SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 14, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JUNE 14, 2024

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_____	1034	KA 22 00627	PEOPLE V PIERRE JONES
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-01021

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

KEVIN CONLEY AND DENISE CONLEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PINELLI LANDSCAPING, INC.,
DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, LLC, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), AND LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK, LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 1, 2022. The order and judgment, among other things, dismissed the complaint upon a jury verdict.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Kevin Conley (plaintiff) when he tripped and fell after striking his foot against the lowered tailgate of a trailer hitched to defendant's parked truck. Plaintiffs appeal from an order and judgment that, inter alia, dismissed the complaint upon a jury verdict in favor of defendant, which determined that defendant's lowered, unmarked tailgate did not create an unsafe condition. We affirm.

We reject plaintiffs' contention that Supreme Court erred in precluding evidence that defendant's truck and trailer were improperly or illegally parked. The location of defendant's vehicles " 'merely furnished the condition or occasion for the occurrence of the event' and was not one of its causes" (*Mendrykowski v New York Tel. Co.*, 2 AD3d 1410, 1410 [4th Dept 2003]).

Even assuming, arguendo, that plaintiffs preserved their contention that they were entitled to an instruction pursuant to *Noseworthy v City of New York* (298 NY 76, 80-81 [1948]) based on plaintiff's amnesia (*see generally Calhoun v County of Herkimer*, 169 AD3d 1495, 1497-1498 [4th Dept 2019]), we conclude that such a charge

is not applicable in this case inasmuch as plaintiffs and defendant were "on an equal footing with respect to knowledge of the occurrence" (*Lynn v Lynn*, 216 AD2d 194, 195 [1st Dept 1995]; *see Ulicki v Jarka*, 122 AD3d 1267, 1268 [4th Dept 2014]; *Morris v Solow Mgt. Corp. Townhouse Co., L.L.C.*, 46 AD3d 330, 331 [1st Dept 2007], *lv dismissed* 11 NY3d 751 [2008]).

Upon our review of the record, we conclude that the verdict is supported by legally sufficient evidence (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]) and that it is not against the weight of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

We have reviewed plaintiffs' remaining contentions and conclude that they are without merit.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01612

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

CHARLES E. LORD, PLAINTIFF-RESPONDENT,

V ORDER

WHELAN AND CURRY CONSTRUCTION SERVICES, INC.
FELDMEIER EQUIPMENT, INC., AND 6800 TOWNLINE ROAD
PARTNERSHIP, DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEGERSKI LAW FIRM, BREWERTON (JOHN P. WEGERSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 6, 2022. The order, inter alia, denied defendants' motion seeking to compel plaintiff to comply with the terms of his duly executed General Release in this matter by executing a Section 32 Agreement.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 21 and 22, 2024,

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-01920

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF TRICIA A.C.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SAUL H. AND JULIE H.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

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

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 18, 2022. The order dismissed the petition with prejudice.

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

Memorandum: In appeal Nos. 1 and 2, petitioner appeals from orders that dismissed with prejudice her petitions seeking to enforce a post-adoption contact agreement with respect to her two biological children, who had been adopted by respondents. The agreement, which was incorporated into a judicial surrender of petitioner's parental rights to the subject children, provides that petitioner shall be permitted a minimum of three visits per year with the children, with petitioner being required to contact the adoptive parents three times each year to schedule those visitations. If petitioner missed two scheduled visits in a row, she would lose her rights to future visitations unless she could prove that her failure to attend was the result of an emergency. The agreement further provides that petitioner will be afforded phone contact with the children once a month. Petitioner alleged in the petitions that respondents improperly refused her visitation. Following a fact-finding hearing, Family Court dismissed the petitions on the ground that petitioner failed to have regular visitation with her children and that resuming visitation is not in the children's best interests. We affirm.

It is well settled that an order incorporating a post-adoption

contact agreement "may be enforced by any party to the agreement . . . [, but t]he court shall not enforce an order [incorporating such an agreement] unless it finds that the enforcement is in the child's best interests" (Domestic Relations Law § 112-b [4]; *see Matter of Bilinda S. v Carl P.*, 193 AD3d 1355, 1356 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]). Thus, this agreement should be enforced only if it is in the children's best interests (*see Bilinda S.*, 193 AD3d at 1356; *Matter of J.B. [Lakoia W.–Paul B.]*, 188 AD3d 1683, 1683 [4th Dept 2020]; *Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337 [4th Dept 2011]). Here, at the fact-finding hearing, the evidence established that petitioner made minimal and inconsistent efforts to schedule visits with the children and had not seen them for over two years. The evidence further established that petitioner did not attend at least one scheduled visitation. The children's treating psychologist opined at the hearing that it was not in the children's best interests to resume contact with petitioner. His opinion was based, in part, on his observation that since the children's contact with petitioner had ceased, the children's behaviors had improved. The court's determination that it is not in the best interests of the children to resume visits with petitioner is supported by a sound and substantial basis in the record (*see Matter of Sapphire W. [Mary W.–Debbie R.]*, 120 AD3d 1584, 1585 [4th Dept 2014]; *Kristian J.P.*, 87 AD3d at 1337-1338).

Petitioner's further contention that the provision of the agreement allowing her monthly telephone contact with the children is severable from the other provisions of the agreement and should be enforced is unpreserved for our review (*see Matter of Frandiego S.*, 270 AD2d 144, 144 [1st Dept 2000]; *see generally Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]). In any event, given petitioner's inconsistent and minimal prior monthly phone contact with the children, it would not be in the children's best interests to enforce that provision.

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I agree with the majority in both appeals that Family Court's determination that it was not in the children's best interests to resume visitation with petitioner is supported by a sound and substantial basis in the record.

I disagree, however, with the majority in both appeals with respect to petitioner's monthly telephone contact with the children, and therefore I respectfully dissent. In the proceedings in Family Court, petitioner sought enforcement of the post-adoption contact agreement, and she contended, among other things, that she had been denied her monthly telephone contact with the children. Thus, contrary to the majority's determination, petitioner's contention seeking enforcement of the part of the agreement providing for such contact is preserved for this Court's review (*see generally Matter of Frandiego S.*, 270 AD2d 144, 144 [1st Dept 2000]). Furthermore, in my view, the court should have granted the petition insofar as it sought to enforce that part of the agreement providing that petitioner have monthly telephone contact with the children. During the hearing, the children's treating psychologist was not asked and did not opine

whether phone contact with the children would be detrimental to the best interests of the children. Moreover, the court's findings of fact and conclusions of law focused on the resumption of in-person physical visitation rather than petitioner's phone contact with the children. I therefore conclude that the court erred in failing to grant the petitions to that extent (*see generally Matter of Sapphire W. [Mary W.—Debbie R.]*, 120 AD3d 1584, 1585 [4th Dept 2014]), and I would modify the respective orders accordingly.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-01924

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF TRICIA A.C.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SAUL H. AND JULIE H.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

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

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 18, 2022. The order dismissed the petition with prejudice.

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

Same memorandum as in *Matter of Tricia A.C. v Saul H.* ([appeal No. 1] — AD3d — [June 14, 2024] [4th Dept 2024]).

All concur except OGDEN, J., who dissents and votes to modify in accordance with the same dissenting memorandum as in *Matter of Tricia A.C. v Saul H.* ([appeal No. 1] — AD3d — [June 14, 2024] [4th Dept 2024]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00636

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

IN THE MATTER OF THE ESTATE OF
WILLIAM A. BEARD, DECEASED.
---------- MEMORANDUM AND ORDER
WENDY LOUGNOUT, ESQ., AS PUBLIC ADMINISTRATOR,
PETITIONER-RESPONDENT;

DIANE BEARD, OBJECTANT-APPELLANT.

CERIO LAW OFFICES, PLLC, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR OBJECTANT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (TERRI CONTI YORK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Onondaga County (Mary Keib Smith, S.), entered April 13, 2022. The order, insofar as appealed from, granted in part the motion of petitioner for summary judgment dismissing the objections to an accounting.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking to dismiss objection F and reinstating that objection, and as modified the order is affirmed without costs.

Memorandum: In this proceeding for the judicial settlement of the final accounting of decedent's estate, objectant appeals from an order that granted in part petitioner's motion for summary judgment dismissing the objections to the accounting filed by objectant.

Here, petitioner established prima facie entitlement to judgment as a matter of law with respect to objections A, B, E, F and H by submitting an accounting reflecting decedent's assets (*see Matter of Crane*, 100 AD3d 626, 628 [2d Dept 2012], *lv dismissed* 21 NY3d 1000 [2013], *lv denied* 29 NY3d 906 [2017]).

We agree with objectant that, in opposition to the motion, she raised an issue of fact with respect to objection F. In objection F, objectant alleged that petitioner had failed to account for items removed from decedent's estate by another beneficiary. Objectant raised an issue of fact with respect to that objection by submitting evidence that a beneficiary had removed items from the estate, including pieces from a bedroom set, and that petitioner had not applied a corresponding offset to that beneficiary's share of the estate (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). We therefore modify the order by denying that part of the motion seeking to dismiss objection F and reinstating that objection.

Contrary to objectant's contention, we conclude that she failed to raise an issue of fact with respect to objections A, B, E, and H (*see Crane*, 100 AD3d at 629; *Matter of McAlpine*, 85 AD3d 1185, 1186 [2d Dept 2011]; *see generally Matter of Wilson*, 178 AD2d 996, 997 [4th Dept 1991]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01438

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARVIS LEWIS, DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (AMY CHADWICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 13, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (four counts), assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count each of assault in the second degree (§ 120.05 [3]) and resisting arrest (§ 205.30).

Defendant contends that Supreme Court violated his right to counsel of his own choosing when, at the outset of jury selection, the court compelled defendant's retained attorney to continue to represent him. We reject that contention.

After discharging his initial assigned counsel and retaining new defense counsel, defendant appeared in person with defense counsel for various pretrial conferences, which included discussions about the exchange of discovery as well as plea negotiations and pretrial motions. At no time during those appearances did defendant report any concern about defense counsel's representation. However, at the outset of jury selection defendant stated to the court that defense counsel was not acting in his best interest and requested that the court discharge the retained counsel and assign new counsel.

"Although a defendant has the constitutionally guaranteed right to be defended by counsel of [their] own choosing, this right is

qualified in the sense that a defendant may not employ such right as a means to delay judicial proceedings" (*People v Arroyave,* 49 NY2d 264, 271 [1980]; *see People v Hunter*, 171 AD3d 1534, 1535 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]), and thus the right "may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system" (*People v O'Daniel*, 24 NY3d 134, 138 [2014] [internal quotation marks omitted]). Here, defendant had not retained other counsel despite having ample opportunity to do so, and failed to demonstrate that substitution of counsel "was necessitated by forces beyond his control and was [thus] not a dilatory tactic" (*Hunter*, 171 AD3d at 1535 [internal quotation marks omitted]; *see People v Howden*, 215 AD3d 1261, 1262-1263 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]). Thus, we conclude that the court properly balanced defendant's request for substitute counsel against "the need for the expeditious and orderly administration of justice" and did not abuse its discretion when it ordered defense counsel to continue to represent him throughout the trial (*Hunter*, 171 AD3d at 1535-1536; *see People v Harris*, 151 AD3d 1720, 1720-1721 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]).

Defendant further contends that he was denied effective assistance of counsel. We reject that contention inasmuch as defendant waived the right to effective assistance of counsel by directing defense counsel not to participate in the proceedings (*see People v Henriquez*, 3 NY3d 210, 217 [2004]). After the court denied defendant's request to substitute counsel and advised defendant that defense counsel would continue to represent him throughout the trial, defendant refused to proceed, was taken to a holding cell, and then refused to return to the courtroom. While in the holding cell, defendant conferred with defense counsel, who advised the court, following the conference, that defendant did not want defense counsel to represent him and objected to the trial proceeding. The court thereafter ordered defense counsel to inform defendant that the court anticipated moving forward with the trial, in defendant's absence and with defense counsel representing defendant. Defense counsel so informed defendant and, in the course of their additional conversation, defendant advised that he did not wish defense counsel to represent him in the trial and directed defense counsel not to participate in the proceedings and to leave. When the court had defendant brought into the courtroom and informed him that he had the right to be present for trial and participate in his defense, defendant again objected to the entire proceeding, reiterated that he had fired defense counsel, refused to answer the court's questions, and renewed his request for substitute counsel. When the court responded that defendant would not receive another attorney but had the right to proceed pro se, defendant left the courtroom. Defense counsel subsequently informed the court that he intended to follow defendant's directive not to participate in the proceedings. The trial was then held in defendant's absence. Defense counsel was present but did not participate, except to move, outside the presence of the jury, for a trial order of dismissal.

We conclude that, under these circumstances, defendant waived his

right to effective assistance of counsel (*see Henriquez*, 3 NY3d at 217). Defendant's "desire to prevent counsel's participation, coupled with his adamant refusal to represent himself, translates into an intentional failure to avail himself of his constitutional right to a fair opportunity to defend against the State's accusations" (*id.* [internal quotation marks omitted]), and he must therefore "accept the decision he knowingly, voluntarily and intelligently made, and the consequences of his intentional actions and choices" (*id.* at 216-217). " 'That defendant now questions the wisdom of his decision cannot relieve him of the consequences of his request' . . . and counsel cannot be charged with failing to provide meaningful or effective representation because that right was waived by defendant" (*id.* at 217).

Defendant failed to preserve for our review his contention that the indictment was multiplicitous (*see* CPL 470.05 [2]; *People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *People v Quinn*, 103 AD3d 1258, 1258 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]), 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]; *Edwards*, 159 AD3d at 1426).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in denying defense counsel's pretrial request for a competency evaluation of defendant pursuant to CPL article 730. While " '[i]t is fundamental that the trial of a criminal defendant while he is mentally incompetent violates due process' " (*People v Winebrenner*, 96 AD3d 1615, 1616 [4th Dept 2012], *lv denied* 19 NY3d 1029 [2012]), a defendant in a criminal proceeding "is presumed to be competent" (*People v Tortorici*, 92 NY2d 757, 765 [1999], *cert denied* 528 US 834 [1999]), and, thus, it is only when " 'the court wherein the criminal action is pending . . . is of the opinion that the defendant may be an incapacitated person' " that it must order a competency evaluation (*id.* at 765-766, quoting CPL 730.30 [1]). "The determination of whether to order a competency hearing lies within the sound discretion of the trial court," and the sole issue on appeal "is whether the trial court abused that discretion, not whether it might have been reasonable to order a hearing" (*id.* at 766). Here, the court had ample opportunity to observe defendant prior to defense counsel's request, and the record supports its determination that defendant demonstrated an understanding of the proceedings and had the ability to assist in his own defense and, additionally, that defendant's refusal to attend the trial and attempt to dismiss his retained counsel were "indicative of obstinance rather than incompetency" (*People v Thorpe*, 218 AD3d 1124, 1125 [4th Dept 2023]; *see People v Estruch*, 164 AD3d 1632, 1633 [4th Dept 2018], *lv denied* 32 NY3d 1171 [2019]).

Finally, we conclude that the sentence of incarceration, as reduced to 20 years' imprisonment by operation of law (*see* Penal Law § 70.30 [1] [e] [i]), is not unduly harsh or severe.

All concur except MONTOUR and OGDEN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully

dissent. Although we agree with the majority that defendant was not denied his right to counsel when Supreme Court refused to grant his request for an adjournment on the eve of trial for assignment of new counsel (*see People v Howden*, 215 AD3d 1261, 1262-1263 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]), we agree with defendant that he was denied effective assistance of counsel.

"It is well established that a defendant may not, by . . . absence alone, 'waive [the] right to effective assistance of counsel' " (*People v Diggins*, 21 NY3d 935, 936 [2013], quoting *People v Aiken*, 45 NY2d 394, 398 [1978]). Nonetheless, when a defendant is tried in absentia, an attorney's complete failure to participate "giv[es] rise to an inference that the attorney's nonparticipation was a protest strategy that would not support a claim of ineffective assistance" (*People v Diggins*, 11 NY3d 518, 525 [2008]). Thus, "a defendant who absents [themselves] from trial may not succeed on appeal by raising counsel's purported ineffectiveness where counsel affirmatively, as a matter of trial strategy, sought to obstruct the trial of [the defendant]" via a "refusal to actively participate" (*Aiken*, 45 NY2d at 399). Similarly, a defendant who both "refuse[s] self-representation and restrict[s] the participation of counsel . . . voluntarily waive[s] the right to the effective assistance of counsel" (*People v Henriquez*, 3 NY3d 210, 216 [2004]). However, on the facts of this case, the inference of strategic nonparticipation is not justified.

Here, as is permissible, the court denied defendant's request to substitute new counsel for retained defense counsel on the eve of trial, later denied defense counsel's request to withdraw, and directed that defense counsel continue to represent defendant (*see People v Kelly*, 60 AD2d 220, 223-224 [1st Dept 1977], *affd for reasons stated* 44 NY2d 725, 727 [1978]; *People v Hunter*, 171 AD3d 1534, 1535-1536 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]; *People v Harris*, 151 AD3d 1720, 1720-1721 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]). In response thereto, defendant repeatedly absented himself from the courtroom and was close to nonresponsive when the court had him brought into the courtroom to ensure that defendant understood his rights.

In particular, after initially visiting defendant in a holding cell, defense counsel reported to the court that defendant did not want defense counsel to represent him going forward and objected to the trial proceeding. The court thereafter ordered defense counsel to inform defendant that his requests were denied and that the court anticipated moving forward with the trial, in defendant's absence and with defense counsel as his attorney. Defense counsel so informed defendant and, in the course of their additional conversation, defendant instructed defense counsel that he did not wish defense counsel to represent him in the trial or to participate in the proceedings and in fact directed defense counsel to leave. Defense counsel noted that he faced a dilemma because he had "explicit instructions from his [client] to not participate in the proceedings" and he did not know what his ethical and legal obligations were at that point. The court responded in relevant part that, in an effort

to protect defendant's rights even in his absence, it had exercised its authority to order that defense counsel continue to represent defendant. The court indicated that it was the decision of defense counsel whether to participate at trial, but it is clear from the record that defense counsel thought that the decision whether defense counsel participated in the trial was defendant's to make.

When the court had defendant brought in to ensure that he understood that he had a right to be present for trial and participate in his defense, defendant "object[ed] to this whole thing" and reiterated that he had "fire[d]" defense counsel. After refusing to answer the court's question whether he waived his presence at trial and starting to leave the courtroom, defendant responded to another inquiry by stating that, rather than wishing to represent himself, he wanted another attorney. When the court responded that defendant would not be assigned another attorney but could proceed pro se, defendant simply left the courtroom. Defense counsel informed the court that it was his intention to follow the instructions of defendant and "not participate at all in these proceedings." After the prosecutor raised concerns that defense counsel had an obligation to participate, the court responded by citing case law stating that a defendant could not demonstrate denial of effective assistance of counsel if the defendant had instructed counsel to refrain from participating. In the court's view, defendant had instructed defense counsel not to do anything, which was his decision, the consequences of which he would have to "live with." Defense counsel retorted, however, that the circumstances were different because defendant had discharged him.

The next day, defendant refused to answer the court's questions whether he understood his rights to assist in his defense and be present in court. The court informed defendant that it could not allow him to discharge defense counsel, but defendant insisted that he had fired defense counsel and reiterated that he did not want to be present in court. Defendant also refused to respond to the court's inquiry whether he wanted to represent himself and simply exited the courtroom. The court thereafter denied defense counsel's request to withdraw and noted that defense counsel was in charge of trial strategy, which could involve standing silent in order to garner compassion from the jury that the government was being overbearing. Defense counsel responded, however, that his decision to be silent was "not a tactical decision on [his] part." The prosecutor later expressed concern that defendant would have "a strong case of ineffective assistance of counsel" if defense counsel continued not to participate. Defendant later reiterated during trial that he had fired defense counsel and did not wish to be present, and he thereafter refused to answer additional questions.

The majority relies on *People v Henriquez*, but we submit that its reliance on that case is misplaced. Although similar in certain aspects, the case before us is distinguishable from *Henriquez*, in which the Court of Appeals determined that a defendant who refused to allow his defense counsel to participate at trial, but never asked that the defense counsel be relieved, had voluntarily waived his right

to the effective assistance of counsel (*see Henriquez*, 3 NY3d at 215-217). Here, by contrast, defendant repeatedly made clear that he sought to have defense counsel discharged, and any instruction by defendant that defense counsel not participate in the proceedings was made in the context of defendant's effort to sever the attorney-client relationship. In other words, unlike the defendant in *Henriquez*, defendant here did not seek to have defense counsel represent him by employing a strategy of silence at trial, nor did defendant expressly acknowledge upon inquiry that he was waiving the right to present a defense by having defense counsel remain mute; rather, defendant sought to discharge defense counsel from representing him at all.

After the court appropriately denied that relief and directed that defense counsel continue to represent defendant at trial, defense counsel was undoubtedly placed in a difficult situation. However, defense counsel's decision to thereafter remain largely mute and not contest any of the proof against defendant was demonstrably not a decision made as a matter of strategy. Indeed, defense counsel expressly stated that his decision not to participate at trial was "not a tactical decision on [his] part," and it is evident that defense counsel's decision was instead based on his misperception that he was "ethically obligated to stand mute." It is well established, however, that a defendant represented by counsel "retains authority only over certain fundamental decisions regarding the case" (*People v Colon*, 90 NY2d 824, 825 [1997]). Those "fundamental decisions" include "whether to plead guilty, waive a jury trial, testify in [their] own behalf or take an appeal" (*id.* at 825-826 [internal quotation marks omitted]); they do not include the decision whether the defense counsel will "stand mute." Thus, unlike the defendant in *Aiken*, here, defense counsel <u>did not</u> "affirmatively, *as a matter of trial strategy*, s[eek] to obstruct the trial" through "refusal to actively participate" (45 NY2d at 399 [emphasis added]). Defense counsel repeatedly insisted that he had been fired and we would conclude that the basis for his conduct was not tactical, but, rather, a misunderstanding of his ethical responsibilities upon being ordered to continue representing defendant (*see generally People v Hogan*, 26 NY3d 779, 786 [2016]). Defense counsel's nonparticipation was, as the record demonstrates, not strategic at all.

Thus, "[a]lthough a defendant's willful absence from trial surely hampers an attorney's ability to represent the client adequately and must be taken into consideration," under the circumstances of this case, we would conclude that defense counsel's "lack of participation during the jury trial amounted to the ineffective assistance of counsel" (*Diggins*, 21 NY3d at 936). We would, therefore, reverse the judgment and grant a new trial.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01891

PRESENT: SMITH, J.P., MONTOUR, OGDEN, AND KEANE, JJ.

PB-20 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. NICODEMUS LUTHERAN CHURCH, UPSTATE NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, DEFENDANTS, AND EVANGELICAL LUTHERAN CHURCH IN AMERICA, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

PB-21 DOE, PLAINTIFF-APPELLANT,

V

ST. NICODEMUS LUTHERAN CHURCH, UPSTATE NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, DEFENDANTS, AND EVANGELICAL LUTHERAN CHURCH IN AMERICA, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)
(APPEAL NO. 1.)

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (VICTORIA E. PHILLIPS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 16, 2022. The order, among other things, granted the motion of defendant Evangelical Lutheran Church in America for summary judgment dismissing plaintiffs' complaints against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendant Evangelical Lutheran Church in America seeking summary judgment dismissing plaintiffs' first causes of action insofar as they assert claims for negligent retention, supervision, or direction and those parts seeking summary judgment dismissing plaintiffs' second causes of action insofar as they assert claims for fraudulent or negligent misrepresentation and reinstating those claims against it and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced these actions pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that they were sexually abused by the pastor of defendant St. Nicodemus Lutheran Church (St. Nicodemus).

In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted the motion of defendant Evangelical Lutheran Church in America (ELCA) for summary judgment dismissing plaintiffs' complaints against it.

In appeal No. 2, plaintiffs appeal from that part of an order that granted the motion of defendant Upstate New York Synod of the Evangelical Lutheran Church in America (Synod) for summary judgment dismissing plaintiffs' complaints against it, and the Synod cross-appeals from that part of the order that denied its motion for summary judgment dismissing the cross-claims of St. Nicodemus against it for indemnification and contribution.

Plaintiffs contend in both appeals that Supreme Court erred in granting the motions for summary judgment because the ELCA and the Synod failed to establish their entitlement to judgment as a matter of law. We agree with plaintiffs that the court erred in dismissing plaintiffs' claims asserting negligent retention, supervision, and direction. "The 'threshold question' in any negligence action is whether a defendant owes a 'legally recognized duty of care to [a] plaintiff' " (*Stephanie L. v House of the Good Shepherd*, 186 AD3d 1009, 1011 [4th Dept 2020], quoting *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]). "An employer may be liable for a claim of negligent hiring or supervision if an employee commits an independent act of negligence outside the scope of employment and the employer was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (*Walden Bailey Chiropractic, P.C. v GEICO Cas. Co.*, 173 AD3d 1806, 1806-1807 [4th Dept 2019] [internal quotation marks omitted]). "The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting hiring and retention of the employee" (*Druger v Syracuse Univ.*, 207 AD3d 1153, 1154 [4th Dept 2022] [internal quotation marks omitted]).

"A cause of action for negligent hiring [or retention, supervision, or direction] . . . is based upon the defendant's status as an employer" (*Sandra M. v St. Luke's Roosevelt Hosp. Ctr.*, 33 AD3d 875, 878 [2d Dept 2006]). Indeed, "it is essential, at the very least, that the person for whose negligent conduct the [defendant] is sought to be charged be engaged in its service" (*Rosensweig v State of New York*, 5 NY2d 404, 409 [1959]). In deciding whether an employment relationship exists, we consider, inter alia, who controls and directs the manner, details, and ultimate result of the employee's work (*see Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017]; *Matter of Empire State Towing & Recovery Assn., Inc. [Commissioner of Labor]*, 15 NY3d 433, 437 [2010]; *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360 [2007]; *State Div. of Human Rights v GTE Corp.*, 109 AD2d 1082, 1083 [4th Dept 1985]).

Here, the ELCA and the Synod moved for summary judgment dismissing plaintiffs' first causes of action on the ground that they did not employ the pastor and, therefore, did not owe plaintiffs a duty of care. In support of its motion for summary judgment dismissing the complaint, the Synod submitted evidence that St. Nicodemus hired plaintiffs' alleged abuser, paid his salary, provided him with a parsonage, supervised his daily activities as pastor, and had the sole authority to terminate his call with the congregation. However, the Synod also submitted its Constitution as an exhibit to its motion. Pursuant to its Constitution, the Synod was responsible "for the oversight of the life and mission of th[e] church in the [Synod's] territory," and those responsibilities included consultation with a congregation regarding the termination of a pastor's call, as well as the authority to discipline an ordained minister, up to and including by termination of that minister's call. To that end, the Synod's Constitution required it to create a "Committee on Discipline," "consistent with the procedures . . . in Chapter 20 of the ELCA constitution and bylaws." Inasmuch as the Synod's own submissions raised an issue of fact regarding its authority over the retention, supervision, and direction of plaintiffs' alleged abuser, it was not entitled to dismissal of plaintiffs' first causes of action to the extent that they assert negligent retention, supervision, and direction (*see Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 636 [2d Dept 2018]).

In support of its motion for summary judgment dismissing the complaint, the ELCA also submitted evidence that St. Nicodemus hired plaintiffs' alleged abuser, paid his salary, provided him with a parsonage, supervised his daily activities as pastor, and had the sole authority to terminate his call with the congregation. Although the ELCA met its initial burden on its motion (*see generally Szarewicz v Alboro Crane Rental Corp.*, 50 AD2d 770, 770-771 [1st Dept 1975], *affd* 40 NY2d 1076 [1976]; *Robinson v Downs*, 39 AD3d 1250, 1251 [4th Dept 2007]), we conclude that plaintiffs raised a triable issue of fact in opposition with respect to whether the ELCA employed the alleged abuser. In addition to the Synod's Constitution, plaintiffs submitted the ELCA's Constitution, Bylaws, and Continuing Resolutions (ELCA Constitution and Bylaws) in opposition to the ELCA's motion for summary judgment. The ELCA Constitution and Bylaws direct its secretary to maintain a roster of ordained ministers and warn that, if a congregation calls a minister who is not on the ELCA roster, it risks losing its status as an ELCA congregation. The ELCA Constitution and Bylaws also set forth the procedure for discipline of an ordained minister. Although the Constitution provides that congregations "shall have authority in all matters that are not assigned by the constitution and bylaws of this church to synods and the churchwide organization" (§ 9.31), the enumerated "[f]unctions" of the congregation do not include the discipline of pastors (*see* § 9.41 [a]-[i]). Rather, the Constitution provides that synods are responsible "for discipline of congregations, ordained ministers, and persons on the official lay roster; as well as for termination of call, appointment, adjudication, and appeals consistent with the procedures established by this church in Chapter 20 of the ELCA constitution and bylaws" (§ 10.21 [c]). Chapter 20 states that there

must be "set forth in the bylaws a process of discipline governing ordained ministers" (§ 20.11), and directs that, because "synods have responsibility for admittance of persons into the ordained ministry of this church or onto other rosters of this church and have oversight of pastoral/congregational relationships, *the disciplinary process shall be a responsibility of the synod on behalf of this church and jointly with it*" (*id.* [emphasis added]). The Bylaws provide that "*[a]ccountability for specific calls to service extended in predecessor church bodies shall be exercised according to the policies and procedures of this church*" (§ 7.41.16 [emphasis added]). Thus, although the alleged abuser's call to service at St. Nicodemus was extended prior to the creation of the ELCA, accountability for his call was to "be exercised according to the policies and procedures of [the ELCA]" (*id.*).

Thus, according to the ELCA Constitution and Bylaws, the authority to discipline pastors within the ELCA was granted to the synods and the ELCA. The authority to remove a pastor from the roster of ordained ministers remained with the synods and the ELCA. Once a pastor was removed from the roster of ordained ministers, a congregation that chose to retain that pastor could be removed from the ELCA. The entire disciplinary process was created by and governed by the ELCA Constitution and Bylaws. Under these circumstances, we conclude that plaintiffs' submissions raised an issue of fact whether the ELCA and the Synod exercised sufficient control over the retention and supervision of plaintiffs' alleged abuser so as to constitute his employers (*see generally State Div. of Human Rights*, 109 AD2d at 1083).

As an alternative ground for affirmance, properly raised on appeal (*see Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1181-1182 [4th Dept 2023]), the ELCA contends that the court properly granted its motion with respect to plaintiffs' first causes of action because the ELCA established as a matter of law that the abuse did not occur on property owned by the ELCA and, therefore, it cannot be held liable. We reject that contention on the merits. The ELCA relies on the decision of the Court of Appeals in *D'Amico v Christie* for the proposition that liability for negligent hiring, retention, supervision, and direction may not be imposed against an employer where all of the improper acts "occurred off the employer's premises and did not involve the employer's property" (*D'Amico v Christie*, 71 NY2d 76, 88 [1987]; *see generally Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 736 [2017]). In the pertinent section of *D'Amico*, however, the Court of Appeals determined that the employer was not liable for the injuries of the plaintiff because the employer was not in *control* of the employee's actions at the time of the injury-producing event. That lack of control was premised upon the fact that the employee had left the employer's property (*see D'Amico*, 71 NY2d at 88). Typically, once an employee has left their employer's property, the employer's authority and control over the employee ceases (*see Roe v Domestic and Foreign Missionary Socy. of the Prot. Episcopal Church*, 198 AD3d 698, 701 [2d Dept 2021]; *"John Doe 1" v Board of Educ. of Greenport Union*

Free Sch. Dist., 100 AD3d 703, 706 [2d Dept 2012], *lv denied* 21 NY3d 852 [2013]).

However, to read into a claim for negligent hiring, retention, supervision, or direction a *requirement* that the injury-producing event occur on property owned by the employer is an unnecessarily restrictive interpretation of the "policy-driven analysis" used to determine the existence and scope of a tortfeasor's duty (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 161 [2023]; *see generally Jones v City of Buffalo*, 267 AD2d 1101, 1102 [4th Dept 1999]). As the Court of Appeals recently outlined, "our framework ensures that an employer is liable . . . when it has notice of a particular employee's propensity for tortious conduct but neglects to reasonably supervise and control such employee, enabling the employee to harm third parties aided by the use of the employer's resources" (*Moore*, 40 NY3d at 161). Here, plaintiffs established that the pastor was able to build a relationship with them solely based upon the pastor's employment. PB-20 was introduced to the pastor through the pastor's position at St. Nicodemus, and attended Sunday School at the church, which the pastor taught. PB-21 was baptized by the pastor, traveled with the pastor during youth group events, and was subjected to the alleged abuse at a church picnic shelter and the parsonage. The pastor allegedly used his position to pressure plaintiffs into keeping the abuse a secret. Plaintiffs' submissions demonstrated that the off-premises abuse was preceded by, and continued during, a time period when plaintiffs were groomed by the pastor while he was engaged in his role as the ELCA's employee (*see Johansmeyer*, 165 AD3d at 636). Inasmuch as "[t]he employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting hiring and retention of the employee" (*Druger*, 207 AD3d at 1154 [internal quotation marks omitted]), we conclude that, under the circumstances of these cases, the fact that the alleged abuse occurred off-premises is not fatal to plaintiffs' first causes of action (*see Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 162 [1st Dept 2022]).

We reject on the merits the ELCA's further alternative ground for affirmance, properly raised on appeal, that imposition of liability for negligent hiring, retention, supervision, and direction of the pastor is prohibited by the Free Exercise Clause of the First Amendment (*see Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 164-166 [2d Dept 1997], *cert denied* 522 US 967 [1997], *lv dismissed* 91 NY2d 848 [1997]).

Plaintiffs further contend in both appeals that their second causes of action were not duplicative of their first causes of action and that the court therefore erred in granting defendants' motions for summary judgment with respect to the second causes of action. With respect to plaintiffs' claims for fraudulent or negligent misrepresentation, asserted in their second causes of action, we agree with plaintiffs. "Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a

material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotation marks omitted]). With respect to negligent misrepresentation, such a claim "requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*id.* at 180 [internal quotation marks omitted]). Inasmuch as we cannot conclude that those claims are "based on the same facts, allege[ ] the same wrongs, and seek[ ] the same relief" as plaintiffs' first causes of action (*Olney v Town of Barrington*, 180 AD3d 1364, 1365 [4th Dept 2020]; *see Drake v Village of Lima*, 221 AD3d 1481, 1483 [4th Dept 2023]), it was error to grant defendants' motions for summary judgment with respect to plaintiffs' claims of fraudulent or negligent misrepresentation. However, inasmuch as plaintiffs' second causes of action allege that defendants' liability was based upon their failure "to have in place an appropriate policy and/or practice for making hiring and assignment decisions," or to "have in place an appropriate policy and/or practice to monitor, supervise or oversee [the pastor's] interactions with minor[s] . . . in order to keep them safe from sexual abuse," those claims are "based on the same facts, allege[ ] the same wrongs, and seek[ ] the same relief" as plaintiffs' first causes of action, and were therefore properly dismissed as duplicative (*Olney*, 180 AD3d at 1365; *see Drake*, 221 AD3d at 1483).

