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

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CA 19-00367

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

IN THE MATTER OF CHRISTINE C. BINGHAM, ET AL.,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF WHEATFIELD, RESPONDENT-RESPONDENT.

NAPOLI SHKOLNIK PLLC, MELVILLE (LILIA FACTOR OF COUNSEL), STAG LIUZZA, L.L.C., NEW ORLEANS, LOUISIANA, AND CHRISTEN CIVILETTO, EAST AMHERST, FOR CLAIMANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (SCOTT M. PHILBIN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 21, 2019. The order denied the application of claimants seeking, inter alia, leave to serve late notices of claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the application insofar as it sought leave to serve late notices of claim, upon condition that the proposed notices of claim are served within 30 days of the date of entry of the order of this Court, and as modified the order is affirmed without costs.

Memorandum: Claimants appeal from an order that denied their application seeking, inter alia, leave to serve 67 late notices of claim alleging damages arising from exposure to pollutants on or escaping from the Nash Road Landfill (Site), which is owned by respondent. The Site was designated a Class 3 State Superfund site in the 1980s and was upgraded to a Class 2 site in December 2015. As alleged in the proposed notices of claim, in November 2016 certain residents living near the Site received the results of environmental testing conducted on their properties, which revealed contamination. A number of affected individuals served timely notices of claim on respondent in early 2017. Four additional groups of claimants filed applications for leave to serve late notices of claim, which were granted. As relevant here, in March 2017, affected individuals also commenced a federal class action suit against, among others, respondent.

Claimants in the instant case served notices of claim on respondent on December 19 and 20, 2018. On December 20, 2018,

claimants also filed an application seeking, among other things, an order declaring that the notices were timely served or leave to serve late notices of claim. Supreme Court determined, inter alia, that the notices of claim were untimely pursuant to General Municipal Law § 50-e (1) (a) and that claimants thus were required to seek leave to serve late notices of claim, which the court denied.

As an initial matter, we reject claimants' contention that the notices of claim served on December 19 and 20, 2018, were timely pursuant to General Municipal Law § 50-e (1) (a). The latest accrual date alleged in the notices of claim was "November 2016," and thus the 90-day period within which to serve the notices of claim without leave had expired by the time claimants' notices of claim were served.

Although the court has discretion to extend the 90-day period for serving a notice of claim, that extension cannot exceed the applicable statute of limitations (*see* General Municipal Law § 50-e [5]), here, one year and ninety days (*see* § 50-i [1] [c]). We reject claimants' contention that the three-year limitations period specified in CPLR 214-f applies and note that, even if that provision were applicable here, the claim would be time-barred inasmuch as that limitations period is measured from the "designation of [the Site] as a superfund site" (CPLR 214-f), which occurred in 1984.

Although more than one year and ninety days had elapsed between the November 2016 accrual date alleged in claimants' proposed notices of claim and their application for leave to serve late notices of claim, we agree with claimants that the filing of the federal class action in March 2017, in which claimants are putative class members, tolled the statute of limitations (*see Badzio v Americare Certified Special Servs., Inc.*, 177 AD3d 838, 840-842 [2d Dept 2019]; *see also Desrosiers v Perry Ellis Menswear, LLC*, 139 AD3d 473, 474 [1st Dept 2016], *affd* 30 NY3d 488 [2017]; *Osarczuk v Associated Univs., Inc.*, 130 AD3d 592, 595 [2d Dept 2015], *lv dismissed* 26 NY3d 1126 [2016]). As claimants contend, the toll applies even where individual claims are filed before the federal court has issued a determination regarding class certification (*see In re WorldCom Sec. Litig.*, 496 F3d 245, 252 [2d Cir 2007]). Because the applicable statute of limitations was tolled and had not expired, the court retained discretion to grant or deny claimants' application for leave to serve late notices of claim (*see* General Municipal Law § 50-e [5]).

