [2014]). "It was not until months after the court directed that the 201[2] action be dismissed that the court, for the purpose of justifying the dismissal of the complaint in this action, stated that . . . plaintiff's neglect of prosecution of the 201[2] action was the basis for the dismissal of the 201[2] action" (*Sokoloff v Schor*, 176 AD3d 120, 131 [2d Dept 2019]). We thus reject the court's attempt to recast the earlier dismissal as a dismissal for neglect to prosecute where the order dismissing the first action and the attached decision did not describe a general pattern of delay by plaintiff (*see id.* at 133), and we conclude that both of the instant causes of action are timely under

CPLR 205 (a) (*see Mulford v Fitzpatrick*, 68 AD3d 634, 635 [1st Dept 2009]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

989
CA 20-00221
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF ARNOLD R. PETRALIA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF LABOR,
RESPONDENT-RESPONDENT.

PETRALIA, WEBB & O'CONNELL, P.C., ROCHESTER (ARNOLD R. PETRALIA OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY KIERNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (James J. Piampiano, J.), entered February 3, 2020 in a CPLR article 78 proceeding. The judgment granted the motion of respondent to dismiss the petition.

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

Memorandum: In the course of defending a client against administrative charges of wage theft filed by respondent, petitioner—an attorney—wrote a letter to the regional office of United States Immigration and Customs Enforcement (ICE). In the letter, petitioner alleged that respondent was prosecuting his client for conduct required by federal immigration law, i.e., the termination of two identified employees who, according to petitioner, were unauthorized aliens that had procured employment with his client through fraudulent means. Petitioner's letter sought ICE's assistance in rectifying respondent's alleged failure to comply with federal immigration law (*see generally Alfred Weissman Real Estate v Big V Supermarkets*, 268 AD2d 101, 106-107 [2d Dept 2000]). Petitioner copied respondent on that letter.

Following receipt of the letter, respondent instituted a formal investigation of petitioner personally for a potential violation of Labor Law § 215 (1) (a), which as relevant here bars an employer's agent from "threaten[ing], penaliz[ing], or in any other manner discriminat[ing] or retaliat[ing] against any employee . . . because such employee has made a complaint to his or her employer" about an alleged wage violation. Section 215 (1) (a) further provides that, "[a]s used in this section, to threaten, penalize, or in any other

manner discriminate or retaliate against any employee includes threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee’s suspected citizenship or immigration status.”

Petitioner then commenced the instant CPLR article 78 proceeding seeking, in effect, a writ of prohibition barring respondent from proceeding with its personal investigation of him. As grounds for prohibition, the petition alleged only that 8 USC § 1324a (h) (2) expressly preempted Labor Law § 215 (1) (a) insofar as the latter statute made contacting and threatening to contact federal immigration authorities a prohibited form of retaliation under state law. Respondent moved to dismiss the petition, arguing insofar as relevant here that petitioner had neither stated a cause of action nor exhausted his administrative remedies (*see generally* CPLR 7804 [f]). Supreme Court agreed with respondent on both issues, granted the motion, and dismissed the petition. Petitioner now appeals.

Preliminarily, respondent contends that petitioner cannot obtain prohibition under these circumstances because he has an adequate remedy at law with respect to his preemption claim (*see generally Matter of Chasm Hydro, Inc. v New York State Dept. of Envtl. Conservation*, 14 NY3d 27, 29-31 [2010]). As respondent essentially concedes, however, the record on appeal does not demonstrate that it advanced that particular contention in support of its motion before Supreme Court. Although respondent asserts that it raised its adequate-remedy contention in its memorandum of law to that court, the memorandum of law is not part of the record on appeal and thus cannot evidence respondent’s preservation of that particular contention (*see County of Jefferson v Onondaga Dev., LLC*, 162 AD3d 1602, 1602 [4th Dept 2018]; *Lyndaker v Board of Educ. of W. Can. Val. Cent. Sch. Dist.*, 129 AD3d 1561, 1564-1565 [4th Dept 2015]). Respondent’s adequate-remedy argument is therefore unpreserved for our review (*see Canandaigua Natl. Bank & Trust Co. v Palmer*, 119 AD3d 1422, 1424-1425 [4th Dept 2014]; *see generally Matter of County of Chemung v Shah*, 28 NY3d 244, 262 [2016]).

Moreover, we agree with petitioner that the court erred in granting respondent’s motion to dismiss on the ground that petitioner failed to exhaust his administrative remedies. The exhaustion rule does not apply where, as here, “the statute or administrative scheme itself is alleged to be unconstitutional, thus undermining the legality of the entire proceeding” (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 549 [1st Dept 2007]; *see Matter of Haddad v City of Albany*, 149 AD3d 1361, 1364 [3d Dept 2017]). Notably, petitioner’s preemption claim is not the sort of “constitutional claim that may require the resolution of factual issues reviewable at the administrative level [that] should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established” (*Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]). We therefore address the merits of petitioner’s preemption claim.

As a general matter, "the United States Supreme Court has identified three types of preemption: (1) 'express preemption,' where Congress explicitly defines the extent to which its enactment preempts state law, (2) 'field preemption,' where Congress regulates a field so pervasively that an intent to occupy the field exclusively may be inferred, and (3) 'conflict preemption,' where the state and federal law actually conflict so that it is impossible for a party to simultaneously comply with both, or the state law stands as an obstacle to the execution of the full purposes and objectives of Congress" (*Bantum v American Stock Exch., LLC*, 7 AD3d 551, 552 [2d Dept 2004]; *see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356-357 [2006]). Here, as noted above, the petition invoked only the express theory of preemption.

" 'Express preemption' applies where Congress explicitly declares that a federal law is intended to supersede state law" (*Balbuena*, 6 NY3d at 356; *see Altria Group, Inc. v Good*, 555 US 70, 76 [2008]; *People v First Am. Corp.*, 76 AD3d 68, 72 [1st Dept 2010], *affd* 18 NY3d 173 [2011], *cert denied* 566 US 939 [2012]). When analyzing express preemption claims, the courts "take heed of the rule of interpretation that preemption clauses in a statute are to be narrowly construed and that matters beyond their scope are not preempted" (*Wallace v Parks Corp.*, 212 AD2d 132, 138-139 [4th Dept 1995]; *see Cipollone v Liggett Group, Inc.*, 505 US 504, 517, 524 [1992]).

The allegedly preemptive federal statute in this case provides that it "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) *upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens*" (8 USC § 1324a [h] [2] [emphasis added]). As the emphasized text demonstrates, the preemptive ambit of 8 USC § 1324a (h) (2) extends only to state or local laws that impose sanctions upon certain identified individuals, namely, "those who employ, or recruit or refer for a fee for employment, unauthorized aliens." Labor Law § 215 (1) (a), however, does not penalize "those who employ, or recruit or refer for a fee for employment, unauthorized aliens"; rather, it penalizes those who, insofar as relevant here, retaliate against an employee by contacting or threatening to contact federal immigration authorities about the employee's immigration status. Nor does petitioner allege that respondent is invoking section 215 in this case to penalize him for having "employ[ed], or recruit[ed] or refer[red] for a fee for employment, unauthorized aliens." To the contrary, it is undisputed that petitioner did not engage in those actions. Thus, irrespective of its preemptive impact in other situations, 8 USC § 1324a (h) (2) does not preempt the application of section 215 to individuals—like petitioner—who fall "outside the scope of [the federal] preemption provision" (*Small v Lorillard Tobacco Co.*, 252 AD2d 1, 13 [1st Dept 1998], *affd* 94 NY2d 43 [1999]). We therefore affirm the judgment on the ground that petitioner failed to state a cognizable preemption claim in his petition.

Finally, to the extent that petitioner's appellate brief asserts any other basis for preemption in this case, such theories are unpreserved (*see People v Miran*, 107 AD3d 28, 35 [4th Dept 2013], *lv*

denied 21 NY3d 1044 [2013], *reconsideration denied* 22 NY3d 957 [2013], *cert denied* 572 US 1117 [2014]) and hence beyond our review in this CPLR article 78 proceeding (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]). Likewise unpreserved and unreviewable is petitioner's contention that respondent's proposed application of Labor Law § 215 would constitute an unconstitutional ex post facto penalty (*see Matter of Williams v New York State Bd. of Parole*, 277 AD2d 617, 617 [3d Dept 2000]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

993
KA 16-00577
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON COLLINS, 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 (James J. Piampiano, J.), rendered June 18, 2015. The judgment convicted defendant upon his plea of guilty of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [4]). Defendant contends that his waiver of the right to appeal is invalid, that County Court erred in denying that part of his omnibus motion seeking to suppress physical evidence, that he did not knowingly, intelligently and voluntarily plead guilty, and that the sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the judgment should be affirmed.

Defendant contends that the court erred in refusing to suppress the physical evidence found in his vehicle because the police lacked probable cause to search the vehicle. We reject that contention. Initially, contrary to the People's assertion, defendant's contention is preserved for our review because defendant challenged the search of the vehicle at the suppression hearing and the court expressly ruled on that issue (*see People v Graham*, 25 NY3d 994, 997 [2015]; *People v Mack*, 114 AD3d 1282, 1282 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *cf. People v Lanaux*, 156 AD3d 1459, 1460 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]). The record establishes, and defendant does not dispute, that the police were entitled to stop his vehicle based on observed violations of the Vehicle and Traffic Law (*see People v Ricks*, 145 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *see generally People v Robinson*, 97 NY2d 341, 349

[2001]; *People v Binion*, 100 AD3d 1514, 1515 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013]).

Furthermore, we conclude that, after stopping the vehicle, the police had probable cause to search it. "[I]t is well established that [t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause" to search a vehicle (*People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014] [internal quotation marks omitted]). A police officer testified at the suppression hearing that he was familiar with the smell of unburnt marihuana, and that he detected that odor emanating from the vehicle as he approached it (*see People v Wright*, 158 AD3d 1125, 1126-1127 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *Mack*, 114 AD3d at 1282; *Cuffie*, 109 AD3d at 1201). Additionally, we discern no basis to disturb the court's credibility assessments, which are entitled to great deference, because "[n]othing about the [challenged] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self contradictory" (*People v Walker*, 128 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 26 NY3d 936 [2015]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Bush*, 107 AD3d 1581, 1582 [4th Dept 2013], *lv denied* 22 NY3d 954 [2013]).

Defendant also contends that the plea should be vacated on the ground that the plea colloquy is factually insufficient because it undermined his admission of guilt. Defendant failed, however, to preserve that contention for our review (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Sheppard*, 154 AD3d 1329, 1329 [4th Dept 2017]; *People v Brinson*, 130 AD3d 1493, 1493 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]), and this case does not fall within the narrow exception to the preservation requirement. To the extent that defendant negated an essential element of the crime by denying any knowledge of his codefendants' intent to commit a burglary when defendant drove them to and from the crime scene (*see People v Lopez*, 71 NY2d 662, 666 [1988]), we note that the court immediately conducted the requisite further inquiry to ensure that defendant's guilty plea was knowing, intelligent, and voluntary (*see id.*; *People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]; *People v Waterman*, 229 AD2d 1013, 1013 [4th Dept 1996]). We also conclude that "defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017] [internal quotation marks omitted]; *see People v Bonacci*, 119 AD3d 1348, 1349 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]; *People v Ocasio*, 265 AD2d 675, 677-678 [3d Dept 1999]).

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

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

996

KA 16-00354

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELBERT M. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 9, 2015. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Evidence at a suppression hearing established that a police officer stopped a vehicle driven by defendant because, inter alia, it had no front license plate and had darkly tinted windows. When asked for his driver's license and registration, defendant produced the registration but not his license. The officer then requested that defendant exit the vehicle. Moments later, while the officer was speaking with defendant, defendant fled the scene. The officer pursued defendant, who discarded a firearm as he fled, and the officer ended his pursuit in order to secure the weapon. Approximately 15 to 18 minutes later, the officer went to another address, where a showup identification procedure was performed with a possible suspect who had been apprehended by other officers. The officer identified the suspect as defendant.

As an initial matter, we agree with defendant that he did not validly waive his right to appeal because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Crogan*, 181 AD3d 1212, 1212-1213 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]).

We reject defendant's contention, however, that the court erred in refusing to suppress the identification of defendant made by the police officer who performed the traffic stop. Although the People contend that the police officer made a " 'confirmatory identification' " that "as a matter of law . . . could not be the product of undue suggestiveness" (*People v Boyer*, 6 NY3d 427, 431 [2006]), we are precluded from affirming on that basis because the court did not rule on that issue (*see* CPL 470.15 [1]; *People v Davis*, 159 AD3d 1531, 1533-1534 [4th Dept 2018]). Nevertheless, applying the rule applicable to showup identification procedures generally, we reject defendant's contention that the identification was unduly suggestive (*see generally People v Johnson*, 164 AD3d 1593, 1594 [4th Dept 2018], *lv denied* 32 NY3d 1173 [2019]; *People v Bassett*, 112 AD3d 1321, 1322 [4th Dept 2013], *lv denied* 23 NY3d 960 [2014]).