In appeal No. 2, the Synod contends that the court erred in denying its motion for summary judgment dismissing St. Nicodemus's cross-claims against it. The Synod's contentions are unpreserved inasmuch as it failed to direct any portion of its motion for summary judgment to St. Nicodemus's cross-claims (*see Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 367 [2023]; *Henry v Buffalo Mgt. Group, Inc.*, 218 AD3d 1233, 1234 [4th Dept 2023]).

We conclude that the orders should be modified by denying those parts of the motions of the Synod and the ELCA seeking summary judgment dismissing plaintiffs' first causes of action, insofar as they assert claims for negligent retention, supervision, or direction, and those parts seeking summary judgment dismissing plaintiffs' second causes of action, insofar as they assert claims for fraudulent or negligent misrepresentation, and reinstating those claims against them.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01894

PRESENT: SMITH, J.P., MONTOUR, OGDEN, AND KEANE, JJ.

PB-20 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. NICODEMUS LUTHERAN CHURCH, DEFENDANT-RESPONDENT,
UPSTATE NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN
CHURCH IN AMERICA, DEFENDANT-RESPONDENT-APPELLANT,
AND EVANGELICAL LUTHERAN CHURCH IN AMERICA, DEFENDANT.
(ACTION NO. 1.)

PB-21 DOE, PLAINTIFF-APPELLANT,

V

ST. NICODEMUS LUTHERAN CHURCH, DEFENDANT-RESPONDENT,
UPSTATE NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN
CHURCH IN AMERICA, DEFENDANT-RESPONDENT-APPELLANT,
AND EVANGELICAL LUTHERAN CHURCH IN AMERICA, DEFENDANT.
(ACTION NO. 2.)
(APPEAL NO. 2.)

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (VICTORIA E. PHILLIPS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (RICHARD J. ZIELINSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING PLLC, BUFFALO (KEVIN G. COPE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 16, 2022. The order granted in part and denied in part the motion of defendant Upstate New York Synod of the Evangelical Lutheran Church in America for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendant Upstate New York Synod of the Evangelical Lutheran Church in America seeking summary judgment dismissing plaintiffs' first causes of action insofar as they assert claims for negligent retention, supervision, or direction and those parts seeking summary judgment dismissing plaintiffs' second causes of action insofar as they assert claims for fraudulent or negligent misrepresentation and

reinstating those claims against it and as modified the order is affirmed without costs.

Same memorandum as in *PB-20 Doe v St. Nicodemus Lutheran Church* ([appeal No. 1] — AD3d — [June 14, 2024] [4th Dept 2024]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01859

PRESENT: SMITH, J.P., OGDEN, DELCONTE, AND KEANE, JJ.

MALCOLM CULLY AND WENDY CULLY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANTHONY R. RICOTTONE, M.D., WESTERN
NEW YORK UROLOGY ASSOCIATES, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

CONNORS LLP, BUFFALO (KATHERINE G. HOWARD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DEFRANCISCO & FALGIATANO, LLP, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 14, 2022. The order, insofar as appealed from, denied the motion of defendants Anthony R. Ricottone, M.D., and Western New York Urology Associates, LLC, for summary judgment.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries that Malcolm Cully (plaintiff) allegedly sustained as a result of, inter alia, the failure of Anthony R. Ricottone, M.D. and Western New York Urology Associates, LLC (defendants) to timely diagnose and treat plaintiff's prostate cancer. Defendants appeal from an order that, inter alia, denied their motion for summary judgment dismissing the complaint against them. We affirm.

Even assuming, arguendo, that defendants met their initial burden on the motion with respect to both the alleged deviations from the accepted standard of medical care and proximate causation through the submission of Ricottone's affidavit (*see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]), we conclude that plaintiffs raised triable issues of fact with respect to both elements sufficient to defeat the motion by submitting the affidavit of their medical expert (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436 [4th Dept 2007]; *Ferlito v Dara*, 306 AD2d 874, 874 [4th Dept 2003]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiffs' expert affidavit "squarely oppose[d]" the affidavit of Ricottone, resulting in "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]; *see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01124

PRESENT: SMITH, J.P., MONTOUR, OGDEN, AND DELCONTE, JJ.

ROSITA SCOTT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT,
1438 SOUTH PARK AVE CO., LLC, AND BENENSON
DEVELOPMENT CORPORATION, DEFENDANTS.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (BLAKE ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered May 30, 2023. The order denied that part of the motion of defendants seeking summary judgment dismissing the amended complaint against defendant Tops Markets, LLC.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on a wet floor in a building owned and operated by defendants. Defendants moved for summary judgment dismissing the amended complaint, and Supreme Court, inter alia, denied that part of defendants' motion seeking dismissal of the amended complaint against defendant Tops Markets, LLC (Tops). Tops appeals, and we affirm.

" 'In seeking summary judgment dismissing the [amended] complaint, defendant[s] had the initial burden of establishing that [they] did not create the alleged dangerous condition and did not have actual or constructive notice of it' " (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]). Defendants failed to meet their initial burden of demonstrating that Tops did not create the allegedly dangerous condition (*see Cooper v Carmike Cinemas, Inc.*, 41 AD3d 1279, 1280 [4th Dept 2007]; *Telesco v Bateau*, 273 AD2d 894, 894 [4th Dept 2000]) and that Tops did not have notice of the dangerous condition (*see Gentile v University of Rochester Med. Ctr.*, 292 AD2d 874, 875 [4th Dept 2002]; *Mancini v Quality Mkts.*, 256 AD2d 1177, 1177-1178 [4th Dept 1998]). Because defendants failed to meet their initial burden with respect to Tops, we need not consider the sufficiency of plaintiff's opposition to the motion (*see Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]; *Joyes v Buffalo Waterfront Rest. Corp.*, 262 AD2d 1019, 1019-1020 [4th Dept 1999]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AJJA MCCLAIN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH A. DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 4, 2022. The judgment convicted defendant, upon a guilty plea, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her, upon a plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of her challenge to the severity of the sentence (*see People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-00146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE BORDEN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered December 18, 2019. The judgment convicted defendant upon a guilty plea of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Ahmed*, 188 AD3d 1626, 1626 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00620

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

TANIKA R. BYRD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TARGET, TARGET CORPORATION AND HYLAN ENTERPRISES, INC., DEFENDANTS-RESPONDENTS.

DELL & DEAN, PLLC, GARDEN CITY, MISCHEL & HORN, P.C., NEW YORK CITY (ROSS SALVATORE FRISCIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Monroe County (Craig J. Doran, J.), entered March 16, 2023. The amended order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In this personal injury action arising from an accident in which plaintiff slipped and fell in the women's restroom of defendant Target Corporation, plaintiff appeals from an amended order that granted defendants' motion for summary judgment dismissing the complaint. We reverse.

Generally, "landowners and business proprietors have a duty to maintain their properties in reasonably safe condition" (*Andrews v JCP Groceries, Inc.*, 208 AD3d 1607, 1607-1608 [4th Dept 2022] [internal quotation marks omitted]). Thus, "[i]n seeking summary judgment, a defendant landowner [or business proprietor] has the initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of a dangerous condition on the premises" (*Menear v Kwik Fill*, 174 AD3d 1354, 1357 [4th Dept 2019]; *see McGirr v Shifflet*, 208 AD3d 949, 949 [4th Dept 2022]; *Eagan v Page 1 Props., LLC*, 171 AD3d 1452, 1453 [4th Dept 2019]). Preliminarily, we note that plaintiff contends on appeal that defendants failed to establish the absence of a dangerous condition on the premises and, alternatively, the lack of constructive notice of any allegedly dangerous condition and has abandoned any claims that defendants created or had actual notice of

the allegedly dangerous condition (*see generally Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1395 [4th Dept 2021]).

"[A] defendant moving for summary judgment in a premises liability case can demonstrate its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that no hazardous condition existed at the premises" (*Devoe v Nostrand II Meat Corp.*, 216 AD3d 738, 739 [2d Dept 2023]). "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case . . . , and the existence or nonexistence of a defect or dangerous condition is generally a question of fact for the jury" (*Wiedenbeck v Lawrence*, 170 AD3d 1669, 1669 [4th Dept 2019] [internal quotation marks omitted]; *see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Here, defendants' own submissions raise a triable issue of fact whether a dangerous condition existed on the premises. Defendants submitted the deposition testimony of plaintiff, who testified that she fell "on something slippery." Although plaintiff did not see anything on the floor before she fell, she testified that "the back of [her] sweatshirt, the back of [her] legs," and her "entire back" were damp after she fell and that the floor was "really shiny[and] glossy" and had a "medicinal stench." Plaintiff also testified that she told the store manager that "there was something on the floor that [she] slipped on" and denied having described the slippery condition as "droplets of water" on the floor. We therefore conclude that defendants' submissions raised triable issues of fact whether something other than water, incidental to the use of the bathroom, was on the floor "constitut[ing] an 'unreasonably dangerous condition' " (*O'Neil v Holiday Health & Fitness Ctrs. of N.Y.*, 5 AD3d 1009, 1009 [4th Dept 2004]; *cf. Keller v Keller*, 153 AD3d 1613, 1614 [4th Dept 2017]). We further conclude that, "[a]lthough plaintiff was unable to identify the precise cause of her fall," her testimony regarding the shiny, glossy floor that smelled medicinal rendered "any other potential cause of her fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014] [internal quotation marks omitted]).

Additionally, we agree with plaintiff that defendants failed to meet their initial burden of establishing that they did not have constructive notice of the dangerous condition (*see Steele v Samaritan Found., Inc.*, 176 AD3d 998, 999 [2d Dept 2019]; *Lewis v Carrols LLC*, 158 AD3d 1055, 1056 [4th Dept 2018]). Defendants' own submissions "raise triable issues of fact whether the wet floor was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendants' employees] to discover and remedy it" (*Andrews*, 208 AD3d at 1608 [internal quotation marks omitted]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, defendants were required to "submit evidence concerning when the [room] was last cleaned and inspected prior to the accident" (*Propst v Niagara County Jail*, 207 AD3d 1197, 1199 [4th Dept 2022] [internal quotation marks omitted]; *see Rivera v*

Tops Mkts., LLC, 125 AD3d 1504, 1505-1506 [4th Dept 2015]). Although defendants submitted the deposition testimony of the store manager, in which she testified that the store was cleaned by a crew every morning and that employees were charged with remedying any dangerous condition that they observed throughout their shifts, defendants' evidence "failed to establish that the employees actually performed any [inspection] on the day of the incident, or that anyone actually inspected the area in question before plaintiff's fall" (*Andrews*, 208 AD3d at 1609).

Finally, we agree with plaintiff that defendants failed to meet their initial burden on the motion of establishing that defendant Hylan Enterprises, Inc. (Hylan) was an out-of-possession landlord inasmuch as they failed to submit " 'evidentiary proof in admissible form' " with respect to that issue (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally Young v Crescent Coffee, Inc.*, 222 AD3d 704, 705-706 [2d Dept 2023]). Specifically, defendants submitted the purported lease agreement between Target Corporation and Hylan, which was not authenticated and thus inadmissible (*see Dorset v 285 Madison Owner LLC*, 214 AD3d 402, 403 [1st Dept 2023]; *see also Bou v Llamoza*, 173 AD3d 575, 575-576 [1st Dept 2019]; *Bush v Kovacevic*, 140 AD3d 1651, 1654 [4th Dept 2016]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00307

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

KATHRYN J. BANE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LEASE-N-SAVE CORP., DEFENDANT,
DENT ENTERPRISES, INC., DOING BUSINESS AS
DENTCO AND RJS LAWN SERVICE, INC.,
DEFENDANTS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

NICHOLAS PEROT SMITH BERNHARDT & ZOSH, AKRON, POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), dated December 22, 2022. The order denied the motion of defendants Dent Enterprises, Inc., doing business as DENTCO, and RJS Lawn Service, Inc., seeking to dismiss plaintiff's amended complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained after she slipped and fell in an allegedly icy parking lot of an M&T Bank, which was located on property owned by defendant Lease-N-Save Corp. The tenant, nonparty M&T Trust Company, contracted with defendant Dent Enterprises, Inc., doing business as DENTCO (Dent), for property maintenance services including snow and ice removal, and Dent subcontracted the snow and ice removal work to defendant RJS Lawn Service, Inc. (RJS). Dent and RJS (collectively, defendants) then moved to dismiss the amended complaint against them pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (5). We conclude that Supreme Court properly denied the motion.

"When a court rules on a CPLR 3211 motion to dismiss, it 'must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the] plaintiff[ ] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Under CPLR 3211 (a) (1), a dismissal is warranted

only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

Defendants contend that the court erred in denying their motion under CPLR 3211 (a) (1) because the documentary evidence established that they did not owe plaintiff a duty of care. We reject that contention. Although defendants are correct that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), there are three exceptions to that general rule set forth in *Espinal* (*id.* at 140). Here, plaintiff pleaded facts in the amended complaint sufficient to allege the application of the first *Espinal* exception (*see Cavosie v Hussain*, 215 AD3d 1080, 1083 [3d Dept 2023]; *see also Vassenelli v City of Syracuse*, 138 AD3d 1471, 1474 [4th Dept 2016]), and the documentary evidence did not "utterly refute[ ] plaintiff's factual allegations, [thereby failing to] conclusively establish[ ] a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Contrary to the contention of defendants, they were also not entitled to dismissal of the amended complaint pursuant to CPLR 3211 (a) (5). "On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). Once a defendant meets that initial burden, the burden shifts "to plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*id.* at 1562 [internal quotation marks omitted]). Although defendants met their initial burden of establishing that the limitation period had expired, plaintiff established that the statute of limitations was tolled for a portion of that time.

On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" (9 NYCRR 8.202.8). Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 (*see* Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28], 202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]). "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020], *rearg denied* 36 NY3d 962 [2021]). "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (*id.*).

Here, 469 days of the 1,096-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020, the remaining 627 days of the limitation period began to run again, expiring on July 22, 2022 (*see Harden v Weinraub*, 221 AD3d 1460, 1462 [4th Dept 2023]). Thus, the action against defendants was timely commenced in March 2022.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00682

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE J. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered February 15, 2023. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree and grand larceny in the fourth 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 controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [7]) and grand larceny in the fourth degree (§ 155.30 [2]). We affirm.

Defendant contends that he was denied effective assistance of counsel. Insofar as defendant asserts that the alleged ineffectiveness infected his plea, defendant's contention survives both the plea and the waiver of the right to appeal (*see People v Wood*, 217 AD3d 1407, 1409-1410 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]), the validity of which defendant does not challenge.

Defendant claims that defense counsel was ineffective in failing to inform him about his right to testify before the grand jury. Because the record on appeal does not reflect whether defense counsel informed defendant of that right, defendant's contention "is based on matters outside the record and thus must be raised by way of a motion pursuant to CPL 440.10" (*People v Gaston*, 100 AD3d 1463, 1466 [4th Dept 2012]; *cf. People v Mobley*, 309 AD2d 605, 605 [1st Dept 2003], *lv denied* 1 NY3d 599 [2004]).

Defendant further contends that, because three different assistant public defenders represented him at the three proceedings up to and including the plea, he was denied continuity of representation and, consequently, meaningful representation. We reject that contention. Defendant received "a favorable plea and has not demonstrated 'the absence of strategic or other legitimate explanations' for counsel[s'] alleged shortcomings" (*People v Shaw*, 222 AD3d 1401, 1403 [4th Dept 2023], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Griffin*, 204 AD3d 1385, 1386 [4th Dept 2022]). Moreover, "[t]he mere fact that different attorneys assisted in . . . defendant's case at different times does not render their assistance ineffective" (*People v Mejias*, 293 AD2d 819, 820 [3d Dept 2002], *lv denied* 98 NY2d 699 [2002]; *see People v Pompey*, 228 AD2d 720, 721 [3d Dept 1996], *lv denied* 88 NY2d 992 [1996]; *see generally People v Camacho*, 16 NY2d 1064, 1065 [1965]). Here, "[t]he record as a whole reflects that [each] defense counsel provided reasonably competent assistance and . . . was diligent and conscientious" (*People v Dietz*, 79 AD2d 476, 480 [4th Dept 1981]). 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]).

Finally, defendant contends that his enhanced sentence is unduly harsh and severe. As a preliminary matter, a challenge to the severity of an enhanced sentence imposed due to a defendant's violation of the plea agreement is not encompassed by a waiver of the right to appeal where, as here, County Court " 'failed to advise defendant of the potential period of incarceration that could be imposed' for an enhanced sentence" (*People v Huggins*, 45 AD3d 1380, 1381 [4th Dept 2007], *lv denied* 9 NY3d 1006 [2007]; *see generally People v Seaberg*, 74 NY2d 1, 10 [1989]). Nevertheless, we conclude that the enhanced sentence imposed is not unduly harsh or severe.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-01569

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GIORGIO WILLIAMS, DEFENDANT-APPELLANT.

NICHOLAS T. TEXIDO, WEST SENECA, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 18, 2020. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (former § 221.05).

Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although "an acquittal would not have been unreasonable" (*id.* at 348), 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]).

Defendant's contention that he was denied a fair trial by the prosecutor's mischaracterization of certain DNA evidence during opening statements and summation is unpreserved for our review inasmuch as defendant did not object to the alleged instances of misconduct (*see People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). In any event, although the prosecutor may have overstated the import of the DNA evidence, any improper remarks were not so pervasive and egregious as to deny defendant a fair trial (*see People v Lively*, 163 AD3d 1466, 1468-1469 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *see also People v King*, 224 AD3d 1313, 1314 [4th Dept 2024]). Contrary to

defendant's further contention, defense counsel's failure to object to the prosecutor's remarks did not deprive defendant of effective assistance of counsel (*see People v Palmer*, 204 AD3d 1512, 1514-1515 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]).

Finally, we reject defendant's contention that his marihuana conviction is automatically vacated as a matter of law. Inasmuch as defendant was not serving a sentence of incarceration for the marihuana conviction at the time the Marihuana Regulation and Taxation Act (MRTA) became effective (*see* CPL 440.46-a [1]), the "proper mechanism for vacating his marihuana conviction is through the process detailed in CPL 440.46-a, which requires defendant to first 'petition the court of conviction' for any such relief (CPL 440.46-a [2] [a]) and is not automatic" (*People v Bennett*, 210 AD3d 1421, 1423 [4th Dept 2022]; *see People v Gamlen*, 222 AD3d 1440, 1441 [4th Dept 2023], *lv denied* 41 NY3d 965 [2024]). Defendant has not petitioned the court of conviction for vacatur, and his contention is not properly before us on direct appeal from the judgment of conviction (*see People v Hall*, 202 AD3d 1485, 1486 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-01064

PRESENT: SMITH, J.P., CURRAN, OGDEN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS P. MITCHELL, JR. DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered May 24, 2023. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, rape in the third degree, assault in the second degree, assault in the third degree (two counts), endangering the welfare of a child (two counts), harassment in the second degree (two counts) and unlawful imprisonment in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of unlawful imprisonment in the second degree (Penal Law § 135.05), rape in the third degree (§ 130.25 [3]), sexual abuse in the first degree (§ 130.65 [1]), assault in the second degree (§ 120.05 [6]), two counts of assault in the third degree (§ 120.00 [1]), two counts of endangering the welfare of a child (§ 260.10 [1]), and two counts of harassment in the second degree (§ 240.26 [1]). Defendant contends that, contrary to County Court's determination in denying his motion to dismiss the indictment pursuant to CPL 30.30, the People failed to show that they had exercised due diligence and made reasonable efforts to identify mandatory discovery prior to filing their initial certificate of compliance (COC), and therefore the initial COC was not proper when filed and the People's declaration of readiness at that time was illusory. We agree.

After defendant allegedly committed a series of physical and sexual acts of domestic violence against the complainant over a period of years during the course of their relationship, including in the presence of their young child, the complainant reported defendant's conduct to members of the Ontario County Sheriff's Office (OCSO) in December 2020. Following an investigation by the OCSO and other

preindictment proceedings, a grand jury returned an indictment in early August 2021 charging defendant with various crimes. Defendant was arraigned on the indictment in mid-September 2021, during which proceeding defense counsel requested an adjournment to accommodate the exchange of discovery.

The People filed their initial COC in mid-October 2021, which indicated that there were no records of judgments of conviction for defendant or any potential prosecution witnesses, including the complainant, and that all existing *Brady* material had been provided to the defense. The initial COC contained a declaration of trial readiness. Along with the COC, the People provided discovery compliance reports indicating that they had provided the defense with various discovery materials, including incident and arrest reports, grand jury testimony, witness interviews, and photographs of the complainant. In his subsequent omnibus motion, defendant requested, among other things, that the People comply with their discovery obligations pursuant to CPL article 245 and *Brady*/*Giglio*. At an appearance in early December 2021, defense counsel expressed his impression that the People had complied with their discovery obligations, but stated that he would bring any discovery deficiencies to the court's attention if he recognized any such problem in the future. The matter thereafter proceeded with a suppression hearing in early February 2022 and an appearance in late March 2022 during which the court, based on its congested calendar, scheduled a jury trial for September 2022.

Later, in late August 2022, defense counsel moved by notice of motion for a subpoena duces tecum and supporting affirmation for the production and inspection of the complainant's criminal history records based on the defense's good faith belief that the complainant had a criminal history. In particular, defense counsel sought criminal history records within the possession and control of the New York State Division of Criminal Justice Services (DCJS), which would include a repository inquiry or criminal history report. In the afternoon that same day, the Ontario County District Attorney (DA) sent an email to defense counsel explaining that the People had initially relied upon a "prior report" provided by the OCSO that had incorrectly indicated that the complainant had no criminal record, but that the complainant had informed the DA the day before that she did, in fact, have convictions from 2015 for certain offenses. The DA apologized for not knowing that information and promised to promptly provide defense counsel with the records. The DA explained in a follow-up email sent to defense counsel a couple days later that the complainant's certificates of conviction had been uploaded for electronic sharing. The certificates of conviction indicated that the complainant, in satisfaction of two superior court informations, had pleaded guilty in November 2015 before courts in Ontario County to burglary in the third degree, criminal trespass in the second degree, harassment in the second degree, and misdemeanor driving while intoxicated.

The DA contended in an answering affirmation that a subpoena duces tecum was now unnecessary. In particular, the DA explained that

the People had initially been provided with a "Comprehensive Report" from the OCSO indicating that the complainant did not have any known criminal history. The DA further explained, however, that the complainant had recently disclosed during trial preparation that she did, in fact, have a criminal history. The People immediately thereafter obtained the complainant's criminal history repository and, after making efforts to obtain the complainant's certificates of conviction through the Ontario County Clerk's Office website, the People provided defense counsel with electronic copies of those certificates of conviction. The People also filed a supplemental COC in late August 2022 indicating, among other things, that the complainant's certificates of conviction had been disclosed.

Defendant thereafter moved to dismiss the indictment pursuant to CPL 30.30 on the ground that the People initially filed an improper COC and were therefore not actually ready for trial within the requisite time period. Defense counsel contended in a supporting affirmation that the People had filed an improper COC because, in violation of their statutory and constitutional discovery obligations to turn over certificates of conviction and impeaching material for prosecution witnesses, the People had represented in their initial COC that the complainant had no criminal history. Defense counsel contended that the People had failed to exercise due diligence and make reasonable inquiries to ascertain the existence of material subject to discovery because the DA's office had, itself, prosecuted the complainant on the criminal offenses for which she was convicted, and thus the documents related thereto would have been in the immediate possession of the prosecution and the involved law enforcement agencies. Defense counsel asserted that the People had "utterly failed to investigate their witness until the defense sought to investigate her prior convictions" and, "[i]f the defense had not filed the application for the [s]ubpoena [d]uces [t]ecum[,] the prosecution would not have bothered to investigate or to comply with their mandated statutory and [c]onstitutional obligations."

The People opposed the motion on the ground that, for the reasons previously provided by the DA, they had filed the initial COC in good faith and had acted reasonably under the circumstances by initially relying on the report provided by the OCSO and then promptly disclosing the additional discovery material after becoming aware of its existence. The People also pointed out that the discovery statute had been amended in May 2022 to provide that, to the extent a party is aware of a potential deficiency in a COC, that party is required to notify or alert the other party as soon as practicable. The People asserted that the defense had failed to make a timely challenge to the initial COC because, upon information and belief, defendant would have had actual knowledge of the complainant's convictions because they were involved in an intimate relationship and had a child during the time period that the complainant was on probation.

Following oral argument, the court rejected defendant's contention that the People's initial declaration of trial readiness was illusory and, over defense counsel's objection, determined that defendant, despite knowing that the complainant was on felony

probation while they were living together, had not timely challenged the initial COC on the ground the People had failed to disclose the complainant's criminal history. In a subsequent written decision, the court determined that, under the circumstances presented, the People had properly filed the initial and supplemental COCs in good faith after exercising due diligence and making reasonable efforts. The court reasoned that the People had articulated the efforts that were made to ascertain the existence of, and promptly disclose, all discoverable material. The court determined that, although the People had belatedly disclosed impeachment material for a prosecution witness, the DA had taken reasonable steps and made reasonable inquiries to discharge his initial discovery obligations under the statute and, upon learning that the criminal history information provided by the arresting law enforcement agency was not accurate, the People promptly requested, secured, and disclosed the complainant's certificates of conviction and related records. The court thus determined that the COCs were not improperly filed and denied defendant's motion to dismiss the indictment pursuant to CPL 30.30. The court nonetheless concluded that, as a result of the belated disclosure, defendant was entitled under CPL 245.80 to the remedy of additional time to prepare and respond to the new material, and the court thus postponed the trial until December 2022.

With respect to the legal principles applicable to our review of the court's determination, we note that "[i]n felony cases such as this one, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (CPL 30.30 [1] [a]). Whether the People have satisfied [that] obligation is generally determined by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]).

"Any statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL] 245.20" (CPL 30.30 [5]) and, "[n]otwithstanding the provisions of any other law" and "absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of [CPL] 30.30 . . . until it has filed a proper certificate pursuant to [CPL 245.50 (1)]" (CPL 245.50 [3]; *see People v Bay*, 41 NY3d 200, 210 [2023]). In sum, "CPL 245.50 (3) and CPL 30.30 (5), taken together, . . . require that the People file a proper COC reflecting that they have complied with their disclosure obligations before they may be deemed ready for trial" (*Bay*, 41 NY3d at 213-214). The People are thus required, in the COC, to "state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" and to "identify the items provided" (CPL 245.50 [1]). "CPL 245.60 imposes a continuing

duty to disclose, and when the People provide discovery after a COC has been filed, they must file a supplemental COC" (*Bay*, 41 NY3d at 209; *see* CPL 245.50 [1]).

Consequently, "[u]nder the terms of the statute, the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211, quoting CPL 245.50 [1]; *see also* CPL 245.20 [2]; 245.50 [3]). "Although the statute nowhere defines 'due diligence,' it is a familiar and flexible standard that requires the People 'to make reasonable efforts' to comply with statutory directives" (*Bay*, 41 NY3d at 211). "Reasonableness, then, is the touchstone" (*id.* at 211-212). "An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*id.* at 212). Although "[t]here is no rule of 'strict liability' " and thus "the statute does not require or anticipate a 'perfect prosecutor[,]' . . . the plain terms of the statute make clear that while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.*). In assessing due diligence, "courts should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*). "Although belated disclosure will not necessarily establish a lack of due diligence or render an initial COC improper, post-filing disclosure and a supplemental COC cannot compensate for a failure to exercise diligence before the initial COC is filed" (*id.*).

Where, as here, "a defendant bring[s] a CPL 30.30 motion to dismiss on the ground that the People failed to exercise due diligence and therefore improperly filed a COC, the People bear the burden of establishing that they did, in fact, exercise due diligence and ma[k]e reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*id.* at 213). "If the prosecution fails to make such a showing, the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed" (*id.*).

Here, upon our review of the circumstances presented, including the aforementioned illustrative list of relevant factors, we conclude that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the initial COC (*see id.* at 215-216). The record belies the People's representation on appeal that they "promptly requested [that] the [OCSO] compile a 'Comprehensive Report' on the [complainant]" as part of their due diligence efforts to fulfill their disclosure obligations

that arose following defendant's indictment. The report was dated in January 2021, meaning that the report was obtained by the OCSO in the course of its investigation shortly after the complainant first reported defendant's conduct in December 2020 and that the report predates the August 2021 indictment by over six months. Thus, contrary to the court's determination and the People's assertion, the record establishes that the People did not undertake any reasonable affirmative steps to obtain and disclose the complainant's criminal history prior to filing the initial COC; instead, as the DA acknowledged in his first email to defense counsel, the People had actually just relied on the "prior report" from the OCSO indicating that no criminal records were found for the complainant.

Reliance on the report provided by the OCSO may have been in good faith, but "while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.* at 212). The DA's office, as a qualified agency entitled to access such information maintained pursuant to statute by DCJS, did not mention any pre-COC attempts to obtain the complainant's criminal history record from DCJS (*see* Executive Law §§ 835 [9]; 837 [6]; 845-b), nor did the DA suggest that the People, prior to filing the initial COC, ever checked their own files to determine whether the complainant—their prime witness on whose testimony the success of the prosecution would depend—had a criminal history. Instead, the People relied entirely on a non-DCJS report provided by the OCSO that appeared to have been prepared by an unidentified third-party responsible for running background checks, and the People did not independently check the complainant's repository to determine whether the complainant had a criminal history until prompted by defense counsel's request for a judicial subpoena, at which point the People easily obtained and disclosed the complainant's certificates of conviction (*cf. People v Caruso*, 219 AD3d 1682, 1685 [4th Dept 2023]). Under these circumstances, we conclude that the People's explanation for the discovery lapse was insufficient (*see generally Bay*, 41 NY3d at 212).

Despite the length of time over which the alleged domestic abuse occurred, the case is not particularly complex and, as in *Bay*, the People's overall disclosure of various other discovery materials is, under the circumstances of this case, insufficient to establish that they exercised due diligence and made reasonable inquiries to identify mandatory discovery items (*see id.* at 205, 212, 215-216; *cf. People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]). The complainant's criminal history, including judgments of conviction (*see* CPL 245.20 [1] [p]), constituted a significant mandatory item of discovery that was "critical to the underlying case," particularly considering that the success of the prosecution would depend upon the credibility of her testimony, and yet the People failed to undertake the requisite efforts to ascertain the existence of that discovery material (*Cooperman*, 225 AD3d at 1220; *see generally Bay*, 41 NY3d at 215). The record establishes instead that "[t]he belated disclosure here consisted of routinely produced disclosure materials," which were in the possession of the People and would have been readily apparent to a prosecutor exercising due diligence (*Bay*, 41 NY3d at 215; *cf. Cooperman*, 225 AD3d at 1220; *People v Watkins*, 224 AD3d 1342, 1344

[4th Dept 2024], *lv denied* 41 NY3d 986 [2024]). Moreover, while the People admirably responded promptly to the missing disclosure by admitting their detrimental reliance on the report, obtaining and disclosing the complainant's criminal history, and filing a supplemental COC, "post-filing disclosure and a supplemental COC cannot compensate for a failure to exercise diligence before the initial COC is filed" (*Bay*, 41 NY3d at 212). Although the People are undoubtably correct that "the statute does not require or anticipate a 'perfect prosecutor,' " neither does the statute tolerate—as *Bay* itself demonstrates—a lack of due diligence (*id.*). For the aforementioned reasons, we conclude under the circumstances presented here that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the initial COC (*see id.* at 215-216). Consequently, the court "should have determined that the [initial] COC was improper and accordingly stricken the statement of readiness as illusory" (*id.* at 216).

Inasmuch as the court determined that the initial COC was proper and thus that the People's statement of readiness at that time was not illusory, the court did not rule on whether the time chargeable to the People exceeded the applicable CPL 30.30 period. Where, as here, " 'the record does not reflect that the court ruled on a part of a motion, the failure to rule on that part cannot be deemed a denial thereof' " (*People v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine whether the People were ready within the requisite time period (*see* CPL 30.30 [1] [a]), including the applicability and effect, if any, of defendant's obligation under CPL 245.50 (4) (b)—which became effective during the pendency of the prosecution—to notify or alert the People to the extent he was aware of a potential defect or deficiency related to the COC, which awareness was a disputed issue before the court (*see* L 2022, ch 56, § 1, part UU, § 1, subpart D, § 1; *see generally People v Rojas-Aponte*, 224 AD3d 1264, 1266 [4th Dept 2024]; *Session*, 206 AD3d at 1682).

All concur except CURRAN and KEANE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. In applying *People v Bay* (41 NY3d 200 [2023]), courts are required to make a "holistic assessment of the People's efforts to comply with the automatic discovery provisions, rather than a strict item-by-item test that would require us to conclude that a [certificate of compliance (COC)] is improper if the People miss even one item of discovery" (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]). Here, as we shall explain in greater detail below, the People timely "produced a trove of discovery" constituting "extensive, pertinent documentation to the defense" (*People v Williams*, 224 AD3d 998, 1003, 1006 [3d Dept 2024]). Consequently, we reject the majority's conclusion that, on the record before us, the initial COC was improper based solely on the People's failure to timely produce, as impeachment material under CPL 245.20 (1) (k) (iv), two certificates of conviction belonging to the complainant in this case.

Rather, we conclude that the People exercised due diligence to obtain and furnish to defendant materials that were subject to automatic discovery under CPL article 245, inasmuch as, inter alia, the People's failure to disclose those certificates of conviction was "inadvertent and without bad faith," and "[t]he People took sufficient and immediate steps to provide the [impeachment materials] to . . . defendant once they were made aware of [those materials'] existence" (*People v Deas*, 226 AD3d 823, 826 [2d Dept 2024]). Thus, County Court did not err in denying defendant's speedy trial motion.

At the outset, we believe it helpful to our analysis of the criminal discovery issues in this case to lay out, in some detail, the underlying facts, as established by the evidence admitted at trial. Those facts provide a stark illustration of the "scourge of domestic violence" (*People v Ortega*, 15 NY3d 610, 619 [2010]), which "has no place in our society" (*Howell v City of New York*, 39 NY3d 1006, 1010 [2022]). The charges in this case stem from allegations that on multiple occasions over a three-year period, defendant sexually and physically assaulted the complainant, his then-girlfriend. Sometimes those assaults occurred in the presence of their young child.

Defendant and the complainant had known each other for several years at the time they started dating. In August 2017, they went to a bar and drank to the point of intoxication. At some point, the complainant saw defendant trying to aggressively kiss someone else, causing the couple to start arguing and resulting in them being asked to leave the bar. The complainant did not want to go home with defendant, and tried calling a friend for a ride. The friend did not answer the phone, causing the complainant to leave a voicemail.