We further agree with claimants that the court abused its discretion in denying their application insofar as it sought leave to serve late notices of claim on respondent (*see generally Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1790 [4th Dept 2017]). "In determining whether to grant such [relief], the court must consider, inter alia, whether the claimant[s have] shown a reasonable excuse for the delay, whether the [respondent] 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 [respondent]" (*Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1653 [4th Dept 2018] [internal quotation marks omitted]). Although claimants failed to establish a reasonable excuse for the delay, "[t]he failure to

offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" (*id.* at 1654 [internal quotation marks omitted]; *see Terrigino v Village of Brockport*, 88 AD3d 1288, 1288 [4th Dept 2011]).

"While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [respondent] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016] [internal quotation marks omitted]). Here, because respondent knew that its Site was upgraded to a Class 2 site in 2015 and because similarly situated individuals served timely notices of claim on respondent alleging "substantively identical" exposure to the Site's pollutants and resulting damages (*see generally Matter of Holbrook v Village of Hoosick Falls*, 168 AD3d 1263, 1264-1265 [3d Dept 2019]), we conclude that claimants established that respondent received the requisite actual timely knowledge of the claims claimants now assert. We further conclude that claimants met their initial burden of establishing that respondent would not be substantially prejudiced by the delay inasmuch as respondent has been investigating similar claims since early 2017 (*see generally Szymkowiak*, 162 AD3d at 1654) and that, in opposition, respondent failed to make a "particularized showing" of substantial prejudice caused by the late notice (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 468 [2016], *rearg denied* 29 NY3d 963 [2017]). We therefore modify the order by granting the application insofar as it sought leave to serve late notices of claim upon the condition that the proposed notices are served within 30 days of the entry of the order of this Court.

Claimants' remaining contentions are not properly before us on this appeal.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 18-01432

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

IN THE MATTER OF NED E. DEAN, JR., JOHN A. PIERCE, TIMOTHY J. MEAD, STEVEN K. SMITH, AND MICHELE ROSS, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF POLAND ZONING BOARD OF APPEALS, BRENDA M. BUNCE, TERRY A. NUNEZ, DENNIS R. ORMOND, DAWN ORMOND CONSTANTINE AND THE BROADWAY GROUP, LLC, RESPONDENTS-RESPONDENTS.

WRIGHT, WRIGHT AND HAMPTON, JAMESTOWN (EDWARD P. WRIGHT OF COUNSEL), FOR PETITIONERS-APPELLANTS.

JULIE B. HEWITT, JAMESTOWN, AND DAVID R. STAPLETON, FOR RESPONDENTS-RESPONDENTS BRENDA M. BUNCE, TERRY A. NUNEZ, DENNIS R. ORMOND, DAWN ORMOND CONSTANTINE, AND THE BROADWAY GROUP, LLC.

Appeal from a judgment of the Supreme Court, Chautauqua County (Paula L. Feroleto, J.), entered December 29, 2017 in a proceeding pursuant to CPLR article 78. The appeal was held by this Court by order entered March 15, 2019, decision was reserved and the matter was remitted to respondent Town of Poland Zoning Board of Appeals for further proceedings (170 AD3d 1498 [4th Dept 2019]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, the petition is granted, and the determination is annulled.

Memorandum: Respondents Brenda M. Bunce, Terry A. Nunez, Dennis R. Ormond, and Dawn Ormond Constantine (collectively, Ormond respondents), owners of an approximately 17-acre parcel of land, entered into an agreement to sell a two-acre section of that parcel to respondent The Broadway Group, LLC (Broadway), contingent on the issuance of a use variance allowing Broadway to construct a Dollar General store there. After an environmental review and a public hearing, respondent Town of Poland Zoning Board of Appeals (ZBA) granted the use variance, albeit without making any findings of fact regarding whether the application submitted by Broadway and the Ormond respondents (collectively, respondents) established the requisite unnecessary hardship (*see* Town Law § 267-b [2]). Petitioners, at least some of whom own homes near the two-acre parcel and who opposed

the granting of the use variance, filed a CPLR article 78 petition seeking to annul the ZBA's determination. Supreme Court dismissed the petition, concluding that the record was sufficient to establish that the ZBA's determination had a rational basis and was not arbitrary and capricious, and petitioners appealed. This Court held the case, reserved decision, and "remit[ted] the matter to the ZBA to set forth the factual basis for its determination and articulate the reasons for it" (*Matter of Dean v Town of Poland Zoning Bd. of Appeals*, 170 AD3d 1498, 1499 [4th Dept 2019]).