Defendant's additional contention that he was denied effective assistance of counsel survives his guilty plea only insofar as he demonstrates that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). To the extent that defendant contends that his plea was infected by the allegedly ineffective assistance of counsel, we reject defendant's contention that defense counsel's failure to move to suppress the firearm constituted ineffective assistance. "There can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Patterson*, 115 AD3d 1174, 1175-1176 [4th Dept 2014], *lv denied* 23 NY3d 1066 [2014]; *People v Marcial*, 41 AD3d 1308, 1308 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]). On appeal, defendant does not contest the legality of the initial traffic stop, and instead contends that defense counsel was ineffective for failing to seek suppression of the firearm on the ground that the officer was not entitled to direct him to stand at the rear of the stopped vehicle, that the officer was not entitled to pursue him when he fled, and that the firearm was recovered as a result of that purportedly impermissible police conduct. Seeking suppression on that ground had little or no chance of success, however, because the officer was entitled, as part of the traffic stop, to request defendant's license and registration (*see People v McCarley*, 55 AD3d 1396, 1396 [4th Dept 2008], *lv denied* 11 NY3d 899 [2008]). Defendant's "failure, upon demand by the officer, to produce a driver's license was presumptive evidence that he was not duly licensed," and "[d]riving without a license is a traffic offense which justifies a police officer's immediate arrest of the unlicensed operator" (*People v Watson*, 177 AD2d 676, 676 [2d Dept 1991], *lv denied* 79 NY2d 954 [1992]; *see People v Howard*, 19 AD3d 1073, 1074 [4th Dept 2005], *lv denied* 5 NY3d 853 [2005]; *People v Clark*, 227 AD2d 983, 984 [4th Dept 1996]; *see also* Vehicle and Traffic Law § 507 [2]). Additionally, defendant's flight from the traffic stop, "leaving his automobile behind prior to being issued a traffic summons, [further] justified the officers' pursuit"

(*People v Frank*, 161 AD2d 794, 795 [2d Dept 1990], *lv denied* 76 NY2d 939 [1990]), and " 'the recovery of the gun discarded during [defendant's] flight was lawful inasmuch as the officer's pursuit . . . of defendant [was] lawful' " (*People v Thacker*, 156 AD3d 1482, 1483 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1015
KA 18-01045
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTIE HUTSON, DEFENDANT-APPELLANT.

JAY H. SCHWITZMAN, BROOKLYN, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX 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 Oneida County Court (Michael L. Dwyer, J.), dated February 9, 2018. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20

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

Memorandum: Defendant appeals by permission of this Court pursuant to CPL 460.15 from an order denying his pro se motion pursuant to CPL 440.20 seeking, inter alia, to set aside his sentence imposed on March 15, 2013. According to defendant, the sentence imposed on the second count of the corresponding indictment, charging criminal possession of stolen property in the third degree (Penal Law § 165.50), must run concurrently with the sentence imposed on the first count of that indictment, charging scheme to defraud in the first degree (§ 190.65 [1] [b]), because the individual act of possessing the stolen merchandise at issue constitutes part of the scheme to defraud under the circumstances of this case (*see e.g. People v Sanchez*, 195 AD2d 578, 580 [2d Dept 1993], *mod on other grounds* 84 NY2d 440 [1994]; *People v Whitehead*, 84 AD3d 1128, 1131 [2d Dept 2011], *lv denied* 17 NY3d 823 [2011]; *People v D'Anna*, 163 AD2d 810, 810-811 [4th Dept 1990]). "[D]efendant's failure to provide a sufficient record precludes appellate review of his [contention]" (*People v Thomas*, 46 AD3d 712, 712-713 [2d Dept 2007], *lv denied* 10 NY3d 940 [2008], *reconsideration denied* 11 NY3d 742 [2008]; *see generally Matter of Santoshia L.*, 202 AD2d 1027, 1028 [4th Dept 1994]).

We have reviewed defendant's remaining contentions and conclude

that none warrants modification or reversal of the order.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1023
CAF 19-01245
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ANTHONY AMOS, JR.,
PETITIONER-APPELLANT,

V ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered April 3, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1024
CAF 19-01246
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ANTHONY AMOS, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

REBECCA HOFFMAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered April 3, 2019 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Attorney for the Child to dismiss the petition.

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

Memorandum: Petitioner, the biological father of the subject child, appeals from an order granting the motion of the Attorney for the Child (AFC) to dismiss petitioner’s petition seeking visitation with the child. We affirm.

The subject child was born in August 2017. A neglect petition was filed against the biological mother, and she consented to the temporary removal of the child two days after her birth. The child was subsequently placed in foster care with the adoptive parents of several of her siblings. Petitioner was identified as a putative father, and Family Court appointed counsel to represent him in November 2017. Petitioner and the mother were never married, and petitioner has been incarcerated since before the child was born. He was eventually adjudicated the biological father of the child in September 2018, shortly before the parental rights of the mother were terminated in December 2018. Custody of the child was then transferred to respondent, and a permanency hearing was scheduled. The permanency goal for the child, as set forth in the permanency hearing report submitted by respondent prior to the permanency hearing, was placement for adoption, and respondent and the AFC

advocated for placement with the child's foster parents.

In January 2019, petitioner filed his petition seeking visitation with the child. The AFC moved to dismiss petitioner's petition for lack of standing, arguing that petitioner was not entitled to visitation inasmuch as the permanency goal for the child was adoption, and petitioner was a mere notice father whose consent was not required for the child's adoption under Domestic Relations Law § 111 (1) (d) (*see generally Matter of Makia R.J. [Michael A.J.]*, 128 AD3d 1540, 1540 [4th Dept 2015]). Respondent joined in the AFC's motion, and the AFC requested a hearing on the issue whether petitioner was a mere notice father or whether his consent was required for adoption. Following a hearing on the matter, the court determined that petitioner was a notice father only and granted the motion.

On appeal, petitioner contends that the court erroneously applied Domestic Relations Law § 111 in determining that he lacked standing to seek visitation inasmuch as that statute applies to adoption proceedings only. Petitioner, however, did not oppose the AFC's request for a hearing to determine whether he was a mere notice father or whether his consent was required for the child's adoption, and petitioner raised no objection to the court's statement that the purpose of the hearing was to resolve that question. Petitioner also did not challenge the permanency goal of adoption. Thus, petitioner's contention, raised for the first time on appeal, is not preserved for our review (*see* CPLR 5501 [a] [3], [4]; Family Ct Act § 1118).

In any event, we conclude that petitioner's contention lacks merit. Under these circumstances, where the permanency determination in a related proceeding was pending, the court did not err in resolving, as a threshold issue in these related proceedings, the question whether petitioner was a mere notice father or whether his consent was required for the child's adoption (*see generally Matter of Carrie GG.*, 273 AD2d 561, 562 [3d Dept 2000], *lv denied* 95 NY2d 763 [2000]), particularly where, as here, petitioner did not oppose the hearing on that issue. Furthermore, the court's determination that petitioner's consent to adoption was not required is supported by clear and convincing evidence (*see Matter of Tiara Dora S. [Debbie S.]*, 170 AD3d 458, 458 [1st Dept 2019]), and we see no reason to disturb the credibility determinations of the court (*see generally Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166 [4th Dept 2012]). Inasmuch as petitioner's consent to adoption was not required, petitioner lacked standing to seek visitation with the child (*see generally Matter of Kevin W. v Monique T.*, 38 AD3d 672, 673 [2d Dept 2007], *lv denied* 9 NY3d 803 [2007]).

In light of our determination, we do not reach petitioner's remaining contention.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1060
KA 18-01067
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC A. LYNCH, DEFENDANT-APPELLANT.

FRANK MELLACE, II, ROME, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (MICHAEL T. JOHNSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered March 20, 2018. The judgment convicted defendant upon a jury verdict of, inter alia, burglary in the first degree and attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [1]) and attempted burglary in the first degree (§§ 110.00, 140.30 [1]). Defendant's contention that County Court did not properly instruct the jury on the predicate crime of menacing as alleged in the indictment with respect to the crimes of burglary in the first degree and attempted burglary in the first degree is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Couser*, 12 AD3d 1040, 1042 [4th Dept 2004], *lv denied* 4 NY3d 762 [2005]). To the extent that defendant contends that the jury instruction allowed the jury to convict him on an uncharged theory of burglary, we conclude that defendant failed to preserve his challenge for our review (*see People v Hursh*, — AD3d —, — [Feb. 11, 2021] [4th Dept 2021]; *see generally People v Allen*, 24 NY3d 441, 449-450 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court erred in denying his request to charge criminal trespass in the second degree as a lesser included offense of burglary in the first degree. There is no " 'reasonable view of the evidence to support a finding that defendant committed the lesser offense but not the greater' " (*People v Ingram*, 140 AD3d 1777, 1778 [4th Dept 2016]; *see People v Harris*, 50 AD3d

1608, 1608 [4th Dept 2008], *lv denied* 10 NY3d 959 [2008]), i.e., "that [defendant] entered the [dwelling] unlawfully but for an innocent purpose and developed the intent to commit a crime therein after his entry" (*People v Mercado*, 294 AD2d 805, 805 [4th Dept 2002], *lv denied* 98 NY2d 731 [2002]).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction with respect to burglary in the first degree and attempted burglary in the first degree inasmuch as defendant's motion for a trial order of dismissal was not specifically directed at the alleged deficiency in the People's proof (*see generally People v Gray*, 86 NY2d 10, 19 [1995]; *People v Bibbes*, 98 AD3d 1267, 1267-1268 [4th Dept 2012], *amended on rearg* 100 AD3d 1473 [4th Dept 2012], *lv denied* 20 NY3d 931 [2012]), i.e., that the People failed to establish that defendant unlawfully entered the dwellings with the intent to commit the crime of menacing therein. In any event, 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 establish that defendant had the requisite intent (*see generally People v Madore*, 145 AD3d 1440, 1440 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]). Furthermore, viewing the evidence in light of the elements of the crimes of burglary in the first degree and attempted burglary in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict on those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment. Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1066
CA 20-00287

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

JOAN CASILIO ADAMS, ESQ., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RANDY S. MARGULIS, ESQ., DEFENDANT-APPELLANT,
AND KATHRIN L. CACCAMISE, DEFENDANT-RESPONDENT.

RANDY S. MARGULIS, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE (JOAN CASILIO ADAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 17, 2019. The order granted the motion of plaintiff for summary judgment and directed the disbursement of certain escrowed funds to defendant Kathrin L. Caccamise.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and judgment is granted in favor of defendant Randy S. Margulis, Esq. as follows:

> It is ADJUDGED AND DECLARED that defendant Kathrin L. Caccamise is not entitled to receive the proceeds of the subject life insurance policy held in escrow; and plaintiff is directed to return the escrow funds to Metropolitan Life Insurance Company.

Memorandum: Plaintiff, an attorney, commenced this interpleader action as a stakeholder pursuant to CPLR 1006 seeking a declaration that defendant Kathrin L. Caccamise (wife), plaintiff’s client in a divorce action, had a right to receive funds held in escrow by plaintiff and that plaintiff could terminate such escrow funds with payment to the wife. By way of background, plaintiff represented the wife and Randy S. Margulis, Esq. (defendant) represented Brian P. Caccamise (husband) in the divorce action. During the pendency of that action, the husband became ill with cancer. Thereafter, upon the pretrial application of the wife, Supreme Court issued a “stipulated order” directing the husband’s employer to name the wife as beneficiary on the husband’s life insurance policy through the employer and ordering the husband to immediately name the wife as the beneficiary of that life insurance policy, his employee 401k account, and his private individual retirement account. The husband died the day after that order was granted. A few days later, in a letter to

the court and copied to plaintiff, defendant informed the court that the husband had died and asserted that, as a consequence, the pending action terminated by operation of law. Nevertheless, upon plaintiff's request, the court subsequently issued an "amended stipulated order," made retroactive to the date of the initial stipulated order, clarifying for the employer the accounts on which the wife was to be named as beneficiary.

Approximately three weeks after the husband's death, plaintiff sent a letter to the court's clerk and copied defendant requesting that the court issue another amended order naming the wife as beneficiary on a different life insurance policy issued to the husband by Metropolitan Life Insurance Company (MetLife). The husband's parents, who had purportedly provided the MetLife policy to the husband when he was 18 years old and paid the premiums thereon until the early years of the husband's marriage, were apparently the named beneficiaries on the MetLife policy. In a "second amended stipulated order" issued several weeks after the husband's death, the court directed MetLife to name the wife, retroactive to the initial order, as beneficiary on its policy and ordered the now-deceased husband to immediately name the wife as beneficiary on the MetLife policy. Defendant would later dispute that he had consented to the "second amended stipulated order." In any event, after receiving an objection from defendant, the court directed that the insurance proceeds on the MetLife policy, which had been sent by check to the wife, be held in escrow by plaintiff pending review of the issue.

After plaintiff commenced this interpleader action, she moved for summary judgment and defendant opposed the motion, including on the ground that the "second amended stipulated order" should be vacated because the husband died before it was granted. The court granted the motion and directed that the escrow funds, minus fees and costs, be turned over to the wife. A Justice of this Court stayed enforcement of the order pending appeal. Defendant appeals, and we now reverse.

We agree with defendant that the court erred in granting plaintiff's motion. It is well settled that "where one party to a divorce action dies prior to the rendering of a judicial determination which dissolves or terminates the marriage, the action abates inasmuch as the marital relationship between the parties no longer exists" (*Sperber v Schwartz*, 139 AD2d 640, 642 [2d Dept 1988], *lv dismissed* 73 NY2d 871 [1989], *lv denied* 74 NY2d 606 [1989]). "Although an exception to this rule exists where the court has made a final adjudication of divorce but has not performed 'the mere ministerial act of entering the final judgment,' " that exception does not apply here inasmuch as the court had merely granted some pretrial orders but had not made any final adjudication of divorce (*Matter of Forgione*, 237 AD2d 438, 438 [2d Dept 1997], *lv denied* 90 NY2d 804 [1997], quoting *Cornell v Cornell*, 7 NY2d 164, 170 [1959]; *see Acito v Acito*, 72 AD3d 493, 493-494 [1st Dept 2010]; *cf. Matter of Estate of Agliata*, 222 AD2d 1025, 1025 [4th Dept 1995]). In this instance, the husband's death "abated the . . . action for a divorce and ancillary relief" (*Bordas v Bordas*, 134 AD3d 660, 660 [2d Dept 2015]; *see Forgione v Forgione*, 231 AD2d 603, 604 [2d Dept 1996]).