As the complainant walked away, defendant punched her in the face, forced her into his truck, and drove to a nearby parking lot. There, defendant punched the complainant in the face again and, as the complainant tried to run away, defendant knocked her down, dragged her back to his truck, continued to hit her, and raped her. Afterward, defendant drove the complainant to his home and, while he and the complainant were still in the parked vehicle, he pulled her pants down, cut off her underwear with a knife, and unsuccessfully attempted to rape her. The complainant begged defendant to stop, jumped out of his vehicle, and drove away in her own truck. Defendant pursued the complainant and, at one point, pulled his truck alongside hers and told her that he would continue following her unless she came back to his home. The complainant was intoxicated and knew she should not be driving, so she went to defendant's home. In trying to get the complainant to come home with him, defendant also threatened to report her to the probation department because she violated a condition that prohibited her from drinking alcohol. Back at his home, defendant raped the complainant again, and grabbed a gun. At some point, defendant stopped penetrating the complainant himself and instead used his former girlfriend's vibrator to penetrate her. As a result of the assault and rape, the complainant was in pain, had scrapes all over her body, and had a black eye. The complainant took photos of her injuries. Later on, defendant took the complainant's phone, discovered the photos, and deleted the copies that he found. In text

messages between defendant and the complainant that were admitted in evidence at trial, defendant admitted that he deleted the photos that he found. Despite defendant's efforts, the complainant was nonetheless able to retrieve a photo of her eye injuries, which had been saved in a different app, and that photo was ultimately admitted in evidence.

The complainant's account of the August 2017 incident was corroborated by the friend she had tried to contact for a ride. That person testified that, in the voicemail left by the complainant, there was "a lot of banging around," and that she heard the complainant "pleading for her life." The voicemail was admitted in evidence at trial. The friend also testified that, when she saw the complainant the next day, her face was "bruised," her eyes were "swollen," and her cheekbone was "shattered." In addition, the friend identified the photo of the complainant depicting her eye injuries. The complainant did not go to the hospital after the August 2017 incident because she was scared and embarrassed, and she declined to report defendant to the police. After the August 2017 incident, defendant promised he would never hit the complainant again, and the complainant continued her relationship with him because, immediately after that incident, he treated her well. A few months later, the complainant discovered she was pregnant. She rebuffed defendant's requests to terminate the pregnancy.

In July 2019, another incident of domestic violence occurred, this time in the presence of the couple's child. Following an argument, defendant threw a baby bottle at the complainant. The complainant attempted to leave with the child, but defendant grabbed her by the hair and yanked her with the child still in her arms. When the complainant retreated to her vehicle, defendant followed, pushed her against the driver's seat, and started hitting her. Eventually, the complainant agreed to go inside, at which point she noticed that the child had a big mark underneath his eye. The complainant did not call the police because she was afraid of defendant. She took photos of the child's injuries, which were entered in evidence at trial.

Another incident of domestic violence occurred about a month later—albeit one that was ultimately not charged in the indictment. On that occasion, the complainant was leaving the house with the child when she realized she had left something inside. She tried to reenter the house, but defendant would not let her in. He pushed her, causing her to fall and injure her knee. The complainant went to the hospital, but lied about what happened. She was scared to tell the truth because defendant was with her at all times. The complainant took photos of her injuries, which were entered in evidence without objection, even though, as noted above, the underlying incident was not charged in the indictment.

One night in September 2019, the complainant was lying in bed at defendant's house when the child started crying. Defendant became annoyed and, during the ensuing argument, punched the complainant in the head, even though she was holding the child. The complainant fell to the ground and noticed that blood was running down her face. She

took photos of her face, which were entered in evidence. The complainant finally ended her relationship with defendant following yet another altercation that occurred in March 2020. During an argument, the complainant attempted to leave the house with the child. Defendant came up behind the complainant, kneed her in the thigh, and spat in her face. She took photos of her bruises, as well as the spit on her face, which were entered in evidence.

Months later, in December 2020, the complainant followed her attorney's advice and reported defendant's repeated assaults to the Ontario County Sheriff's Office (OCSO) in response to defendant's continued threats to seek court-ordered visitation with the child. The complainant was initially reluctant to press charges. In April 2021, during the ensuing investigation, defendant was taken into custody and interviewed by the OCSO, and the interview was videotaped and entered in evidence at trial. In August 2021, defendant was indicted on 14 counts for acts occurring between August 2017 and March 2020 in connection with various incidents of domestic violence, including some of those recounted above. Ultimately, the jury convicted defendant of nine of those counts, and of a lesser included offense under another count in the indictment.

On appeal, defendant's principal contention is that he is entitled to dismissal of the indictment on statutory speedy trial grounds because the People's initial COC was improper. The majority agrees with defendant that the People's initial COC was improper because they failed to timely produce, as impeachment material subject to automatic disclosure, two certificates of conviction belonging to the complainant. The certificates of conviction reveal that, in November 2015, the complainant pleaded guilty in Ontario County to counts of burglary in the third degree, criminal trespass in the second degree, harassment in the second degree, and misdemeanor driving while intoxicated (DWI) based on allegations that she entered a prior boyfriend's home through a window, found him with another woman, and drove away from the scene while intoxicated. Once the People realized their initial failure to disclose that evidence, they immediately produced the certificates of conviction for defendant. At trial, defendant used those materials to extensively cross-examine the complainant on her prior convictions, including with respect to their underlying facts.

In concluding that the People's initial COC was improper, the majority characterizes the complainant's prior convictions as "a significant mandatory item of discovery," thus primarily employing a scale of significance in evaluating the extent to which the People " 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211, quoting CPL 245.50 [1]). The majority's conclusion that the initial COC was improper, based on the People's purported lack of due diligence, is predicated solely on their failure to timely produce the two certificates of conviction and, in so concluding, the majority assumes that "the success of the prosecution would depend upon the credibility of [the complainant's] testimony." Although such an assumption is generally true in domestic

violence matters, it is insufficient to support a conclusion that the initial COC here was improper under the test set forth in *Bay*, inasmuch as the majority's approach in applying that standard fails to address many of the factors relevant to such analysis—most importantly, the significance of all the other discovery materials that the People did timely produce when they filed their initial COC. As indicated above, much of that material was ultimately received in evidence at trial, thus demonstrating that the People's discovery compliance fulfilled its purpose by enabling defendant to be prepared for trial. In our view, the majority's failure to consider the People's singular untimely production of the two certificates of conviction in the context of the entire discovery process undermines its conclusion that the People did not engage in due diligence at the time they filed the initial COC. Indeed, in our view, the majority's approach improperly applies a strict item-by-item test, rather than taking a global view of whether the People exercised due diligence in the context of the *entire* discovery process. That approach contravenes the overall circumstances-based analysis adopted in *Bay* that requires consideration of, inter alia, the efforts of the People to comply with the statutory discovery requirements and the volume of discovery ultimately produced.

Further, the logical endpoint of the majority's conclusion is that, when a trial involves a single complainant—as is often true in domestic violence cases like this one—the provision of impeachment materials relating to the complainant must be the paramount concern in conducting the *Bay* analysis. In our view, that approach does not reflect a faithful application of the non-exclusive factors that are the focus of *Bay*. Indeed, the majority effectively places an extra burden on the People in domestic violence cases such as this one. Here, in application, the majority's narrow focus on the certificates of conviction—to the exclusion of essentially all else—hews much more closely to the "perfect prosecutor" approach expressly eschewed by the Court of Appeals in *Bay* (41 NY3d at 212 [internal quotation marks omitted]; *see Cooperman*, 225 AD3d at 1218).

We further question the majority's sole reliance on a sliding scale of significance in weighing whether the People exercised due diligence in disclosing each item of automatic discovery subject to CPL 245.50 (1) because applying such an approach to each separate item is a wholly subjective discretionary analysis that is impossible to apply consistently. To illustrate the difficulty inherent in using a sliding scale of significance, consider that if all we had here was the complainant's DWI conviction, the majority might find that sole conviction to be of less significance as impeachment material under CPL 245.20 (1) (k) (iv) and, therefore, not warrant a finding that the entire COC was improper for the failure to timely produce it (*see Cooperman*, 225 AD3d at 1220). In our view, the "scale-of-significance" test seemingly adopted by the majority here, and its emphasis on analyzing each single item of discovery, rather than endorsing a holistic approach to determining due diligence, seems destined to exhaust the courts' capacity to resolve discovery disputes, which cannot have been the legislature's intention. In

short, in light of the majority's analysis based on weighing the significance of a particular item of discovery that was belatedly produced, we have difficulty perceiving the line being drawn for determining when the People's failure to turn over specific items of discovery will render the COC improper.

In conducting our own *Bay* analysis, we conclude, contrary to the view of the majority, that—when the discovery process is viewed as a whole—the People engaged in due diligence and made reasonable efforts to timely comply with the requirements of the automatic discovery statute when they filed the initial COC. Initially, we agree with defendant and the majority that the complainant's certificates of conviction constituted impeachment material that in a perfect world should have been automatically disclosed by the People before they filed the initial COC (*see* CPL 245.20 [1] [k] [iv]). In evaluating whether the People's failure to do so rendered the initial COC improper, we must consider, inter alia, "how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*Bay*, 41 NY3d at 212). As discussed above, in performing that analysis, we should not apply "a strict item-by-item test that would require us to conclude that a COC is improper if the People miss *even one item of discovery*" (*Cooperman*, 225 AD3d at 1220 [emphasis added]). In other words, we also must keep in mind the other factors set forth in *Bay*, and that "[d]ue diligence 'is a . . . flexible standard' " (*id.* at 1218). "An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*Bay*, 41 NY3d at 212).

Here, the People responded promptly and thoroughly once they learned that the complainant had a criminal history that they failed to disclose in the initial COC. Specifically, at that point, which was approximately six months before trial, the People disclosed to defendant the complainant's certificates of conviction and the factual bases underlying her convictions. Moreover, irrespective of the People's disclosure, defendant was certainly aware of the factual underpinnings of the complainant's convictions based on their personal relationship—he knew, for instance, that the complainant was on probation at all relevant times. Under those circumstances and, inasmuch as the certificates of conviction could not be used as evidence in chief given their status as impeachment material, defendant had more than ample time to prepare for cross-examining the complainant despite the People's original failure to disclose.

We also note that, at the time they timely filed their initial COC, the People produced a large volume of material in this fairly complex domestic violence case that involved delayed reporting by the complainant and encompassed incidents over multiple years. By the time the People filed the initial COC, they had produced, in material part: defendant's videotaped OCSO interview; the grand jury testimony of the complainant and the lead investigator; the names of all witnesses who may be called to testify; numerous photographs,

including all of the ones introduced at trial and described above; results of forensic reports, including with respect to the voicemail the complainant left on the friend's phone; the supporting affidavit for a search warrant application concerning defendant's cell phone that was ultimately denied; and all of the other materials that the People had uploaded to the electronic discovery portal, which were listed in the 17-page attachment to the initial COC. Notably, there was no issue at trial stemming from the People's alleged failure to initially produce, at the time of the COC, any item of discovery. Additionally, given the sheer volume of discovery that the People did, in fact, disclose at the time of the initial COC, the complexity of the case, and the significance of the material that was actually timely and properly disclosed, it is unclear how obvious any missing material would likely have been to the People at the time of the initial COC (*see Cooperman*, 225 AD3d at 1219-1220).

To be sure, viewed in hindsight, it would obviously have been better—albeit not statutorily required—for the People to run a criminal history search regarding the complainant before filing the initial COC, rather than wholly relying on the "Comprehensive Report" provided to them by the OCSO and provided to defendant as a part of automatic discovery. Notably, however, there is no suggestion in the record here that the People were in possession of a report from the New York State Criminal Inquiry System pertaining to the complainant that they withheld, or that they otherwise had any actual knowledge of the complainant's criminal convictions when the initial COC was filed that they intentionally declined to disclose. However, even assuming, arguendo, that the People's failure to run a criminal history demonstrated a lack of due diligence with respect to the specific impeachment material at issue here, we nevertheless conclude that given the extensive and pertinent material produced by the People as part of their automatic discovery obligations at the time they filed their initial COC, all of which was gathered during a months-long OCSO investigation, it was reasonable under the circumstances for the People to rely on a comprehensive report regarding the complainant's criminal history (*see People v Watkins*, 224 AD3d 1342, 1344 [4th Dept 2024], *lv denied* 41 NY3d 986 [2024]). Thus, we simply cannot agree with the majority that this singular error, despite the People's overall compliance with CPL 245.50 (1), renders the COC improper due to a lack of due diligence.

Finally, we note that, assuming, arguendo, that remittal is warranted on the record here, we agree with the majority that, on remittal, the court should consider "the applicability and effect, if any, of defendant's obligation under CPL 245.50 (4) (b)." Defendant was expressly required under that provision to "notify or alert" the People "as soon as practicable" about "potential defect[s] or deficienc[ies] related to a [COC]" to the extent that he was aware of the same (CPL 245.50 [4] [b]). Inasmuch as defendant's motion to dismiss the indictment pursuant to CPL 30.30 on speedy trial grounds was made *after* the effective date of CPL 245.50 (4) (b) (*see* L 2022, ch 56, § 1, part UU, § 1, subpart D, § 1), the court should place especial emphasis on determining in the first instance whether the speedy trial motion was made "as soon as practicable" (CPL 245.50 [4]

[b]), particularly in view of defense counsel's previous assurance that he would bring any discovery deficiencies to the court's attention if he recognized any such problem in the future, and—most crucially—defendant's direct personal knowledge of the complainant's criminal history, as evidenced by his threat to report her to the probation department for drinking during one of the incidents at the center of this case. Should the court determine that defendant did not meet his obligation under CPL 245.50 (4) (b)—as appears to be the case on this record—we see no reason why, given the extent of defendant's delay in making his motion, the court could not simply decline to charge the People with most, if not all, of the time that followed the filing of the purportedly improper COC. In amending CPL 245.50 to require parties entitled to disclosure to notify their opponents of any known defects or deficiencies in a COC as soon as practicable, the legislature was clearly aiming to prevent parties—such as defendant here—from sitting on reasonably known discovery violations until the expiration of the speedy trial clock.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01465

PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, NOWAK, AND KEANE, JJ.

JAMES R. SWIEZY AND GREENLEAF DEVELOPMENT & CONSTRUCTION, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

INVESTIGATIVE POST, INC., AND DANIEL TELVOCK, DEFENDANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (DAVID J. MCNAMARA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

FINNERTY OSTERREICHER & ABDULLA, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered August 12, 2022. The order granted the motion of defendants seeking, inter alia, summary judgment dismissing plaintiffs' complaint.

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

Memorandum: Plaintiff James R. Swiezy is the President of plaintiff Greenleaf Development & Construction, LLC (Greenleaf), a property management, construction, and commercial development company. Greenleaf owned properties adjacent to the State University of New York (SUNY) College at Buffalo (Buffalo State) campus. To address a student housing shortage, Buffalo State approached Swiezy regarding the possibility of Greenleaf building student housing on Greenleaf's properties. BSCR Corporation (BSCR), a private foundation that raises funds from private donors to support Buffalo State, also owned properties adjacent to the Buffalo State campus. After several years of negotiations, Greenleaf's affiliate Campus Walk One, LLC (Campus Walk) entered into a contract with BSCR (BSCR contract) in which the two parties exchanged certain parcels of real property in the neighborhood surrounding Buffalo State. This exchange would allow Greenleaf to build a student housing complex (Campus Walk housing) and BSCR to build a visitor center for Buffalo State. Simultaneously, Campus Walk and SUNY entered into an Affiliation Agreement that essentially required Buffalo State to promote the Campus Walk housing to its students. Buffalo State also agreed to modify its on-campus housing policy for four years "to limit on-campus housing to freshmen, sophomores and juniors only" and, to the extent that beds were available at the Campus Walk housing, to direct students to it "as the

preferred alternative for meeting off campus housing needs of any students affected by such change in campus residency policy."

In February 2017, defendant Daniel Telvock, an investigative reporter with defendant Investigative Post, Inc. (IP), completed a story that was published on IP's website and a script that was broadcast on a local television newscast (collectively, reports) regarding the land swap deal and the Affiliation Agreement. The story was titled "Buff State's deal with Greenleaf raises red flags."

In April 2017, plaintiffs commenced this action against defendants asserting two causes of action, for defamation and injurious falsehood, regarding the reports. Plaintiffs alleged that defendants made false statements about the business activities and reputations of plaintiffs, describing them as "unsavory," intentionally ignored verifiable facts concerning plaintiffs' construction of the Campus Walk housing, and falsely implied that plaintiffs gained a commercial advantage by bribing a public official and otherwise engaged in a commercial relationship in violation of public procurement laws. Defendants answered and asserted a counterclaim for attorneys' fees and costs on the ground that plaintiffs had commenced the action in bad faith. Defendants subsequently moved for summary judgment dismissing the complaint and an award of attorneys' fees and costs. Supreme Court granted the motion, and we now affirm.

Contrary to plaintiffs' contention, the court properly dismissed their cause of action for defamation. The court made a prior determination that plaintiffs are public figures for the purpose of this litigation, which is now the law of the case because plaintiffs did not timely perfect their appeal. A plaintiff in a defamation action must establish by clear and convincing evidence that the published material was false (*see Freeman v Johnston*, 84 NY2d 52, 56 [1994], *cert denied* 513 US 1016 [1994]; *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014]; *Khan v New York Times Co.*, 269 AD2d 74, 76 [1st Dept 2000]) and, where the plaintiff is a public figure, the plaintiff must further establish by clear and convincing evidence that the defendant acted with actual malice, i.e., knowledge of the statement's falsity or reckless disregard for the truth (*see Gottwald v Sebert*, 40 NY3d 240, 251 [2023]; *Freeman*, 84 NY2d at 56; *Khan*, 269 AD2d at 76-77).

A libel claim will fail if "the defamatory material on which the action is based is substantially true" (*Love v Morrow & Co.*, 193 AD2d 586, 587 [2d Dept 1993]; *see Hope v Hadley-Luzerne Pub. Lib.*, 169 AD3d 1276, 1277 [3d Dept 2019]). The "omission of relatively minor details in an otherwise basically accurate account is not actionable" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 383 [1977], *rearg denied* 42 NY2d 1015 [1977], *cert denied* 434 US 969 [1977]). In addition, it is well settled that "[s]ince falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, . . . only statements alleging facts can properly be the subject of a defamation action" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotation marks omitted]). "Expressions of opinion,

as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *see Hope*, 169 AD3d at 1277).

Here, we conclude that defendants established, with respect to each of the allegedly defamatory statements, that it was either substantially true (*see Hope*, 169 AD3d at 1278-1279) or an expression of opinion (*see Landa v Capital One Bank [USA], N.A.*, 172 AD3d 1052, 1054 [2d Dept 2019]; *Balderman v American Broadcasting Cos.*, 292 AD2d 67, 72-73 [4th Dept 2002], *lv denied* 98 NY2d 613 [2002]), and plaintiffs failed to raise a triable issue of fact. We reject plaintiffs' contention that, even if the statements were not false, they imparted false and defamatory inferences (*see generally Armstrong v Simon & Schuster*, 85 NY2d 373, 380-381 [1995]). Plaintiffs rely in particular on those parts of the reports stating that Swiezy gave the "golf team" of Buffalo State's Vice President for Finance and Management a "set" of golf drivers that Swiezy had received as a sponsor of Buffalo State's golf tournament, arguing that this conveyed the false implication that Swiezy had bribed a public official. The reports, however, never mentioned the word "bribe," and the reporting was largely accurate. Indeed, we agree with defendants that the reports conveyed by implication that Buffalo State and its officials, as well as BSCR and SUNY, engaged in inappropriate conduct, not that Swiezy bribed a state official. At most, plaintiffs established that the reports created adverse inferences, which is insufficient to maintain this action (*see Roche v Hearst Corp.*, 53 NY2d 767, 769 [1981]).

Moreover, even assuming, arguendo, that the allegedly defamatory statements were false statements of facts, defendants met their burden of establishing that plaintiffs could not show by clear and convincing evidence that defendants published the challenged statements with actual malice (*see Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 354 [2009]; *DiFabio v Jordan*, 113 AD3d 1109, 1110 [4th Dept 2014]). Plaintiffs contend that defendants acted with actual malice when Telvock relied in the reports on a "government expert" (expert) instead of a lawyer to determine whether the BSCR contract and Affiliation Agreement violated state law, and otherwise failed to investigate the expert's claims. However, there is no evidence in the record from which a jury could determine with "convincing clarity" that defendants purposely avoided the truth or entertained serious doubts about the truthfulness of the statements made by the expert (*Kipper*, 12 NY3d at 356 [internal quotation marks omitted]). The expert sought the legal opinion of a staff attorney, Telvock contacted the New York State Comptroller's Office for an opinion on the matter, and Telvock reported in the story the opinion given by SUNY's counsel.

In opposition to the motion, plaintiffs failed to present "any evidence to raise a triable issue of fact concerning actual malice, let alone sufficient evidence to establish actual malice by clear and convincing evidence" (*Sprewell v NYP Holdings, Inc.*, 43 AD3d 16, 21 [1st Dept 2007]). Plaintiffs' reliance on the affidavit of their expert in journalism is misplaced. The expert proffered an incorrect

definition of actual malice and conflated the defamation standards applicable to private persons and public figures. While the defamation standard applicable to private individuals focuses on whether the journalist satisfies objective professional standards (*see Gordon v LIN TV Corp.*, 89 AD3d 1459, 1459 [4th Dept 2011]), the standard applicable to public figures focuses on the journalist's subjective state of mind (*see Khan*, 269 AD2d at 77). Thus, the expert's emphasis on whether Telvock complied with journalistic standards is of little evidentiary value. As public figures, plaintiffs "must prove more than an extreme departure from professional standards and . . . a [journalist's] motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice" (*Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 665 [1989]).

We reject plaintiffs' further contention that the court erred in dismissing the injurious falsehood cause of action. As explained above, defendants met their burden of establishing, with respect to each of the statements relied upon by plaintiffs, that it was substantially true (*see Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 18 AD3d 454, 455 [2d Dept 2005]) or constituted opinion (*see Shenoy v Kaleida Health*, 162 AD3d 1701, 1702 [4th Dept 2018]). Plaintiffs failed to raise an issue of fact in opposition.

Contrary to plaintiffs' contention, the court properly held that defendants are entitled to an award of costs and attorneys' fees on their counterclaim. Under the 2020 amendments to the anti-strategic lawsuits against public participation (anti-SLAPP) statutes, "costs and attorney's fees *shall be recovered* upon a demonstration, including an adjudication pursuant to [CPLR 3211 (g) or CPLR 3212 (h)], that the action involving public petition and participation *was commenced or continued* without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law" (Civil Rights Law § 70-a [1] [a] [emphasis added]). Although this lawsuit did not fall within the definition of an "action involving public petition and participation" until the 2020 amendments to the statute (*see* § 76-a [1] [a] [1], [2]; [d]), and "the intended application [of the amendments to the statute allowing a counterclaim for costs and attorney's fees] is prospective," nevertheless "[t]here is no retroactive effect when [those amendments] are applied, according to their terms, to the *continuation* of [an] action beyond the effective date of the amendments" (*Gottwald*, 40 NY3d at 258 [emphasis addded]; *see Reeves v Associated Newspapers, Ltd.*, 2024 NY Slip Op 01898, *6 [1st Dept 2024]). Inasmuch as defendants established that this action was "continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law" (Civil Rights Law § 70-a [1] [a]), they are entitled to an award of costs and attorneys' fees from November 10, 2020, the effective date of the amendments (*see Reeves*, 2024 NY Slip Op 01898, *11).

We have considered plaintiffs' remaining contentions and conclude that they do not require modification or reversal of the order.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

210

CA 23-00747

PRESENT: WHALEN, P.J., LINDLEY, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF CAYUGA NATION, BY ITS LAWFUL GOVERNING BODY, THE CAYUGA NATION COUNCIL, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

CHIEF STUART W. PEENSTRA, IN HIS CAPACITY AS CHIEF OF POLICE OF SENECA FALLS POLICE DEPARTMENT, TOWN OF SENECA FALLS, HON. MARK S. SINKIEWICZ, IN HIS CAPACITY AS DISTRICT ATTORNEY FOR COUNTY OF SENECA, AND COUNTY OF SENECA, RESPONDENTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR CLAIMANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CHIEF STUART W. PEENSTRA, IN HIS CAPACITY AS CHIEF OF POLICE OF SENECA FALLS POLICE DEPARTMENT AND TOWN OF SENECA FALLS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS HON. MARK S. SINKIEWICZ, IN HIS CAPACITY AS DISTRICT ATTORNEY FOR COUNTY OF SENECA AND COUNTY OF SENECA.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered April 13, 2023. The order denied the application of claimant seeking leave to serve a late notice of claim.

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

Memorandum: Claimant appeals from an order that denied its application for leave to serve a late notice of claim regarding allegations that respondents were negligent and violated a bailment with respect to the seizure and disposition of property belonging to claimant. We reverse.

On December 27, 2021, claimant purchased real property located in Seneca Falls, New York (premises). At the time claimant purchased the premises, a business was being operated thereon by a nonparty. One

day later, claimant obtained an order in Cayuga Nation Civil Court (Nation Court) permitting it to, inter alia, evict all persons operating the business on the premises and seize all property relative to the operation of that business.

On January 1, 2022, Cayuga Nation Police went to the premises to enforce the Nation Court order. On arrival, Cayuga Nation Police encountered the manager of the business, who resisted their efforts and was ultimately arrested by Seneca Falls Police. During that incident, the Seneca Falls Police Department took possession of, inter alia, a bag containing $59,400, which was found in the manager's car. It is undisputed that the money found in the manager's car constituted the daily cash revenues of the business.

Two days later, on January 3, 2022, claimant, through counsel, sent a letter to respondent Hon. Mark S. Sinkiewicz, in his capacity as District Attorney for County of Seneca (District Attorney), advising that the money seized was subject to the Nation Court order—a copy of which was enclosed—and requesting that the money be promptly returned to claimant. Claimant also stated that it objected to returning the money to the manager of the business. The District Attorney did not respond to that correspondence.

On October 25, 2022, claimant again wrote to the District Attorney and reiterated the demand to return the seized funds, noting that the charges pending against the manager had been disposed of on June 27, 2022 and thus, there was no need to withhold the money as evidence. Additionally, the superintendent of the Cayuga Nation Police asserted in an affidavit in support of the application that, on October 26, 2022, he had a telephone conversation with respondent Chief Stuart W. Peenstra, in his capacity as Chief of Police of the Seneca Falls Police Department, who stated that the money had already been returned to the manager "at the instruction of the District Attorney himself . . . while the criminal charges against her were still in the investigative stage," i.e., that the money was returned to the manager sometime before her criminal case was resolved on June 27, 2022.

On December 23, 2022, claimant made the instant application for leave to serve a late notice of claim based on allegations that respondents were negligent and violated a bailment by returning the money to the manager, and Supreme Court denied the application.

In determining whether to grant an application for leave to serve a late notice of claim, " 'the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality' " (*Tate v State Univ. Constr. Fund*, 151 AD3d 1865, 1865 [4th Dept 2017]; *see* General Municipal Law § 50-e [5]; *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 461 [2016], *rearg denied* 29 NY3d 963 [2017]). Although "the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is

whether the [municipality] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1654 [4th Dept 2018] [internal quotation marks omitted]). "[A] court's decision to grant or deny a motion to serve a late notice of claim is purely a discretionary one" (*Newcomb*, 28 NY3d at 465 [internal quotation marks omitted]) and, "[while] the discretion of Supreme Court [in considering the application] will generally be upheld absent demonstrated abuse[,] . . . such discretion is ultimately reposed in [the Appellate Division]" (*Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020]).

Initially, we conclude that claimant established a reasonable excuse for failing to timely file and serve a notice of claim. The record establishes that claimant was unaware that respondents returned the money to the manager until October 26, 2022, when Peenstra so advised the superintendent of the Cayuga Nation Police, and a lack of awareness of the underlying injury is a reasonable excuse for failing to timely serve a notice of claim (*see More v General Brown Cent. School Dist.*, 262 AD2d 1030, 1030 [4th Dept 1999]).

We further agree with claimant that respondents possessed actual knowledge of the essential facts constituting the claim within 90 days of its accrual (*see generally Dusch*, 184 AD3d at 1170-1171) inasmuch as claimant's January 3, 2022 letter to the District Attorney advised respondents that claimant owned the premises; that the Nation Court order authorized claimant to, inter alia "seize any and all property being used directly or indirectly to operate the [business] on the Premises and any and all goods from [the business]"; and that the letter also advised that claimant "is the rightful owner of the funds and receipt tapes that the Seneca Falls Police Department took into possession on January 1, 2022 during [the manager's] arrest." The letter further requested that the money seized from the manager's car be turned over to claimant. Under these circumstances, we conclude that respondents possessed actual knowledge of the essential facts constituting the claim within 90 days of its accrual.

Finally, we agree with claimant that it met its initial burden of showing that late notice would not substantially prejudice respondents (*see generally Newcomb*, 28 NY3d at 466), and in response, respondents failed to make a " 'particularized showing' of substantial prejudice caused by the late notice" (*Turner v Roswell Park Cancer Inst. Corp.*, 214 AD3d 1376, 1379 [4th Dept 2023]).

Based upon the foregoing, we exercise our discretion to grant the application (*see Dusch*, 184 AD3d at 1171). We have considered respondents' contentions raised as alternative grounds for affirmance (*see generally Parochial Bus Sys., Inc. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]) and conclude that they lack merit.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

230

CA 23-00769

PRESENT: SMITH, J.P., CURRAN, MONTOUR, DELCONTE, AND KEANE, JJ.

BUFFALO BIODIESEL, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BLUE BRIDGE FINANCIAL, LLC, DEFENDANT-RESPONDENT.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, ALBANY (DANIEL R. LECOURS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered April 10, 2023. The order granted the motion of defendant to strike the complaint.

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

Memorandum: Plaintiff commenced this action asserting four causes of action arising from allegations that defendant sent an email to a financial services company in which defendant falsely characterized an ongoing legal dispute between the parties. Two of the causes of action were previously dismissed, leaving only plaintiff's causes of action for libel and tortious interference with business relations. Defendant thereafter served discovery demands in which it sought, inter alia, copies of all communications between plaintiff and the financial services company. In response, plaintiff advised that it no longer had any such documents in its possession. Plaintiff later revealed that it had failed to issue a litigation hold and that all of its emails were deleted during the pendency of the instant action, either by plaintiff itself or, upon plaintiff's approval, by the company hosting its server. Plaintiff attempted to subpoena the deleted emails directly from the financial services company, but that company was no longer operating and the emails could not be recovered. Supreme Court thereafter granted defendant's motion for spoliation sanctions pursuant to CPLR 3126, striking the complaint and dismissing plaintiff's remaining causes of action with prejudice. Plaintiff appeals, and we affirm.

We reject plaintiff's contention that the court abused its discretion in striking plaintiff's pleading as a sanction for spoliation of evidence. "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence,

the responsible party may be sanctioned under CPLR 3126" (*Mahiques v County of Niagara*, 137 AD3d 1649, 1650 [4th Dept 2016] [internal quotation marks omitted]). "The nature and severity of the sanction depends upon a number of factors, including . . . the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*id.* at 1651 [internal quotation marks omitted]). The court has broad discretion in determining what, if any, sanction is warranted for spoliation of evidence, including "an order striking out pleadings or parts thereof" (*Miller v Miller*, 189 AD3d 2089, 2094 [4th Dept 2020] [internal quotation marks omitted]; *see* CPLR 3126 [3]). While the striking of a pleading is generally limited to "instances of willful or contumacious conduct," it may also be warranted where the negligent destruction of relevant evidence leaves a party prejudicially bereft "of the means of proving [its] claim or defense" (*Mahiques*, 137 AD3d at 1651 [internal quotation marks omitted]; *see Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [4th Dept 2008]; *New York Cent. Mut. Fire Ins. Co. v Turnerson's Elec.*, 280 AD2d 652, 653 [2d Dept 2001]).

Here, plaintiff's failure to suspend the routine deletion of its emails during the course of litigation constituted the grossly negligent spoliation of evidence (*see Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). Although plaintiff contends that defendant failed to establish the relevance of the deleted emails, "it is the peculiarity of many spoliation cases that the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly" (*Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]) and, thus, where emails are deleted "either intentionally or as the result of gross negligence, the court [may] properly dr[a]w an inference as to the[ir] relevance" (*Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010]). Thus, on the facts presented in this action, we conclude that the court did not abuse its discretion in striking the complaint (*see Sage Realty Corp.*, 275 AD2d at 18).

Plaintiff's contention that the court erred in imposing a spoliation sanction prior to the completion of depositions is improperly raised for the first time on appeal, and we therefore do not consider it (*see Matter of Davis v Czarny*, 153 AD3d 1556, 1557 [4th Dept 2017]).

Entered: June 14, 2024 Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00980

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MCCLENDON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM MCCLENDON, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 31, 2022. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count 3 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). Initially, defendant's contention in his main and pro se supplemental briefs that the evidence is legally insufficient to support the conviction is unpreserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the jury's verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree, however, with defendant's contention in his main and pro se supplemental briefs that he received ineffective assistance of counsel because defense counsel failed to seek a tailored jury instruction on the burglary count limited to the theory alleged by the People in the indictment. We therefore reverse the judgment of conviction and grant a new trial on count 3 of the indictment.

"What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation" (*People v Baldi*, 54 NY2d 137, 146 [1981]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). "The core of the inquiry is whether defendant received 'meaningful representation' " (*Benevento*, 91 NY2d at 712), and "it is incumbent on [a] defendant [alleging ineffective assistance of counsel] to demonstrate the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013] [internal quotation marks omitted]). A single error may qualify as ineffective assistance only if it is "sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Baker*, 14 NY3d 266, 270 [2010] [internal quotation marks omitted]).

This case arises from domestic disputes between defendant and his ex-girlfriend. Count 3 of the indictment, charging burglary in the second degree, provided, in relevant part, that defendant, at a specific date and approximate time, "knowingly entered or remained unlawfully in . . . the dwelling of [the victim] with intent to commit a crime therein, to wit: the defendant entered and remained unlawfully within the dwelling of the victim and held a knife to the victim's throat."

At trial, the People called the victim, who testified that defendant entered her apartment without permission, came up behind her, put his arm around her neck, and "had a knife." The victim stated that she knocked the knife out of defendant's hand and went to a neighbor's apartment and that, once defendant had vacated her apartment, she went back there and locked the door. The victim further testified that defendant returned about 20 minutes later and began climbing into her apartment through a window, that she ran to the neighbor's apartment and that defendant chased after her. The victim added that defendant then entered her apartment again and that when she returned defendant was aggressive. Defendant also testified at his trial, and he denied much of the victim's account, including that he had possessed a knife. The jury found defendant guilty of burglary in the second degree, but found him not guilty on all other counts, including criminal possession of a weapon in the third degree and menacing in the second degree.