Upon remittal, the ZBA individually addressed each of the four factors in Town Law § 267-b (2) and determined that respondents demonstrated "that applicable zoning regulations and restrictions have caused unnecessary hardship" (*id.*). Petitioners contend on appeal that respondents failed to satisfy at least one of the four requirements for the issuance of a use variance based on unnecessary hardship, that the ZBA's determination therefore was not supported by substantial evidence, and that the court thus erred in dismissing the petition. We agree with petitioners, and we therefore reverse the judgment, reinstate the petition, grant the petition, and annul the ZBA's determination.

In order to establish unnecessary hardship, the Town Law requires an applicant for a use variance to establish, among other things, that, for each and every permitted use under the zoning regulations for the particular district where the property is located, the applicant cannot realize a reasonable return for the property and that the lack of return is substantial as demonstrated by competent financial evidence (*see* § 267-b [2] [b] [1]; *see generally Matter of Morrissey v Apostol*, 75 AD3d 993, 996-997 [3d Dept 2010]). Thus, respondents were required to demonstrate "by dollars and cents proof" that they cannot realize a reasonable return by any conforming use (*Matter of Village Bd. of Vil. of Fayetteville v Jarrold*, 53 NY2d 254, 256 [1981]). An applicant's failure to establish that he or she cannot realize a reasonable return by any conforming use requires denial of the use variance by the ZBA (*see Matter of Leone v City of Jamestown Zoning Bd. of Appeals*, 151 AD3d 1828, 1829 [4th Dept 2017]; *see generally Edwards v Davison*, 94 AD3d 883, 884 [2d Dept 2012]).

Here, respondents failed to meet that burden. Respondents submitted evidence of the cost of removing a decrepit 19th-century house from the two-acre parcel, including the costs of asbestos remediation and air monitoring, which would be required to sell the property as vacant land. However, there is no evidence in the record establishing whether respondents could realize a reasonable return on the parcel if it were used for any other conforming use. Indeed, respondents' expert did not discuss any possible use of the property other than as vacant land. Thus, inasmuch as respondents' expert failed to discuss the possible return with respect to all uses permitted within the zoning district, respondents failed to meet their burden of demonstrating that they cannot realize a reasonable return on the property without the requested use variance (*see Leone*, 151 AD3d at 1829).

Furthermore, the expert discussed only the possible return on a small section of the property owned by the Ormond respondents, rather than evaluating the potential return on the Ormond respondents' entire parcel (*see Matter of Concerned Residents of New Lebanon v Zoning Bd. of Appeals of Town of New Lebanon*, 222 AD2d 773, 774-775 [3d Dept 1995]; *Matter of Amco Dev. v Zoning Bd. of Appeals of Town of Perinton*, 185 AD2d 637, 638 [4th Dept 1992]). The fact that respondents' application for a use variance was limited to the two-acre parcel is "of no moment; the inquiry as to an inability to realize a reasonable return may not be segmented to examine less than all of an owner's property rights subject to a regulatory regime" (*Matter of Nemeth v Village of Hancock Zoning Bd. of Appeals*, 127 AD3d 1360, 1363 [3d Dept 2015]). The expert's failure to address respondents' ability to obtain a reasonable return on the remaining parts of the parcel, or on other permissible uses within the zoning district, is fatal to the application. Thus, the determination is not supported by substantial evidence (*see generally Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01660