Despite the foregoing, after the husband's death, the "second amended stipulated order" directing that the wife be named as the beneficiary on the MetLife policy was requested by plaintiff and issued by the court. As defendant argued below in this interpleader action and contends on appeal, that order should never have been issued because any claim that the wife may have had to the MetLife policy in the divorce action was extinguished upon the death of the husband (*see Bordas*, 134 AD3d at 660; *Forgione*, 231 AD2d at 604), and the court should have, instead, vacated that order (*see Forgione*, 231 AD2d at 604; *see generally First Metlife Invs. Ins. Co. v Filippino*, 170 AD3d 672, 673-674 [2d Dept 2019]; *Matter of Alfieri*, 203 AD2d 562, 563 [2d Dept 1994]). Under these circumstances, we exercise our power to "search the record and grant summary judgment to a nonmoving party," i.e., defendant (*JMD Holding Corp. v Congress Fin. Corp*., 4 NY3d 373, 385 [2005]; *see* CPLR 3212 [b]; *Dunham v Hilco Constr. Co.,* 89 NY2d 425, 429 [1996]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111 [1984]). We conclude that there are no material issues of fact and that the record establishes, as a matter of law, that the "second amended stipulated order" is without effect. Thus, inasmuch as the wife is not entitled to receive the proceeds of the MetLife insurance policy, we direct plaintiff to release the escrow funds to MetLife, which may then distribute the proceeds of the policy in accordance with the policy terms and its procedures.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1067
CA 20-00602
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

CAROUSEL CENTER COMPANY, LP, CAROUSEL LEASEHOLD, LLC, AND PYRAMID COMPANY OF ONONDAGA, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KAUFMANN'S CAROUSEL, INC., ALSO KNOWN AS MACY'S, LT PROPCO, LLC, DEFENDANTS-APPELLANTS, AND CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (DAVID J. EDWARDS OF COUNSEL), AND JACKSON LEWIS P.C., ST. LOUIS, MISSOURI, FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT J. SMITH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

BARCLAY DAMON LLP, ROCHESTER (MARK R. MCNAMARA OF COUNSEL), AND BOUSQUET HOLSTEIN PLLC, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 3, 2019. The order and judgment, among other things, granted the cross motion of plaintiffs Carousel Center Company, LP and Pyramid Company of Onondaga for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by amending the caption to remove Carousel Leasehold, LLC and as modified the order and judgment is affirmed without costs.

Memorandum: In the present declaratory judgment action arising from a longstanding dispute primarily between a shopping mall and department store tenants (*see e.g. Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP*, 87 AD3d 1343 [4th Dept 2011], *lv dismissed* 18 NY3d 975 [2012], *rearg denied* 19 NY3d 938 [2012]; *LT Propco LLC v Carousel Ctr. Co., L.P.*, 68 AD3d 1697 [4th Dept 2009], *lv dismissed in part and denied in part* 15 NY3d 743 [2010]; *Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292 [4th Dept 2002], *lv denied* 99 NY2d 508 [2003]), Supreme Court, among other things, granted the cross motion of Carousel Center Company, LP and Pyramid Company of Onondaga (plaintiffs) for summary judgment by issuing declarations in their favor related to the contractual obligations of Kaufmann's Carousel, Inc., also known as Macy's

(Kaufmann's) and LT Propco, LLC (LT Propco) (collectively, defendants). As limited by their brief, defendants appeal from that part of the order and judgment declaring that plaintiffs are entitled to attorneys' fees, and LT Propco appeals from that part of the order and judgment dismissing its counterclaims seeking alternative declarations.

We reject LT Propco's contention that the court erred in dismissing its counterclaims seeking alternative declarations regarding the definitions of various contractual terms. Pursuant to CPLR 3001, "[S]upreme [C]ourt may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy." "A declaratory judgment action thus requires an actual controversy between genuine disputants with a stake in the outcome, and may not be used as a vehicle for an advisory opinion" (*Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1405 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014] [internal quotation marks omitted]; *see New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 529-532 [1977]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3001:3).

Here, the rationale essential to the court's determination that plaintiffs were entitled to summary judgment did not necessarily depend on, or require definition of, any contractual terms, and LT Propco does not challenge the resulting declarations in plaintiffs' favor. Inasmuch as the court resolved the immediate dispute, the present action "no longer presented a genuine controversy" and, given that "courts may not issue advisory opinions which can have no immediate effect," the court properly dismissed defendants' counterclaims seeking alternative declarations (*Matter of United Water New Rochelle v City of New York*, 275 AD2d 464, 466 [2d Dept 2000]; *see Green Thumb Lawn Care, Inc.*, 107 AD3d at 1404-1405; *Goldfeld v Mattoon Communications Corp.*, 99 AD2d 711, 712 [1st Dept 1984], *appeal dismissed* 62 NY2d 802 [1984]). Contrary to LT Propco's further contention, to the extent that the court was obligated under these circumstances to "state its grounds" for declining to issue declarations on the counterclaims (CPLR 3001), we conclude that the court fulfilled that obligation.

Contrary to defendants' contention, the court did not err in declaring that plaintiffs are entitled to attorneys' fees. It is unmistakably clear from the relevant contractual provisions that the prevailing party is entitled to attorneys' fees in any judicial action instituted to enforce the subject contracts, and the court properly determined that the present action sought to enforce those contracts and that plaintiffs prevailed (*see Leonard E. Riedl Constr., Inc. v Homeyer*, 105 AD3d 1391, 1392 [4th Dept 2013]; *Colonial Sur. Co. v Genesee Val. Nurseries, Inc.*, 94 AD3d 1422, 1424 [4th Dept 2012]; *see generally Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989]). Defendants nonetheless contend that plaintiffs are not entitled to attorneys' fees because they were not required to commence this action and instead should have first resorted to contractual remedies. We reject that contention. Where, as here, "an agreement

is negotiated between sophisticated, counseled business people negotiating at arm's length . . . , courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Global Reins. Corp. of Am. v Century Indem. Co.*, 30 NY3d 508, 518-519 [2017] [internal quotation marks omitted]). The relevant contractual provisions allow for the award of attorneys' fees to the prevailing party in, without restriction, *any* judicial action instituted to enforce the subject contracts, and those provisions do not contain language limiting the availability of attorneys' fees to situations in which litigation is "required" (*cf. Blaylock & Partners, L.P. v 609 Fifth Ave. Partners L.L.C.*, 29 AD3d 476, 477 n 1 [1st Dept 2006], *lv dismissed* 8 NY3d 840 [2007]).

Finally, there is no dispute between the parties that the court, in an attempt to add an entity related to LT Propco as a defendant, mistakenly added ostensible entity "Carousel Leasehold, LLC" as a plaintiff, and that the caption should be amended accordingly. We therefore modify the order and judgment by amending the caption to remove "Carousel Leasehold, LLC" (*see generally Matter of Town Bd. of Town of Brighton v West Brighton Fire Dept., Inc.*, 126 AD3d 1433, 1435 [4th Dept 2015], *lv dismissed* 26 NY3d 980 [2015]).

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

1103
KA 16-02342
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE F., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from an adjudication of the Monroe County Court (Vincent M. Dinolfo, J.), rendered November 3, 2016. The adjudication revoked defendant's sentence of probation.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: In appeal No. 1, defendant appeals from an adjudication that revoked the sentence of probation imposed on his prior youthful offender adjudication of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (*id.*) and sentencing him to a determinate term of imprisonment of six years followed by three years of postrelease supervision.

As an initial matter, defendant raises no contentions with respect to the adjudication in appeal No. 1, and we therefore dismiss the appeal from that adjudication (*see People v White* [appeal No. 2], 173 AD3d 1852, 1852 [4th Dept 2019]; *People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

With respect to appeal No. 2, we agree with defendant that his waiver of the right to appeal is invalid. Here, in describing the nature of defendant's right to appeal and the breadth of the waiver of that right, County Court said: "[T]his case ends when I sentence you. . . ." Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), defendant's waiver of the right to appeal was invalid because the court mischaracterized it as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d

545, 565 [2019], — US —, 140 S Ct 2634 [2020]). The better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*id. at* 567, citing NY Model Colloquies, Waiver of Right to Appeal). We further conclude that the written waiver signed by defendant did not contain any clarifying language to correct the deficiencies in the oral colloquy (*see People v Davis*, 188 AD3d 1731, 1732 [4th Dept 2020]). Rather, it perpetuated the oral colloquy's mischaracterization of the waiver of the right to appeal as an absolute bar to the taking of an appeal by stating that defendant was "giv[ing] up any and all rights to appeal from the judgment" and that "the plea agreement in this matter will be a complete and final disposition of this matter" (*see generally id.*).

Nevertheless, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1104
KA 16-02343
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE F., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered November 3, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Josue F.* ([appeal No. 1] — AD3d — [Feb. 11, 2021] [4th Dept 2021]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1176

KA 18-02378

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 12, 2018. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm.

Defendant contends that County Court erred in refusing to suppress evidence and statements obtained when the police stopped his vehicle and searched him. At the outset, as the People correctly concede, we conclude that defendant did not validly waive his right to appeal and therefore we are not precluded from reviewing his challenge to the suppression ruling (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US — , 140 S Ct 2634 [2020]; *People v Mitchell*, 185 AD3d 1410, 1410-1411 [4th Dept 2020]). We note that the better practice with respect to a waiver of the right to appeal is for the court "to use the Model Colloquy, which neatly synthesizes . . . the governing principles" (*People v Williams*, 186 AD3d 1112, 1113 [4th Dept 2020] [internal quotation marks omitted]; *see* NY Model Colloquies, Waiver of Right to Appeal).

We nevertheless conclude that the court did not err in refusing to suppress the evidence and statements obtained as a result of the challenged vehicle stop because the stop was based on reasonable suspicion that the driver of the vehicle had been involved in criminal activity (*see generally People v Hinshaw*, 35 NY3d 427, 431 [2020]; *People v Hollman*, 79 NY2d 181, 185 [1992]; *People v Black*, 48 AD3d

1154, 1155 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]). The evidence at the suppression hearing established that a police officer responded to a 911 call broadcast over the radio, reporting that a man had been seen brandishing a gun at a woman near the officer's location. The caller specifically described the gunman's vehicle, the driver and his clothing, the license plate number of the vehicle, its general direction of travel, and the location of the crime.

Within minutes of receiving that radio broadcast, the police officer saw a vehicle, license plate, and driver—i.e., defendant—that matched the description provided by the 911 caller. We conclude that the officer had reasonable suspicion that defendant had been involved in criminal activity "based on the totality of the circumstances, including a radio transmission providing a general description of the perpetrator[ ] of [the] crime . . . [,] the . . . proximity of the defendant to the site of the crime, the brief period of time between the crime and the discovery of the defendant near the location of the crime, and the [officer's] observation of the defendant, who matched the radio-transmitted description" (*People v Moss*, 89 AD3d 1526, 1527 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012] [internal quotation marks omitted]; *see People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]).

Even assuming, arguendo, that defendant's contention that he was deprived of effective assistance of counsel survives the guilty plea (*see People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]; *People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]), we reject that contention. Specifically, defendant argues that defense counsel was ineffective for failing to pursue a line of defense regarding the operability of the gun recovered from defendant. However, because there is evidence in the record supporting the conclusion that the gun was operable (*see People v Habeeb*, 177 AD3d 1271, 1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *People v Solomon*, 78 AD3d 1426, 1428 [3d Dept 2010], *lv denied* 16 NY3d 899 [2011]; *People v Velez*, 278 AD2d 53, 53 [1st Dept 2000], *lv denied* 96 NY2d 808 [2001]), defendant failed to demonstrate that defense counsel's decision to forego that line of defense was not strategic (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]). In addition, we conclude that defense counsel was not ineffective in light of the favorable plea deal he obtained for defendant inasmuch as, "[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018] [internal quotation marks omitted]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1179
KA 19-01042
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOSHEEM BETHEA, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered January 12, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Initially, we agree with defendant that the waiver of the right to appeal is invalid because County Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Soriano*, 178 AD3d 1376, 1376 [4th Dept 2019], *lv denied* 34 NY3d 1163 [2020]). The record therefore does not establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

Contrary to defendant's contention, however, the court properly refused to suppress the handgun recovered from inside defendant's vehicle following a traffic stop. "[I]n evaluating the legality of police conduct, we 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Howard*, 129 AD3d 1654, 1655 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *see People v De Bour*, 40 NY2d 210, 222-223 [1976]). The court properly determined that the initial stop of defendant's vehicle was justified by the police officers' observations of multiple traffic infractions, including that the vehicle did not have a front license plate (*see People v Lightner*, 56 AD3d 1274, 1274 [4th Dept 2008], *lv dismissed* 12 NY3d 760 [2009]), and had an

inoperative headlight (*see People v Tittensor*, 244 AD2d 784, 784 [3d Dept 1997]) and an expired registration sticker (*see generally People v Jean-Pierre*, 47 AD3d 445, 445 [1st Dept 2008], *lv denied* 10 NY3d 865 [2008]). After initiating the traffic stop but before exiting the patrol car, the officers further observed defendant sit up in his seat and make what they described as a "furtive movement" as if defendant was secreting something. Further, upon the officers' initial approach of the vehicle, one of the officers observed chalky crumbs on defendant's clothing that, based on the officer's experience and training, the officer identified to be crack cocaine. The observation of what the officer identified as cocaine pieces on defendant "provided [the officers with] probable cause to arrest and search defendant" (*People v Edwards*, 14 NY3d 741, 742 [2010], *rearg denied* 14 NY3d 794 [2010]). The subsequent search of the vehicle, which resulted in the recovery of the handgun, was justified under the automobile exception to the search warrant requirement inasmuch as "[t]he circumstances furnishing probable cause for the arrest also gave the police probable cause to believe that the vehicle contained evidence of the crime" (*People v Hampton*, 50 AD3d 1605, 1606 [4th Dept 2008], *lv denied* 10 NY3d 959 [2008]; *see generally People v Nichols*, 175 AD3d 1117, 1118-1119 [4th Dept 2019], *lv denied* 34 NY3d 1018 [2019]; *People v Barclay*, 201 AD2d 952, 953 [4th Dept 1994]).