In its charge to the jury on count 3, County Court made no mention of the People's theory of the crime as limited by the indictment. The court charged, with respect to the intent element, that the People must prove beyond a reasonable doubt that defendant entered or remained in the building "with the intent to commit a crime inside the building," without specifying the intended crime. Defense counsel did not seek a tailored instruction limited to the theory in the indictment.

"There is no requirement that the People allege or establish what particular crime was intended," to secure a conviction for burglary (*People v James*, 114 AD3d 1202, 1204 [4th Dept 2014], *lv denied* 22

NY3d 1199 [2014]; *see People v Maier*, 140 AD3d 1603, 1603 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]). However, "[i]f the People . . . expressly limit[ ] their theory of the 'intent to commit a crime therein' element to a particular crime, then they . . . have . . . to prove that the defendant intended to commit that crime" (*James*, 114 AD3d at 1204).

Here, defense counsel failed to seek an appropriately tailored instruction to the jury on burglary in the second degree or object to the burglary charge given. Defense counsel thereby permitted the jury to convict defendant upon a theory of the intent element that was not set forth in the indictment (*see generally People v Graves*, 136 AD3d 1347, 1348 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]). We conclude, under the circumstances of this case, that defense counsel's error was sufficiently egregious and prejudicial as to compromise defendant's right to a fair trial (*see generally People v Rodriguez*, 31 NY3d 1067, 1068 [2018]; *People v McGee*, 20 NY3d 513, 518 [2013]; *Baker*, 14 NY3d at 270).

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

251

KA 22-01188

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHARY BENTLEY, DEFENDANT-APPELLANT.

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

MARK MOODY, ACTING 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 June 3, 2021. The judgment convicted defendant upon his plea of guilty of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of robbery in the second degree (Penal Law § 160.10 [1]). Assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of any of defendant's contentions (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Henry*, 207 AD3d 1062, 1062-1063 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *see generally People v Thomas*, 34 NY3d 545, 561-562 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we reject defendant's contention that the sentence is unduly harsh and severe.

We conclude that defendant failed to preserve for our review his contention regarding the voluntariness of his plea (*see People v Secrist*, 74 AD3d 1853, 1853 [4th Dept 2010], *lv denied* 16 NY3d 863 [2011]). In any event, we conclude that the contention lacks merit (*see People v Alicea*, 148 AD3d 1662, 1663 [4th Dept 2017], *lv denied* 29 NY3d 1122 [2017]).

In his reply brief, defendant has withdrawn his further contention that County Court violated his right to be physically present at sentencing (*see* CPL 380.40). We have reviewed defendant's

remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

261

CA 23-00056

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND KEANE, JJ.

AARON A. FUSCO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRYAN T. HANSEN, DEFENDANT-APPELLANT.

BURGIO, CURVIN & BANKER, BUFFALO (NICHOLAS M. ROSSI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FROMEN, ATTORNEYS AT LAW, P.C., SNYDER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered December 6, 2022. The order denied the motion of defendant for leave to amend his answer and granted in part the cross-motion of plaintiff seeking, inter alia, an order compelling disclosure of certain investigative statements.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's cross-motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when the vehicle he was driving was involved in a collision with a vehicle owned and operated by defendant. After filing an answer to the complaint, defendant moved for leave to amend his answer to assert an affirmative defense premised on plaintiff's alleged failure to comply with General Municipal Law §§ 50-e, 50-h, and 50-i. According to defendant, at the time of the collision, he was operating his personal vehicle while in the scope of his employment with the West Valley Central School District, and he contended that plaintiff therefore had to comply with those provisions of the General Municipal Law, including the requirement to serve a notice of claim. Plaintiff cross-moved for an order, inter alia, compelling disclosure of the investigative statements defendant provided to his insurer regarding the subject collision, and for a determination that defendant was statutorily liable for the collision, regardless of whether he was acting within the scope of employment, pursuant to Vehicle and Traffic Law § 388. Supreme Court denied defendant's motion for leave to amend the answer, without prejudice and with leave to renew at the close of discovery. The court granted plaintiff's cross-motion in part by ordering an in camera inspection of the investigative statements that defendant

provided to his insurer, and determining that, as a matter of law, "the [d]efendant in his individual capacity, as the titled and registered owner of the vehicle he was operating at the time of the collision which is the subject of this action, is statutorily liable pursuant to . . . Vehicle and Traffic [L]aw § 388 for the [p]laintiff's alleged damages regardless of whether the [d]efendant was operating his motor vehicle in the scope of his municipal employment with the West Valley Central School District and further notwithstanding whether said School District is vicariously responsible for [d]efendant's negligent conduct in the operation of his privately owned vehicle under the doctrine of respondeat superior." Defendant appeals.

Contrary to defendant's contention, the court did not abuse its discretion in denying his motion for leave to amend the answer. Although "[g]enerally, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party," a proposed amendment is properly denied if it is "patently lacking in merit" (*Palaszynski v Mattice*, 78 AD3d 1528, 1528 [4th Dept 2010] [internal quotation marks omitted]; *see Travelers Cas. & Sur. Co. of Am. v Costanza*, 125 AD3d 1358, 1360-1361 [4th Dept 2015]; *Armstrong v Merrick*, 99 AD3d 1247, 1247 [4th Dept 2012]). Here, defendant failed to establish that his proposed affirmative defense is not patently lacking in merit. Most notably, "[s]ervice of [a] notice of claim upon an . . . employee of a public corporation shall not be a condition precedent to the commencement of an action . . . against such person" (General Municipal Law § 50-e [1] [b]), and defendant failed to allege any exception to that principle that would have otherwise required plaintiff to serve a notice of claim in this action against defendant only. The decision whether to grant a motion for leave to amend a pleading "is committed to the sound discretion of the court" (*Palaszynski*, 78 AD3d at 1528 [internal quotation marks omitted]; *see Williams v New York Cent. Mut. Fire Ins. Co.*, 108 AD3d 1112, 1114 [4th Dept 2013]; *Prego v Gutchess*, 61 AD3d 1394, 1395 [4th Dept 2009]), and we perceive no abuse of discretion here, especially where the court's denial of defendant's motion was without prejudice and with leave to renew at a time when defendant may be able to establish that the affirmative defense is not patently lacking in merit.

We agree with defendant, however, that the court erred in granting that part of the cross-motion seeking an order compelling disclosure of the investigative statements that defendant provided to his insurer regarding the subject collision, and we therefore modify the order accordingly. The statements sought in plaintiff's cross-motion constitute materials "produced solely in connection with the report of an accident to a liability insurance carrier . . . with respect to plaintiff's claim [that] are not discoverable under CPLR 3101 (g), but rather are conditionally immunized from discovery under CPLR 3101 (d) (2)" (*Beaumont v Smyth*, 306 AD2d 921, 922 [4th Dept 2003] [internal quotation marks omitted]; *see generally Johnson v Murphy*, 121 AD3d 1589, 1590 [4th Dept 2014]). Plaintiff failed to establish either that he has a "substantial need of the materials" or that he is "unable without undue hardship to obtain the substantial

equivalent of the materials by other means" (CPLR 3101 [d] [2]; *see Color Dynamics, Inc. v Kemper Sys. Am., Inc.*, 186 AD3d 1024, 1025-1026 [4th Dept 2020]; *see generally Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1643 [4th Dept 2017]).

We likewise agree with defendant that the court erred in granting that part of the cross-motion seeking an order determining that defendant is "vicariously liable" for the accident pursuant to Vehicle and Traffic Law § 388. We therefore further modify the order accordingly. Section 388 extends liability to owners of vehicles being driven by another person "with the permission, express or implied, of such owner" (§ 388 [1]; *see generally Oishei v Gebura*, 221 AD3d 1529, 1530 [4th Dept 2023]). It is undisputed that, at the time of the collision, defendant was driving a vehicle that he owned, and thus section 388 does not apply here.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00207

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, NOWAK, AND KEANE, JJ.

WILLIE KENDRICK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER GENERAL HOSPITAL, ROCHESTER GENERAL HEALTH SYSTEM, PAULO BORODIN, KATE STEWART, PEDRO DEJESUS SANCHEZ, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

OSBORN REED & BURKE LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN HUTCHINSON, LLP, ROCHESTER (MICHAEL COBBS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered January 31, 2023. The judgment awarded plaintiff money damages against defendant Pedro DeJesus Sanchez.

It is hereby ORDERED that said appeal insofar as taken by defendants Rochester General Hospital, Rochester General Health System, Paulo Borodin and Kate Stewart is unanimously dismissed and the judgment is affirmed without costs.

Memorandum: Plaintiff was assaulted by security guards, including defendant Pedro DeJesus Sanchez, when plaintiff visited a patient at defendant Rochester General Hospital (RGH) in 2016. Plaintiff commenced the instant action asserting causes of action for, inter alia, assault, battery, and false imprisonment. After trial, the jury awarded plaintiff damages of $150,000 for past pain and suffering on his assault cause of action and $50,000 for past pain and suffering on his false imprisonment cause of action. Sanchez moved to set aside the verdict pursuant to CPLR 4404 (a) on the ground that the verdict was against the weight of the evidence and the product of juror confusion. Supreme Court denied the motion. Defendants RGH, Rochester General Health System (RGHS), Paulo Borodin, Kate Stewart, and Sanchez appeal from the subsequent judgment. The appeal insofar as taken by defendants RGH, RGHS, Borodin and Stewart must be dismissed as those defendants are not aggrieved by the judgment awarding damages against Sanchez only (*see* CPLR 5511; *Tomaszewski v Seewaldt*, 11 AD3d 995, 995 (4th Dept 2004]).

Sanchez (defendant) contends that the verdict is inconsistent

insofar as the jury found that he was liable for false imprisonment despite its finding that he had reasonable grounds to believe that plaintiff had committed or attempted to commit trespass or harassment, which, according to defendant, would serve as a legal justification for detention and a complete defense to the false imprisonment claim. Although defendant did not preserve that contention, we nevertheless address it in the context of defendant's challenge to the weight of the evidence (*see Almuganahi v Gonzalez*, 174 AD3d 1492, 1493 [4th Dept 2019]; *Berner v Little*, 137 AD3d 1675, 1676 [4th Dept 2016]). "A motion to set aside a jury verdict as against the weight of the evidence should not be granted unless 'the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached upon any fair interpretation of the evidence' " (*Gumas v Niagara Frontier Tr. Metro Sys., Inc.*, 189 AD3d 2095, 2096 [4th Dept 2020], quoting *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

"A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Martinez v City of Schenectady*, 97 NY2d 78, 85 [2001]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 759 [2016]; *Oakley v City of Rochester*, 71 AD2d 15, 18 [4th Dept 1979], *affd* 51 NY2d 908 [1980]). "For purposes of the privilege element . . . , an act of confinement is privileged if it stems from a lawful arrest supported by probable cause" (*De Lourdes Torres*, 26 NY3d at 759). The Court of Appeals, in outlining the considerations relevant to that element, has noted "that, generally, restraint or detention, *reasonable under the circumstances in time and manner*, imposed for the purpose of preventing another from inflicting personal injuries or interfering with or damaging real or personal property . . . is not unlawful" (*Sindle v New York City Tr. Auth.*, 33 NY2d 293, 297 [1973] [emphasis added]). In other words, "[w]here, as here, there is no claim that a confinement took place under a valid process issued by a court having jurisdiction . . . , confinement that would otherwise be unlawful will be found to be privileged only if the defendant establishes that it was reasonable under the circumstances and in time and manner" (*Casey v State of New York*, 148 AD3d 1370, 1372 [3d Dept 2017]; *see Zegarelli-Pecheone v New Hartford Cent. Sch. Dist.*, 132 AD3d 1258, 1259 [4th Dept 2015]). "[T]he reasonableness of [a] plaintiff['s] restraint presents a question for the jury to resolve" (*Barrett v Watkins*, 82 AD3d 1569, 1572 [3d Dept 2011]).

Here, although the jury concluded that defendant had "reasonable grounds to believe that [p]laintiff . . . had committed or attempted to commit the offense of trespass and/or harassment," the jury also found that plaintiff was not "detained in a *reasonable manner*" (emphasis added). Thus, we conclude that the verdict is not inconsistent inasmuch as the verdict sheet makes clear that the award of damages for false imprisonment rests upon the finding that defendant's actions were unreasonable and, therefore, not justified (*see generally Parvi v City of Kingston*, 41 NY2d 553, 559 [1977]). We further conclude that the verdict is not against the weight of the

evidence because the evidence, including the proof of plaintiff's extensive injuries, did not so preponderate in defendant's favor that the verdict could not have been reached upon any fair interpretation of the evidence.

Defendant similarly contends that the verdict is against the weight of the evidence with respect to plaintiff's assault cause of action. We reject that contention. It is well established that "it is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*McMillian v Burden*, 136 AD3d 1342, 1343-1344 [4th Dept 2016] [internal quotation marks omitted]; *see Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013]). Here, the jury's findings with respect to the assault cause of action "reasonably could have been rendered upon the conflicting evidence adduced at trial" (*Ruddock v Happell*, 307 AD2d 719, 721 [4th Dept 2003]; *see 2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 222 AD3d 1436, 1438-1439 [4th Dept 2023]; *Rew v Beilein* [appeal No. 2], 151 AD3d 1735, 1738 [4th Dept 2017]).

Defendant further contends that the verdict is the result of juror confusion. We reject that contention. Here, we conclude that there is no proof in the record "that the jury was substantially confused by the verdict sheet," with respect to whether it was permitted to consider the actions of security guards other than defendant, "and thus was unable to make a proper determination upon adequate consideration of the evidence" (*Martinez v Te*, 75 AD3d 1, 6 [1st Dept 2010] [internal quotation marks omitted]; *see generally Matter of State of New York v Farnsworth*, 107 AD3d 1444, 1444-1445 [4th Dept 2013]).

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01946

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM MALLOY, DEFENDANT-APPELLANT.

NATHANIEL L. BARONE, II, PUBLIC DEFENDER, MAYVILLE (HEATHER BURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (MICHAEL J. PISKO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), entered November 23, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs and the designation of defendant as a sexually violent offender is vacated.

Memorandum: Defendant appeals from an order insofar as it designated him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). The sexually violent offender designation is based solely on defendant's 2010 conviction in Kansas of aggravated sexual battery, which required him to register as a sex offender in that state. As authority for the designation, which subjects defendant to lifetime registration as a sex offender in New York (*see* Correction Law § 168-h [2]) even though he is only a level one risk, the People rely on Correction Law § 168-a (3) (b) to the extent that it defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred."

Although defendant acknowledges that he qualifies as a sexually violent offender under the foreign registration clause of Correction Law § 168-a (3) (b), he contends that the provision is unconstitutional—both facially and as applied to him—under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Defendant further contends that the foreign registration clause violates the Privileges and Immunities Clause of the Federal Constitution (US Const, art IV, § 2) because it discriminates against sex offenders who were convicted of qualifying

offenses in a state other than New York. Inasmuch as defendant's qualifying out-of-state felony conviction was for a nonviolent offense, we agree with defendant that his constitutional right to substantive due process was violated by County Court's designation of him as a sexually violent offender.

The relevant facts are not in dispute. In February 2010, defendant entered a plea of no contest in the state of Kansas to one count of aggravated sexual battery (Kan Stat Ann former § 21-3518 [a] [3]), a felony under the Kansas Criminal Code. Aggravated sexual battery was defined in that statute to include, as relevant here, "the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another . . . when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by, or was reasonably apparent to, the offender" (Kan Stat Ann former § 21-3518 [a] [3]). Pursuant to the plea agreement, defendant was sentenced to 36 months of probation and was required to register as a sex offender in Kansas. Defendant had no prior criminal record and served his term of probation without incident. Approximately 10 years later, defendant moved to New York.

Upon learning of defendant's new residence, the Board of Examiners of Sex Offenders (Board) determined that he was required to register as a sex offender in New York (*see* Correction Law § 168-k [2]). Based on its review of information relating to defendant's Kansas conviction, the Board submitted to the court a risk assessment instrument (RAI) recommending that defendant be adjudicated a level one risk. Notably, the Board recommended that no points be assessed under risk factor 1 for the use of violence and that defendant not be designated a sexually violent offender under Correction Law § 168-a (3) (b).

Although the People did not challenge the Board's recommendation with respect to the risk level and point assessments, they provided a departure statement contending that, contrary to the Board's determination, the court should designate defendant a sexually violent offender under Correction Law § 168-a (3) (b) based on the felony conviction in Kansas. Defendant thereafter filed a motion in which he challenged the constitutionality of section 168-a (3) (b), asserting, in relevant part, that the second disjunctive clause of the paragraph—defining a sexually violent offense to include a conviction of an out-of-state felony for which sex offender registration is required in the state of conviction—is not rationally related to any legitimate governmental purpose and indeed "misleads the public, and places an unwarranted lifetime stigma on those persons whose underlying offenses are not of a violent nature." In response, the People argued that "the designation of out-of-state defendants with registrable felony convictions is rationally related to a legitimate state interest," to wit, "protecting vulnerable populations (including the public at large) from potential harm by sex offenders."

In its one-page order, the court determined that defendant is a

level one risk and designated him a sexually violent offender. The court offered no explanation for rejecting defendant's constitutional claims. We now reverse the order insofar as appealed from and vacate the sexually violent offender designation.

As the Court of Appeals noted in *People v Talluto* (39 NY3d 306, 309 [2022]), SORA "provides for two circumstances in which a person convicted of an offense in another jurisdiction must register as a sex offender. One circumstance is where the offense satisfies an 'essential elements' test—i.e., the offense 'includes all of the essential elements' of an enumerated 'sex offense' or 'sexually violent offense' (§ 168-a [2] [d] [i]; [3] [b]). The other circumstance is where the offense falls within SORA's foreign registration requirements—i.e., 'a felony in any other jurisdiction for which the offender is required to register as a sex offender' therein (§ 168-a [2] [d] [ii]; [3] [b])."

Here, the People did not recommend that points be assessed against defendant for the use of violence and the People correctly concede that the offense of which defendant was convicted in Kansas, i.e., aggravated sexual battery, does not constitute a sexually violent offense under the essential elements test. The question presented is whether the second disjunctive clause of Correction Law § 168-a (3) (b), the foreign registration clause, withstands constitutional scrutiny as applied to defendant given the nonviolent nature of his underlying sex offense.

"Under the Fourteenth Amendment to the United States Constitution, a state government may not deprive an individual 'of life, liberty, or property, without due process of law' " (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 198 [2020], quoting US Const Fourteenth Amend, § 1). Due process review generally is comprised of two distinct analyses: procedural due process, the bedrock of which is notice and an opportunity to be heard (*see People v Watts*, — NY3d —, —, 2024 NY Slip Op 00926, *3 [2024]; *People v Worley*, 40 NY3d 129, 131 [2023]; *People v David W.*, 95 NY2d 130, 138 [2000]), and substantive due process, i.e., the right to be free from "certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them" (*Zinermon v Burch*, 494 US 113, 125 [1990] [internal quotation marks omitted]; *see Johnson*, 36 NY3d at 198).

Defendant does not raise any procedural objections to his designation, and thus our focus is exclusively on substantive due process, which "protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised' " (*Kaluczky v City of White Plains*, 57 F3d 202, 211 [2d Cir 1995]). "Substantive due process 'provides heightened protection against government interference with certain fundamental rights and liberty interests' . . . , namely those rights and interests that are 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed' " (*Johnson*, 36 NY3d at 198,

quoting *Washington v Glucksberg*, 521 US 702, 720, 721 [1997]).

There are several components of our substantive due process analysis. First, we must determine the level of review, i.e., "strict scrutiny or the rational basis test" (*Johnson*, 36 NY3d at 198). If "a 'fundamental' liberty interest" was impacted, then the infringement must be " 'narrowly tailored to serve a compelling state interest' " (*id.* at 199, quoting *Reno v Flores*, 507 US 292, 302 [1993]). "If 'no fundamental right is infringed[, the government action] is valid if it is rationally related to legitimate government interests' " (*id.*, quoting *People v Knox*, 12 NY3d 60, 67 [2009], *cert denied* 558 US 1011 [2009]).

We agree with the People that, although a sexually violent offender designation affects a "liberty interest . . . [that] is substantial" (*David W.*, 95 NY2d at 137) because it "imposes a stigma that broadly impacts a defendant's life and ability to participate in society" (*People v Brown*, 41 NY3d 279, 290 [2023]), "[t]he right not to have a misleading label attached to one's serious crime is not fundamental in [the constitutional] sense" (*Knox*, 12 NY3d at 67; *see Brown*, 41 NY3d at 285). As a result, defendant's "constitutional claims [are] subject to deferential rational basis review" (*Brown*, 41 NY3d at 285, citing *Knox*, 12 NY3d at 67; *see People v Diaz*, 150 AD3d 60, 62 [1st Dept 2017], *affd on other grounds* 32 NY3d 538 [2018]).

"The rational basis test is not a demanding one" (*Knox*, 12 NY3d at 69; *see Myers v Schneiderman*, 30 NY3d 1, 15 [2017], *rearg denied* 30 NY3d 1009 [2017]); "rather, it is 'the most relaxed and tolerant form of judicial scrutiny' " (*Myers*, 30 NY3d at 15, quoting *Dallas v Stanglin*, 490 US 19, 26 [1989]). That test "involves a 'strong presumption' that the challenged legislation is valid, and 'a party contending otherwise bears the heavy burden of showing that a statute is so unrelated to the achievement of any combination of legitimate purposes as to be irrational' " (*id.*, quoting *Knox*, 12 NY3d at 69). Ultimately, "[a] challenged statute will survive rational basis review so long as it is 'rationally related to any conceivable legitimate State purpose' . . . [and] 'courts may even hypothesize the Legislature's motivation or possible legitimate purpose' " (*id.*). At its core, " '[t]he rational basis standard of review is a paradigm of judicial restraint' " (*id.* at 15-16; *see Johnson*, 36 NY3d at 202; *People v Taylor*, 42 AD3d 13, 16 [2d Dept 2007], *lv dismissed* 9 NY3d 887 [2007]).

Here, defendant relies on the undisputed fact that his out-of-state crime was nonviolent in nature; as noted, neither the Board nor the People requested that points be assessed under risk factor 1 for use of violence, and, again, the crime of which he was convicted would not be a sexually violent offense if committed in New York. Given that context, we conclude that defendant met his burden of establishing that the foreign registration clause of Correction Law § 168-a (3) (b) is unconstitutional as applied to him, inasmuch as mislabeling him as a sexually violent offender is not rationally related to any legitimate governmental interest. Although it is true,

as the People contend, that the government has a legitimate interest in protecting vulnerable populations, and in some instances the public at large, from the potential harm posed by sex offenders (*see People v Alemany*, 13 NY3d 424, 430 [2009]; *People v Mingo*, 12 NY3d 563, 574 [2009]), that purpose is already served by requiring defendant to register in New York as a sex offender.

We conclude that designating defendant as sexually violent merely because he had an out-of-state sex conviction requiring out-of-state registration, regardless of whether that underlying offense is violent—as is currently required by the text of Correction Law § 168-a (3) (b)—bears no rational relationship to the legitimate governmental interest of informing the public of threats posed by sex offenders. Indeed, the animating notification purpose of SORA presupposes that the information available to the public as a consequence of a SORA registration is accurate. Where, as here, an offender is designated a sexually violent offender merely because of an out-of-state conviction requiring out-of-state registration, the public is not accurately informed of the true risk posed by the offender. We further conclude that the designation of defendant as a sexually violent offender—augmenting defendant's SORA registration period from a term of 20 years to his entire lifetime—merely because of the location of the registrable offense does not result in "a criminal designation that rationally fits [defendant's] conduct and public safety risk" (*Brown*, 41 NY3d at 290).

The People contend for the first time on appeal that the foreign registration clause of Correction Law § 168-a (3) (b) is rationally related to a legitimate governmental interest because prosecutors in New York may have difficulty obtaining complete records relating to out-of-state convictions. According to the People, the "reliance on third parties inherently means that some material information [necessary for designation purposes] may unintentionally be omitted" from consideration by the SORA court, and it would therefore be rational for the Legislature to designate as a sexually violent offender any individual who committed an out-of-state felony for which registration is required and then moved to New York.

As a preliminary matter, we note that it is highly unlikely that the Legislature had any such intent when it enacted subdivision (3) (b). As has been noted by the Court of Appeals, the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York concluded that the foreign registration clause was the result of a drafting error (*see Talluto*, 39 NY3d at 313). In any event, the Board in this case evidently had no trouble obtaining information relating to defendant's out-of-state conviction, as the record on appeal is replete with such records, including police reports. Nor is there any indication in the record that the Board has found it difficult or cumbersome to obtain out-of-state records in any other case.

As noted above, however, a reviewing court in a substantive due process analysis may rely on any conceivable legitimate governmental interest, real or imagined (*see Myers*, 30 NY3d at 15). Nevertheless,

we cannot discern any conceivable legitimate governmental interest that is served by the application to defendant of a statutory provision that effectively deems his out-of-state felony to be sexually violent regardless of whether it actually involved the use or threatened use of violence. Even assuming, arguendo, that the rationale raised by the People concerning the potential unavailability of out-of-state records constitutes a conceivable legitimate governmental interest, we conclude that applying the foreign registration clause of Correction Law § 168-a (3) (b) to defendant is "so unrelated to the achievement of [that goal] as to be irrational" (*Knox*, 12 NY3d at 69).

In the absence of any rational relationship between the application of the foreign registration clause to defendant and a conceivable legitimate governmental interest, we conclude that the clause is unconstitutional as applied to defendant, who was designated a sexually violent offender based on his conviction of an out-of-state felony that is undisputedly nonviolent in nature.

Here, the " 'few' individuals" framework of *Knox* and *Brown* is inapplicable to defendant's challenge to Correction Law § 168-a (3) (b) because there are no studies in the record showing that the vast majority of defendants convicted of registrable out-of-state felonies have engaged in sexually violent conduct. Thus, there is no reason to believe that only a few such offenders committed their qualifying out-of-state offenses in a nonviolent manner. While there was a rational basis for the Legislature to be overinclusive in defining "sex offenses" in Correction Law § 168-a (2) (a) (i), the People here established no rational basis for the Legislature's use of overinclusive terms in defining sexually violent offenses in the second disjunctive clause of section 168-a (3) (b), especially considering that almost all out-of-state felonies that require sex offender registration and involve the use of violence will qualify as sexually violent offenses in New York under the essential elements test set forth in the first disjunctive clause of that paragraph.

It is true, as the dissent points out, that defendant has the burden of proof on his as-applied due process challenge. In our view, however, defendant met that burden by establishing in his motion papers that his out-of-state felony conviction was for a nonviolent offense and that the foreign registration clause of Correction Law § 168-a (3) (b) is therefore unconstitutional as applied to him. Although defendant did not specifically dispute the victim's allegations of violence as set forth in police reports attached to the case summary, he had no reason to do so given that, as noted by defense counsel in the motion papers, neither the Board nor the People recommended that points be assessed against defendant for the use of violence. Moreover, the case summary made clear that defendant pleaded not guilty to the counts of the indictment alleging violent conduct and that he entered a plea of no contest to a lesser offense that does not include any elements of violence (*see* Kan Stat Ann former § 21-3518 [a] [3]).

Furthermore, we note that the People have never contended that

defendant should be designated a sexually violent offender based on the allegations set forth in the case summary. The People relied instead on the mere fact that defendant was convicted of a felony in Kansas for which he was required to register as a sex offender in that state. In fact, during oral argument in another case this term involving the same attorneys and similar contentions (*People v Naomi Cromwell*), the People conceded, correctly in our view, that a sexually violent offender designation under Correction Law § 168-a (3) (b) must be based solely on the elements of the crime of *conviction*, and that a defendant's alleged conduct may be considered only in assessing points to determine the appropriate risk level. Thus, not only is the dissent relying on an argument never advanced by the People, it is relying on an argument expressly disavowed by the People. Although the victim here alleged to the police that defendant engaged in sexual conduct that was violent in nature, the counts of the indictment based on those allegations were dismissed upon defendant's plea to a lesser offense, and, consistent with the People's concession, we conclude that defendant should not be designated a sexually violent offender in New York based on the victim's unproven allegations alone.

We see no merit to defendant's remaining contentions. Briefly, a facial constitutional challenge under the Due Process Clause "must fail so long as there are circumstances under which the challenged provision could be constitutionally applied" (*Matter of Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transp.*, 40 NY3d 55, 61 [2023] [internal quotation marks omitted]). "In other words, the challenger must establish that no set of circumstances exists under which the [statute] would be valid" (*id.* [internal quotation marks omitted]; *see United States v Stevens*, 559 US 460, 472 [2010]). Here, we can conceive of cases where a defendant has been convicted of an out-of-state felony involving violent sexual conduct that requires registration as a sex offender in the other state but does not include all of the essential elements of a sexually violent offense enumerated in Correction Law § 168-a (3) (a) (i). That is to say, we do not believe that the sexually violent offenses identified in section 168-a (3) (a) (i) comprise the entire universe of sex crimes that could be deemed sexually violent in nature. Considered as to a theoretical offender *convicted* of such an offense, the lifetime registration requirement associated with the designation of sexually violent offender would bear a rational relationship to the governmental interest of protecting the public from potential harm by sex offenders, thereby defeating a facial challenge to the statute.

Finally, with respect to the Privileges and Immunities Clause (US Const, art IV, § 2), which was intended to "plac[e] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned" (*McBurney v Young*, 569 US 221, 226 [2013] [internal quotation marks omitted]), we conclude that, contrary to defendant's contention, Correction Law § 168-a (3) (b) does not discriminate unfairly on the basis of state citizenship; instead, it draws its distinctions based on the location of an offender's illegal conduct. For instance, in this case, New York is treating defendant in exactly the same way that it would be statutorily authorized to treat a New

York resident who committed the same sex crime while visiting Kansas (*see generally People v Hoyos-Sanchez*, 147 AD3d 701, 701-702 [1st Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v McGarghan*, 83 AD3d 422, 423 [1st Dept 2011]; *Spiteri v Russo*, 2013 WL 4806960, *34-35, 2013 US Dist LEXIS 128379, *138-141 [ED NY, Sept. 7, 2013, 12-CV-2780 (MKB) (RLM)], *affd sub nom. Spiteri v Camacho* 622 Fed Appx 9 [2d Cir 2015]).

LINDLEY and NOWAK, JJ., concur; OGDEN, J., concurs in the result in the following memorandum: I concur in the result reached by the plurality, but I write separately because, in my view, the second disjunctive clause of Correction Law § 168-a (3) (b)—requiring a person under SORA's foreign registration requirements to be designated a sexually violent offender—is unconstitutional on its face.

To begin, I agree with the plurality that defendant's "constitutional claims [are] subject to deferential rational basis review" (*People v Brown*, 41 NY3d 279, 285 [2023], citing *People v Knox*, 12 NY3d 60, 67 [2009]). We are therefore required to review whether defendant has met his burden of showing that the foreign registration clause of Correction Law § 168-a (3) (b) "is 'so unrelated to the achievement of any combination of legitimate purposes' as to be irrational" (*Knox*, 12 NY3d at 69). In my view, defendant has met his burden.

"Given the impact of a sex offender designation, there should be no room for error in classification" (*Brown*, 41 NY3d at 294). As the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York has recognized, however, the foreign registration clause of subdivision (3) (b) " 'collapses the distinction between violent and nonviolent sex offenses, at least as it applies to out-of-state offenders who reside in New York' " (*People v Talluto*, 39 NY3d 306, 314 [2022], quoting Rep of Advisory Comm on Crim Law and Pro to Chief Admin Judge of Cts of St of NY at 17 [Jan. 2010], available at https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2010-CriminalLaw&Procedure-ADV-Report.pdf [accessed May 23, 2024]). The clause thus stigmatizes and brands all nonviolent out-of-state offenders as violent. It unnecessarily increases the pool of those with the designation—and misapplies the term to those who do not have a violent history. It does nothing to further the legislative purpose of protecting the public from those who commit violent sex offenses, and it undermines the usefulness of the designation (*see Brown*, 41 NY3d at 290-291). In my view, there is no conceivable legitimate governmental interest supported by the foreign registration requirements, and I therefore disagree with the plurality's conclusion that defendant's facial challenge has no merit.

In particular, I disagree with the plurality's rationale that the foreign registration clause is facially constitutional as long as one can merely "conceive"—without any example—of a scenario with a theoretical offender who "has been convicted of an out-of-state felony involving violent sexual conduct that requires registration as a sex offender in the other state but does not include all of the essential

elements of a sexually violent offense enumerated in Correction Law § 168-a (3) (a) (i)" (*see generally Janklow v Planned Parenthood, Sioux Falls Clinic*, 517 US 1174, 1175 [1996] [Stevens, J., respecting denial of cert]). This exercise in speculation is particularly inapposite here, given the likelihood that "the legislature may have meant for subdivision (3) (b)'s foreign registration clause to apply only to an offender who is required to register as a *sexually violent* offender in the jurisdiction in which the conviction occurred" (*Talluto*, 39 NY3d at 314). I therefore cannot agree with the conclusion that the foreign registration clause is *rationally related* to legitimate government interests (*cf. Knox*, 12 NY3d at 67).

On the basis of my conclusion that the second disjunctive clause of Correction Law § 168-a (3) (b) is facially unconstitutional, and because I agree with the plurality that defendant's conviction does not constitute a sexually violent offense under the essential elements test set out in the first disjunctive clause, I agree with the plurality to reverse the order insofar as appealed from and vacate defendant's designation as a sexually violent offender.

WHALEN, P.J., and DELCONTE, J., dissent and vote to affirm in the following memorandum: We respectfully dissent. In our view, defendant failed to meet his heavy burden of proving beyond a reasonable doubt that the foreign registration clause in Correction Law § 168-a (3) (b), that is, the definition of a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred," is either facially unconstitutional or unconstitutional as applied to him (*see People v Viviani*, 36 NY3d 564, 576 [2021]; *People v Foley*, 94 NY2d 668, 677 [2000], *cert denied* 531 US 875 [2000]; *People v Taylor*, 42 AD3d 13, 16 [2d Dept 2007], *lv dismissed* 9 NY3d 887 [2007]). We would therefore affirm the order determining that defendant is a level one risk and designating him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*).

Defendant was convicted upon his plea of guilty in 2010 in Kansas of aggravated sexual battery (*see* Kan Stat Ann former § 21-3518 [a] [3]), which is a registerable "sexually violent crime" under the Kansas Offender Registration Act ([KORA] Kan Stat Ann § 22-4902 [c] [9]; *see generally* Kan Stat Ann § 22-4901 *et seq.*). Although the issue was not addressed by either party in the proceeding before the SORA court, the People conceded at oral argument on appeal that the Kansas crime does not constitute a sexually violent offense under SORA's essential elements test, i.e., that the conduct of which defendant was convicted under the Kansas statute, if committed in New York, would not have amounted to a sexually violent offense under New York law (*see Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]).