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1190

KA 09-00914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERROL MASSEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

TERROL MASSEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered April 20, 2007. The appeal was held by this Court by order entered June 28, 2019, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (173 AD3d 1801 [4th Dept 2019]). The proceedings were held and completed (M. William Boller, A.J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and conspiracy in the second degree (§ 105.15). In a prior appeal, we rejected the majority of defendant's contentions but, with respect to his contention that Supreme Court erred in refusing to suppress his statements to the police based on a violation of *Dunaway v State of New York* (442 US 200 [1979]), we held the case, reserved decision, and remitted the matter to Supreme Court for a determination of "whether the statements should be suppressed as the fruit of an illegal detention or arrest" (*People v Massey*, 173 AD3d 1801, 1805 [4th Dept 2019]). Upon remittal, the court (Boller, A.J.) held a hearing, after which it determined that the police had probable cause to arrest defendant and declined to suppress his subsequent statements to the police. We affirm.

Contrary to defendant's initial contention in his main brief, the court did not err in conducting a de novo *Dunaway* hearing. Prior to trial, the court (Forma, J.) ordered a combined *Huntley* and *Dunaway* hearing. Near the conclusion of the hearing, the court made findings of fact concerning the *Huntley* part of the hearing, but merely noted

in passing that defendant was taken into custody before he spoke to the police. A substitute Justice was assigned and a final witness testified, whereupon the court (Wolfgang, J.) declined to suppress the statements based on the *Huntley* issue, but did not rule on the *Dunaway* issue.

Pursuant to Judiciary Law § 21, insofar as relevant here, a justice "shall not decide or take part in the decision of a question, which was argued orally in the court, when he [or she] was not present and sitting therein as a judge." "It has been made clear that [section 21] applies not only to oral argument of motions, but to the taking of testimony, and violation [thereof] is a defect so fundamental that it cannot be waived" (*People v Cameron*, 194 AD2d 438, 438 [1st Dept 1993]). In determining whether a substitute judge may determine an issue in which the evidence was taken before another judge, we "look[ ] at whether the replacement judge will be asked to make factual determinations, as opposed to reaching legal conclusions, and overall fairness" (*People v Hampton*, 21 NY3d 277, 285 [2013]).

Here, although we previously concluded that the second justice could render a decision on the *Huntley* issue because the first justice made detailed findings of fact concerning that issue, neither of those justices made any findings of fact regarding the *Dunaway* issue. Consequently, after remittal, the third justice (Boller, A.J.) properly concluded that a new hearing was required because otherwise he would be required to make credibility and factual determinations based upon evidence that was introduced before another justice. Thus, we agree with the court that a de novo hearing was required upon remittal pursuant to Judiciary Law section 21 (*see People v Banks*, 152 AD3d 816, 817-818 [3d Dept 2017]; *Cameron*, 194 AD2d at 438-439).

Contrary to defendant's further contention in his main and pro se supplemental briefs, the People established at the hearing upon remittal that the officers who took defendant into custody had probable cause to arrest him, and thus the court properly ruled that the *Dunaway* issue did not require suppression. Prior to taking defendant into custody, police officers spoke to numerous witnesses regarding the crime, including two accomplices and one additional witness, all of whom indicated that defendant killed the victim. One of those witnesses overheard a telephone call defendant made to one of the accomplices during the killing, in which defendant said that he was strangling the victim and she was bleeding but not dying. Thus, contrary to defendant's contention, "the police had probable cause to arrest him on the basis of statements [of his accomplices] implicating him in the crime" (*People v Luciano*, 43 AD3d 1183, 1183 [2d Dept 2007], *lv denied* 9 NY3d 991 [2007]; *see People v Mills*, 137 AD3d 1690, 1690 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]; *People v Fulton*, 133 AD3d 1194, 1195 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]), and upon his admission that was overheard by a witness. It is well settled that information provided "by [an] identified citizen informant that was against the informant's 'own penal interest constitute[s] reliable information for the purposes of supplying probable cause' " (*People v Brito*, 59 AD3d 1000, 1000 [4th Dept 2009], *lv denied* 12 NY3d 814 [2009]; *see Fulton*,

133 AD3d at 1195; *see generally People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014]), and the information provided by the accomplices implicated themselves as well as defendant. Based on the totality of the evidence, the court properly determined that the arresting officers had probable cause to arrest defendant.

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1197

KAH 20-00549

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ROBERT S. DEAN, ESQ., ON BEHALF OF IRA GOLDBERG,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK REARDON, SUPERINTENDENT, MARCY
CORRECTIONAL FACILITY, AND ANTHONY ANNUCCI,
ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

ROBERT S. DEAN, CENTER FOR APPELLATE LITIGATION, NEW YORK CITY
(ALEXANDRA L. MITTER OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (David A. Murad, J.), entered May 1, 2020 in a habeas corpus proceeding. The judgment granted the motion of respondents to dismiss the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on behalf of Ira Goldberg, who was incarcerated at Marcy Correctional Facility at the time the petition was filed. Petitioner alleged that, due to Goldberg's age and preexisting medical conditions, his incarceration placed him at heightened risk of serious illness or death from COVID-19. Respondents moved to dismiss the petition for failure to state a cause of action, and Supreme Court granted the motion. Petitioner appeals.

Goldberg died after oral argument of this appeal, but prior to this Court's decision. The substantive relief sought in the petition was a judgment directing Goldberg's immediate release from prison. Thus, Goldberg's death renders the appeal moot, and no exception to the mootness doctrine applies (*see generally People ex rel. Peterson v LeConey*, 122 AD3d 1299, 1299 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1200
CAF 18-02167
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF BIANCA F.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TERRALD F., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 31, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In appeal Nos. 1 and 2, respondent father appeals from orders terminating his parental rights to the subject children pursuant to Social Services Law § 384-b on the ground of permanent neglect. We now affirm in both appeals.

Contrary to the contentions of petitioner and the Attorney for the Child in both appeals, the orders were not entered on the father's default. An order is entered on default where the parent fails to appear and the attorney, although present, elects *not* to participate in the parent's absence (*see e.g. Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445 [4th Dept 2015]). Here, however, the father's attorney participated by cross-examining one witness, repeatedly indicating his lack of objection to various exhibits offered by petitioner, and informing Family Court that he had no witnesses after petitioner rested. Where, as here, an attorney participates in the proceedings, the resulting order cannot be said to have been entered on default (*see e.g. Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1482 [4th Dept 2014]; *Matter of Danielle M.*, 26 AD3d 748, 748 [4th Dept 2006], *lv denied* 7 NY3d 703 [2006]).

With respect to the merits, we conclude in both appeals that petitioner met its burden of establishing by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the father's relationship with the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]).

Contrary to the father's contention in both appeals, the evidence at the hearing establishes that, despite those diligent efforts, the father failed to plan for the future of the children, although physically and financially able to do so. In particular, he failed to correct the conditions that led to their removal inasmuch as he failed, inter alia, to find "suitable and stable housing" (*Matter of Sophia M.G.K. [Tracy G.K.]*, 132 AD3d 1377, 1378 [4th Dept 2015]; *see Matter of Zachary H. [Jessica H.]*, 129 AD3d 1501, 1501 [4th Dept 2015], *lv denied* 25 NY3d 915 [2015]; *see generally Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374 [4th Dept 2010], *lv denied* 15 NY3d 708 [2010]).

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

1201
CAF 18-02169
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF BRIANA F.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TERRALD F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 31, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Bianca F. (Terrald F.)* ([appeal No. 1] — AD3d — [Feb. 11, 2021] [4th Dept 2021]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1217
KA 18-01855
PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD DOZIER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered September 18, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that he was deprived of effective assistance of counsel, that he did not validly waive his right to appeal, and that County Court erred in refusing to suppress a handgun seized by the police. We affirm.

Contrary to defendant's contention, the court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Kastenhuber*, 180 AD3d 1333, 1334 [4th Dept 2020] [internal quotation marks omitted]; *see generally People v Thomas*, 34 NY3d 545, 559-560 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Moreover, we conclude that the court did not conflate defendant's waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see generally People v Bradshaw*, 18 NY3d 257, 264 [2011]). Contrary to defendant's further contention, the court was "not required to engage in any particular litany in order to obtain a valid waiver of the right to appeal . . . , and the waiver is not invalid on the ground that the court did not specifically inform defendant that his general waiver of the right to appeal encompassed the court's suppression ruling[]" (*People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019] [internal quotation marks omitted]; *see People v Brand*, 112 AD3d 1320, 1321 [4th Dept 2013], *lv denied* 23 NY3d 961

[2014]). Nevertheless, we reiterate that the better practice is for the court to use the Model Colloquy, "which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal).

Defendant's valid waiver of the right to appeal encompasses his contention that the court erred in refusing to suppress the physical evidence seized from him (*see People v Goodwin*, 147 AD3d 1352, 1352 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *Brand*, 112 AD3d at 1321).

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], *lv denied* 35 NY3d 1050 [2020], *reconsideration denied* 35 NY3d 1098 [2020]; *see generally People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]), we conclude that defendant received meaningful representation inasmuch as defense counsel obtained "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Corron*, 180 AD3d 1330, 1331 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]; *People v Blarr* [appeal No. 1], 149 AD3d 1606, 1606 [4th Dept 2017], *lv denied* 29 NY3d 1123 [2017]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1223
CA 19-02195
PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

MICHAEL O'MARA AND CAROL O'MARA,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES P. RANALLI, III, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ADAM P. CAREY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 28, 2019. The order granted the motion of defendant James P. Ranalli, III, for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant James P. Ranalli, III.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Michael O'Mara (plaintiff) after he fell from an unsecured ladder at a construction site while attempting to descend from the first floor to the basement. Plaintiff was one of several contractors who James P. Ranalli, III (defendant) had hired to build a single-family residence. We agree with plaintiffs that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint against him. We therefore reverse the order, deny the motion, and reinstate the complaint against defendant.

With respect to the Labor Law §§ 240 (1) and 241 (6) causes of action, defendant failed to meet his burden of establishing as a matter of law that he is entitled to the benefit of the statutory homeowner's exemption from liability. We conclude that defendant's own submissions, which included the depositions of plaintiff and a nonparty contractor, created issues of fact whether defendant directed or controlled the method and manner of the work being done on the house (*see Cummings v Doo Wha Sung*, 142 AD3d 1393, 1394 [4th Dept 2016]; *cf. Dennis v Cerrone*, 167 AD3d 1475, 1476 [4th Dept 2018]). At

their respective depositions, plaintiff testified that defendant supplied the ladders that were used by the contractors, and the nonparty contractor testified that defendant was on site giving direction nearly every day. The nonparty contractor had asked defendant several times prior to plaintiff’s accident for permission to build stairs from the basement to the first floor, insisting that it was necessary to allow for safer and easier access to the first floor. Although defendant was aware that workers had been entering the house through the basement and using a ladder to access the first floor, he refused permission to build the stairs until after plaintiff’s accident, at which time defendant immediately directed the nonparty contractor to build the stairs. Such participation goes “far beyond ‘[a] homeowner’s typical involvement in a construction project’ ” (*Emmi v Emmi*, 186 AD2d 1025, 1025 [4th Dept 1992]). Indeed, the nonparty contractor further testified that a real estate limited liability company of which defendant was a member had hired him to perform work on the construction of a six-story building, suggesting that defendant had a degree of “sophistication or business acumen” such that he was in a position to know about and insure himself against his exposure to absolute liability (*Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991]; *see Pavon v Koral*, 113 AD3d 830, 831 [2d Dept 2014]).

We likewise conclude that triable issues of fact whether defendant had the authority to direct, supervise, or control plaintiff and his work preclude summary judgment with respect to the Labor Law § 200 cause of action (*see Cummings*, 142 AD3d at 1394).

In light of our determination, we conclude that the court also erred in granting the motion with respect to the derivative cause of action (*see generally Ingutti v Rochester Gen. Hosp.*, 145 AD3d 1423, 1425 [4th Dept 2016]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

1232
KA 16-02227
PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 13, 2016. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that County Court erred in refusing to suppress physical evidence obtained following a vehicle and traffic stop, as well as statements he thereafter made to officers. We agree.

Officers on patrol stopped the vehicle in which defendant was a passenger after observing that the driver was not wearing a seatbelt. Defendant was the backseat passenger and, as officers were investigating the validity of the occupants' licenses, defendant appeared nervous and turned his body toward his waistband, blocking the officers' view of his hands. When asked to remove his hands from the waistband area of his pants, defendant complied, stating that he was looking for a bottle cap upon which to chew. Once it was discovered that none of the occupants had a valid driver's license, the officers asked the occupants to exit the vehicle. At that point, defendant "bladed away" from the officers while "reach[ing] for his waistband."

As one of the officers prepared to conduct a pat frisk, defendant

"pulled away and ran." While he was running, defendant had his hands in front of him, "huddled in." Officers thereafter pursued defendant and took him into custody. Ultimately, a weapon was found in a yard in which defendant had fallen during the pursuit. Although defendant denied possession of the gun, he informed officers that he knew it was going to be tested and stated that, "if it [came] back with a body on it or it's dirty," then they would "have to sit down and talk again." At the suppression hearing, the officers candidly admitted that they never saw a bulge or any other indication of an object in defendant's waistband and that they never saw defendant actually touch his waistband. The court refused to suppress the physical evidence and the statements, and defendant thereafter pleaded guilty.

We agree with defendant that his waiver of the right to appeal is not valid and thus does not preclude our review of his challenge to the suppression ruling (*cf. People v Kates*, 162 AD3d 1627, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019]; *People v Adames*, 158 AD3d 1289, 1289 [4th Dept 2018], *lv denied* 31 NY3d 1077 [2018]; *People v Joubert*, 158 AD3d 1314, 1315 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]). In our view, the "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Here, "[t]he written waiver of the right to appeal signed by defendant and the verbal waiver colloquy by [the court] together improperly characterized the waiver as 'an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief' " (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020], quoting *Thomas*, 34 NY3d at 565). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*Thomas*, 34 NY3d at 567, citing NY Model Colloquies, Waiver of Right to Appeal).

With respect to the merits of the suppression motion, we conclude that the officers lacked the requisite reasonable suspicion to pursue defendant. "[T]he police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime . . . Flight alone is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry . . . However, a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010] [internal quotation marks omitted]; *see People v Rainey*, 110 AD3d 1464, 1465 [4th Dept 2013]; *see generally People v Sierra*, 83 NY2d 928, 929 [1994]). In contrast, "actions that are 'at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality' " (*Riddick*, 70 AD3d at 1422; *see People v Holmes*, 81 NY2d 1056, 1058 [1993]).

Here, the officers stopped the vehicle for a traffic infraction as opposed to a call related to a particular crime. Although defendant appeared to reach toward his waistband, he never touched his waistband and there was no other indication of a weapon, such as a bulge or the visible outline of a gun (*see Riddick*, 70 AD3d at 1422-1423). A suspect's action in grabbing at his or her waistband, standing alone, is insufficient to establish reasonable suspicion of a crime (*see e.g. People v Elliott*, 140 AD3d 1752, 1752-1753 [4th Dept 2016]; *People v Clermont*, 133 AD3d 612, 614 [2d Dept 2015], *lv denied* 27 NY3d 1149 [2016]; *People v Haynes*, 115 AD3d 676, 676-677 [2d Dept 2014]).

Defendant's nervousness, use of a bottle cap, and "blading" do not provide additional specific circumstances indicating that defendant was engaged in criminal activity. There is no doubt that defendant engaged in furtive and suspicious activity and that his pattern of behavior, viewed as a whole, was suspicious, but there is nothing in this record to establish that the officers had a reasonable suspicion of criminal conduct to justify the pursuit (*see People v Gerard*, 94 AD3d 592, 592-593 [1st Dept 2012]; *cf. People v Simmons*, 133 AD3d 1275, 1276 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]).

We therefore conclude that the pursuit of defendant was unlawful and that the physical evidence seized by the police and the statements made by defendant to the police following the unlawful seizure should have been suppressed. As a result, defendant's guilty plea must be vacated and the indictment dismissed, and we remit the matter to County Court for proceedings pursuant to CPL 470.45 (*see Elliott*, 140 AD3d at 1753; *Riddick*, 70 AD3d at 1424).

All concur except CENTRA, J.P., and NEMOYER, J., who dissent and vote to affirm in the following memorandum: County Court found that the totality of the circumstances supplied the reasonable suspicion necessary to justify the pursuit of the fleeing defendant. The majority now rejects that finding and concludes that law enforcement lacked the requisite reasonable suspicion to pursue defendant. We cannot agree. We therefore respectfully dissent and vote to affirm.

The facts are largely undisputed. During a nighttime patrol of a high crime area in the City of Rochester, officers observed a vehicle being operated by an unbelted driver. The vehicle was pulled over; defendant was the backseat passenger. During the license checks, the officers observed defendant for several minutes. In this period, one officer testified, defendant appeared "very nervous," repeatedly looked around the vehicle, moved his hands in the vicinity of his waistband, and ultimately "bladed" his body - i.e., turned his body away from the officer such that defendant's hands could not be seen. When the officer asked defendant what he was looking for, defendant picked up a plastic bottle cap, put it in his mouth, and said that he chews on plastic caps all the time. The officer, understandably, found this explanation to be suspicious.

Once the officers determined that neither the driver nor the passengers had valid licenses and that the vehicle would therefore

need to be towed, all three occupants were directed to exit the vehicle. When defendant exited the vehicle, the officer again observed defendant "blading" his body away from the officer and reaching toward his waistband. The officer testified that, based on his training and experience, defendant's action indicated that he was concealing a gun. Now concerned for his safety and the safety of his colleagues, the officer reached over to defendant to conduct a pat frisk. At that point, however, defendant fled, and the officers pursued him.

We acknowledge that flight alone is insufficient to justify pursuit (*see People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]). Grabbing a waistband, standing alone, is likewise insufficient to justify pursuit (*see People v Elliott*, 140 AD3d 1752, 1752-1753 [4th Dept 2016]). Nevertheless, flight is a proper consideration in conjunction with other attendant circumstances, including the suspect's suspicious behavior, the time of the stop, and the location of the stop (*see People v Martinez*, 80 NY2d 444, 448 [1992]). Indeed, in determining whether a pursuit was justified by the requisite reasonable suspicion, the suppression court should not focus narrowly on any single factor; rather, the court should evaluate the totality of the circumstances and take into account the realities of everyday life unfolding before a trained officer (*see People v Walker*, 149 AD3d 1537, 1538 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]; *People v Bachiller*, 93 AD3d 1196, 1197 [4th Dept 2012], *lv dismissed* 19 NY3d 861 [2012]).

Here, defendant's suspicious and evasive actions during the routine traffic stop, coupled with his nonsensical response about the bottle cap and his eventual flight, supplied the trained officer with reasonable suspicion to justify the pursuit. Indeed, the officers would have neglected their duty had they allowed defendant to flee unchallenged into the night, and suppression will serve only to hamstring law enforcement's efforts to protect the law-abiding residents of our most dangerous communities.

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

1247
KA 18-01865
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCHWANIKA R. PATTERSON, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR DEFENDANT-APPELLANT.

SCHWANIKA R. PATTERSON, DEFENDANT-APPELLANT PRO SE.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered March 16, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). We agree with defendant in her main brief that her purported waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's contentions in her main brief regarding the written waiver of indictment are " 'forfeited by [her] guilty plea' inasmuch as defendant 'lodges no claim that [s]he lacked notice of the precise crime[s] for which [s]he waived prosecution by indictment' " (*People v Ramirez*, 180 AD3d 1378, 1379 [4th Dept 2020], *lv denied* 35 NY3d 973 [2020]).

Defendant further contends in her main brief that her plea was not knowingly and voluntarily entered. Because defendant did not move to withdraw the plea or to vacate the judgment of conviction, her contention is not preserved for our review (*see People v Brown*, 115 AD3d 1204, 1205 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602 [4th Dept 2011]). Moreover, we note that the court conducted further inquiry to ensure that the plea was knowingly and voluntarily entered

(*see Lopez*, 71 NY2d at 666; *Brown*, 115 AD3d at 1206).

To the extent that defendant's contention in her pro se supplemental brief that she did not receive effective assistance of counsel survives her plea of guilty (*see People v Wright*, 66 AD3d 1334, 1334 [4th Dept 2009], *lv denied* 13 NY3d 912 [2009]), we conclude that it lacks merit. Defense counsel secured an advantageous plea offer and "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]). Although defendant contends that she was denied effective assistance of counsel based on defense counsel's failure to make certain discovery demands and to conduct motion practice, we note that defendant has provided no indication that any such action would have produced a successful result, and "[i]t is well established that [t]here can be no denial of effective assistance of . . . counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007] [internal quotation marks omitted]). Furthermore, "[d]efense counsel's failure to file an omnibus motion does not, by itself, constitute ineffective assistance of counsel" (*People v Willey*, 48 AD3d 1097, 1098 [4th Dept 2008], *lv denied* 10 NY3d 965 [2008]; *see People v Bueno*, 299 AD2d 918, 918 [4th Dept 2002], *lv denied* 99 NY2d 612 [2003]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, contrary to defendant's contentions in her main and pro se supplemental briefs, we conclude that the sentence is not unduly harsh or severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

8

KA 18-01114

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. MEYERS, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered July 21, 2017. The judgment convicted defendant upon a jury verdict of arson in the first degree (two counts), murder in the second degree, murder in the first degree, falsifying business records in the first degree (three counts), attempted insurance fraud in the second degree and conspiracy in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of arson in the first degree (Penal Law § 150.20 [1] [a] [i], [ii]), one count of murder in the second degree (§ 125.25 [3]), and one count of murder in the first degree (§ 125.27 [1] [a] [vii]; [b]). Defendant contends, and the People correctly concede, that missing and otherwise defective transcripts from the trial preclude appellate review of defendant's conviction. Indeed, the present state of the record on appeal is "deplorable" (*People v Glass*, 43 NY2d 283, 286 [1977]) inasmuch as it is missing, inter alia, three days of jury selection, opening statements, summations, final jury instructions, County Court's handling of a jury note, and the verdict. In addition, the transcription of the testimony of some of the witnesses includes irregularities such as notations stating "omitted," "untranscribable," and "blah, blah," and unintelligible strings of characters that appear to be in code. We reject defendant's contention, however, that summary reversal and a new trial is the appropriate remedy at this point. The "loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction" (*People v Parris*, 4 NY3d 41, 44 [2004], *rearg denied* 4 NY3d 847 [2005]). The Court of Appeals has held that "the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee him [or her] a perfect trial or a perfect

appeal” (*People v Rivera*, 39 NY2d 519, 523 [1976]). “To overcome the presumption of regularity, a defendant must show not only that minutes are missing, but also ‘that there were inadequate means from which it could be determined whether appealable and reviewable issues were present’ ” (*Parris*, 4 NY3d at 46, quoting *Glass*, 43 NY2d at 287). It is only when a defendant shows that a reconstruction is not possible that a defendant is entitled to summary reversal and a new trial (*see Glass*, 43 NY2d at 286; *People v Kings*, 100 AD3d 1019, 1019 [2d Dept 2012], *lv denied* 20 NY3d 1062 [2013]; *People v Andino*, 183 AD2d 834, 834 [2d Dept 1992], *lv denied* 80 NY2d 901 [1992]).

Here, we conclude that defendant failed to establish that alternative means to provide an adequate record are not available (*see Glass*, 43 NY2d at 286-287). There is no indication that defendant’s former attorneys could not participate in a reconstruction hearing, despite the fact that one of them is now employed by the District Attorney’s Office. There is also no indication that the now-retired trial judge could not participate as well (*see Parris*, 4 NY3d at 47; *People v Bryant*, 159 AD2d 962, 962 [4th Dept 1990]).

We therefore hold the case, reserve decision, and remit the matter to County Court to conduct a reconstruction hearing with respect to the missing and irregular transcripts.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

17
CAF 19-02080
PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF NINO H.

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

MEMORANDUM AND ORDER

DANIELLE F. AND JAMES H.,
RESPONDENTS-APPELLANTS.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR RESPONDENT-APPELLANT DANIELLE F.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-APPELLANT JAMES H.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 30, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudicated the subject child to be a neglected child.

It is hereby ORDERED that said appeal of respondent James H. from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father and respondent mother appeal from an order that, inter alia, adjudicated the subject child to be a neglected child based on a finding of derivative neglect. Contrary to the contentions of respondents, Family Court's finding of derivative neglect has a sound and substantial basis in the record (*see Matter of Carmela H. [Danielle F.]*, 164 AD3d 1607, 1607 [4th Dept 2018], *lv dismissed in part and denied in part* 32 NY3d 1190 [2019]; *Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1437 [4th Dept 2018]). Furthermore, the father failed to preserve for our review his contentions that the court should have recused itself (*see Matter of Chromczak v Salek*, 173 AD3d 1750, 1750 [4th Dept 2019]), that the Attorney for the Child should have been removed (*see Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1562 [4th Dept 2018]), and that certain testimony was improperly admitted (*see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]). Finally, the father's challenge to the dispositional

provisions in the order, which were entered upon the parties’ consent, is not properly before us because “ ‘no appeal lies from that part of an order entered on consent’ ” (*Carmela H.*, 164 AD3d at 1608).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

25

KA 18-01927

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVON S., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered May 8, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, defendant appeals from an adjudication revoking the sentence of probation imposed on his prior youthful offender adjudication of promoting a sexual performance by a child (§ 263.15) and sexual misconduct (§ 130.20 [2]) and imposing a sentence of incarceration based on his admission that he violated the terms and conditions of his probation. Defendant pleaded guilty and admitted to the violation of probation in a single proceeding. In both appeals, defendant contends that his waiver of the right to appeal is invalid and does not encompass his challenge to the severity of the sentences. Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentences (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentences are not unduly harsh or severe. We note that, although defendant was sentenced to the maximum term of imprisonment for burglary in the second degree and was only 19 years old at the time of the offense, he committed the offense while he was on probation, his plea was in full satisfaction of numerous other residential burglaries, and several of those burglaries involved the theft of firearms from the homes.