At the outset, we agree with our colleagues that defendant has a "constitutionally-protected liberty interest, applicable in a substantive due process context, in not being required to register

under an incorrect label" (*People v Knox*, 12 NY3d 60, 66 [2009], *cert denied* 558 US 1011 [2009]) and that rational basis review is appropriate for defendant's substantive due process challenge to his alleged misdesignation as a sexually violent offender (*see People v Brown*, 41 NY3d 279, 285 [2023]; *Knox*, 12 NY3d at 67). Next, where, as here, a defendant presents both a facial and an as-applied challenge, our first task is to decide whether the challenged statute is unconstitutional as applied to the defendant (*see generally People v Stuart*, 100 NY2d 412, 422 [2003]). "As the term implies, an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant *under the facts of the case*" (*id.* at 421 [emphasis added]).

To that end, we note that, under relevant Court of Appeals precedent, a statute requiring a defendant to register as a sex offender based on a conviction for a specified offense is not constitutionally invalid simply because that statute may encompass defendants whose criminal conduct was not sexual in nature "as that term is commonly understood" (*Knox*, 12 NY3d at 65; *see Brown*, 41 NY3d at 289). Indeed, the Court acknowledged in *People v Brown* that "the Legislature may cast a wide net by 'employ[ing] overinclusive terms' to include within SORA's reach those who commit a non-sexual crime but nonetheless present a future risk of sexual harm" (*Brown*, 41 NY3d at 289; *see Knox*, 12 NY3d at 69). Nonetheless, the *Brown* Court specifically recognized the existence of a judicial remedy for constitutional harm caused by the application of an overbroad SORA designation statute where there is an affirmative showing in the record that the defendant "is one of the 'few' individuals . . . [encompassed within the statutory definition of 'sex offender'] for whom the sex offender designation 'is unmerited' " (*Brown*, 41 NY3d at 289, quoting *Knox*, 12 NY3d at 69). Such a showing was evidenced in *Brown* by the SORA court's finding of fact that the defendant's "sole motivation [in committing the predicate offense] was to steal money and that the offense [of unlawful imprisonment in the first degree] involved 'no sexual contact or motivation' whatsoever" (*Brown*, 41 NY3d at 283).

We see no reason to depart from the logic of *Brown* in the present case, where the foreign registration clause of Correction Law § 168-a (3) (b) broadly permits the People to establish, as they did, that defendant's designation as a sexually violent offender is warranted solely based on his Kansas conviction of an offense that required his registration as a sex offender in that jurisdiction (*see People v Talluto*, 39 NY3d 306, 310 [2022]). The People had no further burden, inasmuch as, once the fact of the requisite foreign conviction is established, "the decision whether to designate a defendant a sexually violent offender is not a matter with respect to which the adjudicating court may exercise discretion" (*id.* at 315). Instead, to establish the merits of his as-applied challenge, the onus is on defendant to establish that, although he is encompassed within the statutory definition of "sexually violent offender," he is an "individual[ ] . . . for whom the [sexually violent] offender designation is unmerited" because the foreign conviction involved no

acts of sexual violence "and his conduct provides no basis to predict risk of future sexual[ly violent] harm" (*Brown*, 41 NY3d at 289, 290 [internal quotation marks omitted]).

Contrary to the conclusion of our colleagues, defendant did not meet that burden. Instead, defendant, without distinguishing between a facial and an as-applied constitutional challenge, argued generally that "[t]here is no logical rationale in defining all registerable out-of-state sex offenses as 'violent,' " an argument repeated on appeal without further explication. Defendant's failure to make a factual argument that his foreign conviction involved no conduct defined as sexually violent under New York law or that his "conduct provides no basis to predict risk of future sexual[ly violent] harm" alone warrants rejection of his as-applied challenge (*Brown*, 41 NY3d at 290; *see generally Stuart*, 100 NY2d at 421).

The plurality nonetheless supplies defendant with a factual argument that defendant's conviction is "nonviolent" by construing the recommendation of the Board of Examiners of Sex Offenders to assess zero points against defendant under risk factor 1, and presumably the court's adoption of that recommendation, as evidence of defendant's lack of sexually violent conduct or future risk thereof (*see Brown*, 41 NY3d at 290). We respectfully note that the plurality offers no rationale to support its narrow focus on that single factor, even though a SORA determination must be based on the court's review of all relevant factors, including the Board's recommendation and any additional evidence or arguments regarding a defendant's future risk of sexual offense presented by the parties (*see* Correction Law § 168-k [2]; *Brown*, 41 NY3d at 290; *see generally People v Perez*, 35 NY3d 85, 93-94 [2020]). Risk factor 1, entitled "Use of Violence," is limited to the assessment of points for the use of forcible compulsion, infliction of physical injury, or presence of a dangerous instrument in the underlying crime. Here, however, the SORA court also adopted the Board's recommendation to assess points under both risk factor 2 (sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse) and risk factor 6 (the victim suffered from mental disability or incapacity or from physical helplessness) because defendant's conviction stemmed from his conduct in "having sexual intercourse . . . with the physically helpless victim." Specifically, the case summary reflects that the victim, who had consumed alcohol to the point of unconsciousness, woke up and realized that she was restrained in her bed and that a man identified as defendant was engaging in anal sex with her. Such conduct by a defendant is sufficient to constitute, inter alia, criminal sexual act in the first degree under New York law (*see* Penal Law §§ 130.00 [7]; 130.50 [2]; *People v Dunham*, 172 AD3d 1462, 1463-1464 [3d Dept 2019], *lv denied* 33 NY3d 1068 [2019]), which the Legislature has designated as sexually violent conduct even in the absence of any forcible compulsion, resulting physical injury, or use of a weapon (*see* Penal Law § 70.02 [1] [a]; Correction Law § 168-a [3] [a] [i]). Defendant did not contest those factual allegations or the related risk factors, and, contrary to the conclusion of the plurality, defendant was required to do so in order to establish that his designation as a sexually violent offender

would, in fact, be incorrect. Inasmuch as defendant failed to do so, the People had no obligation to raise a contrary argument and the evidence of defendant's sexually violent conduct was properly before the SORA court (*see People v Bethune*, 108 AD3d 1231, 1231-1232 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013]; *cf. People v Maund*, 181 AD3d 1331, 1331-1332 [4th Dept 2020]; *see generally People v Diaz*, 34 NY3d 1179, 1181 [2020]). Thus, even if we agreed that defendant had availed himself of a plea agreement to a Kansas offense that, considered in the abstract, would not constitute a sexually violent offense under New York law, there is still a rational justification for defendant's designation as a sexually violent offender "under the facts of th[is] case" (*Stuart*, 100 NY2d at 421; *cf. Brown*, 41 NY3d at 284).

The plurality, however, concludes that "a sexually violent offender designation under Correction Law § 168-a (3) (b) must be based solely on the elements of the crime of *conviction*, and that a defendant's alleged conduct may be considered only in assessing points to determine the appropriate risk level." First, that conclusion appears to contradict the plurality's initial reliance on the absence of an assessment of points against defendant under risk factor 1 for the use of certain types of physical violence. Next, by limiting the analysis to the elements of the foreign conviction, the plurality appears to conclude that a defendant may not be constitutionally designated a sexually violent offender unless the foreign conviction satisfies the "essential elements" test found in the first clause of section 168-a (3) (b)—i.e., the offense "includes all of the essential elements" of an enumerated "sexually violent offense" under New York law (§ 168-a [3] [b]). Notably, the statutory interpretation argument that the foreign registration clause should be read out of the statute has already been rejected by the Court of Appeals (*see Talluto*, 39 NY3d at 315). The plurality's conclusion also appears to conflict with its subsequent statement that defendant's facial challenge must fail because the plurality can "conceive of cases where a defendant has been convicted of an out-of-state felony involving violent sexual conduct that requires registration as a sex offender in the other state but does not include all of the essential elements of a sexually violent offense enumerated in Correction Law § 168-a (3) (a) (i)." That hypothetical appears to be premised on defendant's underlying conduct, despite the simultaneous assertion that such conduct "may be considered only in assessing points to determine the appropriate risk level."

Further, even if we were to agree with the plurality that the sexually violent offender designation is constitutionally permissible only where the defendant's foreign conviction "includes all of the essential elements" of an enumerated "sexually violent offense" under New York law (§ 168-a [2] [d] [i]; [3] [b]), we would still affirm. The plurality relies on the People's concession that the Kansas crime of conviction does not constitute a sexually violent offense under SORA's essential elements test. Defendant made no such argument in support of his constitutional challenges and, we are compelled to reiterate, he had the initial burden of establishing the merits

thereof. In any event, this concession does not "relieve us from the performance of our judicial function and does not require us to adopt the proposal urged upon us" (*People v Berrios*, 28 NY2d 361, 366-367 [1971]; *see People v Nathan*, 222 AD3d 1416, 1417 [4th Dept 2023]).

Here, the elements of the Kansas offense of aggravated sexual battery include "the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another . . . when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by, or was reasonably apparent to, the offender" (Kan Stat Ann former § 21-3518 [a] [3]). The analogous offense in New York appears to be sexual abuse in the first degree. Under New York law, "[a] person is guilty of sexual abuse in the first degree when [that person] subjects another person to sexual contact . . . [w]hen the other person is incapable of consent by reason of being physically helpless" (Penal Law § 130.65 [2]). " 'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party" (§ 130.00 [3]), and in New York law physical helplessness includes alcohol-induced unconsciousness (*see* § 130.00 [7]; *Dunham*, 172 AD3d at 1463-1464). Comparing these overlapping statutes, and mindful that a "strict equivalency standard" is not required in SORA cases (*Perez*, 35 NY3d at 93), we note that the Kansas "statute's victim age threshold [i.e., 16 or older] is narrower than that in the New York statute [i.e., no victim age threshold] and is thus inclusive of the New York age threshold" (*id.* at 96). At the same time, the Kansas statute is arguably broader than the New York statute (*see id.* at 96-97), inasmuch as the sexual contact is not expressly limited to "sexual or other intimate parts of a person" (§ 130.00 [3]), and therefore we "must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense" (*North*, 8 NY3d at 753). Here, defendant's conduct meets the elements of the New York crime of sexual abuse in the first degree. Sexual abuse in the first degree is a sexually violent offense under New York law (*see* Correction Law § 168-a [3] [a] [i]). Thus, the conduct of which defendant was convicted under the Kansas statute, if committed in New York, would have amounted to a sexually violent offense under New York law (*see North*, 8 NY3d at 753), regardless of whether we begin our analysis with the essential elements test or the unchallenged conduct described in the case summary.

In sum, defendant failed to establish that he was not a sexually violent offender under New York law and, as such, there can be no violation of his "constitutionally-protected liberty interest, applicable in a substantive due process context, in not being required to register under an *incorrect* [designation]" (*Knox*, 12 NY3d at 66 [emphasis added]). In light of our conclusion that defendant's as-applied challenge to the foreign registration clause in Correction Law § 168-a (3) (b) lacks merit, "the facial validity of the statute is confirmed" (*Stuart*, 100 NY2d at 422). Inasmuch as we agree with

our colleagues that defendant's remaining constitutional challenge based on the Privileges and Immunities Clause lacks merit, we would affirm.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00412

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTA M. G., DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Jefferson County Court (David A. Renzi, J.), entered January 4, 2022. The order denied the application of defendant for resentencing.

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

Memorandum: Defendant appeals from an order that denied her application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47; Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1). Defendant contends that County Court (Renzi, J.) erred in determining that she failed to meet her burden of proof and, in the alternative, that she was deprived of effective assistance of counsel by the attorney who represented her at the resentencing hearing. We affirm.

Defendant killed her boyfriend by stabbing him in the chest with a 12-inch steak knife. The jury acquitted defendant of murder in the second degree but found her guilty of the lesser included offense of manslaughter in the first degree (Penal Law § 125.20 [1]), among other offenses. County Court (Martusewicz, J.) sentenced defendant to a determinate term of imprisonment of 24 years plus five years of postrelease supervision for manslaughter in the first degree.

In affirming the judgment, we rejected defendant's contention that the People failed to disprove her justification defense beyond a reasonable doubt (*People v Krista G.*, 113 AD3d 1083, 1083-1084 [4th Dept 2014]). We noted that, "[a]lthough defendant told the police that the victim was about to strike her with a 'hammer fist' when she stabbed him . . . , [she] conceded during her grand jury testimony, which was admitted in evidence at trial, that she told at least five fellow inmates in jail that the victim was so drunk on the night in question that he could barely stand but that she was nevertheless

going to pursue a strategy of self-defense" (*id.*). We further noted that defendant "testified before the grand jury that, although she told the police that she stabbed the victim in self-defense, the victim essentially stabbed himself by pushing her hand toward his chest" (*id.* at 1084).

After having served approximately 10 years of her sentence, defendant requested permission from the court to apply for resentencing pursuant to the DVSJA, which amended Penal Law § 60.12 to grant courts discretion to impose less severe sentences on certain defendants who were victims of domestic violence at the time of their crimes. The court granted defendant's request, determining that she met the eligibility requirements for an alternative sentence under section 60.12 (*see* CPL 440.47 [1] [a]). The court therefore assigned counsel to represent defendant (*see* CPL 440.47 [1] [c]). Defendant submitted evidence pursuant to CPL 440.47 (2) (c) and the court thereafter conducted a hearing pursuant to CPL 440.47 (2) (e).

Following the hearing, the court denied defendant's application, determining that she failed to establish by a preponderance of the evidence that she "suffered physical, sexual, or psychological abuse necessary to meet the criteria of [Penal Law] § 60.12 (1) (a) and/or that [the] alleged abuse was a significant contributing factor to her criminal behavior [under § 60.12 (1) (b)]." The court further determined that the sentence imposed upon defendant for manslaughter in the first degree is not "unduly harsh" (§ 60.12 [1] [c]).

Pursuant to Penal Law § 60.12 (1), the sentencing court may, in its discretion, apply an alternative sentence if it determines following a hearing that the defendant has established the existence of three conditions: (1) "at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant"; (2) "such abuse was a significant contributing factor to the defendant's criminal behavior"; and (3) "having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, . . . a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" (§ 60.12 [1]; *see People v Liz L.*, 221 AD3d 1288, 1289-1290 [3d Dept 2023]; *People v T.P.*, 216 AD3d 1469, 1471-1472 [4th Dept 2023]).

Here, we conclude that, even assuming, arguendo, that defendant established that she was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household at the time of the killing, she did not prove by a preponderance of the evidence (*see T.P.*, 216 AD3d at 1471-1472; *People v Burns*, 207 AD3d 646, 648 [2d Dept 2022]) that such abuse was a significant contributing factor to her criminal behavior against the victim (*see People v Riley*, 221 AD3d 1162, 1163-1164 [3d Dept 2023], *lv denied* 40 NY3d 1094 [2024]; *People v Fisher*, 221 AD3d 1195, 1197 [3d Dept 2023]). Defendant did not offer any proof during her hearing testimony or in her affirmation, which was admitted in evidence, explaining how the alleged abuse influenced her

behavior against the victim on the night of the killing. The court therefore did not err in denying defendant's request for a lesser sentence pursuant to Penal Law § 60.12 (*see* § 60.12 [1] [b]; *Riley*, 221 AD3d at 1163-1164).

Defendant's challenge to the court's determination is premised largely on her contention that the testimony of a jailhouse informant was incredible as a matter of law. The evidence at the hearing included trial testimony from a jailhouse informant who testified, inter alia, that defendant, when asked by the informant whether the victim had abused her, said that the victim "did not have the power nor the strength to overcome her in any fight, and that he couldn't beat her up" because she was "much more powerful." We reject defendant's contention. The informant's testimony was not "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Huff*, 133 AD3d 1223, 1226 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016] [internal quotation marks omitted]; *see People v Pinkard*, 191 AD3d 1333, 1334-1335 [4th Dept 2021], *lv denied* 36 NY3d 1123 [2021], *reconsideration denied* 37 NY3d 967 [2021]).

Defendant further contends that her defense counsel was ineffective in failing to elicit testimony from defendant at the hearing with respect to her "perspective on her domestic violence survivorship" and "to further develop the statements she made in her written submissions." Notably, defendant's affirmation set forth in detail her self-described history of domestic abuse, and she testified at the hearing about the rehabilitative efforts she had made while incarcerated. In the absence of any indication in the record on appeal as to what additional testimony defendant would have offered at the hearing if defense counsel had engaged in further examination, it cannot be said that defense counsel was ineffective in failing to elicit such testimony. Moreover, defendant has not demonstrated the absence of a legitimate explanation for defense counsel's allegedly deficient conduct (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). Considering the nature of the evidence against defendant and the fact that she had been convicted of perjury in the first degree, defense counsel may have reasonably believed that eliciting additional testimony from defendant would have exposed her to damaging cross-examination, and that it was a better strategy to rely on defendant's affirmation. In sum, viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we cannot conclude that defense counsel failed to afford defendant with meaningful representation at the resentencing hearing (*see People v Susan C.*, 217 AD3d 1576, 1576 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-02002

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

IN THE MATTER OF TREVOR TORRES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NICOLETTE BURCHELL, RESPONDENT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Jefferson County (James Eby, R.), entered November 10, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole legal and physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner father sole legal and physical custody of the subject child. We affirm.

Initially, we conclude that the mother "failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order" (*Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517 [4th Dept 2012] [internal quotation marks omitted]). In any event, that contention lacks merit because the father met his burden of establishing "a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child[ ]" (*Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022] [internal quotation marks omitted]). The evidence at the hearing established that the parties' relationship had become acrimonious and they were unable to communicate effectively about the needs and activities of their child (*see id.* at 1315-1316).

Contrary to the mother's further contention, Family Court's determination to award sole legal and primary physical custody to the father has a sound and substantial basis in the record (*see Matter of Torres v Torres*, 211 AD3d 1597, 1598 [4th Dept 2022]). "The court's

determination following a hearing that the best interests of the child would be served by such an award is entitled to great deference . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses . . . We will not disturb that determination inasmuch as the record establishes that it is the product of the court's careful weighing of [the] appropriate factors" (*Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017] [internal quotation marks omitted]).

The mother failed to preserve for our review her contention that the court improperly assumed the role of advocate, depriving her of a fair trial (*see Matter of Robinson v Robinson*, 158 AD3d 1077, 1077-1078 [4th Dept 2018]; *Matter of Gallo v Gallo*, 138 AD3d 1189, 1190 [3d Dept 2016]) and, in any event, the record does not support her contention (*see Robinson*, 158 AD3d at 1078; *Matter of Veronica P. v Radcliff A.*, 126 AD3d 492, 492 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-01293

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

IN THE MATTER OF RODCLIFFE M., JR., AND LEVON E.M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RODCLIFFE M., SR., RESPONDENT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MARY M. WHITESIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered July 15, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by vacating the first and second ordering paragraphs and as modified the order is affirmed without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order terminating his parental rights with respect to the two subject children on the ground of permanent neglect. The father contends that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parental relationship during the period of his incarceration as required by Social Services Law § 384-b (7) (a). We reject that contention.

The father was incarcerated during the relevant time period, and petitioner demonstrated that its caseworker sent the father a series of letters that informed him of the status of the children and invited him to participate in service plan reviews. The father repeatedly failed to respond, but did ultimately communicate with the caseworker by telephone, identifying his sister, a resident of the State of Florida, as a potential placement resource. The caseworker informed the father that his sister was not responding to contact attempts, but the father did not provide any alternative resources. Where, as here, "[a]n incarcerated parent has failed on more than one occasion while

incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child" (Social Services Law § 384-b [7] [e] [ii]; *see Matter of Eric L.*, 51 AD3d 1400, 1403 [4th Dept 2008], *lv denied* 10 NY3d 716 [2008]), diligent efforts to encourage and strengthen the parental relationship are not required.

The father additionally contends that the record lacks a sound and substantial basis to support Family Court's determination of permanent neglect based on the father's failure to maintain contact with or plan for the future of the children during his incarceration. We reject that contention inasmuch as the resources proposed by the father "were not realistic alternatives to foster care" (*Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1229 [4th Dept 2006] [internal quotation marks omitted]; *see also Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]).

The father further contends that the court abused its discretion in refusing to issue a suspended judgment. A suspended judgment "provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child" (*Matter of Grace G. [Gloria G.]*, 194 AD3d 712, 713 [2d Dept 2021]). Notably, we may substitute our discretion for that of the trial court even in the absence of an abuse of discretion (*see Matter of Montgomery v List*, 173 AD3d 1657, 1658 [4th Dept 2019]), and here we conclude that a suspended judgment, rather than termination of parental rights, was in the children's best interests (*see generally Grace G.*, 194 AD3d at 713-714; *Matter of Trinity J. [Lisa F.]*, 100 AD3d 504, 504-505 [1st Dept 2012]). At the time of the dispositional hearing—just two months after his release from prison—the father had found full-time employment, participated in weekly visitation with the children, had started communicating regularly with the children's foster family regarding the children, and was in the process of finding housing and completing a mental health evaluation and parenting classes, while the children were reportedly happy to be visiting with the father regularly. "Given the child[ren]'s . . . young age, [the father's] recommencement of regular visitation, . . . the sustained efforts on the part of [the father following his release from prison], and the Legislature's express desire to return children to their natural parents whenever possible" (*Trinity J.*, 100 AD3d at 505, citing Social Services Law § 384-b [1] [a] [ii]), we conclude that the father "should have been granted a 'second chance' in the form of a suspended judgment" (*id.*), and we therefore modify the order by vacating the first and second ordering paragraphs and remit the matter to Family Court for the entry of a suspended judgment, the duration and conditions of which are to be determined by Family Court.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

281

CAF 22-01703

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

IN THE MATTER OF JASMINE L. AND MARGUERITE L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had 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 these proceedings pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order of disposition that, inter alia, determined that he neglected one of his children and derivatively neglected another one of his children. In appeal No. 2, respondent appeals from an order of disposition that, inter alia, determined that he neglected three more of his children. In appeal No. 3, respondent appeals from an order of disposition that, inter alia, determined that he neglected another child. We affirm in all three appeals.

We conclude that there is a sound and substantial basis in the record to support Family Court's determination that respondent neglected five of the six children. A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent or other person legally responsible for [the child's] care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]). Here, petitioner established by a preponderance of the evidence that respondent engaged

in acts of domestic violence against the children's mother while the children were present, including an incident in which he destroyed the mother's cell phone, choked her unconscious, threatened one of his children with an axe, and then prevented the mother and five of the children from leaving their home until the police arrived (*see Matter of Ricky A. [Barry A.]*, 162 AD3d 1747, 1748 [4th Dept 2018]; *Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1159-1160 [4th Dept 2013]). Petitioner further established by a preponderance of the evidence that those five children were in imminent danger of physical, mental, or emotional impairment based on respondent's history of mental illness, alcoholism, and substance abuse issues for which he refused to seek treatment (*see Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1590-1591 [4th Dept 2016]), and that respondent made inappropriate sexual comments to at least two of the children and inappropriately touched one of them by repeatedly rubbing up against her breasts and buttocks (*see Matter of Thomas XX. [Thomas YY.]*, 180 AD3d 1175, 1176-1177 [3d Dept 2020]). Contrary to respondent's contention, the statements made by certain of the children to the investigating caseworker "provided sufficient cross-corroboration inasmuch as they tend to support the statements of [each other] and, viewed together, give sufficient indicia of reliability to each [child's] out-of-court statements" (*Matter of Cameron M. [Keira P.]*, 187 AD3d 1582, 1582 [4th Dept 2020] [internal quotation marks omitted]).

We also conclude in appeal No. 1 that there is a sound and substantial basis in the record to support Family Court's determination that respondent derivatively neglected the sixth child, inasmuch as "the nature, duration and circumstances surrounding the neglect of the . . . other children can be said to evidence fundamental flaws in [respondent's] understanding of the duties of parenthood" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637-1638 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011] [internal quotation marks omitted]).

We have reviewed petitioner's remaining contention and respondent's remaining contention and conclude that they lack merit.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

282

CAF 22-01704

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

IN THE MATTER OF MONTU L., TIARA L., AND WAKEL L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject children.

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

Same memorandum as in *Matter of Jasmine L. (Montu L.)* ([appeal No. 1] — AD3d — [June 14, 2024] [4th Dept 2024]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

283

CAF 22-01707

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

IN THE MATTER OF VANESSA M.R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Jasmine L. (Montu L.)* ([appeal No. 1] — AD3d — [June 14, 2024] [4th Dept 2024]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

288

CA 23-00767

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

EDWARD C. CHAPMAN, AS EXECUTOR OF THE
ESTATE OF BETTY JANE CHAPMAN, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

OLEAN GENERAL HOSPITAL, DEFENDANT-RESPONDENT.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MARK C. BACHMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered April 25, 2023. The order granted the motion of defendant for summary judgment dismissing the amended complaint and denied the cross-motion of plaintiff for leave to amend the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by granting the cross-motion and striking the note of issue and certificate of readiness and as modified the order is affirmed without costs.

Memorandum: Plaintiff's decedent commenced this negligence action seeking damages for injuries that she sustained when she allegedly slipped and fell in a parking lot at defendant's premises after her discharge from the emergency department. Following discovery and the filing of a note of issue and certificate of readiness, defendant moved for summary judgment dismissing the amended complaint, contending, inter alia, that plaintiff was unable to establish the cause of decedent's fall without engaging in speculation. Plaintiff opposed the motion and cross-moved for leave to amend the amended complaint to add a cause of action alleging negligent discharge of decedent from defendant's facility. Supreme Court granted the motion and denied the cross-motion, and plaintiff now appeals.

" 'In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of [the] fall' without engaging in speculation" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014]; *see Weed v Erie County*

Med. Ctr., 187 AD3d 1568, 1568 [4th Dept 2020]). Here, defendant established its prima facie entitlement to judgment as a matter of law by submitting plaintiff's deposition testimony in which he stated that he did not know what caused decedent to fall and did not see any accumulation of ice or snow in that area (see *McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077 [4th Dept 2008]).

We further conclude that plaintiff failed to raise a triable issue of fact sufficient to defeat summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff contends that the testimony from his deposition that decedent told him that she had "slipped" and "it was icy" recounts admissible hearsay pursuant to the excited utterance exception and raises a question of fact as to whether an accumulation of ice was the cause of decedent's fall. Contrary to plaintiff's contention, the record does not establish that decedent's statements were " 'made shortly after the [accident and] . . . while [she] was under the extraordinary stress of [her] injuries' " and, thus, we conclude that the statements are not admissible hearsay (*People v Farrington*, 171 AD3d 1538, 1539 [4th Dept 2019], *lv denied* 34 NY3d 930 [2019]; *see generally People v Johnson*, 1 NY3d 302, 305-307 [2003]). Although inadmissible hearsay "may be considered in opposition to a motion for summary judgment, it is by itself insufficient to defeat such a motion" (*Raux v City of Utica*, 59 AD3d 984, 985 [4th Dept 2009]; *see Savage v Anderson's Frozen Custard, Inc.*, 100 AD3d 1563, 1564-1565 [4th Dept 2012]).

With respect to the cross-motion for leave to serve a second amended complaint adding a cause of action for the allegedly negligent discharge of decedent from defendant's facility, we note, as a preliminary matter, that the proposed additional cause of action sounds in medical malpractice because it "challenge[s] the hospital's assessment of [decedent's] need for supervision" (*Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [4th Dept 1994]; *see Scott v Uljanov*, 74 NY2d 673, 674-675 [1989]), and therefore "bears a substantial relationship to the rendition of medical treatment by a licensed physician" (*Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996] [internal quotation marks omitted]; *cf. Edson v Community Gen. Hosp. of Greater Syracuse*, 289 AD2d 973, 974 [4th Dept 2001]). While "[i]t is well settled that [l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (*Burke, Albright, Harter & Rzepka LLP v Sills*, 187 AD3d 1507, 1508-1509 [4th Dept 2020] [internal quotation marks omitted]), that policy does not apply "on the eve of trial," and once a case has been certified ready for trial "there is a heavy burden on [a] plaintiff to show extraordinary circumstances to justify amendment by submitting affidavits which set forth the recent change of circumstances justifying the amendment and otherwise giving an adequate explanation for the delay" (*Jablonski v County of Erie*, 286 AD2d 927, 928 [4th Dept 2001] [internal quotation marks omitted]). Inasmuch as plaintiff failed to offer any explanation for the delay, we reject plaintiff's contention that the court abused its discretion in denying the cross-motion for leave to amend the amended complaint to add a medical malpractice cause of action. Nevertheless, because defendant failed to establish any prejudice that would result from plaintiff's delay in

seeking leave to amend, if further discovery is conducted, we modify the order in the exercise of our discretion by granting plaintiff leave to amend his amended complaint to assert a cause of action for the allegedly negligent discharge of decedent from defendant's facility, and, further, striking the note of issue and certificate of readiness to allow for additional discovery (*see Wegner v Town of Cheektowaga*, 159 AD3d 1348, 1349 [4th Dept 2018]; *Matter of Trader v State of New York*, 259 AD2d 951, 951 [4th Dept 1999]; *Omni Group Farms v County of Cayuga*, 199 AD2d 1033, 1034-1035 [4th Dept 1993]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

292

CA 23-01740

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

JOHN C. FOLLETT, AS TRUSTEE OF THE DORIS C. FOLLETT IRREVOCABLE TRUST, ROBERT PINKERTON, BELINDA PINKERTON, MICHAEL GUMPPER, BRIDGET THOMAS, PHYLLIS A. SWEETEN, KENNETH M. RITTER, JANINE L. RITTER, NORTON CAMP, LLC, ROBERT KLEI, COLLEEN KLEI, CHRISTOPHER LAMB, ELIZABETH A. MEYERS, JOHN J. SURGOINE, RICHARD W. SOUTHARD, MARGARET L. SOUTHARD, ROYCE H. BURGESS, AND MARY C. BURGESS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RONALD DUMOND, DEFENDANT-RESPONDENT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LYNN D'ELIA TEMES & STANCZYK, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 16, 2023, in a declaratory judgment action. The judgment determined the rights and duties of plaintiffs and defendant in relation to an easement.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the complaint is dismissed without prejudice to the commencement of a new action with all necessary parties.

Memorandum: Plaintiffs appeal from a judgment in this action seeking, inter alia, a declaration under RPAPL article 15 of the respective rights and duties of plaintiffs and defendant in relation to a recreational easement burdening real property owned by defendant in the "Godfrey's Shady Point Track" subdivision on the shoreline of Oneida Lake. The subject parcel is a "reserved park" that provides waterfront access for the cottage lots in the subdivision. Notably, the record contains no evidence concerning which lots plaintiffs own, and it includes an affidavit from one of the plaintiffs stating that 11 "of the non-lakefront property owners are [p]laintiffs in this case," i.e., that some of the non-lakefront property owners are *not* plaintiffs in this case.

CPLR 1001 (a) provides, in relevant part, that all "[p]ersons who

ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." It is well established that "[t]he absence of a necessary party may be raised at any stage of the proceedings, by any party or by the court on its own motion" (*Ullman v Medical Liab. Mut. Ins. Co.*, 159 AD3d 1498, 1500 [4th Dept 2018] [internal quotation marks omitted]; *see Town of Amherst v Hilger*, 106 AD3d 120, 129 [4th Dept 2013]). In an action seeking to determine the extent of a recreational easement, the owners of all parcels of land burdened or benefitted by the easement are necessary parties because there is a potential that their real property rights will be affected by the outcome of the litigation (*see Schaffer v Landolfo*, 27 AD3d 812, 812 [3rd Dept 2006]; *Hitchcock v Boyack*, 256 AD2d 842, 844 [3d Dept 1998]). Inasmuch as owners of real property who are not currently named as parties may be affected by the outcome of litigation concerning the subject parcel, we reverse the judgment and dismiss the complaint without prejudice (*see* CPLR 1003). Plaintiffs are thus "not precluded from recommencing the action in the proper manner naming all necessary parties" (*Hitchcock*, 256 AD2d at 844).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

308.1

CA 22-01902

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

IN THE MATTER OF SRC FAMILY TRUST ESTABLISHED UNDER THE VALHALLA TRUST DATED APRIL 1, 1978, AS AMENDED BY COURT DECREE ISSUED MAY 1, 2006. (PROCEEDING NO. 1.)

MEMORANDUM AND ORDER

IN THE MATTER OF MJC FAMILY TRUST ESTABLISHED UNDER THE VALHALLA TRUST DATED APRIL 1, 1978, AS AMENDED BY COURT DECREE ISSUED MAY 1, 2006. (PROCEEDING NO. 2.)

MICHAEL A. MAMMOLITO AND TIMOTHY AHERN, TRUSTEES OF THE SRC FAMILY TRUST AND THE MJC FAMILY TRUST, PETITIONERS-RESPONDENTS;

MARK CONGEL, REBECCA CONGEL, SABRINA CONGEL, ROBERT CONGEL, JACK CONGEL, RYAN CONGEL, SYDNEY CONGEL, LOGAN CONGEL AND JAEDYN CONGEL, OBJECTANTS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), FOR OBJECTANTS-APPELLANTS REBECCA CONGEL, SABRINA CONGEL, ROBERT CONGEL, JACK CONGEL, RYAN CONGEL, SYDNEY CONGEL, LOGAN CONGEL AND JAEDYN CONGEL.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR OBJECTANT-APPELLANT MARK CONGEL.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT J. SMITH OF COUNSEL), AND MORRISON & FOERSTER LLP, BOSTON, MASSACHUSETTS, FOR PETITIONERS-RESPONDENTS.

Appeals from an order of the Surrogate's Court, Onondaga County (Mary Keib Smith, S.), entered October 19, 2022. The order, inter alia, granted in part the motions of petitioners for summary judgment.

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

Memorandum: In this dispute over family trusts, objectants appeal from an order that, inter alia, granted in part petitioners' motions for summary judgment dismissing particular objections to certain settlements of accounting filed by petitioners. Following a subsequent trial, Surrogate's Court entered a final decree (denominated order) dated December 13, 2023 denying the remaining

objections after finding them without merit and judicially settling the accounts. Inasmuch as "[t]he right to appeal from an intermediate order terminates with the entry of a final judgment" (*Matter of Scott v Manilla*, 203 AD2d 972, 973 [4th Dept 1994]; *see generally* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]), this appeal from the intermediate order must be dismissed (*see McCann v Gordon*, 204 AD3d 1449, 1449 [4th Dept 2022], *appeal dismissed* 38 NY3d 1158 [2022]; *see also Matter of Frank A. Clemente Two-Year Grantor Retained Annuity Trust*, 224 AD3d 945, 945-946 [3d Dept 2024]; *Matter of Panella* [appeal No. 2], 218 AD3d 1198, 1199 [4th Dept 2023]). Objectants may raise their contentions in an appeal from the final decree (*see generally Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

308

CA 23-01607

PRESENT: SMITH, J.P., CURRAN, BANNISTER, GREENWOOD, AND KEANE, JJ.

PAUL A. MONESCALCHI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PIERSMA & SON CONTRACTING, LLC, JUSTIN PIERSMA,
DEFENDANTS-APPELLANTS,
AND ROBERT PIERSMA, DEFENDANT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR DEFENDANTS-APPELLANTS.