We note that the certificate of conviction in appeal No. 1 incorrectly states that defendant was sentenced on May 7, 2018, and it must therefore be corrected to reflect that he was actually sentenced on May 8, 2018 (*see People v Saxton*, 32 AD3d 1286, 1286-1287 [4th Dept 2006]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

26
KA 18-02181
PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVON S., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an adjudication of the Genesee County Court (Charles N. Zambito, J.), rendered May 8, 2018. The adjudication revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Same memorandum as in *People v Davon S.* ([appeal No. 1] — AD3d — [Feb. 11, 2021] [4th Dept 2021])

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

29

KA 15-01496

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

KEITH L. PONDER, ALSO KNOWN AS KEITH PONDERS,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HODGSON RUSS LLP, BUFFALO (SARAH NAGEL MILLER 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 (Joanne M. Winslow, J.), rendered July 14, 2015. The judgment convicted defendant upon a nonjury verdict of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fourth degree, criminal possession of marihuana in the third degree and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment against defendant is dismissed and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), one count of criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), one count of criminal possession of marihuana in the third degree (§ 221.20), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), defendant contends that the verdict is against the weight of the evidence with respect to his constructive possession of drugs and other items recovered from the apartment in which he was arrested following the execution of a search warrant. We agree.

Where there is no evidence that the defendant actually possessed the controlled substance or drug paraphernalia, the People are required to establish that the defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see*

Penal Law § 10.00 [8]; *People v Williams*, 162 AD3d 1544, 1545 [4th Dept 2018]). The People may establish constructive possession by circumstantial evidence (*see People v Torres*, 68 NY2d 677, 678-679 [1986]; *People v Boyd*, 145 AD3d 1481, 1481-1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]), but a defendant's mere presence in the area in which contraband is discovered is insufficient to establish constructive possession (*see Boyd*, 145 AD3d at 1482).

Here, we conclude that an acquittal would not have been unreasonable and, upon our independent review of the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), we further conclude that the verdict is against the weight of the evidence inasmuch as Supreme Court was not justified in finding beyond a reasonable doubt that defendant possessed the drugs or drug paraphernalia in question (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant was present in the apartment at the time the police executed the search warrant, no other evidence was presented "to establish that defendant was an occupant of the apartment or that he regularly frequented it" (*People v Swain*, 241 AD2d 695, 696 [3d Dept 1997]). Two of the police officers testified that they did not discover anything that belonged to defendant on the premises. The clothing, cell phone, and identification found on the premises belonged instead to other men who were present in the apartment during the execution of the search warrant. Photographs found on the premises included the other men but not defendant. While defendant admitted that he had been at the apartment on one other occasion, the evidence did not otherwise specifically connect defendant to the apartment in which the contraband was found. We thus conclude that the weight of the evidence does not support a finding that defendant "exercised dominion and control over the [contraband] by a sufficient level of control over the area in which [it was] found" (*People v Burns*, 17 AD3d 709, 710 [3d Dept 2005] [internal quotation marks omitted]; *see People v Hunt*, 185 AD3d 1531, 1531 [4th Dept 2020]). We therefore reverse the judgment and dismiss the indictment against defendant.

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

31
KA 18-01735
PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE L. STANLEY, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered April 23, 2007. The judgment convicted defendant upon a plea of guilty of robbery in the second degree.

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, Monroe County, for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that his plea should be vacated because Supreme Court failed to advise him of the consequences of violating the plea agreement and, in the alternative, that this Court should exercise its interest of justice jurisdiction to adjudicate him a youthful offender and reduce the sentence. We agree with defendant that his plea should be vacated.

Pursuant to the plea agreement, defendant entered his plea in exchange for a promise of youthful offender adjudication and a sentence of probation. Following the entry of the plea, the court informed defendant that, if he violated the terms of the plea agreement, the court would "not keep the promise [it] made regarding [his] sentence" and that it could "impose a much more significant or higher sentence." The court did not specify what that higher sentence could entail, nor did it mention the possibility of postrelease supervision (PRS).

Prior to sentencing, defendant violated the terms of the plea agreement when he failed to cooperate with the probation department and was arrested on new felony charges. The court held a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]) and determined that

there was a valid basis on which to enhance the sentence. The prosecutor then requested that the court sentence defendant as an adult and impose a sentence of 15 years of incarceration with five years of PRS. The court imposed a determinate sentence of 7½ years of incarceration plus five years of PRS.

The court was required "to advise defendant that his enhanced sentence would include PRS, and was also required to specify the length of the term of PRS to be imposed" (*People v Singletary*, 118 AD3d 610, 611 [1st Dept 2014], citing *People v McAlpin*, 17 NY3d 936, 938 [2011]; *see People v Chander*, 113 AD3d 697, 698-699 [2d Dept 2014]). Although defendant did not object to the imposition of PRS or move to withdraw his plea or to vacate the judgment of conviction, this case falls under an exception to the preservation rule inasmuch as "[t]he prosecutor's mention of PRS immediately before sentencing was not the type of notice under *People v Murray* (15 NY3d 725 [2010]) that would require defendant to preserve the issue" (*Singletary*, 118 AD3d at 611; *see McAlpin*, 17 NY3d at 938; *cf. People v Donald*, 132 AD3d 1396, 1397 [4th Dept 2015], *lv denied* 26 NY3d 1144 [2016]; *see generally People v Williams*, 27 NY3d 212, 214 [2016]). We therefore conclude that defendant's plea was not knowingly, voluntarily, and intelligently entered and that vacatur of the plea is required (*see McAlpin*, 17 NY3d at 937-938).

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

52

KA 19-00151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS HOLLINGSWORTH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered November 28, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: 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]), defendant contends that County Court erred in refusing to suppress the weapon found in his vehicle. According to defendant, although the police officers legally executed a search warrant for the apartment complex where he resided, their purportedly immediate arrest of him was illegal. We reject defendant’s contention inasmuch as his detainment while the officers executed the search warrant was lawful (*see People v Henderson*, 162 AD3d 517, 517 [1st Dept 2018], *lv denied* 32 NY3d 1111 [2018]). Defendant further contends that the weapon should be suppressed because the police illegally used his key fob to locate his vehicle, which led to the discovery of the firearm. We similarly reject that contention. Defendant was handcuffed while lying on the floor and, upon one of the officers standing defendant up, a vehicle key fob appeared beneath defendant. Defendant denied ownership of the key fob, and the officer activated the panic button to determine the location of the car, which was in an adjacent parking lot. While standing outside of the car, the officer observed the butt of a revolver underneath the seat and, thereafter, obtained a search warrant for the car. We conclude that defendant’s disclaimer of ownership of the key fob constituted an abandonment of the same (*see People v Muscoreil*, 214 AD2d 953, 953 [4th Dept 1995], *lv denied* 86 NY2d 799 [1995], *cert denied* 516 US 1059 [1996]), and therefore defendant lacked standing to challenge its

seizure and subsequent use (*see People v Osteen*, 145 AD3d 1515, 1517 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]; *People v Stevenson*, 273 AD2d 826, 827 [4th Dept 2000]; *see also People v Smith*, 170 AD3d 1564, 1565 [4th Dept 2019], *lv denied* 33 NY3d 1035 [2019]).

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

53
KA 17-00971
PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

JERRY MCLAMORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 17, 2017. The judgment convicted defendant upon a nonjury verdict of promoting prison contraband in the first degree and conspiracy in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of promoting prison contraband in the first degree (Penal Law § 205.25 [1]) under count five 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 Wyoming County Court for sentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him after a bench trial of promoting prison contraband in the first degree (Penal Law § 205.25 [1]) and conspiracy in the fifth degree (§ 105.05 [1]). The charges arose from an incident in which correction officers seized several packages containing a form of synthetic marihuana from a visitor to the Wyoming Correctional Facility, where defendant was an inmate.

On appeal, defendant contends that the evidence is legally insufficient to establish that the substance in the packages constitutes "dangerous contraband" as required for the conviction of promoting prison contraband in the first degree (Penal Law § 205.25 [1]). We agree.

As relevant here, a person is guilty of promoting prison contraband in the first degree if he or she "knowingly and unlawfully introduces any dangerous contraband into a detention facility" (*id.*). The Court of Appeals has "conclude[d] that the 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]). "Generally, dangerous contraband refers to weapons . . . Items that facilitate escape are also dangerous contraband" (*id.* [internal quotation marks omitted]). Conversely, small amounts of marihuana, "unlike other contraband such as weapons, are not inherently dangerous and the dangerousness is not apparent from the nature of the item" (*People v Flagg*, 167 AD3d 165, 169 [4th Dept 2018]; *see Finley*, 10 NY3d at 657-658). Additionally, we note that the substance at issue here is a synthetic drug that mimics the effects of THC, the active ingredient in marihuana, and "the conclusion that . . . small amounts of marihuana . . . are not dangerous contraband is informed by the Legislature's more lenient treatment of marihuana offenses, as opposed to those involving other drugs" (*Finley*, 10 NY3d at 658). Although the People assert that the drugs at issue may lead to disputes over sales or to inmates becoming violent, they failed to establish that synthetic marihuana causes violence, death or other serious injury. Further, "general concerns about the drugs possessed that are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband. Indeed, the determination of what types and quantities of drugs are 'dangerous contraband' per se is one that should be left to the legislature" (*Flagg*, 167 AD3d at 169; *see also People v McCrae*, 68 AD3d 1451, 1452 [3d Dept 2009]; *see generally People v Stanley*, 19 AD3d 1152, 1152-1153 [4th Dept 2005], *lv denied* 5 NY3d 856 [2005]). We therefore modify the judgment by reducing the conviction of promoting prison contraband in the first degree under count five of the indictment to promoting prison contraband in the second degree (Penal Law § 205.20 [1]; *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).

We have considered defendant's remaining contention concerning the legal sufficiency of the evidence, and we conclude that it does not require reversal or further modification of the judgment of conviction. We note, however, that the uniform sentence and commitment sheet fails to state that defendant was convicted of conspiracy in the fifth degree (Penal Law § 105.05 [1]), and thus it must be amended to reflect that conviction (*see People v Facen*, 71 AD3d 1410, 1411 [4th Dept 2010], *lv denied* 15 NY3d 749 [2010], *reconsideration denied* 15 NY3d 804 [2010]). Finally, we note that the uniform sentence and commitment sheet incorrectly states that defendant was convicted upon a plea of guilty, and thus it must be further amended to reflect that the conviction was entered after a nonjury trial (*see generally People v Curtis*, 162 AD3d 1758, 1758 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

54

KA 20-00592

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

NISSAR MOORE, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), dated October 23, 2019. The order granted that part of defendant's omnibus motion seeking to suppress physical evidence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to suppress physical evidence is denied, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: On appeal from an order granting that part of defendant's omnibus motion seeking to suppress physical evidence, i.e., a loaded handgun, the People contend that County Court erred in suppressing the handgun on the ground that it was seized following an unlawful police pursuit. We agree.

The evidence at the suppression hearing established that an unidentified person called 911 and said that there was a group of five to seven black males at a particular location and that two of the men "had guns out." According to the caller, one of the men with a gun was wearing a tan and black coat while the other was wearing a black coat. One officer responded to the location identified by the caller and observed two groups of men walking in different directions. The officer exited her patrol car, approached a man wearing a tan and brown coat, and asked if he would consent to a pat frisk. The man obliged, and the officer found no weapons.

In the meantime, a man wearing a black coat continued walking, and his movements were captured on a street pole police camera that was being monitored by a different officer. The man in the black coat was defendant, who was on probation at the time. The monitoring officer reported defendant's whereabouts over the police radio,

stating that he matched the description provided by the anonymous caller. A third officer was in the vicinity in an unmarked vehicle, heard the report, activated the rear emergency lights on his vehicle, and responded to the scene.

As the third officer approached the scene, he observed defendant in a black coat walking westbound on the sidewalk. Upon seeing the third officer in his vehicle, defendant ran down a driveway. The third officer pulled into the driveway of that residence and, while still in the vehicle, observed defendant toss what appeared to be a long-barreled handgun over the fence while he ran. It was at that point that the third officer exited his vehicle and chased defendant, ultimately apprehending him. A loaded .22-caliber firearm was found on the ground in the backyard adjacent to the driveway.

"A detention or a pursuit of a person for the purpose of detention amounts to a level three encounter and must be supported by reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Allen*, 188 AD3d 1595, 1596 [4th Dept 2020]). Nevertheless, "[a]n officer may use his or her vehicle to unobtrusively follow and observe an individual without elevating the encounter to a level three pursuit" (*id.*). A police-civilian encounter will escalate to a level three encounter, i.e., a forcible stop or seizure, "whenever an individual's freedom of movement is significantly impeded . . . . Illustrative is police action which restricts an individual's freedom of movement by pursuing one who, for whatever reason, is fleeing to avoid police contact" (*People v Martinez*, 80 NY2d 444, 447 [1992]; *see People v Bora*, 83 NY2d 531, 535-536 [1994]).