ALEXANDER KOROTKIN, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered May 19, 2023. The order denied in part the motion of defendants to vacate a default judgment and to dismiss the complaint against defendants Justin Piersma and Robert Piersma.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking to vacate the default judgment and dismiss the complaint against defendant Justin Piersma, vacating the order dated October 13, 2022 with respect to that defendant, and dismissing the complaint against him, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for defendants' alleged breach of contract. Following entry of a default judgment, defendants moved, as relevant here, to vacate the default judgment and to dismiss the complaint against defendants Justin Piersma and Robert Piersma. Supreme Court granted the motion to that extent with respect to Robert Piersma and dismissed the complaint against him, but otherwise denied the motion.

We agree with defendants-appellants (defendants) that plaintiff failed to show due diligence in attempting to serve defendant Justin Piersma under CPLR 308 (1) and (2) at his home or actual place of business. CPLR 308 (4) allows the "nail and mail" method of service only "when service pursuant to CPLR 308 (1) and (2) cannot be made with due diligence" (*Austin v Tri-County Mem. Hosp.*, 39 AD3d 1223, 1224 [4th Dept 2007]; *see Interboro Ins. Co. v Tahir*, 129 AD3d 1687, 1688-1689 [4th Dept 2015]). Plaintiff submitted the affidavit of service with respect to Justin, which affidavit ordinarily constitutes prima facie evidence of proper service (*see State of New York v Walker*, 224 AD3d 1368, 1370 [4th Dept 2024]). The process server's

affidavit, however, "fail[ed] to demonstrate the requisite due diligence" (*Interboro Ins. Co.*, 129 AD3d 1689; *see Matter of Kader v Kader*, 132 AD3d 1376, 1377 [4th Dept 2015]). We therefore conclude that the court erred in denying those parts of the motion seeking to vacate the default judgment and to dismiss the complaint against Justin, and we modify the order accordingly (*see Hallston Manor Farm, LLC v Andrew*, 60 AD3d 1330, 1331 [4th Dept 2009]; *see also Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1660-1661 [4th Dept 2017]).

Contrary to defendants' contention, we conclude that defendant Piersma & Son Contracting, LLC was properly served pursuant to Limited Liability Company Law § 303 and that it did not establish a reasonable excuse for the default (*see Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]; *see also Butchello v Terhaar*, 176 AD3d 1579, 1580 [4th Dept 2019]). Thus, the court properly denied that part of the motion seeking to vacate the default judgment against that defendant (*see generally* CPLR 5015).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

311

KA 21-01024

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY WILLIAMS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Charles A. Schiano, Jr., J.), rendered June 28, 2021. 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 case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following 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]).

Initially, we agree with defendant that his "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 Zabko*, 206 AD3d 1642, 1642 [4th Dept 2022] [internal quotation marks omitted]). The oral colloquy improperly characterized the waiver as an absolute bar "to all postconviction relief separate from the direct appeal" (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020] [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). "Although ambiguities in a court's explanation may be cured by adequate clarifying language, which may be provided . . . in a written waiver" (*People v Durie*, 216 AD3d 1449, 1450 [4th Dept 2023] [internal quotation marks omitted]), here, Supreme Court "failed to confirm that [defendant] understood the contents of the written waiver[ ]" (*People v Parker*, 189 AD3d 2065, 2066 [4th Dept 2020], *lv denied* 36 NY3d 1122 [2021] [internal quotation marks omitted]).

Defendant contends that the court erred in denying that part of his omnibus motion seeking to dismiss the indictment pursuant to CPL

30.30. In particular, defendant contends that the COVID-19 Executive Orders purporting to extend the toll of CPL 30.30 beyond May 8, 2020, were unconstitutional because their complete suspension of CPL 30.30 did not provide for the "minimum deviation from the requirements of the statute" required by Executive Law § 29-a (2) (e) and because compliance with CPL 30.30 after that date would not "prevent, hinder, or delay action necessary to cope with the disaster" as required by Executive Law § 29-a (1). At the very latest, defendant contends, the orders became unconstitutional after July 13, 2020, when grand juries were reconvened in Monroe County. Defendant further contends that Executive Order (A. Cuomo) No. 202.28 (9 NYCRR 8.202.28), which modified the prior suspension of CPL 180.80 by requiring the People to show good cause why they could not empanel a grand jury, necessarily impacted CPL 30.30, although it did not expressly modify that statute.

Contrary to the People's assertion, we conclude that defendant did not waive his contention by failing to obtain a ruling on the specific grounds he raised. "[A] party who without success has either expressly or impliedly sought or requested a particular ruling . . . is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule . . . accordingly sufficiently to raise a question of law with respect to such disposition or failure" (CPL 470.05 [2]). Further, defendant did not plead guilty until he had received a ruling from the court on his speedy trial claim (*see generally People v Hardy*, 173 AD3d 1649, 1649-1650 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019]).

Nevertheless, we may not reach defendant's contention. Although the court denied defendant's speedy trial claim, it did not rule on the constitutional issues raised by defendant, and this court has no power to review issues not ruled on by the trial court (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v Coles*, 105 AD3d 1360, 1363 [4th Dept 2013]). We therefore hold the case and remit the matter to Supreme Court to rule on that part of defendant's omnibus motion seeking dismissal of the indictment pursuant to CPL 30.30 based on defendant's contention that the executive orders tolling that statute were unconstitutional (*see People v Baek*, 196 AD3d 1112, 1112-1113 [4th Dept 2021]; *People v Johnston*, 103 AD3d 1202, 1203-1204 [4th Dept 2013], *lv denied* 21 NY3d 912 [2013]; *see generally People v Anderson*, 210 AD3d 1464, 1466 [4th Dept 2022]).

Defendant further contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge to the statute during the proceedings before the trial court, and therefore any such contention is unpreserved for our review (*see People v Cabrera*, 41 NY3d 35, 42-43 [2023]; *People v Garcia*, 41 NY3d 62, 66 [2023]; *People v David*, 41 NY3d 90, 95-96 [2023]; *People v Fruster*, 225 AD3d 1275, 1275 [4th Dept 2024]). We decline to exercise our power to review defendant's constitutional challenge as a matter

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

313

KA 23-00658

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY S. WILLIAMS, DEFENDANT-APPELLANT.

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

JEFFREY S. WILLIAMS, DEFENDANT-APPELLANT PRO SE.

CHRISTINE K. CALLANAN, ACTING DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered March 22, 2023. The judgment convicted defendant, upon a guilty plea, of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]).

Defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and the valid waiver encompasses his challenge in his main brief to County Court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Snyder*, 151 AD3d 1939, 1939 [4th Dept 2017]), his non-jurisdictional challenge in his pro se supplemental brief to the residency of the assistant district attorneys who pursued the charges against him (*see People v Jackson*, 129 AD3d 1342, 1343 [3d Dept 2015]; *see generally Matter of Haggerty v Himelein*, 89 NY2d 431, 437 n [1997]), his evidentiary challenge in his pro se supplemental brief with respect to the grand jury proceeding (*see People v Frasier*, 105 AD3d 1079, 1080 [3d Dept 2013], *lv denied* 22 NY3d 1088 [2014]), and his contention in his pro se supplemental brief that he was denied effective assistance of his counsel inasmuch as he does not claim that defense counsel's performance affected the voluntariness of his plea (*see People v Wood*, 217 AD3d 1407, 1409 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *People v Walker*, 189 AD3d 1619, 1619-1620 [2d Dept 2020], *lv dismissed* 37 NY3d 975 [2021]). We note that, although the

written waiver form executed by defendant incorrectly portrays the waiver as an absolute bar to the taking of an appeal (*see generally People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), the "oral colloquy, which followed the appropriate model colloquy, cured that defect" (*People v Clark*, 221 AD3d 1550, 1551 [4th Dept 2023]; *see People v Yeara*, — AD3d —, —, 2024 NY Slip Op 02625, *1 [4th Dept 2024]).

Although defendant's contention in his main brief that his plea was rendered involuntary due to the duress from his continued incarceration survives even a valid waiver of the right to appeal (*see People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]), defendant "failed to preserve [that contention] for our review by way of a motion to withdraw his plea or to vacate the judgment of conviction on that ground" (*People v Thigpen-Williams*, 198 AD3d 1366, 1367 [4th Dept 2021]). We decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We have considered the remaining contentions in defendant's pro se supplemental brief, and we conclude that none warrants modification or reversal of the judgment.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

335

KA 19-01184

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARRETT WHITE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Alex R. Renzi, J.), rendered November 28, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that Supreme Court erred in refusing to suppress cocaine seized by police officers after a search of his person. We affirm.

The evidence at the suppression hearing established that the police stopped defendant's vehicle for a traffic violation and that an officer detected the odor of marihuana emanating from the vehicle when he approached. Defendant handed the officer a marihuana cigarette after the officer asked if anyone in the vehicle was smoking. The officer ordered defendant and his passenger out of the vehicle, but instead of complying, defendant placed his hands inside his pants. Officers wrestled defendant out of the vehicle and onto the ground, where he was handcuffed. During the altercation, the officer instructed defendant to "stop resisting." The officer patted defendant down for weapons and felt a bulge in his pants in the same area where defendant had placed his hands. The officer removed the item, which was 52 bags of crack cocaine. Defendant was placed under arrest for possession of the cocaine.

The court upheld the search as a lawful search incident to an arrest, and we note that we are precluded from affirming on any alternative basis (*see People v Concepcion*, 17 NY3d 192, 197-198

[2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]). Defendant, relying on *People v Reid* (24 NY3d 615, 618-619 [2014]), contends that the search was illegal because it preceded the arrest and that the only reason for the arrest was the cocaine that was found during the search. We conclude that the court properly determined that the search and the arrest were "substantially contemporaneous" (*id.* at 619; *see People v Chestnut*, 36 NY2d 971, 973 [1975]) "so as to constitute one event" (*People v Evans*, 43 NY2d 160, 166 [1977]). The evidence at the suppression hearing supports the conclusion "that the search was 'incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not' " (*People v Johnson*, 186 AD3d 1168, 1168 [1st Dept 2020], *lv denied* 36 NY3d 973 [2020]). Unlike in *Reid*, the officer never testified that he had no intent to arrest defendant when he ordered him out of the vehicle (*cf. Reid*, 24 NY3d at 618). It is not decisive "that the police chose to predicate the arrest on the possession of [cocaine], rather than on [possession of marihuana]" (*id.* at 619).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

338

KA 21-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL L. WALKER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 26, 2021. The judgment convicted defendant, upon a jury verdict, of driving while ability impaired.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon a jury verdict, of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]), defendant contends that County Court erred in rejecting his *Batson* challenge with respect to a prospective juror. We reject that contention. The court's determination whether the prosecutor's proffered race-neutral reason for striking a prospective juror is pretextual is accorded great deference on appeal (*see People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *People v Larkins*, 128 AD3d 1436, 1441-1442 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]). Here, the People's proffered reason was that the prospective juror stated during voir dire that "innocent people get charged every day," that he talked about a right not to cooperate with police, and that he showed a better rapport with defense counsel. We conclude that the proffered reason was sufficient to satisfy "the People's 'quite minimal' burden of providing a race-neutral reason" for exercising a peremptory challenge (*People v Herrod*, 174 AD3d 1322, 1323 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019]), and we see no reason on this record to disturb the court's determination that the prosecutor's explanations were not pretextual (*see People v Johnson*, 195 AD3d 1510, 1512 [4th Dept 2021]).

Defendant next contends that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). In particular, he contends that the People's failure to disclose transcripts from the refusal hearing of the Department of

Motor Vehicles (*see* CPL 30.30 [5]; 245.50 [1]) rendered any certificate of compliance (COC) filed pursuant to CPL 245.50 improper and thereby rendered any declaration of trial readiness made pursuant to CPL 30.30 illusory and insufficient to stop the running of the speedy trial clock. CPL 245.20 (1) requires the People to automatically disclose to the defendant " 'all items and information that relate to the subject matter of the case' that are in the People's 'possession, custody or control' " (*People v Johnson*, 218 AD3d 1347, 1350 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]). The statute enumerates 21 categories of material subject to disclosure, but the People's disclosure obligations are not limited to those categories (*see* CPL 245.20 [1]; *People v Bay*, 41 NY3d 200, 208-209 [2023]).

Here, although the transcripts of the refusal hearing were discoverable inasmuch as they relate to the subject matter of the case (*see generally* CPL 245.20 [1] [e]), the People established that those transcripts were not in their possession and control when the COC was filed (*see generally People v Flynn*, 79 NY2d 879, 882 [1992]; *People v Vargas*, 78 Misc 3d 1235[A], 2023 NY Slip Op 50425[U], *6 [Crim Ct, Bronx County 2023]).

Nevertheless, the court erred in failing to consider whether the People were required to exercise due diligence to obtain transcripts not in their possession pursuant to CPL 245.20 (2) and, if so, whether the People made " 'reasonable efforts' to comply with [the] statutory directives" and " 'ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211; *see generally People v Sumler*, — AD3d — [June 14, 2024] [4th Dept 2024]). Additionally, the court did not address the People's claim that defendant's motion to dismiss was untimely. We therefore hold the case, reserve decision, and remit the matter to County Court to determine the motion by ruling on the abovementioned outstanding issues, after further submissions, if warranted (*see People v Rojas-Aponte*, 224 AD3d 1264, 1266 [4th Dept 2024]).

Defendant failed to preserve for our review his contention that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds insofar as the motion is premised on the People's failure to disclose the criminal background of a witness (*see generally People v Morrison*, 216 AD3d 1430, 1431 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]).

Entered: June 14, 2024 Ann Dillon Flynn
Clerk of the Court

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

345

CA 23-01299

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

ANNISA S. ALI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CVS PHARMACY, INC., CVS ALBANY, LLC, ELBERT A. BUTLER-CLYBURN AND ASHLEY K. MCGUIRE, DEFENDANTS-RESPONDENTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MONACO COOPER LAMME & CARR, PLLC, ALBANY (JONATHAN E. HANSEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CVS PHARMACY, INC., CVS ALBANY, LLC, AND ELBERT A. BUTLER-CLYBURN.

BARTH CONDREN, LLP, BUFFALO (PIERRE A. VINCENT OF COUNSEL), FOR DEFENDANT-RESPONDENT ASHLEY K. MCGUIRE.

Appeal from an amended order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered April 27, 2023. The amended order granted the motion of defendants CVS Pharmacy, Inc., CVS Albany, LLC and Elbert A. Butler-Clyburn for summary judgment, dismissed the amended complaint against those defendants and denied the cross-motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying the motion and reinstating the amended complaint against defendants CVS Pharmacy, Inc., CVS Albany, LLC, and Elbert A. Butler-Clyburn and by granting that part of the cross-motion seeking partial summary judgment on the issue of negligence with respect to defendant Ashley K. McGuire, and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she sustained as a pedestrian when a vehicle operated by defendant Elbert A. Butler-Clyburn collided with a vehicle operated by defendant Ashley K. McGuire. The vehicle Butler-Clyburn was operating was owned by defendant CVS Pharmacy, Inc., and he was operating the vehicle in the scope of his employment with defendant CVS Albany, LLC. The accident occurred when McGuire drove her vehicle either out of a driveway or from the side of the road into the path of Butler-Clyburn, who had the right-of-way, and plaintiff was pinned between the two vehicles. Butler-Clyburn, CVS Pharmacy, Inc., and CVS Albany, LLC (collectively, CVS defendants) moved for summary judgment

dismissing the amended complaint against them, and plaintiff cross-moved for, inter alia, partial summary judgment on the issue of negligence with respect to all defendants. Supreme Court granted the motion and denied the cross-motion, and plaintiff now appeals.

Plaintiff contends that the court erred in granting the CVS defendants' motion. To be entitled to summary judgment, the CVS defendants had to establish that Butler-Clyburn "was operating his vehicle in a lawful and prudent manner and that there was nothing [he] could have done to avoid the collision" (*Heltz v Barratt*, 115 AD3d 1298, 1299 [4th Dept 2014], *affd* 24 NY3d 1185 [2014] [internal quotation marks omitted]; *see Marx v Kessler*, 145 AD3d 1618, 1619 [4th Dept 2016]; *see also Stewart v Kier*, 100 AD3d 1389, 1389-1390 [4th Dept 2012]). "[A] driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way . . . Although a driver with the right-of-way has a duty to use reasonable care to avoid a collision . . . , a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision" (*Carpentieri v Kloc*, 213 AD3d 1314, 1315 [4th Dept 2023] [internal quotation marks omitted]; *see Penda v Duvall*, 141 AD3d 1156, 1157 [4th Dept 2016]; *Doxtader v Janczuk*, 294 AD2d 859, 859-860 [4th Dept 2002], *lv denied* 99 NY2d 505 [2003]). Moreover, under the emergency doctrine, "when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes [the driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the [driver] has not created the emergency" (*Shanahan v Mackowiak*, 111 AD3d 1328, 1329 [4th Dept 2013] [internal quotation marks omitted]; *see generally Caristo v Sanzone*, 96 NY2d 172, 174 [2001]).

We conclude that the CVS defendants failed to meet their initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In support of their motion, the CVS defendants submitted Butler-Clyburn's deposition testimony that he first observed McGuire's vehicle parked and stopped in the parking lane of the roadway and that plaintiff was at that time standing outside the driver's side door. Butler-Clyburn then testified that he was trying to go around McGuire's vehicle when it turned abruptly into his lane of travel and struck his vehicle, leaving him no time to avoid the collision. The CVS defendants' submissions in support of their motion for summary judgment, however, included the deposition testimony of plaintiff and McGuire, each of whom offered differing versions of the accident that raise triable issues of fact regarding Butler-Clyburn's negligence and the applicability of the emergency doctrine (*see Brown v Askew*, 202 AD3d 1501, 1504 [4th Dept 2022]). In particular, McGuire testified that she was not parked on the road but was parked in the driveway. She further testified that she pulled out of the driveway after looking both ways and did not observe any traffic. She

testified that she was not traveling fast and was "pretty much coasting" at the time. When McGuire's vehicle was approximately "halfway into the street," Butler-Clyburn's vehicle then hit plaintiff and McGuire's vehicle. Plaintiff testified that she was standing next to the driver's side door of McGuire's vehicle while it was parked in the driveway when McGuire pushed on the gas pedal and drove out of the driveway and into the street. Based on the foregoing, among other things, we conclude that the CVS defendants failed to make a prima facie showing of entitlement to judgment as a matter of law, thereby requiring denial of their motion "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We therefore modify the amended order accordingly.

We further agree with plaintiff that the court erred in denying that part of her cross-motion with respect to the issue of McGuire's negligence inasmuch as plaintiff met her initial burden on that part of the cross-motion and McGuire failed to raise a triable issue of fact in opposition. We therefore further modify the amended order accordingly. Contrary to the court's determination, the existence of triable issues of fact regarding the apportionment of liability between plaintiff and McGuire "does not preclude an award of summary judgment in plaintiff[']s] favor on the issue of [McGuire's] negligence" (*Pachan v Brown*, 204 AD3d 1435, 1436 [4th Dept 2022]; *see Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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OP 23-02118

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

IN THE MATTER OF HON. JOHN J. FLYNN, DISTRICT ATTORNEY OF ERIE COUNTY, PETITIONER,

V MEMORANDUM AND ORDER

HON. SHEILA A. DITULLIO AND PATRICK PRIM, RESPONDENTS.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR PETITIONER.

PAUL G. DELL, BUFFALO, FOR RESPONDENT PATRICK PRIM.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit respondent Hon. Sheila A. DiTullio from enforcing an order appointing a Special District Attorney.

It is hereby ORDERED that said petition is unanimously granted without costs and judgment is granted in favor of petitioner as follows:

> It is ADJUDGED that respondent Hon. Sheila A. DiTullio is prohibited from enforcing the order dated August 18, 2023, under Erie County indictment No. 71431-23.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to prohibit Hon. Sheila A. DiTullio (respondent) from enforcing an order that granted the motion of respondent Patrick Prim seeking to disqualify petitioner from prosecuting a criminal case against Prim and appoint a Special District Attorney to prosecute the matter instead.

We agree with petitioner that the petition should be granted inasmuch as respondent exceeded her authority in granting Prim's motion (*see generally Matter of Soares v Herrick*, 20 NY3d 139, 144-146 [2012]). "A court may intervene to disqualify an attorney only under limited circumstances," particularly "in the case of a District Attorney who is a constitutional officer chosen by the electorate and whose removal by a court implicates separation of powers considerations" (*Matter of Schumer v Holtzman*, 60 NY2d 46, 54-55 [1983]). "The courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising

from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" (*id.* at 55; *see People v Adams*, 20 NY3d 608, 612 [2013]). "[I]n rare situations, the appearance of impropriety itself is a ground for disqualification . . . when the appearance is such as to 'discourage[ ] public confidence in our government and the system of law to which it is dedicated' " (*Adams*, 20 NY3d at 612, quoting *People v Zimmer*, 51 NY2d 390, 396 [1980]).

We conclude that under the circumstances presented, respondent erred in finding that Prim established that disqualification was warranted due to the existence of an appearance of impropriety arising from the fact that Prim was being prosecuted in another matter for crimes allegedly committed against an Assistant District Attorney (ADA) employed by petitioner (*see People v Wynn*, 248 AD2d 494, 494 [2d Dept 1998], *lv denied* 91 NY2d 1014 [1998]; *see also Soares*, 20 NY3d at 146-147). The mere fact that an ADA was a victim in another, unrelated case against Prim does not create an appearance of impropriety (*see Wynn*, 248 AD2d at 494; *People v Seymour*, 225 AD2d 487, 488 [1st Dept 1996]; *see generally People v Hooper*, 288 AD2d 948, 949 [4th Dept 2001], *lv denied* 97 NY2d 755 [2002]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

355

KA 18-01760

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. SMITH, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEFANIE M. STARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARK A. SMITH, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 9, 2018. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the first degree (Penal Law § 160.15 [4]), arising from allegations that he forcibly stole property from a victim at a hair salon. Defendant contends in his main brief that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Defendant's contention regarding the legal sufficiency of the evidence is preserved only in part (*see People v Gray*, 86 NY2d 10, 19 [1995]) and, in any event, is without merit (*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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jurors "failed to give the evidence the weight it should be accorded" (*People v Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]).

We reject defendant's contention in his main and pro se supplemental briefs that County Court erred in refusing to suppress evidence obtained as the result of an arrest that was made without probable cause. Contrary to defendant's contention, the court properly determined that his warrantless arrest was supported by

probable cause, which was established by, inter alia, hearsay information provided by a citizen informant. Here, the information provided by the informant satisfied both prongs of the *Aguilar-Spinelli* test. First, the informant was an identified citizen and thus is "presumed to be reliable" (*People v Bartholomew*, 132 AD3d 1279, 1280 [4th Dept 2015]). Second, the statements of the informant were based upon "[her] conversation with defendant" and were corroborated by the information obtained by the police as part of their investigation (*People v Gefell*, 227 AD2d 973, 974 [4th Dept 1996]).

We reject the contention of defendant in his main brief that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]) and, here, defendant failed to meet that burden.

Defendant further contends in his main brief that the court erred in admitting in evidence testimony that defendant planned to commit another similar crime. Initially, we conclude that the testimony in question does not constitute *Molineux* evidence, and we note that the fact "[t]hat the People classified it as *Molineux* evidence, and the trial court considered it on that basis, does not prevent us from concluding it was not, because the parties' arguments . . . regarding the probative value of the [evidence] and its prejudicial effect would remain the same" (*People v Frumusa*, 29 NY3d 364, 370 [2017]; *see People v Hart*, 225 AD3d 1158, 1160 [4th Dept 2024]). We further conclude, however, that any error in the admission of the testimony in question is harmless because "the proof of [defendant's] guilt was overwhelming . . . and . . . there was no significant probability that the jury would have acquitted [him] had [such testimony] not been introduced" (*People v Torres*, 217 AD3d 1585, 1586 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023] [internal quotation marks omitted]).

We reject defendant's further contention in his main brief that the court failed to conduct a sufficient inquiry into his complaints about defense counsel. Only where a defendant makes "specific factual allegations of serious complaints about counsel" must the court make a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; *see People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]), and the court is required to substitute counsel only where good cause is shown (*see Porto*, 16 NY3d at 100; *People v Sides*, 75 NY2d 822, 824 [1990]; *Gibson*, 126 AD3d at 1302). Here, although defendant did not make a specific request for new counsel, we conclude, even assuming, arguendo, that defendant made "specific factual allegations of serious complaints about counsel" (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]), that the court nevertheless "conducted the requisite 'minimal inquiry' to determine whether substitution of counsel was warranted" (*People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018], *lv denied* 32 NY3d 936

[2018], quoting *Sides*, 75 NY2d at 825). The court "allowed defendant to air his concerns about defense counsel, and . . . reasonably concluded that defendant's vague and generic objections had no merit or substance" (*People v Fulton*, 210 AD3d 1436, 1438 [4th Dept 2022], *lv denied* 39 NY3d 1154 [2023]).

Defendant also contends in his main brief that the court erred in denying his request to charge the jury on the statutory affirmative defense to robbery in the first degree, to which a defendant is entitled if the object displayed "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (Penal Law § 160.15 [4]; *see generally People v Lopez*, 73 NY2d 214, 219 [1989]). We reject that contention. "A defendant is entitled to a charge on the affirmative defense to robbery in the first degree when there is presented sufficient evidence for the jury to find by a preponderance of the evidence that the elements of the defense are satisfied, i.e., that the object displayed was not a loaded weapon capable of producing death or other serious physical injury" (*People v Gilliard*, 72 NY2d 877, 878 [1988]). Here, the People's theory of the case was that defendant displayed a BB gun during the incident. Under the circumstances of this case, we conclude "there is no reasonable interpretation of the evidence, even when viewed in the light most favorable to defendant, that the BB gun allegedly displayed was unloaded or inoperable, and the court therefore properly denied defendant's request to charge the affirmative defense" (*People v Akinlawon*, 158 AD3d 1245, 1247 [4th Dept 2018], *lv denied* 31 NY3d 1114 [2018]). We decline defendant's request that we revisit our decision in *Akinlawon.*

Defendant failed to preserve for our review his contention in his pro se supplemental brief that the People committed a violation of their *Rosario* or *Brady* obligations, and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

370

KA 22-01555

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRUZ RIVERA, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), dated August 22, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) after a conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]). Correction Law §§ 168-d (3) and 168-n (3) both require "the court fixing a sex offender's risk level determination to 'render an order setting forth . . . the findings of fact and conclusions of law on which the determinations are based' " (*People v Leopold*, 13 NY3d 923, 924 [2010], quoting Correction Law § 168-n [3]; *see People v Smith*, 11 NY3d 797, 798 [2008]). We agree with defendant that Supreme Court failed to comply with the statutes inasmuch as it made only general and conclusory findings of fact and conclusions of law (*see People v Mahar*, 191 AD3d 1237, 1237 [4th Dept 2021]; *People v Flax*, 71 AD3d 1451, 1451-1452 [4th Dept 2010]). Nevertheless, we conclude that the record is sufficient to allow us to render our own findings of fact and conclusions of law (*see People v Palmer*, 20 NY3d 373, 380 [2013]; *People v Gilbert*, 78 AD3d 1584, 1584 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]; *People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

We reject defendant's contention that the court erred in assessing 15 points under risk factor 11 for alcohol or drug abuse. Risk factor 11 applies "where the offender had a history of alcohol or drug abuse or where the offender consumed sufficient quantities of

these substances such that the offender can be shown to have abused alcohol or drugs" (*Palmer*, 20 NY3d at 378). "A history of substance abuse within the meaning of risk factor 11 exists only when there is a pattern of drug or alcohol use in [the] defendant's history" (*People v Jackson*, 203 AD3d 1680, 1681 [4th Dept 2022] [internal quotation marks omitted]). The case summary prepared by the Board of Examiners of Sex Offenders states that, at a substance abuse evaluation conducted in April 2021, defendant indicated that he began drinking alcohol at age 12 and would consume "approximately 25 bottles on weekends" when he was drinking. Defendant reported that he last used alcohol in 2014, but he admitted to being under the influence of alcohol when he was arrested in September 2015. In any event, defendant's abuse of alcohol prior to 2014 occurred during the time period of some of the underlying offenses. Defendant was given diagnostic impressions of alcohol use disorder—severe. The People therefore established by clear and convincing evidence that defendant had the requisite pattern of alcohol abuse to support the assessment of 15 points under risk factor 11 (*see People v Heffernan*, 217 AD3d 1593, 1594 [4th Dept 2023], *lv denied* 40 NY3d 909 [2023]; *Jackson*, 203 AD3d at 1681; *People v Stewart*, 199 AD3d 1479, 1479-1480 [4th Dept 2021], *lv denied* 38 NY3d 908 [2022]).

We reject defendant's further contention that the court erred in assessing 15 points under risk factor 12 for acceptance of responsibility. The assessment of 15 points is appropriate where, as here, the offender has refused or been expelled from treatment (*see People v Ford*, 25 NY3d 939, 941 [2015]). The case summary states that defendant was removed from the sex offender counseling and treatment program in May 2021 and has thereafter refused to participate in the program. Although defendant is correct that removal from a sex offender treatment program for disciplinary violations is not tantamount to refusal to participate in treatment (*see id.*), defendant's reliance on *Ford* is misplaced inasmuch as there is no indication in the record that defendant was expelled from the program based on disciplinary violations (*cf. id.*; *People v Loughlin*, 145 AD3d 1426, 1427 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]). The assessment of 15 points under risk factor 12 was therefore proper (*see People v Richardson*, 197 AD3d 878, 880 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022]; *People v Thousand*, 109 AD3d 1149, 1149-1150 [4th Dept 2013], *lv denied* 22 NY3d 857 [2013]).

Finally, we note that, even without the assessment of 15 points for risk factor 11 and 15 points for risk factor 12, defendant remains a level 3 risk (*see People v Valentine*, 187 AD3d 1681, 1681-1682 [4th Dept 2020], *lv denied* 36 NY3d 907 [2021]; *People v Robinson*, 160 AD3d 1441, 1442 [4th Dept 2018]; *People v Riddick*, 139 AD3d 1121, 1122 [3d Dept 2016]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

372

KA 18-00867

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHESTER DORTCH, DEFENDANT-APPELLANT.

DAVID M. GIGLIO, UTICA, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 23, 2018. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree, and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), robbery in the second degree (§ 160.10 [2] [a]), and assault in the second degree (§ 120.05 [2]). The conviction arises out of an incident in which the defendant allegedly, inter alia, cut a woman with a knife and forcibly stole property from her while they were seated in a car owned by defendant's girlfriend.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with the defendant that Supreme Court failed to respond meaningfully to a jury note and we therefore reverse the judgment and grant defendant a new trial. A court is required to respond meaningfully to a jury request (*see* CPL 310.30; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). While " '[n]ot every failure to comply with a jury's request for information during deliberation is reversible error,' " reversal is required where the " 'failure to respond seriously prejudice[s] the defendant' " (*People v Lourido*, 70 NY2d 428, 435 [1987]; *see People v Taylor*, 26 NY3d 217, 224 [2015]).

Here, the jury submitted a note requesting, inter alia, a

readback of testimony from the victim "about the time she was in the car on Glenwood until she was out of the car from both defense and the DA's questions." The court responded to the jury's request by reading back only testimony from the victim on direct examination about the time that she was *inside* the car. The court did not order the readback of any cross-examination, which included questioning about inconsistencies in the victim's account of the incident, including questions about the victim's earlier statement to the police describing a conversation that she had with defendant outside the car and questions regarding her statement to the police on the day of the incident that the driver of a car attempted to pull her into the car through the window. The court also instructed the jury that only direct examination included questions with respect to the victim being inside the car and, despite the jury's request to hear questioning from both the prosecution and the defense, the court did not request clarification from the jury whether they wanted to hear the defense's cross-examination regarding the incident. A meaningful response to a request for a readback of testimony "is presumed to include cross-examination which impeaches the testimony to be read back" (*People v Grant*, 127 AD3d 990, 991 [2d Dept 2015], *lv denied* 26 NY3d 968 [2015] [internal quotation marks omitted]; *see People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]). We conclude that the court's "failure to give the jury necessary information and its inaccurate . . . remarks prejudiced the defense," and that, under the totality of the circumstances in this case, the court abused its discretion "by failing to adequately answer the jurors' note and creating a false impression of the nature of the evidence" (*Taylor*, 26 NY3d at 227).

We also agree with defendant that the court erred in refusing to conduct a suppression hearing with respect to the search of the vehicle and the seizure of the knife during that search. Initially, we conclude that, as the daily user of the vehicle**,** defendant has standing to seek suppression of the evidence seized during the search of the vehicle (*see generally People v Ramirez-Portoreal*, 88 NY2d 99, 108 [1996]; *People v Banks*, 85 NY2d 558, 561-562 [1995]).

Further, we conclude that defendant raised a factual dispute regarding the voluntariness of the consent to search the vehicle given by the owner of the vehicle, i.e., defendant's girlfriend. "[A] motion may be decided without a hearing unless the papers submitted raise a factual dispute on a material point" (*People v Gruden*, 42 NY2d 214, 215 [1977]). A suppression motion my be summarily denied "if [the] defendant does not allege a proper legal basis for suppression, or (with two exceptions) if the 'sworn allegations of fact do not as a matter of law support the ground alleged' " (*People v Mendoza*, 82 NY2d 415, 421 [1993], quoting CPL 710.60 [3] [b]). "[T]he sufficiency of [the] defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) [the] defendant's access to information" (*id.* at 426).

Here, defendant's factual submissions, which included body camera

footage capturing a conversation between police officers where they allegedly discuss their intent to threaten to seize the vehicle from defendant's girlfriend in order to attempt to obtain her consent to search the vehicle, and allegations that, after the girlfriend purportedly consented to a search of the vehicle, she nevertheless attempted to move the knife out of plain view before the vehicle was searched, are sufficient to warrant a hearing to determine whether the girlfriend's consent to search "was induced by overbearing official conduct and was not a free exercise of the will" (*People v Gonzalez*, 39 NY2d 122, 130 [1976]).

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

379

OP 23-01960

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF COUNTY OF ORLEANS,
PETITIONER,

V MEMORANDUM AND ORDER

GENESEE COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DOING BUSINESS AS GENESEE COUNTY ECONOMIC DEVELOPMENT CENTER, GENESEE GATEWAY LOCAL DEVELOPMENT CORPORATION, STAMP SEWER WORKS, INC., G. DEVINCENTIS & SON CONSTRUCTION CO., INC., CLARK PATTERSON LEE AND HIGHLANDER CONSTRUCTION,
RESPONDENTS.

LIPPES MATHIAS LLP, BUFFALO (ALEXANDER W. EATON OF COUNSEL), FOR PETITIONER.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), FOR RESPONDENTS GENESEE COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DOING BUSINESS AS GENESEE COUNTY ECONOMIC DEVELOPMENT CENTER, GENESEE GATEWAY LOCAL DEVELOPMENT CORPORATION, STAMP SEWER WORKS, INC., AND G. DEVINCENTIS & SON CONSTRUCTION CO., INC.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review a certain condemnation by eminent domain.