Here, the third officer had activated his emergency lights en route to the scene and before he encountered defendant. Upon observing defendant walking on the sidewalk, the third officer stopped his vehicle in a driveway. At no point did the third officer engage in any particularized act toward defendant or restrict his freedom of movement (*see Allen*, 188 AD3d at 1597; *People v Jimenez*, 224 AD2d 1002, 1002 [4th Dept 1996]; *see also People v Shankle*, 37 AD3d 742, 742-743 [2d Dept 2007], *lv denied* 9 NY3d 851 [2007]).

In our view, the third officer was entitled to "continue [his] observation [of defendant] provided that [he did] so unobtrusively and [did] not limit defendant's freedom of movement by so doing" (*People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]; *see Allen*, 188 AD3d at 1597; *see generally Bora*, 83 NY2d at 535). Nothing the third officer did before defendant abandoned the handgun would have communicated to defendant an intent to intrude upon defendant's freedom of movement (*see Allen*, 188 AD3d at 1597; *cf. People v Collins*, 185 AD3d 447, 447-448 [2d Dept 2020]).

We thus conclude that the handgun was properly seized by the police because defendant did not discard the handgun in response to unlawful police conduct (*see Allen*, 188 AD3d at 1597). The reliance of defendant and the court on *People v Jones* (174 AD3d 1532, 1533 [4th Dept 2019]) is misplaced inasmuch as the police officer in that case,

unlike the third officer here, did not see the fleeing defendant abandon a gun before giving chase.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

73
KA 15-01060
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. NELSON, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered January 21, 2015. The judgment convicted defendant upon a plea of guilty of robbery in the first degree (four counts), robbery in the second degree (four counts), assault in the first degree, assault in the second degree (four counts), attempted robbery in the first degree, attempted robbery in the second degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, four counts of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. We agree with defendant that he did not validly waive his right to appeal. As the People correctly concede, County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing it as an absolute bar to the taking of an appeal, and we thus conclude that the colloquy was insufficient to ensure that defendant's waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that "[t]he better practice is for the court to use the Model Colloquy, which neatly synthesizes . . . the governing principles" (*People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* — NY3d — [2020] [internal quotation marks omitted]; *see Thomas*, 34 NY3d at 567; NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

94
KA 16-02359
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY D. MONTGOMERY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered September 27, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the third degree (Penal Law § 140.20). We agree with defendant that the record does not establish that he validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, — NY3d —, —, 2020 NY Slip Op 07484, *2 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

97

KA 19-01822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

MICHAEL MAZAIKA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered August 14, 2019. The judgment convicted defendant upon a plea of guilty of criminal sexual act 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 sexual act in the second degree (Penal Law § 130.45 [1]). We agree with defendant that his purported waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

102
KA 18-01268
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY R. SMITH, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NOLAN D. PITKIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 27, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the third degree, menacing in the first degree, harassment in the second degree and menacing in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), menacing in the first degree (§ 120.13), harassment in the second degree (§ 240.26 [1]), and menacing in the second degree (§ 120.14 [1]), defendant contends that the evidence is legally insufficient to support the conviction with respect to the weapon possession and menacing counts. Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence with respect to all four counts of which defendant was convicted 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).

Contrary to defendant's further contention, County Court did not abuse its discretion by continuing the trial in defendant's absence when defendant did not appear in court on the second and third days of trial. The record establishes that the court had given defendant the requisite warnings (*see People v Parker*, 57 NY2d 136, 141 [1982]), and he therefore waived his right to be present at trial (*see People v Ligammari*, 140 AD3d 1631, 1632 [4th Dept 2016], *lv denied* 28 NY3d 971

[2016]; *People v Bynum*, 125 AD3d 1278, 1278 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]; *People v Anderson*, 52 AD3d 1320, 1321 [4th Dept 2008], *lv denied* 11 NY3d 733 [2008]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

103
CAF 19-01244
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF DIANE O. TOMLINSON AND
LEONARD L. TOMLINSON, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHARLES HORTON, RESPONDENT-APPELLANT.

IN THE MATTER OF DIANE O. TOMLINSON AND
LEONARD L. TOMLINSON, PETITIONERS,

V

LIANE P. TOMLINSON, RESPONDENT.

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

AYOKA A. TUCKER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered June 6, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded sole custody of the subject child to petitioners.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, awarded sole custody of the subject 11-year-old child to petitioners, the child's maternal grandparents (grandparents), following a hearing. The father correctly concedes that his imprisonment in a federal facility for the eight years before the petition against him was filed constitutes the requisite extraordinary circumstances warranting an inquiry into whether it is in the best interests of the child to award the grandparents custody, and that the grandparents therefore met their burden of proof with respect to that issue (*see Matter of Sharon B. v Tiffany P.*, 143 AD3d 573, 574 [1st Dept 2016]; *see generally Matter of Suarez v Williams*, 26 NY3d 440, 446-448 [2015]).

Contrary to the father's contention, there is a sound and substantial basis in the record for Family Court's determination that the best interests of the child are served by awarding the grandparents sole custody of the child (*see Matter of Mumford v Milner*, 183 AD3d 893, 895 [2d Dept 2020]; *see also Matter of*

Wojciulewicz v McCauley, 166 AD3d 1489, 1490 [4th Dept 2018], *lv denied* 32 NY3d 918 [2019]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). The record establishes that the grandparents, without any financial contribution from the father, have provided the child with a loving and stable home environment since the birth of the child, and have provided for the child's physical, emotional, educational, and medical needs, as well as for the special therapeutic needs arising from the child's medical diagnoses of autism and attention deficit hyperactivity disorder.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

105
CAF 18-02356
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF PAUL S., JR.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

INGRID D., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CHARU NARANG, BROCKPORT, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 31, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In appeal Nos. 1-4, respondent mother appeals from orders terminating her parental rights with respect to the subject children and freeing them for adoption. The mother refused to appear at the dispositional hearing and her attorney, although present, elected not to participate in the mother's absence. We thus conclude that the mother's refusal to appear constituted a default, and we therefore dismiss the appeals (*see Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]; *see also Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

106
CAF 18-02357
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF LIAM A.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

INGRID D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CHARU NARANG, BROCKPORT, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 31, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Paul S., Jr. (Ingrid D.)* (— AD3d — [Feb. 11, 2021] [4th Dept 2021]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

107
CAF 18-02358
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF BIANCA F.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

INGRID D., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

CHARU NARANG, BROCKPORT, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 31, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Paul S., Jr. (Ingrid D.)* (— AD3d — [Feb. 11, 2021] [4th Dept 2021]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

108
CAF 18-02359
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF BRIANA F.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

INGRID D., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

CHARU NARANG, BROCKPORT, FOR RESPONDENT-APPELLANT.

DONALD S. THOMSON, BATH, FOR PETITIONER-RESPONDENT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered October 31, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Same memorandum as in *Matter of Paul S., Jr. (Ingrid D.)* (— AD3d — [Feb. 11, 2021] [4th Dept 2021]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

120
KA 20-01111
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY T. PRUETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered January 16, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]) and imposing a determinate term of imprisonment, followed by a period of postrelease supervision. We reject defendant's contention that County Court erred in determining that he violated conditions of his probation. "A violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard" (*People v Wheeler*, 99 AD3d 1168, 1169 [4th Dept 2012], *lv denied* 20 NY3d 989 [2012] [internal quotation marks omitted]). Here, the People met their burden of establishing by a preponderance of the evidence that defendant violated conditions of his probation (*see* CPL 410.70 [3]; *People v Travis*, 156 AD3d 1399, 1399 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]). The evidence included the testimony of defendant's probation officers and defendant's own testimony, which established the violations (*see People v Wiggins*, 151 AD3d 1859, 1860 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]; *People v Pringle*, 72 AD3d 1629, 1630 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]). Although defendant "offered excuses for his various violations, [the court] was entitled to discredit those excuses and instead . . . credit the testimony of the People's witnesses" (*People v Donohue*, 64 AD3d 1187, 1188 [4th Dept 2009]).

We also reject defendant's contention that he was denied

effective assistance of counsel. Contrary to defendant’s contention, “it is apparent from [defense counsel’s] thorough cross-examination of prosecution witnesses and his overall performance that [he] had adequately prepared for [the hearing]” (*People v Washington*, 122 AD3d 1406, 1406 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015] [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

124
KA 19-02215
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEONA OWENS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 28, 2019. The judgment convicted defendant after a nonjury trial of murder in the second degree and manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [4]). The case arose from defendant's role in the death of her two-year-old son. Defendant contends that the evidence is legally insufficient to support the conviction. As an initial matter, we reject the People's assertion that defendant failed to preserve that contention for our review. Defendant's renewal of her motion for a trial order of dismissal is sufficient to preserve her contention for our review because the renewal directly referenced her earlier motion, which was specifically directed at the alleged errors now raised on appeal (*see People v Bacon*, 161 AD3d 1533, 1534 [4th Dept 2018], *lv denied* 32 NY3d 935 [2018]). Nevertheless, we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational factfinder to find the elements of the crimes proved beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see id.*), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that she was denied effective assistance of counsel. Specifically, defendant contends that defense counsel failed to conduct a thorough interview with her and that such an interview would have led defense counsel to discover that her statements to the

police were coerced by her codefendant's family. Inasmuch as defendant's contention is based on allegations that defense counsel failed to conduct a proper investigation, it is based on matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Lane*, 160 AD3d 1363, 1365 [4th Dept 2018]; *People v Johnson*, 81 AD3d 1428, 1428 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). To the extent that we are able to review defendant's contention on the record before us, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's further contention that Supreme Court erred in denying her request to consider criminally negligent homicide (Penal Law § 125.10) as a lesser included offense of murder in the second degree (§ 125.25 [4]). Criminally negligent homicide is not a lesser included offense of depraved indifference murder of a person less than 11 years old (*see People v Stahli*, 159 AD3d 1055, 1059 [3d Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *see generally People v Santiago*, 101 AD3d 1715, 1716 [4th Dept 2012], *lv denied* 21 NY3d 946 [2013]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

127

CAF 20-00667

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

IN THE MATTER OF KRISTEN B., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN Z., RESPONDENT-RESPONDENT.

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

DIANE MARTIN-GRANDE, ROME, FOR RESPONDENT-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered April 27, 2020 in a proceeding pursuant to Family Court Act article 5. The order, inter alia, dismissed the amended petition to vacate an acknowledgment of paternity.

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

Memorandum: In this proceeding seeking to vacate an acknowledgment of paternity more than 60 days after it was signed, petitioner mother appeals from an order that, inter alia, dismissed her amended petition pursuant to CPLR 3211 (a) (7). We affirm.

A party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must establish the existence of fraud, duress, or a material mistake of fact before Family Court is required to order DNA or genetic marker testing (*see* Family Ct Act § 516-a [b] [iv]; *Matter of Demetrius H. v Mikhaila C.M.*, 35 AD3d 1215, 1215-1216 [4th Dept 2006]; *Matter of Westchester County Dept. of Social Servs. v Robert W.R.*, 25 AD3d 62, 69 [2d Dept 2005]). Assuming the truth of the allegations in the amended petition and according petitioner the benefit of every favorable inference, we conclude that the facts alleged in the amended petition do not fit into any of the specified grounds for vacatur of an acknowledgment of paternity more than 60 days after it was executed (*Matter of Joshua AA. v Jessica BB.*, 132 AD3d 1107, 1108 [3d Dept 2015]; *Matter of Ronnyeh R. v Gwendolyn M.*, 99 AD3d 717, 717 [2d Dept 2012]; *see also Demetrius H.*, 35 AD3d at 1216).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

128

CAF 19-01543

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

IN THE MATTER OF ANDREW G. AND JONATHON P.

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

MEMORANDUM AND ORDER

ELIZABETH G., RESPONDENT, AND JEFFERSON P., RESPONDENT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (YVETTE VELASCO OF COUNSEL), FOR PETITIONER-RESPONDENT.

MICHAEL J. KERWIN, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered July 15, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent Jefferson P. neglected one of the subject children and derivatively neglected the other subject child.

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

Memorandum: In this Family Court Act article 10 proceeding, respondent father appeals from an order that, inter alia, determined that he neglected the older subject child and derivatively neglected the younger subject child. We affirm. Family Court's determination is supported by the requisite preponderance of the evidence (*see Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]). Contrary to the father's contention, the older child's out-of-court statements were sufficiently corroborated (*see id.*). Contrary to the father's further contention, the court properly drew a negative inference from his failure to testify, notwithstanding the factually related criminal charges pending against him (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 441 [1st Dept 2017]; *Matter of Jenny N.*, 262 AD2d 951, 952 [4th Dept 1999]). The father's remaining contentions do not warrant reversal or modification of the order.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

134
CA 20-00537
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE ESTATE OF KYMBER ANN VOELKER, DECEASED.
--- MEMORANDUM AND ORDER
ANTHONY S. PECORARO, PETITIONER-RESPONDENT;

SANDRA KENYON, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

COLE SORRENTINO HURLEY HEWNER GAMBINO P.C., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate’s Court, Niagara County (Matthew J. Murphy, III, S.), dated March 7, 2019. The decree, inter alia, ordered that a lost will may be offered for probate.

It is hereby ORDERED that the decree is unanimously affirmed without costs.