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

Memorandum: Petitioner commenced this proceeding pursuant to EDPL 207 seeking to annul the determination of respondent STAMP Sewer Works, Inc., to acquire by condemnation two temporary easements for placement of construction equipment in order to install an underground sewer force main, i.e., a wastewater pipeline, that begins in Genesee County and will run over the border into Orleans County. Respondents Genesee County Industrial Development Agency, doing business as Genesee County Economic Development Center, Genesee Gateway Local Development Corporation, STAMP Sewer Works, Inc., and G. DeVincentis & Son Construction Co., Inc., contend that the petition must be dismissed as untimely. We agree.

"A proceeding under EDPL 207 must be commenced within 30 days 'after the condemnor's completion of its publication of its determination and findings' " (*Matter of H.H. Warner, LLC v Rochester*

Genesee Regional Transp. Auth., 87 AD3d 1388, 1389 [4th Dept 2011], *lv denied* 19 NY3d 809 [2012], quoting EDPL 207 [A]). Here, the last date of publication was October 22, 2023, and thus the limitations period expired on November 21, 2023. The verified petition was not filed until November 22, 2023, rendering the filing untimely by one day (*see Matter of Hothhouse v Village of Otisville*, 35 AD3d 740, 740 [2d Dept 2006]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

380

CA 23-00345

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

SREEKRISHNA CHERUVU, PLAINTIFF-APPELLANT,

V ORDER

HEALTHNOW NEW YORK, INC., DOING BUSINESS AS BLUE CROSS AND BLUE SHIELD OF WESTERN NEW YORK, INDEPENDENT HEALTH ASSOCIATION INC., INDIVIDUAL PRACTICE ASSOCIATION OF WESTERN NEW YORK, INC., EXCELLUS HEALTH PLAN, INC., DOING BUSINESS AS UNIVERA, AND SUSAN P. SCHULTZ, ALSO KNOWN AS SUSAN NASON, DEFENDANTS-RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HEALTHNOW NEW YORK, INC., DOING BUSINESS AS BLUE CROSS AND BLUE SHIELD OF WESTERN NEW YORK AND SUSAN P. SCHULTZ, ALSO KNOWN AS SUSAN NASON.

NIXON PEABODY LLP, BUFFALO (MARK A. MOLLOY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS INDEPENDENT HEALTH ASSOCIATION INC. AND INDIVIDUAL PRACTICE ASSOCIATION OF WESTERN NEW YORK, INC.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR DEFENDANT-RESPONDENT EXCELLUS HEALTH PLAN, INC., DOING BUSINESS AS UNIVERA.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 19, 2023. The order granted the motions of defendants to dismiss the complaint.

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

384

KA 23-00871

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. BALENTINE, DEFENDANT-APPELLANT.

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), entered December 22, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant was presumptively a level two risk based on the risk assessment instrument, but County Court determined that he is a level three risk based on the presumptive override for a prior felony sex crime conviction. We affirm.

Defendant failed to preserve for our review his contentions that the court violated his due process rights by accepting his letter waiving his right to appear at the SORA hearing (*see People v Poleun*, 119 AD3d 1378, 1378-1379 [4th Dept 2014], *affd* 26 NY3d 973 [2015]; *People v Turner*, 188 AD3d 1746, 1746 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]), and by allegedly failing to provide his counsel with certain documents within the statutorily prescribed time period prior to the hearing (*see* Correction Law § 168-n [3]; *People v Montanez*, 88 AD3d 1278, 1279 [4th Dept 2011]).

We reject defendant's contention that the court erred in treating the presumptive override as mandatory. Here, the court noted in its written decision that defendant was a presumptive level three risk based on the override, and also noted that a court "may depart from [the presumptive risk level] if special circumstances warrant." The court further considered defendant's request for a downward departure and determined that such a departure was not warranted. Contrary to

defendant's contention, the court applied the correct standard (*see People v Pace*, 121 AD3d 1315, 1316 [3d Dept 2014], *lv denied* 24 NY3d 914 [2015]; *cf. People v Jones*, 172 AD3d 1786, 1787-1788 [3d Dept 2019]; *see generally People v Edmonds*, 133 AD3d 1332, 1332-1333 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). Defendant's contention that his prior out-of-state conviction did not qualify as a prior sex felony conviction for purposes of applying the override is unpreserved for our review (*see People v Johnson*, 32 Misc 3d 138[A], 2011 NY Slip Op 51548[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists 2011]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel based on his counsel's performance at the SORA hearing. Although "[a] sex offender facing risk level classification under SORA has a right to . . . effective assistance of counsel" (*People v Root*, 216 AD3d 1435, 1436 [4th Dept 2023], *lv denied* 40 NY3d 904 [2023] [internal quotation marks omitted]; *see People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]), we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of [the] representation, defendant received effective assistance of counsel" (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]; *see People v Hackett*, 198 AD3d 1323, 1324 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

387

KA 17-00924

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. KOHMESCHER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered March 20, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). The conviction arises from an incident at a motorcycle repair shop, where defendant struck the victim in the face with a shotgun, causing injuries including a fractured orbital wall.

We reject defendant's contention that he was deprived of effective assistance of counsel. A defendant has not been deprived of effective assistance of counsel when "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). The focus is on whether defense counsel's acts or omissions were such that defendant did not receive a fair trial (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]), and for a defendant to prevail on an ineffective assistance claim, defense counsel's conduct must be "egregious and prejudicial" (*People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000] [internal quotation marks omitted]).

Defense counsel was not ineffective in failing to object during the People's closing statement inasmuch as the challenged statements constituted " 'fair comment on the evidence' " (*People v Maldonado*, 189 AD3d 2083, 2086 [4th Dept 2020], *lv denied* 36 NY3d 1098 [2021]) and, further, the People's attempt to rehabilitate the credibility of

their witness was permissible in response to defendant's closing statement attacking that witness's credibility (*see People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]). Defense counsel was also not ineffective for failing to object during the People's opening statement inasmuch as the challenged statements cannot be reasonably construed as having shifted the burden of proof onto defendant (*see People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]; *cf. People v Griffin*, 125 AD3d 1509, 1510 [4th Dept 2015]).

Defense counsel's failure to object to testimony regarding the execution of a search warrant at the motorcycle shop and the military history of the victim, and for further eliciting testimony on those issues, " 'was a matter of trial strategy and cannot be characterized as ineffective assistance of counsel' " (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]; *see People v Moore*, 185 AD3d 1544, 1545-1546 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]).

Defense counsel's waiver of any contention regarding defendant's standing to challenge probable cause for the search warrant does not constitute ineffective assistance of counsel inasmuch as a challenge to standing "had little or no chance of success" (*People v Burgess*, 159 AD3d 1384, 1385 [4th Dept 2018], *lv denied* 31 NY3d 1115 [2018]). Further, defense counsel's attempt to call character witnesses attesting to the allegedly violent nature of the victim, although unsuccessful, was part of a " 'reasonable and legitimate [trial] strategy under the circumstances and evidence presented' " (*People v Standard*, 273 AD2d 870, 870 [4th Dept 2000], *lv denied* 95 NY2d 908 [2000]), and defendant's contention that it was error "merely amounts to a second-guessing of [defense] counsel's trial strategy and does not establish ineffectiveness" (*Moore*, 185 AD3d at 1545 [internal quotation marks omitted]; *see People v Simpson*, 173 AD3d 1617, 1620 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]).

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

Defendant also contends that the evidence is legally insufficient to establish that the victim suffered a serious physical injury. We may not address that contention, however, because County Court reserved decision on defendant's motion for a trial order of dismissal and never ruled on the motion (*see People v Keane*, 221 AD3d 1586, 1590 [4th Dept 2023]; *cf.* CPL 290.10 [1]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). The failure of a trial court to rule on a motion for a trial order of dismissal cannot be deemed a denial of that motion, and thus we must hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see Keane*, 221 AD3d at 1590; *People v Johnson*, 192 AD3d 1612, 1616 [4th Dept 2021]). In light of our determination, we

do not address defendant's contention that the verdict is against the weight of the evidence.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

390

OP 23-01819

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF TOWN OF CAMBRIA, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK OFFICE OF RENEWABLE ENERGY SITING,
NEW YORK STATE AND BEAR RIDGE SOLAR, LLC,
RESPONDENTS.

LIPPES MATHIAS LLP, BUFFALO (CARMEN A. VACCO OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSHUA M. TALLENT OF COUNSEL), FOR RESPONDENTS NEW YORK OFFICE OF RENEWABLE ENERGY SITING AND NEW YORK STATE.

YOUNG/SOMMER, LLC, ALBANY (STEVEN D. WILSON OF COUNSEL), FOR RESPONDENT BEAR RIDGE SOLAR, LLC.

WISNIEWSKI LAW PLLC, WEBSTER (BENJAMIN E. WISNIEWSKI OF COUNSEL), FOR CAMBRIA OPPOSITION TO INDUSTRIAL SOLAR, INC., AMICUS CURIAE.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to Executive Law former § 94-c [5][g]) to annul and vacate a determination of respondent New York Office of Renewable Energy Siting.

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

Memorandum: Petitioner, Town of Cambria, commenced this original proceeding pursuant to CPLR article 78 and Executive Law former § 94-c (5) (g) after respondent New York Office of Renewable Energy Siting (ORES) issued a siting permit to respondent Bear Ridge Solar, LLC (Bear Ridge) for the construction of a 100-megawatt solar project (Facility). Petitioner sought, inter alia, to annul a determination that denied petitioner's request for full party status and an adjudicatory hearing and that confirmed the waiver of certain local laws of petitioner.

In June 2019, the legislature passed the New York Climate Leadership and Community Protection Act (CLCPA), which amended various laws, including the Environmental Conservation Law and Public Service Law, to address the dangers posed by climate change (*see* L 2019,

ch 106). The CLCPA set forth a rigorous schedule to achieve zero emissions of electrical energy by 2040 (*see* Public Service Law § 66-p [2] [b]). The legislature also enacted the Accelerated Renewable Energy Growth and Community Benefit Act (AREGCBA) (*see* L 2020, ch 58, part JJJ), which directed respondent New York State (state) to "take appropriate action to ensure that . . . new renewable energy generation projects can be sited in a timely and cost-effective manner" (*id.* § 2 [2] [a]). The AREGCBA further required the state to provide "transmission infrastructure . . . to access and deliver renewable energy resources" to areas of the state where those resources are needed (*id.* § 2 [2] [b]).

As relevant here, AREGCBA added Executive Law former § 94-c (*see* L 2020, ch 58, part JJJ, § 4), which created ORES. ORES was tasked with providing "a coordinated and timely review of proposed major renewable energy facilities to meet the state's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors" (Executive Law former § 94-c [1]). Mechanisms were established to override or waive certain local laws that were found to be "unreasonably burdensome" in light of the goals of the CLCPA and the environmental benefits of the proposed facility (Executive Law former § 94-c [5] [e]).

It is under that statutory and regulatory backdrop that Bear Ridge applied for a permit to construct the Facility, which Bear Ridge expected to "offset . . . more than 136,000 tons of carbon dioxide associated with greenhouse gas emissions." Although Bear Ridge's initial application stated that it had "designed the Facility to comply with all substantive local laws and ordinances to the greatest extent practicable," Bear Ridge sought, as relevant here, a waiver of certain provisions of petitioner's Local Law No. 1 of 2021 and Superseding Local Law No. 2 of 2017 (collectively, Solar Laws) on the ground that they were unreasonably burdensome.

After Bear Ridge supplemented its initial application per ORES's request, ORES determined that Bear Ridge's application complied with Executive Law former § 94-c (5) (a) and 19 NYCRR 900-4.1, and published a draft siting permit containing, inter alia, initial recommendations on whether various provisions of the Solar Laws should be waived. ORES also scheduled public hearings and set the deadlines for the submission of issue statements and petitions for party status. Thereafter, public hearings were held.

Petitioner filed a combined request for party status, issue statement, and statement of noncompliance. Petitioner argued that there were issues of fact whether the requested waivers were necessary, i.e., whether the relevant provisions of the Solar Laws were unreasonably burdensome, and that it was therefore entitled to full party status and an adjudicatory hearing. The determination denied petitioner's request for full party status and an adjudicatory hearing and ordered ORES to continue processing Bear Ridge's siting permit application. The determination stated that the issues raised by petitioner "concerning improper waiver of local laws or

regulations, opposition to the project, or adherence to Executive Law [former] § 94-c or [19 NYCRR] Part 900 do not meet the standards for adjudication." The determination was affirmed by the Executive Director of ORES, and ORES issued a siting permit to Bear Ridge. Petitioner thereafter commenced the instant proceeding.

Petitioner contends that ORES arbitrarily denied its request for full party status and for an adjudicatory hearing because petitioner raised substantive and significant issues with respect to ORES's determination, i.e., whether certain provisions of the Solar Laws were unreasonably burdensome in light of the CLCPA targets and the alleged environmental benefits of the Facility. We reject that contention. The determination whether adjudicable issues exist that require a hearing is governed by Executive Law former § 94-c and 19 NYCRR 900-8.3. If any public comment on a draft permit condition, "including comments provided by a municipality . . . raises a substantive and significant issue, as defined in regulations adopted pursuant to this section, that requires adjudication, the office shall promptly fix a date for an adjudicatory hearing to hear arguments and consider evidence with respect thereto" (Executive Law former § 94-c [5] [d]; *see* 19 NYCRR 900-8.3 [b] [1], [5] [ii]). A "substantive issue" exists when "there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would inquire further" (19 NYCRR 900-8.3 [c] [2]). In determining whether a substantive issue exists, the administrative law judge (ALJ) "shall consider the proposed issue in light of the application and related documents, the standards and conditions, or siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination and any subsequent written or oral arguments authorized by the ALJ" (*id.*). An issue is "significant" when "it has the potential to result in the denial of a siting permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit, including uniform standards and conditions" (19 NYCRR 900-8.3 [c] [3]). Where an application, as proposed or as conditioned by the draft siting permit, is found by ORES to conform to the applicable law, the burden of establishing the existence of a substantive or significant issue is on the potential party raising such issue (*see* 19 NYCRR 900-8.3 [c] [4]). "Any party aggrieved by the issuance or denial of a permit under [Executive Law former § 94-c] may seek judicial review of such decision as provided in [former § 94-c [5] (g)]" (former § 94-c [5] [g]).

Here, contrary to petitioner's contention, ORES's determination that petitioner failed to raise a substantive and significant issue is supported by "substantial evidence in the record" (Executive Law former § 94-c [5] [g] [ii] [B]) and is not "[a]rbitrary, capricious or an abuse of discretion" (former § 94-c [5] [g] [ii] [E]; *see Matter of Town of Ellery v New York State Dept. of Envtl. Conservation*, 159 AD3d 1516, 1518 [4th Dept 2018]; *Matter of Raritan Baykeeper, Inc. v Martens*, 142 AD3d 1083, 1086 [2d Dept 2016]). Petitioner's contention is based on its assertion that Bear Ridge failed to establish in its application that the Facility would produce renewable solar energy

that replaced fossil fuels rather than other renewable energy sources. According to petitioner, because Bear Ridge failed to demonstrate that the Facility would result in any environmental benefit, the applicable provisions of the Solar Law were not—and indeed, could not be—unreasonably burdensome "in view of the CLCPA targets and the environmental benefits of the proposed [Facility]" (former § 94-c [5] [e]). However, as noted, once ORES determined that the application, "as proposed or as conditioned by the draft siting permit, conform[ed] to all applicable requirements of statute and regulation, the burden of persuasion" shifted to petitioner to establish a significant and substantive issue (19 NYCRR 900-8.3 [c] [4]). Thus, it was up to petitioner to show that there is a significant and substantive issue whether the Facility would result in environmental benefits or further the CLCPA's targets. Petitioner failed to do so. Indeed, petitioner's evidence in support of its assertion consisted of New York Independent Systems Operation reports, which clearly establish that, although there are currently issues with the transmission of renewable energy generated in Western New York to downstate areas where it is needed, there is a state-wide effort to address those transmission issues.

Petitioner further contends that ORES failed to apply the regulatory framework, which requires facts and analysis to support the waiver of local laws, and instead granted the waivers with respect to certain provisions of the Solar Laws based upon Bear Ridge's "conclusory determinations" that the laws were burdensome and that the Facility created environmental benefits. We reject that contention. Bear Ridge supported its requests for waiver of certain provisions of the Solar Laws with evidence that the requirements would reduce the available acreage to such an extent that the project would not be feasible or that the necessary technology for compliance did not yet exist. Inasmuch as Bear Ridge's assertions were not conclusory, ORES's decision with respect to the waiver of certain Solar Laws was "in conformity with the . . . regulations" (Executive Law former § 94-c [5] [g] [ii] [A]) and was not arbitrary, capricious or an abuse of discretion (*see* former § 94-c [5] [g] [ii] [E]).

In addition, petitioner contends that ORES's determination to allow the waiver of certain decommissioning provisions of the Solar Laws was arbitrary and capricious. Specifically, petitioner asserted that Bear Ridge failed to provide any analysis of the cost to consumers of applying those laws. Unlike the waiver of the other provisions of the Solar Laws, the waiver of the decommissioning provisions was grounded in cost considerations. Thus, Bear Ridge was required to demonstrate "that the needs of consumers for the facility outweigh the impacts on the community that would result from refusal to apply the identified local substantive requirements" (19 NYCRR 900-2.25 [c] [3]). In support of its request for the waiver of the relevant decommissioning provisions, Bear Ridge explained that the cost of removing wires buried at depths greater than four feet would "translate into higher energy costs for consumers, as they will drive up the costs of building and operating solar facilities over their lifetimes," and that removal of wires buried at those depths would be burdensome and had been determined by the Department of Agriculture

and Markets to be unnecessary. Further, Bear Ridge explained that, as relevant, the amount paid as security for decommissioning costs would increase from $5 million to $8.42 million, which would affect funding. We note that ORES determined that a 15% contingency was reasonable and that the security amount has to be regularly reevaluated. We conclude that Bear Ridge established that the "impacts to the community" of failing to require a greater amount of security to cover future decommissioning costs were minimal. Under these circumstances, we conclude that ORES's determination with respect to waiver of the relevant decommissioning provisions complied with the applicable regulations and was not arbitrary or capricious.

Petitioner's contention that ORES erred in failing to hold a non-adjudicatory public hearing after it denied petitioner's request for full party status is not reviewable by this Court inasmuch as petitioner failed to raise that issue in its administrative appeal and, therefore, failed to exhaust its administrative remedies (*see Matter of Gullace v Schroeder*, 215 AD3d 1297, 1298 [4th Dept 2023]; *Matter of Coalition of Concerned Citizens v New York State Bd. on Elec. Generation Siting & the Envt.*, 199 AD3d 1310, 1314 [4th Dept 2021], *appeal dismissed* 37 NY3d 1168 [2022]; *Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 887 [4th Dept 2021]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

400

KA 21-01064

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IVAN GILBERT, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. MCHALE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered June 29, 2021. The judgment convicted defendant, upon a guilty plea, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Hawkins*, 224 AD3d 1219, 1219 [4th Dept 2024]; *see also People v Rowell*, 224 AD3d 1335, 1335 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]; *People v Roberto*, 224 AD3d 1367, 1367 [4th Dept 2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

401

KA 21-00658

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN KAZMIERCZAK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 7, 2020. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Gandy*, 221 AD3d 1599, 1599 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]; *People v Franklin*, 217 AD3d 1427, 1427 [4th Dept 2023]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

403

KA 21-01028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZAKKEE NAFI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered July 12, 2021. The judgment convicted defendant, upon a guilty plea, 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 guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Vilella*, 213 AD3d 1282, 1283 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]; *People v Hemphill*, 192 AD3d 1479, 1480 [4th Dept 2021]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to his sentence, we conclude that the sentence is not unduly harsh or severe.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

404

KA 19-01406

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE L. LONG, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 1, 2018. The judgment convicted defendant upon a nonjury verdict of aggravated driving while intoxicated, aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated, endangering the welfare of a child, criminal mischief in the fourth degree and attempted assault 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 nonjury verdict of, inter alia, aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i] [B]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]) and driving while intoxicated (§§ 1192 [3]; 1193 [1] [b] [i]), defendant contends that the verdict is against the weight of the evidence with respect to the common element of operation of a motor vehicle. We reject that contention. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence,' we must afford great deference to the fact-finder's opportunity to view the witnesses, hear their testimony and observe their demeanor" (*People v Friello*, 147 AD3d 1519, 1520 [4th Dept 2017], *lv denied* 29 NY3d 1031 [2017]; *see People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, County Court did not fail to give the evidence the weight it should be accorded (*see People v McCutcheon*, 219 AD3d 1698,

1700 [4th Dept 2023], *lv denied* 40 NY3d 1040 [2023]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

405

KA 23-00738

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

JESSE COLEY, DEFENDANT-RESPONDENT.

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

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, SULLIVAN & CROMWELL LLP, NEW YORK CITY (ZOETH M. FLEGENHEIMER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Karen Bailey Turner, J.), entered April 7, 2023. The order granted defendant's motion to vacate his judgment of conviction pursuant to CPL 440.10 (1)(h).

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01450

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN M. TILLMON, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 21, 2022. The judgment convicted defendant upon a jury verdict of assault in the second degree (two counts) and assault 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 following a jury trial of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the conviction of those counts is not supported by legally sufficient evidence inasmuch as the People failed to establish that the officers were performing a lawful duty when defendant was arrested and that he intended to prevent police officers from performing that lawful duty. Defendant failed to preserve his contention for our review (*see People v McCrea*, 202 AD3d 1437, 1437 [4th Dept 2022]; *People v Townsley*, 50 AD3d 1610, 1611 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, the contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that would lead a rational juror to conclude that defendant intentionally prevented the officers from performing their lawful duty (*see People v Bell*, 176 AD3d 1634, 1634-1635 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]; *People v Metales*, 171 AD3d 1562, 1563 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]; *cf. People v William EE.*, 276 AD2d 918, 919 [3d Dept 2000]).

Defendant further contends that his conviction of assault in the second degree as charged in count two of the indictment is not supported by legally sufficient evidence that the officer in question sustained a physical injury. Contrary to the People's assertion, we

conclude that defendant's contention is preserved for review (*see People v Lawrence*, 221 AD3d 1583, 1584-1585 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *cf. Bell*, 176 AD3d at 1634). We nevertheless reject his contention.

Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). " '[S]ubstantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). Here, the People elicited testimony that the officer hit his left knee on the floor and on a nearby object during a struggle with defendant, immediately after which he felt pain in his knee, walked with a limp, and had trouble bending that leg. The officer sought emergency medical attention for his injury, treated it with over-the-counter pain medication, and missed several days of work because of it, and his knee continued to trouble him years later. We conclude that the foregoing evidence is sufficient to establish that the officer sustained a physical injury (*see People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *People v Stillwagon*, 101 AD3d 1629, 1630 [4th Dept 2012], *lv denied* 21 NY3d 1020 [2013]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to whether the officer sustained a physical injury (*see People v Bookman*, 224 AD3d 1269, 1270 [4th Dept 2024]; *People v Westbrooks*, 213 AD3d 1274, 1275 [4th Dept 2023], *lv denied* 39 NY3d 1144 [2023]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; *cf. People v Cooney* [appeal No. 2], 137 AD3d 1665, 1668 [4th Dept 2016], *appeal dismissed* 28 NY3d 957 [2016]; *People v Gibson*, 134 AD3d 1512, 1514 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]).

Defendant's contention that he was punished for exercising his right to trial is not preserved for our review (*see People v Gilmore*, 202 AD3d 1453, 1454 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]; *People v Dupuis*, 192 AD3d 1626, 1627 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]), 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]). Finally, the sentence is not unduly harsh or severe.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

408

CAF 23-01048

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

IN THE MATTER OF DELBERT W. HARGIS, JR.,
PETITIONER-APPELLANT,

V ORDER

VICTORIA A. PRITTY-PITCHER, RESPONDENT-RESPONDENT.

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

Appeal from a judgment (denominated order) of the Family Court, Jefferson County (James K. Eby, R.), entered June 7, 2023. The judgment dismissed the petition for a writ of habeas corpus.

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

410

CAF 23-00545

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

IN THE MATTER OF MEGHAN O. MURIEL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUAN L. MURIEL, RESPONDENT-RESPONDENT.

GARY MULDOON, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

JUAN L. MURIEL, RESPONDENT-RESPONDENT PRO SE.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered February 17, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent shall continue to have sole legal and physical custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6 seeking modification of the parties' custody and visitation arrangement, the Attorney for the Child (AFC) representing the older child appeals, as limited by his brief, from an order insofar as it refused to award petitioner mother unsupervised visitation with the older child and instead continued the condition that the mother's parenting time with the older child and her younger sister be supervised by the maternal grandparents. We affirm.

Preliminarily, the AFC for the younger sister, who supports the determination that the mother's visitation remain supervised, contends that the appeal should be dismissed under our case law because the older child, while dissatisfied with the order, cannot unilaterally pursue an appeal in the absence of a perfected appeal by the mother. We reject that contention under the circumstances of this case.

Where, as here, an aggrieved parent in a custody and visitation proceeding pursuant to Family Court Act article 6 does not take or perfect an appeal, dismissal of an appeal by an AFC under the invoked

case law is warranted only when it can be said that entertaining the appeal would "force the [aggrieved yet nonappellant parent] to litigate a petition that [they] ha[ve] since abandoned" (*Matter of Kessler v Fancher*, 112 AD3d 1323, 1324 [4th Dept 2013]; *see Matter of Lawrence v Lawrence*, 151 AD3d 1879, 1879 [4th Dept 2017]; *see also Matter of Newton v McFarlane*, 174 AD3d 67, 73 [2d Dept 2019]). That cannot be said in this case. The mother filed and served a notice of appeal but, after being denied poor person relief and assignment of counsel, the mother was unrepresented and unable to timely perfect her appeal. The mother nonetheless submitted a letter to us explaining that, despite her inability to obtain assigned or pro bono counsel in order to perfect her own appeal, she remained steadfast in her disagreement with Family Court's order. Therein, the mother expressed her support for the merits position taken by the AFC representing the older child. The mother also attempted to submit a brief in opposition to the brief of the AFC representing the younger sister, which we rejected on the ground that the mother is not an appellant. The mother subsequently moved for leave to file a brief wherein she reiterated her support for the position taken by the AFC representing the older child. Thus, it cannot be said that entertaining the appeal by the AFC representing the older child would "force the mother to litigate a petition that she has since abandoned," and we therefore conclude under the circumstances of this case that the appeal should not be dismissed (*Kessler*, 112 AD3d at 1324; *see Matter of Amber B. v Scott C.*, 207 AD3d 847, 848 n 1 [3d Dept 2022]; *Newton*, 174 AD3d at 73; *cf. Lawrence*, 151 AD3d at 1879).

We nonetheless reject the contention of the AFC representing the older child that the court erred in refusing to award the mother unsupervised visitation with that child. "Generally, a court's determination regarding custody and visitation issues, based upon a 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 Muriel v Muriel*, 179 AD3d 1529, 1529 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020] [internal quotation marks omitted]). "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]; *see Muriel*, 179 AD3d at 1531; *Matter of Shaffer v Woodworth*, 175 AD3d 1803, 1804 [4th Dept 2019]). Here, we conclude that there is a sound and substantial basis in the record supporting the court's determination that visitation should continue to be supervised (*see Shaffer*, 175 AD3d at 1804).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

411

CAF 23-01371

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

IN THE MATTER OF ROSHEADA DAVIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ARDEN MARSHALL, RESPONDENT-APPELLANT.

LAW OFFICE OF MAURICE J. VERRILLO, P.C., ROCHESTER (LUCY ANDERSON BRADO OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Tanya Conley, R.), entered May 8, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection.

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 8, respondent appeals from an order of protection entered upon a finding that she committed the family offense of aggravated harassment in the second degree against petitioner, her niece (*see* Penal Law § 240.30; *see also* Family Ct Act § 812 [1]). Respondent's challenges to the order are not preserved for our review (*see Smith v Woods Constr. Co.*, 309 AD2d 1155, 1157 [4th Dept 2003]; *see generally Miller v Miller*, 68 NY2d 871, 873 [1986]; *Matter of Hill v Trojnor*, 137 AD3d 1671, 1672 [4th Dept 2016]), and we decline to review her challenges in the interest of justice.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

419.1

CAF 22-01265

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF ANTHONY L. COLLICHIO,
PETITIONER-APPELLANT,

V ORDER

LAURA A. BISHOP, RESPONDENT-RESPONDENT.

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

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

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered June 17, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied petitioner's request for expanded visitation and scheduled supervised visitation for petitioner with respect to the subject child. The appeal was held by this Court by order entered December 22, 2023, decision was reserved and the matter was remitted to Family Court, Orleans County, for further proceedings (222 AD3d 1352 [4th Dept 2023]).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 15 and 17, 2024,

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

454

OP 23-02166

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

IN THE MATTER OF PENNEY PROPERTY SUB HOLDINGS LLC,
PETITIONER,

V ORDER

TOWN OF AMHERST, RESPONDENT.

HARTER SECREST & EMERY LLP, ROCHESTER (MEGAN K. DORRITIE OF COUNSEL), FOR PETITIONER.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review a determination of respondent. The determination acquired certain property of petitioner by eminent domain.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 20, 2024,

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

456

CA 23-01457

PRESENT: WHALEN, P.J., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

BL DOE 1, PLAINTIFF-RESPONDENT,

V ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (AMANDA L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, among other things, denied in part the motion of defendant Rochester City School District for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 15, 2024,

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

475

CA 23-01057

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

DENALI T., AN INFANT BY AND THROUGH TRACY A.,
HER PARENT AND NATURAL GUARDIAN, AND TRACY A.,
INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V ORDER

JENNIE DEMBSKI, M.D., KALEIDA HEALTH,
DOING BUSINESS AS WOMEN AND CHILDREN'S
HOSPITAL OF BUFFALO, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CONNORS LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE DEMPSEY FIRM, PLLC, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered January 10, 2023. The order, insofar as appealed from, denied the motion of defendants insofar as it sought summary judgment dismissing the complaint against defendants Jennie Dembski, M.D., and Kaleida Health, doing business as Women and Children's Hospital of Buffalo.

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

479

KA 21-01359

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ASIA K. WIMBUSH, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 8, 2021. 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.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

502

CAF 23-01037

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

IN THE MATTER OF AZRAEL R. GIACALONE,
PETITIONER-APPELLANT,

V ORDER

CONNOR B. BUSHART, RESPONDENT-RESPONDENT.

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

TYSON BLUE, MACEDON, FOR RESPONDENT-RESPONDENT.

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered May 16, 2023, in a proceeding pursuant to Family Court Act article 8. The order dismissed the petitions and vacated a temporary order of protection.

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

506

CA 23-01404

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

CARL G. CLARK AND CATHERINE CLARK,
PLAINTIFFS-APPELLANTS,

V ORDER

CITY OF BUFFALO AND DEPARTMENT OF PUBLIC WORKS,
PARKS AND STREETS, DEFENDANTS-RESPONDENTS.

JEFFREY E. MARION, WILLIAMSVILLE, FOR PLAINTIFFS-APPELLANTS.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 13, 2023. The order, inter alia, granted the cross-motion of defendants for summary judgment.

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

508

CA 23-01192

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

FIRESTONE FINANCIAL, LLC, PLAINTIFF-APPELLANT,

V ORDER

PANOS FITNESS OF GREECE, LLC, DEAN S. PANOS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (RYAN M. POPLAWSKI OF COUNSEL), AND HALLORAN & SAGE, LLP, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

LYNN D'ELIA TEMES & STANCZYK, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered July 7, 2023. The order denied plaintiff's motion for severance.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 29, 2024,

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

510

TP 24-00201

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

IN THE MATTER OF MELVIN RODRIGUEZ VELAZQUE,
PETITIONER,

V ORDER

DANIEL F. MARTUSCELLO III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL E. RAIMONDI OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Melissa Lightcap Cianfrini, A.J.], entered January 29, 2024) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various incarcerated individual rules.

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

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

979

KA 22-01360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAQUAN SUMLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 3, 2022. The judgment convicted defendant upon a jury verdict of rape in the first degree, burglary in the first degree, assault in the third degree, aggravated criminal contempt, criminal contempt in the first degree, burglary in the second degree, criminal contempt in the second degree, petit larceny and stalking in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga 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, rape in the first degree (Penal Law § 130.35 [1]), burglary in the first degree (§ 140.30 [2]), aggravated criminal contempt (§ 215.52 [1]), criminal contempt in the first degree (§ 215.51 [b] [v]), assault in the third degree (§ 120.00 [1]), burglary in the second degree (§ 140.25 [2]), and stalking in the fourth degree (§ 120.45 [1]). Defendant's conviction arises from two incidents. In the first, defendant went to the apartment of his ex-girlfriend (victim) in violation of a no-contact order of protection in favor of his children and took the victim's cell phone. In the second, approximately three months later, defendant went to the victim's apartment in violation of a no-contact order of protection in favor of the victim and forced her to have sexual intercourse with him.

Defendant contends that County Court abused its discretion in denying his motion to sever the counts arising from the first incident from the counts arising from the second incident because the underlying incidents were separate and unrelated, and the inclusion of counts from the first incident served as prejudicial propensity evidence tending to establish the second incident. We reject that

contention. The counts were properly joined pursuant to CPL 200.20 (2) (b), and the court therefore "lacked statutory authority to grant defendant's [severance] motion" (*People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]; *see People v Almodovar*, 183 AD3d 1243, 1243 [4th Dept 2020]; *People v Jones*, 89 AD3d 1395, 1396 [4th Dept 2011], *lv denied* 18 NY3d 925 [2012]).

We reject defendant's contention that the court violated his right to a fair and impartial jury when it denied his request to remove a sworn juror based on comments that she made during defense counsel's cross-examination of the victim. As relevant here, a court must discharge a sworn juror upon a finding that the juror is "grossly unqualified to serve in the case" (CPL 270.35 [1]; *see People v Buford*, 69 NY2d 290, 298 [1987]). A juror is grossly unqualified "only 'when it becomes obvious that [the] particular juror possesses a state of mind which would prevent the rendering of an impartial verdict' " (*Buford*, 69 NY2d at 298; *see People v Kuzdzal*, 31 NY3d 478, 483 [2018]). Where, as here, the juror is merely "irritated with one of the attorneys or disagrees with the way the evidence is presented" (*Buford*, 69 NY2d at 299; *see People v Batticks*, 35 NY3d 561, 566 [2020]), discharge is not required. The court properly concluded after an inquiry of the juror in the presence of defense counsel that she was not "grossly unqualified to serve in the case" (CPL 270.35 [1]; *see People v Pittman*, 109 AD3d 1080, 1081 [4th Dept 2013], *lv denied* 22 NY3d 1043 [2013]).

Defendant contends that the evidence is legally insufficient to support the conviction of rape in the first degree, burglary in the first degree, aggravated criminal contempt, criminal contempt in the first degree, assault in the third degree, burglary in the second degree, and stalking in the fourth degree. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

With respect to the first incident, defendant contends that he was guilty of, at most, criminal trespass in the second degree because, although he entered the victim's home in violation of an order of protection, he did not intend to commit any other crime therein. We conclude that the evidence presented to the jury is legally sufficient to support the conviction of burglary in the second degree inasmuch as it established "that when defendant entered the apartment, he intended to commit a crime in the apartment other than his trespass" (*People v Lewis*, 5 NY3d 546, 552 [2005]). A rational jury could have inferred beyond a reasonable doubt from the circumstances of defendant's entry, including the inference that defendant shut off the power to the apartment, that defendant intended to frighten and intimidate his family, in express violation of the order of protection prohibiting defendant from, inter alia, menacing, intimidating, or threatening his children. "Those acts are distinct from the trespass element of burglary and, when [as here are] prohibited by an order of protection . . . , can serve as predicate

crimes for the 'intent to commit a crime therein' element of burglary" (*id.* at 552-553).

With respect to the second incident, defendant contends that the victim did not sustain a "physical injury" to support the counts of burglary in the first degree, aggravated criminal contempt, and assault in the third degree. The victim testified that defendant grabbed her left hand and bent her middle and ring fingers back so far that she thought her hand was broken, she rated her pain as a 7½ out of 10, and she received medical attention for her hand. As defined in the Penal Law, "[p]hysical injury" means "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). In determining whether a victim has sustained a physical injury, "[m]otive is relevant because an offender more interested in displaying hostility than in inflicting pain will often not inflict much of it" (*People v Chiddick*, 8 NY3d 445, 448 [2007]; *see People v Anderson*, 211 AD3d 1485, 1486 [4th Dept 2022], *lv denied* 39 NY3d 1077 [2023]). Here, the victim testified that the injuries were inflicted while defendant was trying to force her to have sex with him. Based on all the evidence, we conclude that a rational jury could have inferred beyond a reasonable doubt that the victim sustained a physical injury (*see People v Abughanem*, 203 AD3d 1710, 1712-1713 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]). We have examined defendant's remaining challenges to the legal sufficiency of the evidence and conclude that they are without merit.

Viewing the evidence in light of the elements of the crimes of rape in the first degree, burglary in the first degree, aggravated criminal contempt, criminal contempt in the first degree, assault in the third degree, burglary in the second degree, and stalking in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to those counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]; *see People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Here, the jury was "entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of . . . defendant[ ]," and we perceive no reason to disturb the jury's credibility determinations in that regard (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]).

We further reject defendant's contention that he was deprived of a fair trial by the cumulative effect of various alleged errors raised on appeal (*see People v Anderson*, 220 AD3d 1223, 1227 [4th Dept 2023]; *People v Evans*, 217 AD3d 1461, 1461 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]). The sentence is not unduly harsh or severe.

Defendant further contends that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds

(*see* CPL 30.30). In particular, he contends that the People's failure to disclose existing disciplinary records of potential law enforcement witnesses for use as impeachment materials (*see* CPL 245.20 [1] [k]) rendered any certificate of compliance (COC) filed pursuant to CPL 245.50 improper and thereby rendered any declaration of trial readiness made pursuant to CPL 30.30 illusory and insufficient to stop the running of the speedy trial clock. As the Court of Appeals recently stated in *People v Bay*, "the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*People v Bay*, 41 NY3d 200, 211 [2023], quoting CPL 245.50 [1]). Due diligence "is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives" (*id.* [internal quotation marks omitted]). "[W]hether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*id.* at 212). "[C]ourts should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*). Although the statute does not require a " 'perfect prosecutor,' " the Court emphasized that the prosecutor's good faith, while required, "is not sufficient standing alone and cannot cure a lack of diligence" (*id.*).

The People bear the burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the COC (*see id.* at 213). "If the prosecution fails to make such a showing, the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed" (*id.*).

Here, in denying the motion to dismiss, the court determined that the People complied with the discovery mandates of CPL 245.20. As we recently held, however, the statute "does not authorize the use of a screening panel to decide what evidence and information should be disclosed, or to otherwise act as a substitute for the disclosure of the required material" (*People v Rojas-Aponte*, 224 AD3d 1264, 1266 [4th Dept 2024]), and the People in this case used such a screening committee to review law enforcement disciplinary records. The court therefore erred in denying the motion on the basis that the People complied with their discovery obligations under CPL 245.20 (*see id.* at 1255-1256). In light of its determination, the court did not consider whether the People exercised due diligence within the meaning of CPL 245.50, that is, whether they made " 'reasonable efforts' to comply with [the] statutory directives," and " 'ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211). We note that, "[i]n *Bay*, the Court of Appeals made clear that whether the People exercised due diligence is not to be examined in a vacuum. To that end, the non-

exclusive list of factors articulated by the Court in that case calls for a holistic assessment of the People's efforts to comply with the automatic discovery provisions, rather than a strict item-by-item test that would require us to conclude that a COC is improper if the People miss even one item of discovery" (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024], citing *Bay*, 41 NY3d at 212). We therefore hold the case, reserve decision, and remit the matter to County Court to determine the motion after further submissions, if warranted.

All concur except MONTOUR and NOWAK, JJ., who dissent and vote to hold the case, reserve decision and remit the matter in accordance with the following memorandum: We agree with the majority's conclusion that it was error for County Court to deny defendant's motion to dismiss the indictment pursuant to CPL 30.30 on the basis that the People complied with CPL article 245. Specifically, we agree with the majority that CPL 245.20 does not authorize the use of a screening panel to review law enforcement disciplinary records "to decide what evidence and information should be disclosed, or to otherwise act as a substitute for the disclosure of the required material" (*People v Rojas-Aponte*, 224 AD3d 1264, 1266 [4th Dept 2024]). We would further conclude, however, that because the People provided only a summary of the disciplinary records of two law enforcement witnesses after deeming that such records were relevant to the witnesses' credibility and did not disclose the actual records, the People failed to fulfill their discovery obligations (*see* CPL 245.20 [1] [k] [iv]). In light of the People's failure to comply with the discovery mandates of CPL 245.20, we would remit the matter for a determination whether the People exceeded the time within which they were required to announce readiness for trial. Insofar as we do not believe that remittal for a determination of due diligence is appropriate, we dissent.

Effective January 1, 2020, sweeping legislative changes transformed discovery and speedy trial practices in criminal courts throughout New York. Subdivision (1) of CPL 245.20 broadly provides that the People "shall disclose to the defendant . . . all items and information that relate to the subject matter of the case." At issue in this appeal is subparagraph (iv) of paragraph (k), which specifically requires disclosure of "[a]ll evidence and information . . . that tends to . . . impeach the credibility of a testifying prosecution witness" (CPL 245.20 [1] [k] [iv]). Paragraph (k) further provides that the information "shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information." Subdivision (2) of CPL 245.20 imposes on the People the duty to "make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control," and further provides that "all items and information related to the prosecution of a charge in the possession of any . . . law enforcement agency shall be deemed to be in the possession of the prosecution" (CPL 245.20 [2]). Moreover, pursuant to subdivision (7) of CPL 245.20, "[t]here shall be a presumption in favor of disclosure

when interpreting . . . subdivision one of section 245.20" (CPL 245.20 [7]; *see People v Bonifacio*, 179 AD3d 977, 978 [2d Dept 2020]). Also relevant to this appeal is the repeal of former Civil Rights Law § 50-a, effective June 12, 2020 (*see generally Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1401, 1403 [4th Dept 2022]).

The legislative reforms tie the People's fulfillment of the above discovery obligations to their readiness for trial under CPL 30.30. To that end, CPL 245.50 requires that, "[w]hen the prosecution has provided the discovery required by [CPL 245.20 (1)], . . . it shall serve upon the defendant and file with the court a certificate of compliance," which "shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" (CPL 245.50 [1]). Subdivision (3) of CPL 245.50 provides that, as a general rule, "the prosecution shall not be deemed ready for trial for purposes of [CPL 30.30] until it has filed a proper certificate" (CPL 245.50 [3]; *see also* CPL 30.30 [5]).

This appeal presents two distinct violations of CPL 245.20 (1) (k) (iv) by the People. First, with respect to two potential law enforcement witnesses, the People provided a brief summary of the officers' disciplinary history rather than the underlying records. Second, with respect to several potential law enforcement witnesses, the People indicated that, although the officers had disciplinary records, the People had determined that such records were not impeachment material inasmuch as the records allegedly had "no bearing on the witness'[s] truthfulness or credibility." As a result, the People refused to turn over those records.

With respect to the first issue, we agree with defendant that he was entitled to the disciplinary records of the potential law enforcement witnesses, and that the summaries provided by the People were improper (*see e.g. Matter of Jayson C.*, 200 AD3d 447, 449 [1st Dept 2021]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (*People v Roberts*, 31 NY3d 406, 418 [2018] [internal quotation marks omitted]). Here, the statute requires that the prosecution turn over to the defense "[a]ll evidence and information . . . that tends to . . . impeach the credibility of a testifying prosecution witness" (CPL 245.20 [1] [k] [iv]). That information must be turned over "irrespective of whether the prosecutor credits the information" (*id.*). Significantly, CPL 245.20 uses the term "summary" only twice and neither instance occurs in paragraph (k). The word occurs once in CPL 245.20 (1) (f), which requires that the prosecution disclose a "written statement of facts and opinions to which [an] expert is expected to testify and a *summary* of the grounds for each opinion" (emphasis added), and once in CPL 245.20 (1) (l), which requires that the prosecution provide "[a] *summary* of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons

who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement" (emphasis added). "[W]here the legislature includes particular language in one section of a statute but omits it in another section of the same [statute], it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion" (*Hart v City of Buffalo*, 218 AD3d 1140, 1144 [4th Dept 2023] [internal quotation marks omitted]). Here, the absence of any reference to a summary in CPL 245.20 (1) (k) makes clear that the legislature did not intend to permit the People to fulfill their discovery obligation under this section through the use of a summary (*see generally People v Thomas*, 33 NY3d 1, 6-7 [2019]).

With respect to the second issue, we would conclude that it was also improper for the People to refuse to disclose the disciplinary records of potential law enforcement witnesses that they unilaterally deemed irrelevant. Whether something is potential impeachment material is not for the People to decide, but rather for defense counsel. Indeed, the Court of Appeals has long recognized "that the potential impeachment value of a witness'[s] prior statement could best be determined by the 'single-minded counsel for the accused' " (*People v Banch*, 80 NY2d 610, 615 [1992]). There is no reason the impeachment value of an officer's disciplinary record should be treated any differently. If the People believe that certain disciplinary records should not be disclosed because they do not involve an officer's credibility or truthfulness, the best practice would be to seek a protective order from the court pursuant to CPL 245.70 (1). That would provide defense counsel with notice that certain records were being withheld, and the court would be able to conduct an in camera review to determine whether such records should be turned over after having the benefit of arguments from each side. Further, even if such records are turned over—bearing in mind the presumption favoring disclosure contained within CPL 245.20 (7)—it does not necessarily follow that they are admissible at trial. Both the People and defendant would be free to argue that the records and any questions relating to such records are irrelevant, but the parties would be placed on an equal footing with respect to knowledge that such records exist and what information they contain.

Instead of following that permissible practice, the People here unilaterally chose not to disclose disciplinary records of potential witnesses. We would conclude, on the basis of the People's failure to comply with their discovery obligations, that the People did not file a valid certificate of compliance, and therefore any announcement of readiness pursuant to CPL 30.30 was illusory and insufficient to stop the running of the speedy trial clock (*see* CPL 245.50 [3]; *see also* CPL 30.30 [5]).

The majority, however, relying on *People v Bay* (41 NY3d 200 [2023]), concludes that the matter must be remitted for a determination whether the People made " 'reasonable efforts' to comply with [the] statutory directives," and " 'ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211). We reject the majority's

position. Notably, *Bay* had no occasion to address the circumstance presented here—i.e., "where the People *know* discovery exists but nonetheless certify compliance without disclosing it," or "where the People know that some material exists but nonetheless unilaterally choose to withhold it, deeming it 'irrelevant,' 'immaterial,' or 'not discoverable' " (*People v Marte*, 82 Misc 3d 528, 532, 533 [Crim Ct, Queens County 2023]).

The plain language of CPL article 245 with respect to due diligence is instructive. CPL 245.20 (2) provides that "[t]he prosecutor shall make a diligent, good faith effort *to ascertain the existence* of material or information discoverable under [CPL 245.20 (1)]" (emphasis added). Similarly, CPL 245.50 requires the People to file a certificate of compliance stating "that, after exercising due diligence and making reasonable inquiries *to ascertain the existence* of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" (CPL 245.50 [1] [emphasis added]; *see Bay*, 41 NY3d at 211).

The requirement of due diligence and reasonable efforts is linked to the People's obligation to determine whether mandatory discovery material and information exists; it is *not* linked to the People's attempts to comply with the statutory requirements once such material or information has been found. That due diligence refers to the People's efforts to identify the existence of discoverable material is, we submit, clear from *Bay*, in which the Court of Appeals identifies "relevant factors for assessing due diligence," including "how obvious any missing material would likely have been to a prosecutor exercising due diligence, . . . and the People's response when apprised of any missing discovery" (*Bay*, 41 NY3d at 212). In addition, as noted above, the discovery statute itself states that there is "a presumption in favor of disclosure when interpreting . . . section 245.20 [1]" (CPL 245.20 [7]). Here, the People improperly failed to disclose material after its existence was ascertained.

In light of our conclusion, we would hold the case, reserve decision, and remit the matter to County Court to determine, in the first instance, whether the People had exceeded the time under CPL 30.30 to announce readiness for trial.

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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

1034

KA 22-00627

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PIERRE JONES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 5, 2022. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault (six counts), unlawful imprisonment in the second degree (two counts) and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of six counts of predatory sexual assault (Penal Law § 130.95 [1] [b]), two counts of unlawful imprisonment in the second degree (§ 135.05), and one count of assault in the third degree (§ 120.00 [1]).

Defendant contends that he was denied his right to be present at a material stage of his trial when County Court conducted some discussion of his pro se motion, requesting new counsel, in his absence. We reject that contention. Although defendant was absent at the beginning of the discussion, defendant then argued the motion himself, and under those circumstances we conclude that defendant was afforded the requisite meaningful opportunity to participate (*see People v Sharp*, 214 AD3d 1428, 1428-1429 [4th Dept 2023]; *People v Strong*, 164 AD3d 1637, 1638-1639 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019], *cert denied* — US —, 140 S Ct 199 [2019]).

We reject defendant's related contention that defense counsel improperly disparaged the merits of defendant's affidavit in support of his pro se motion, which sought to relieve a different counsel of his assignment. Defense counsel merely explained that he could not personally attest to the truth of defendant's affidavit and that he did not "agree with" the contents of the affidavit. Stating that one

does not "agree with" the contents of a pro se affidavit is not the same as asserting that it lacks merit, and, without more, does not amount to "affirmatively undermin[ing] [a] defendant's assertions or [taking] an adverse position against [the] defendant" (*People v Thaxton*, 191 AD3d 1166, 1168 [3d Dept 2021], *lv denied* 37 NY3d 960 [2021]; *see People v Leeper*, 298 AD2d 190, 190 [1st Dept 2002], *lv denied* 99 NY2d 560 [2002]). Defense counsel's comments did not create a conflict of interest requiring his replacement.

Defendant further contends that the court erred in denying his motion for severance. We reject that contention. Here, both victims were forcibly raped in the same secluded location after being struck and threatened with a knife. The offenses were joinable pursuant to CPL 200.20 (2) (b) because defendant's identity as the perpetrator was at issue and the modus operandi was sufficiently unique to make proof of defendant's commission of the crimes involving one victim probative of his commission of the crimes involving the other victim (*see People v Beaty*, 89 AD3d 1414, 1416 [4th Dept 2011], *affd* 22 NY3d 918 [2013]; *People v Matthews*, 175 AD2d 24, 25 [1st Dept 1991], *affd* 79 NY2d 1010 [1992]; *see generally People v Arafet*, 13 NY3d 460, 466 [2009]; *People v Robinson*, 68 NY2d 541, 549 [1986]).

We find no merit to defendant's further contention that the People violated a ruling of the court by using a precluded photo array as the basis for an in-court identification procedure. The victim did not claim that she had identified defendant from the photo array before trial. She testified only that she recognized defendant from the array at the time of trial, which is permissible where, as here, a defendant is voluntarily absent from the courtroom during testimony (*see People v Farrow*, 216 AD3d 996, 998 [2d Dept 2023], *lv denied* 40 NY3d 951 [2023]; *People v Gonzalez*, 61 AD3d 775, 776 [2d Dept 2009], *lv denied* 12 NY3d 915 [2009]; *People v Thompson*, 306 AD2d 758, 760 [3d Dept 2003], *lv denied* 1 NY3d 581 [2003]; *People v Waithe*, 163 AD2d 347, 347 [2d Dept 1990], *lv denied* 76 NY2d 897 [1990]).

Defendant contends that certain testimony elicited by the People impermissibly bolstered the identification testimony of the victims. Although we agree with defendant that some testimony concerning the victims' identifications of defendant constituted improper bolstering, any error in that regard is harmless because the evidence of defendant's guilt, without reference to the error, is overwhelming and there is no significant probability that the jury would have acquitted defendant but for that error (*see People v Pendarvis*, 143 AD3d 1275, 1276 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *People v McCullen*, 63 AD3d 1708, 1709 [4th Dept 2009], *lv denied* 13 NY3d 747 [2009]; *People v Owens*, 51 AD3d 1369, 1371-1372 [4th Dept 2008], *lv denied* 11 NY3d 740 [2008]; *see generally People v Johnson*, 57 NY2d 969, 970 [1982]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his contention that the People impermissibly introduced evidence of his involvement in the criminal justice system. In any event, the contention is without merit. The challenged testimony did not imply that defendant had a

criminal history or had committed a prior offense (*see People v Tromans*, 177 AD3d 1103, 1107 [3d Dept 2019]; *People v Keener*, 152 AD3d 1073, 1075-1076 [3d Dept 2017]). The use of mugshot-style photographs of defendant provided corroboration of the facial scar described by the victims (*see People v Buskey*, 13 AD3d 1058, 1059 [4th Dept 2004]), and we conclude that the probative value of the photographs outweighed their potential for prejudice.

We reject defendant's contention that the court erred in permitting a registered nurse to testify about how memory is affected by trauma. " 'The qualification of a witness to testify as an expert rests in the discretion of the court, and its determination will not be disturbed in the absence of serious mistake, an error of law or an abuse of discretion' " (*People v Owens*, 70 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 14 NY3d 890 [2010]). The witness testified that she had been a registered nurse for 23 years and, as a sexual assault nurse examiner, had performed around 100 sexual assault examinations and encountered "trauma-informed memory" during those examinations (*see People v Johnson*, 153 AD3d 1606, 1606-1607 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]; *People v Maynard*, 143 AD3d 1249, 1252 [4th Dept 2016], *lv denied* 28 NY3d 1148 [2017]; *People v Vaello*, 91 AD3d 548, 548 [1st Dept 2012], *lv denied* 19 NY3d 868 [2012]; *Owens*, 70 AD3d at 1470).

The sentence is not unduly harsh or severe.

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

Finally, we note that the certificate of conviction incorrectly recites that defendant was convicted of two counts of unlawful imprisonment in the second degree under Penal Law § 130.05, and it must be amended to reflect that he was convicted under Penal Law § 135.05 (*see People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]).

Entered: June 14, 2024

Ann Dillon Flynn
Clerk of the Court

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M., JR., RODCLIFFE, MTR. OF				
280	CAF 22-01293	04/08/2024	06/14/2024	(B-4516/17-21)
MURIEL, MEGHAN O. v MURIEL, JUAN L.				
410	CAF 23-00545	05/20/2024	06/14/2024	(V-05828/29-20/20A-D)
RIVERA, CRUZ, PEOPLE v				
370	KA 22-01555	04/16/2024	06/14/2024	(2015-011332) (I2015-0967)
SMITH, MARK A., PEOPLE v				
355	KA 18-01760	04/15/2024	06/14/2024	(I2017-0682)
WALKER, TERRELL, PEOPLE v				
338	KA 21-00656	04/11/2024	06/14/2024	(I2019-0766)
WHITE, JARRETT, PEOPLE v				
335	KA 19-01184	04/11/2024	06/14/2024	(I2018-0757)
WILLIAMS, LEROY, PEOPLE v				
311	KA 21-01024	04/10/2024	06/14/2024	(I2020-0408)
WIMBUSH, ASIA, PEOPLE v				
479	KA 21-01359	05/28/2024	06/14/2024	(I2018-0490)

Total Cases Listed for this county = 17

NIAGARA COUNTY **********

Case Name / Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
ALI, ANNISA S. v CVS PHARMACY, INC.,				
345	CA 23-01299	04/11/2024	06/14/2024	(E170256/2019)
TOWN OF CAMBRIA, v NEW YORK OFFICE OF RENEWABLE ENERGY, SITING				
390	OP 23-01819	04/17/2024	06/14/2024	

Total Cases Listed for this county = 2

ONEIDA COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
FOLLETT, JOHN C. v DUMOND, RONALD	292	CA 23-01740	04/08/2024	06/14/2024	(EFCA2022-002390)
MONESCALCHI, PAUL A. v PIERSMA & SON CONTRACTING, LLC,	308	CA 23-01607	04/09/2024	06/14/2024	(efca2022-001111)

Total Cases Listed for this county = 2

ONONDAGA COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
FIRESTONE FINANCIAL, LLC, v PANOS FITNESS OF GREECE, LLC,	508	CA 23-01192	05/29/2024	06/14/2024	(008147/2022)
JONES, PIERRE, PEOPLE v	1034	KA 22-00627	12/05/2023	06/14/2024	(I2020-0109-1)
LORD, CHARLES E. v WHELAN AND CURRY CONSTRUCTION SERVI,	52	CA 22-01612	01/10/2024	06/14/2024	(2013-4385)
LOUGNOUT, ESQ., WENDY v BEARD, DIANE	111	CA 23-00636	01/17/2024	06/14/2024	(2019-273/C)
MAMMOLITO, MICHAEL A. v CONGEL, REBECCA	308.1	CA 22-01902	04/09/2024	06/14/2024	(20520-138)
MCCLAIN, AJJA, PEOPLE v	139	KA 22-01392	02/20/2024	06/14/2024	(I2019-0182-1)
MCCLENDON, WILLIAM, PEOPLE v	233	KA 22-00980	02/28/2024	06/14/2024	(I2020-0553-1)
SUMLER, NAQUAN, PEOPLE v	979	KA 22-01360	11/30/2023	06/14/2024	(I2019-0809-1)

Total Cases Listed for this county = 8

ONTARIO COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
C., TRICIA A. v H., SAUL	99	CAF 22-01920	01/17/2024	06/14/2024	(Z-00299-21)
C., TRICIA A. v H., SAUL	105	CAF 22-01924	01/17/2024	06/14/2024	(Z-00300-21)
MITCHELL, THOMAS, PEOPLE v	182	KA 23-01064	02/22/2024	06/14/2024	(I21-07-068)

Total Cases Listed for this county = 3

ORLEANS COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
COLLICHIO, ANTHONY L. v BISHOP, LAURA A.	419.1	CAF 22-01265		06/14/2024	(V-00349-13/21E)
COUNTY OF ORLEANS, v GENESEE COUNTY INDUSTRIAL DEVELOPME,	379	OP 23-01960	04/16/2024	06/14/2024	(E23-01035)

Total Cases Listed for this county = 2

OSWEGO COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
BENTLEY, ZACHARY, PEOPLE v	251	KA 22-01188	02/29/2024	06/14/2024	(I20C-0056)

Total Cases Listed for this county = 1

SENECA COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
CAYUGA NATION, v PEENSTRA, CHIEF STUART W.	210	CA 23-00747	02/26/2024	06/14/2024	(20220325)

Total Cases Listed for this county = 1

WAYNE COUNTY **********

Case Name	Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
BALENTINE, MICHAEL A., PEOPLE v					

Case Name / Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
384	KA 23-00871	04/17/2024	06/14/2024	(S19-W10)
GIACALONE, AZRAEL R. v BUSHART, CONNOR B.				
502	CAF 23-01037	05/29/2024	06/14/2024	(O-01312-22/23A-D)
WILLIAMS, JEFFREY S., PEOPLE v				
313	KA 23-00658	04/10/2024	06/14/2024	(I20-33)

Total Cases Listed for this county = 3

**WYOMING COUNTY **

Case Name / Cal No	Docket No	Term Date	Disposition Date	Lower Court Number
VELAZQUE RODRIGUEZ, MELVIN v MARTUSCELLO III, DANIEL F.				
510	TP 24-00201	05/30/2024	06/14/2024	(22,236-23)

Total Cases Listed for this county = 1

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 14, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

MOTION NO. (590/22) KA 19-01871. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEREMY A. ACOSTA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, BANNISTER, KEANE, AND HANNAH, JJ. (Filed June 14, 2024.)

MOTION NO. (638/23) KA 22-00490. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V AL AMIN MCMILLON, DEFENDANT-APPELLANT. -- Motion to vacate the memorandum and order of this Court, entered October 6, 2023, granted, and the appeal is dismissed (*see People v Lewis*, 196 AD3d 968, 968-969 [3d Dept 2021]; *see generally People v Matteson*, 75 NY2d 745, 747 [1989]). PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND NOWAK, JJ. (Filed June 14, 2024.)

MOTION NO. (804/23) CA 23-00285. -- IN THE MATTER OF THE ESTATE OF KATHRYN W. BUCK, DECEASED. RICHARD M. BUCK, III, PETITIONER-APPELLANT-RESPONDENT. (PROCEEDING NO. 1.) JOSEPH J. TIMPANO, TEMPORARY ADMINISTRATOR OF THE ESTATE OF KATHRYN M. BUCK, DECEASED, PETITIONER-RESPONDENT. (PROCEEDING NO. 2.) RICHARD M. BUCK CONSTRUCTION CORPORATION, PETITIONER-RESPONDENT, STEVEN G. BUCK AND BUCK CONSTRUCTION LLC, APPELLANTS. (PROCEEDING NO. 3.) -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ. (Filed June 14, 2024.)

MOTION NO. (832/23) CA 23-00529. -- TAMMY L. KELLY AND MICHELLE MOUDY, AS

GUARDIANS OF THE PERSON AND PROPERTY OF JOHN M. MOUDY, PLAINTIFFS-APPELLANTS, V NICHOLAS J. PROHASKA, DEFENDANT, AND SNAP-ON CREDIT LLC, DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ. (Filed June 14, 2024.)

MOTION NO. (889/23) CA 23-00023. -- JAZMON MORRISON, PLAINTIFF-RESPONDENT, V SOUTH UNION RD HC, LLC, AND WILLIAMSVILLE SUBURBAN, LLC, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ. (Filed June 14, 2024.)

MOTION NO. (1023/23) CA 22-00860. -- GARY J. SKALYO, PLAINTIFF, V DONALD ALESSI, SR., ESQ., ALESSI LAW FIRM, DEFENDANTS-APPELLANTS, WILLIAM ILECKI, ESQ., ILECKI & OSTROWSKI, LLP, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, GREENWOOD, AND DELCONTE, JJ. (Filed June 14, 2024.)

MOTION NOS. (16-17/24) CA 22-01929. -- IN THE MATTER OF DANIEL T. WARREN, PETITIONER-PLAINTIFF-APPELLANT, V PLANNING BOARD OF THE TOWN OF WEST SENECA, TOWN OF WEST SENECA, AND CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, BY AND THROUGH FR. DAVID CIANCIMINO, S.J., AS ITS PRESIDENT,

RESPONDENTS-DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) CA 23-00546. -- IN THE MATTER OF DANIEL T. WARREN, PETITIONER-APPELLANT, V PLANNING BOARD OF THE TOWN OF WEST SENECA, TOWN OF WEST SENECA, AND CANISIUS HIGH SCHOOL OF BUFFALO, NEW YORK, BY AND THROUGH FR. DAVID CIANCIMINO, S.J., AS ITS PRESIDENT, RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN,

MOTION NO. (151/24) CA 23-00120. -- CAROL L. JONES, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF DONALD J. JONES, DECEASED, JONES-CARROLL, INC., AND SEALAND WASTE LLC, PLAINTIFFS-APPELLANTS, V TOWN OF CARROLL AND TOWN BOARD OF TOWN OF CARROLL, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, OGDEN, AND DELCONTE, JJ. (Filed June 14, 2024.)

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

DECISIONS FILED JUNE 14, 2024

_____	979	KA 22 01360	PEOPLE V NAQUAN SUMLER
_____	1034	KA 22 00627	PEOPLE V PIERRE JONES
_____	50	CA 22 01021	KEVIN CONLEY V PINELLI LANDSCAPING, INC.
_____	52	CA 22 01612	CHARLES E. LORD V WHELAN AND CURRY CONSTRUCTION SE
_____	99	CAF 22 01920	TRICIA A. C. V SAUL H.
_____	105	CAF 22 01924	TRICIA A. C. V SAUL H.
_____	111	CA 23 00636	WENDY LOUGNOUT, ESQ. V DIANE BEARD
_____	115	KA 22 01438	PEOPLE V JARVIS LEWIS
_____	120	CA 22 01891	PB-20 DOE V ST. NICODEMUS LUTHERAN CHURCH
_____	121	CA 22 01894	PB-20 DOE V ST. NICODEMUS LUTHERAN CHURCH
_____	125	CA 22 01859	MALCOLM CULLY V ANTHONY R. RICOTTONE, M.D.
_____	126	CA 23 01124	ROSITA SCOTT V TOPS MARKETS, LLC
_____	139	KA 22 01392	PEOPLE V AJJA MCCLAIN
_____	143	KA 20 00146	PEOPLE V DWAYNE M. BORDEN
_____	148	CA 23 00620	TANIKA BYRD V TARGET
_____	154	CA 23 00307	KATHRYN J. BANE V LEASE-N-SAVE CORP.
_____	162	KA 23 00682	PEOPLE V GEORGE J. LEWIS
_____	166	KA 23 01569	PEOPLE V GIORGIO WILLIAMS
_____	182	KA 23 01064	PEOPLE V THOMAS MITCHELL
_____	203	CA 22 01465	JAMES R. SWIEZY V INVESTIGATIVE POST, INC.
_____	210	CA 23 00747	CAYUGA NATION V CHIEF STUART W. PEENSTRA
_____	230	CA 23 00769	BUFFALO BIODIESEL, INC. V BLUE BRIDGE FINANCIAL,
_____	233	KA 22 00980	PEOPLE V WILLIAM MCCLENDON
_____	251	KA 22 01188	PEOPLE V ZACHARY BENTLEY
_____	261	CA 23 00056	AARON A. FUSCO V BRYAN T. HANSEN

_____	264	CA 23 00207	WILLIE KENDRICK V ROCHESTER GENERAL HOSPITAL
_____	273	KA 22 01946	PEOPLE V ADAM MALLOY
_____	278	KA 22 00412	PEOPLE V KRISTA G.
_____	279	CAF 22 02002	TREVOR TORRES V NICOLETTE BURCHELL
_____	280	CAF 22 01293	Mtr of RODCLIFFE M., JR.
_____	281	CAF 22 01703	Mtr of JASMINE L.
_____	282	CAF 22 01704	Mtr of MONTU L.
_____	283	CAF 22 01707	Mtr of VANESSA M. R.
_____	288	CA 23 00767	EDWARD C. CHAPMAN V OLEAN GENERAL HOSPITAL
_____	292	CA 23 01740	JOHN C. FOLLETT V RONALD DUMOND
_____	308	CA 23 01607	PAUL A. MONESCALCHI V PIERSMA & SON CONTRACTING, L
_____	308.1	CA 22 01902	MICHAEL A. MAMMOLITO V REBECCA CONGEL
_____	311	KA 21 01024	PEOPLE V LEROY WILLIAMS
_____	313	KA 23 00658	PEOPLE V JEFFREY S. WILLIAMS
_____	335	KA 19 01184	PEOPLE V JARRETT WHITE
_____	338	KA 21 00656	PEOPLE V TERRELL WALKER
_____	345	CA 23 01299	ANNISA S. ALI V CVS PHARMACY, INC.
_____	349	OP 23 02118	HON. JOHN J. FLYNN V HON. SHEILA A. DITULLIO
_____	355	KA 18 01760	PEOPLE V MARK A. SMITH
_____	370	KA 22 01555	PEOPLE V CRUZ RIVERA
_____	372	KA 18 00867	PEOPLE V CHESTER DORTCH
_____	379	OP 23 01960	COUNTY OF ORLEANS V GENESEE COUNTY INDUSTRIAL DEV
_____	380	CA 23 00345	SREEKRISHNA CHERUVU V HEALTHNOW NEW YORK, INC.
_____	384	KA 23 00871	PEOPLE V MICHAEL A. BALENTINE
_____	387	KA 17 00924	PEOPLE V DAVID M. KOHMESCHER
_____	390	OP 23 01819	TOWN OF CAMBRIA V NEW YORK OFFICE OF RENEWABLE EN
_____	400	KA 21 01064	PEOPLE V IVAN GILBERT
_____	401	KA 21 00658	PEOPLE V ALLEN KAZMIERCZAK
_____	403	KA 21 01028	PEOPLE V ZAKKEE NAFI
_____	404	KA 19 01406	PEOPLE V TYRONE L. LONG

_____	405	KA 23 00738	PEOPLE V JESSE COLEY
_____	406	KA 22 01450	PEOPLE V JUSTIN M. TILLMON
_____	408	CAF 23 01048	DELBERT W. HARGIS, JR. V VICTORIA A. PRITTY-PITCHE
_____	410	CAF 23 00545	MEGHAN O. MURIEL V JUAN L. MURIEL
_____	411	CAF 23 01371	ROSHEADA DAVIS V ARDEN MARSHALL
_____	419.1	CAF 22 01265	ANTHONY L. COLLICHIO V LAURA A. BISHOP
_____	454	OP 23 02166	PENNEY PROPERTY SUB HOLDINGS V TOWN OF AMHERST
_____	456	CA 23 01457	BL DOE 1 V EDWIN D. FLEMING
_____	475	CA 23 01057	TRACY A. V JENNIE DEMBSKI, M.D.
_____	479	KA 21 01359	PEOPLE V ASIA WIMBUSH
_____	502	CAF 23 01037	AZRAEL R. GIACALONE V CONNOR B. BUSHART
_____	506	CA 23 01404	CARL G. CLARK V CITY OF BUFFALO
_____	508	CA 23 01192	FIRESTONE FINANCIAL, LLC V PANOS FITNESS OF GREEC
_____	510	TP 24 00201	MELVIN VELAZQUE RODRIGUEZ V DANIEL F. MARTUSCELLO