Memorandum: In appeal No. 1, respondent appeals from a decree that, following a hearing, ordered, inter alia, that decedent’s lost will may be offered for probate. In appeal No. 2, respondent appeals from an order that denied her motion pursuant to CPLR 5015 for “reconsideration” of the decree. Although Surrogate’s Court considered the motion to be one pursuant to CPLR 2221, a motion pursuant to CPLR 2221 is not the proper procedural vehicle in which to address a final judgment (*see e.g. Matter of Synergy, LLC v Kibler*, 124 AD3d 1261, 1262 [4th Dept 2015], *lv denied* 25 NY3d 967 [2015]; *Gorman v Hess*, 301 AD2d 683, 686 [3d Dept 2003]), and the decree is a final judgment inasmuch as it determined the rights of the parties in this special proceeding pursuant to SCPA 1407 (*see* SCPA 601; *Matter of Carroll*, 100 AD2d 337, 337 n 1 [2d Dept 1984]). Nevertheless, inasmuch as respondent has not raised on appeal any issues with respect to the denial of her motion pursuant to CPLR 5015, she has abandoned any contentions with respect thereto, and we therefore dismiss the appeal from the order in appeal No. 2 (*see Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

Based on our review of the record in appeal No. 1, we see no reason to disturb the findings of the Surrogate, “ ‘which are entitled to great weight inasmuch as they hinged on the credibility of the

witnesses' " (*Matter of Lee*, 107 AD3d 1382, 1384 [4th Dept 2013]; *see Matter of Winters*, 84 AD3d 1388, 1389 [2d Dept 2011]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

135
CA 20-00538
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE ESTATE OF KYMBER ANN VOELKER, DECEASED.

ANTHONY S. PECORARO, PETITIONER-RESPONDENT;

SANDRA KENYON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

COLE SORRENTIO HURLEY HEWNER GAMBINO P.C., BUFFALO, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate’s Court, Niagara County (Matthew J. Murphy, III, S.), entered June 14, 2019. The order denied the motion of respondent Sandra Kenyon for “reconsideration” of a decree.

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

Same memorandum as in *Matter of Voelker* ([appeal No. 1] — AD3d — [Feb. 11, 2021] [4th Dept 2021]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

139
KA 18-01681
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. DEMARCO, DEFENDANT-APPELLANT.

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

ANDREW J. DEMARCO, DEFENDANT-APPELLANT PRO SE.

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 June 12, 2018. The judgment convicted defendant upon a plea of guilty of driving while ability impaired by drugs (two counts), aggravated unlicensed operation of a motor vehicle in the first degree, escape in the second degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, assault in the second degree (Penal Law § 120.05 [3]), defendant contends in his main and pro se supplemental briefs that his waiver of the right to appeal is invalid. We agree. Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]), here defendant's waiver of the right to appeal was invalid because Supreme Court's oral colloquy mischaracterized it as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Shantz*, 186 AD3d 1076, 1077 [4th Dept 2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*Thomas*, 34 NY3d at 567, citing NY Model Colloquies, Waiver of Right to Appeal).

Additionally, although defendant purportedly signed a written waiver at the plea colloquy, we may not consider whether that document corrected any defects in the court's oral colloquy because "[t]he court did not inquire of defendant whether he understood the written

waiver or whether he had even read the waiver before signing it" (*People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). We nevertheless conclude that, contrary to defendant's contention in his main and pro se supplemental briefs, the sentence is not unduly harsh or severe.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

141
KA 18-00637
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE JENNINGS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN R. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered February 20, 2018. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a joint trial with the codefendant, of murder in the second degree (Penal Law § 125.25 [1]). Both defendant and the codefendant were charged with murder in the second degree by acting in concert and intentionally causing the death of the victim. The codefendant was acquitted.

Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the verdicts are repugnant based on the fact that the codefendant was acquitted (*see People v McLaurin*, 50 AD3d 1515, 1516 [4th Dept 2008]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.05 [6] [a]). We agree with defendant, however, that he was denied meaningful

representation at trial inasmuch as there is no reasonable and legitimate trial strategy for defense counsel's failure to object to the repugnant verdicts (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]; *People v Baldi*, 54 NY2d 137, 146-147 [1981]; *People v Morales*, 108 AD3d 574, 575 [2d Dept 2013]). We therefore reverse.

A verdict is repugnant only if, when viewed in light of the elements of each crime as charged to the jury, "it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other" (*People v Muhammad*, 17 NY3d 532, 539-540 [2011]; *see People v DeLee*, 24 NY3d 603, 608 [2014], *rearg denied* 31 NY3d 1127 [2018]). Stated differently, "a conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime as charged, for which the guilty verdict was rendered" (*People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]). "The determination as to the repugnancy of the verdict is made solely on the basis of the trial court's charge and not on the correctness of those instructions" (*People v Hampton*, 61 NY2d 963, 964 [1984]). The repugnancy doctrine also applies when one codefendant is convicted of a crime while another is acquitted of the same crime (*see McLaurin*, 50 AD3d at 1516).

Here, the jury was instructed that the People had to prove beyond a reasonable doubt that defendant "direct[ed] [the codefendant] to emerge from a hiding place and shoot [the victim] in the head[,] which caused his death." The codefendant's acquittal was conclusive as to a necessary element of the crime of which defendant was convicted, i.e., murder in the second degree for the codefendant shooting the victim at the direction of defendant and causing the victim's death. By acquitting the codefendant, the jury negated an essential element of the crime for which defendant was charged, i.e., that the codefendant committed the offense at defendant's direction (*see generally Hampton*, 61 NY2d at 964; *People v Demott*, 188 AD2d 1068, 1069-1070 [4th Dept 1992]; *cf. People v Palmer*, 135 AD2d 1103, 1103 [4th Dept 1987], *lv denied* 71 NY2d 900 [1988]). Because the verdicts are repugnant, the indictment must be dismissed, with leave to re-present the murder in the second degree charge to another grand jury (*see DeLee*, 24 NY3d at 611).

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

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

153

CA 20-00503

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

VDRNC, LLC, DOING BUSINESS AS VAN DUYN CENTER
FOR REHABILITATION AND NURSING,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SARAH G. MERRICK, AS COMMISSIONER OF ONONDAGA
COUNTY DEPARTMENT OF SOCIAL SERVICES,
DEFENDANT-RESPONDENT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (COREY R. BARKLOW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MORGAN R. THURSTON, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 1, 2019. The order granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff, a domestic corporation that operates a skilled nursing facility, commenced this action seeking a declaratory judgment or money damages for expenses it allegedly incurred in providing care for one of its residents after the resident was determined to be ineligible for Medicaid benefits during a penalty period of 11.74 months. Defendant moved to dismiss the complaint on the grounds, inter alia, that plaintiff failed to exhaust its administrative remedies and that the statute of limitations had expired.

We agree with plaintiff that Supreme Court erred in granting the motion and dismissing the complaint. It is well established that a skilled nursing facility such as plaintiff "may bring a plenary action in its own right against the agency designated to declare Medicaid eligibility" (*Park Ridge Hosp. v Richardson*, 175 AD2d 631, 631 [4th Dept 1991]; *see Peninsula Gen. Nursing Home v Hammons*, 247 AD2d 599, 599 [2d Dept 1998], *lv dismissed* 92 NY2d 836 [1998]). In such a plenary action, the facility is "not bound by the patient's failure to request an administrative appeal of the local agency's denial of medical assistance" or "by the four-month Statute of Limitations contained in CPLR 217" (*Long Beach Mem. Nursing Home v D'Elia*, 108

AD2d 901, 902 [2d Dept 1985]; *see Peninsula Gen. Nursing Home*, 247 AD2d at 599; *Park Ridge Hosp. v Richardson*, 147 Misc 2d 283, 286 [Sup Ct, Monroe County 1990], *affd* 175 AD2d 631 [4th Dept 1991]; *see generally Bellanca v Grand Is. Cent. School Dist.*, 275 AD2d 944, 944 [4th Dept 2000]). Although we offer no opinion whether the admission agreement entered into between plaintiff and the resident authorized plaintiff to commence a CPLR article 78 proceeding on behalf of the resident to challenge the denial of benefits during the penalty period, we conclude that there is nothing in the agreement that would vitiate plaintiff's right to commence its own plenary action.

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

159
KA 19-02203
PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW BAJEK, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered October 21, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*). We agree with defendant that County Court improperly assessed 25 points under risk factor two for sexual contact with the victim because the People did not establish by the requisite clear and convincing evidence (*see People v Pettigrew*, 14 NY3d 406, 408 [2010]) that there was any sexual contact between defendant and the victim (*see People v Blue*, 186 AD3d 1088, 1090 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]). Defendant's score on the risk assessment instrument should therefore be reduced, which results in a total score of 70 and renders defendant a presumptive level one risk. We therefore modify the order accordingly. Because the People failed to seek an upward departure at the SORA hearing, their present request to remit for further proceedings to determine whether an upward departure may be warranted is "unpreserved and beyond our review" (*People v Bryant*, 187 AD3d 1657, 1658 [4th Dept 2020]).

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

Entered: February 11, 2021 Mark W. Bennett
Clerk of the Court

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

162
KA 20-01200
PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ROBERT BASKA, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Onondaga County Court (John H. Crandall, A.J.), dated January 27, 2020. The order dismissed the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment on the ground that the evidence before the grand jury is legally insufficient because the People failed to sufficiently corroborate the testimony of an accomplice, as required by CPL 60.22 (1). The indictment charged defendant with perjury in the first degree (Penal Law § 210.15), conspiracy in the fifth degree (§ 105.05 [1]), criminal solicitation in the fourth degree (§ 100.05 [1]), and hindering prosecution in the third degree (§ 205.55).

The People contend that County Court erred in determining that the grand jury testimony of defendant's accomplice was not sufficiently corroborated. We agree. The corroboration requirement is satisfied by evidence that " 'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]). Sufficient corroboration may be provided by evidence that " 'harmonize[s]' " with the accomplice testimony, i.e., when "read with the accomplice's testimony, [it] makes it more likely that the defendant committed the offense" (*id.* at 194; *see People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

Here, the accomplice's testimony that, on a specific date, defendant and the accomplice had a telephone conversation regarding

the alleged criminal conduct is corroborated by defendant's cell phone records, which establish "that cell phone calls were made as the accomplice[] testified" (*People v Pratcher*, 134 AD3d 1522, 1524 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]). The accomplice's testimony is also corroborated by, among other things, the testimony of non-accomplices and the transcript of the criminal jury trial during which the charged offenses were allegedly committed (*see People v Lett*, 12 AD3d 1076, 1077 [4th Dept 2004], *lv denied* 4 NY3d 765 [2005]; *see also People v Guilliard*, 309 AD2d 673, 673 [1st Dept 2003], *lv denied* 1 NY3d 597 [2004]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

172
CAF 20-00076
PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF JENNIE M. VERNE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. HAMILTON, RESPONDENT-APPELLANT.

ANTHONY F. BRIGANO, UTICA, FOR RESPONDENT-APPELLANT.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Donald J. VanStry, R.), entered November 7, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical residence of the subject children to petitioner.

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

Memorandum: Respondent father appeals from an order that, inter alia, modified a prior custody and parenting time order by awarding petitioner mother primary physical residence of the subject children and reducing the father's parenting time. As an initial matter, the father "waived [his] contention that the [mother] failed to establish a change in circumstances warranting an inquiry into the best interests of the children inasmuch as the [father] alleged in [his] own cross petition that there had been such a change in circumstances" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]).

Contrary to the father's further contention, we conclude that Family Court did not err in modifying the prior order of custody and parenting time. "Generally a court's determination regarding custody and visitation issues, based on its first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015] [internal quotation marks omitted]), and here the record establishes that the court's determination resulted from a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record" (*Biernbaum*, 162 AD3d at 1665 [internal quotation marks omitted]). Specifically, the

record of the hearing establishes that the prior custody and parenting time order was no longer practical upon one of the children attaining school age, and that it is in the children's best interests to enroll them in the school district in which the mother lived and to provide father with reduced parenting time during the school year and increased parenting time when school was not in session (*see generally Matter of Austin v Smith*, 144 AD3d 1467, 1468 [3d Dept 2016]; *Matter of Pecore v Blodgett*, 111 AD3d 1405, 1406 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court

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

173
CAF 19-00561
PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF XANDER B., EZZIE B., AND
MILOH B.
-- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

JAMES B. AND MADISON P., RESPONDENTS-APPELLANTS.

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

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT MADISON P.

JAMES E. HARMON, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN J. MORRISSEY OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 27, 2019 in a proceeding pursuant to Family Court Act article 10. The order determined that respondents had neglected the subject children.

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

Memorandum: In this Family Court Act article 10 proceeding, respondents appeal from an order determining that they neglected the subject children. We affirm. Contrary to respondent Madison P.'s contention, Family Court properly determined that she "acted as 'the functional equivalent of a parent in a familial or household setting' for the children" and thus was a person legally responsible for their care (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1623 [4th Dept 2019], quoting *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *see* § 1012 [g]). Contrary to respondents' contentions, the court's determination that they neglected the subject children is supported by a preponderance of the evidence (*see Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1367-1368 [4th Dept 2013]; *Matter of Brian A.*, 190 AD2d 530, 530 [1st Dept 1993], *lv denied* 81 NY2d 710 [1993]). Contrary to respondents' further contentions, the out-of-court statements of the two oldest children were sufficiently corroborated (*see Matter of Rachel H.*, 60 AD3d 1060, 1061 [2d Dept 2009]).

Entered: February 11, 2021

Mark W. Bennett
Clerk of the Court