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

CHARLES D.J. AND LYNN M.J., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF SCOTT J., AN INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND BUFFALO BOARD OF EDUCATION, DEFENDANTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT H. PERK ATTORNEYS AND COUNSELORS AT LAW, BUFFALO (ROBERT H. PERK OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 6, 2019. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this negligence action individually and on behalf of their son, who was sexually assaulted at a public school in Buffalo when he was a five-year-old kindergarten student. The assault was perpetrated by a fifth-grade student whose identity has not been determined, and it occurred in the boys' bathroom, across the hall from the kindergarten classroom. According to plaintiffs, their son, given his age, should not have been allowed by his substitute teacher to go to the bathroom alone and unsupervised. The complaint asserts a cause of action for negligent supervision as well as a derivative cause of action. Following discovery, defendants, the City of Buffalo and the Buffalo Board of Education, moved for summary judgment dismissing the complaint, contending that they lacked notice of any prior sexual misconduct involving students at the school and, thus, they could not have foreseen the sexual assault of plaintiffs' son. Supreme Court denied the motion, and we now affirm.

"Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent.*

School Dist., 15 NY3d 297, 302 [2010]). "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another' " (*Mirand*, 84 NY2d at 49).

"In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*id.*; *see Hale v Holley Central Sch. Dist.*, 159 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). "Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*Mirand*, 84 NY2d at 49). Thus, "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*id.*).

Defendants, as parties moving for summary judgment, had the initial burden of establishing as a matter of law that they lacked actual or constructive notice of prior similar sexual assaults upon students at the school (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We conclude that defendants failed to meet that burden. In support of their motion defendants submitted, inter alia, the deposition testimony of the person who was the assistant principal at the school when plaintiffs' son was assaulted. When asked whether she was aware of any other student who was sexually assaulted in a Buffalo public school, the former assistant principal testified that no "specific instance comes to mind." The assistant principal further testified, however, "things were kept very quiet" and that teachers and staff would not necessarily have been informed of sexual assaults.

Defendants also submitted the deposition testimony of the substitute teacher who allowed plaintiffs' son to go to the bathroom alone. Although the substitute teacher testified that she was not aware of any prior sexual assaults at the school, the day that plaintiffs' son was assaulted was the first day the substitute teacher worked at the school. Thus, she was not in a position to know whether school authorities were aware of prior sexual assaults upon students.

Defendants submitted the deposition testimony of various other witnesses, none of whom were in a position to know whether there had been prior sexual assaults at the school. Thus, inasmuch as the former assistant principal testified that information about previous incidents would not necessarily be shared with teachers and staff and the other witnesses were not in a position to know whether there were previous incidents, defendants failed to establish that they lacked

actual or constructive notice of prior similar sexual assaults.

Because defendants failed to meet their burden, the court properly denied defendants' motion regardless of the sufficiency of plaintiffs' opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-00438

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

GLENN FREELAND AND SUSAN FREELAND, AS ADMINISTRATORS OF THE ESTATE OF TREVELL WALKER, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE COUNTY, TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF AND MARK WIPPERMAN, ERIE COUNTY UNDERSHERIFF, DEFENDANTS-RESPONDENTS.

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

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY TOTH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 14, 2019. The order granted the motion of defendants for leave to reargue and, upon reargument, granted that part of defendants' motion seeking partial summary judgment dismissing the third cause of action against defendants Timothy B. Howard, Erie County Sheriff, and Mark Wipperman, Erie County Undersheriff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendants' motion seeking partial summary judgment dismissing the third cause of action against defendants Timothy B. Howard, Erie County Sheriff and Mark Wipperman, Erie County Undersheriff and reinstating that cause of action against those defendants, and as modified the order is affirmed without costs.

Memorandum: This action arises from the suicide of Trevell Walker (Trevell) while he was incarcerated at the Erie County Holding Center. After an initial action was dismissed because plaintiffs improperly commenced the action in their capacity as guardians of Trevell's infant child (*Freeland v Erie County*, 122 AD3d 1348 [4th Dept 2014]), plaintiffs commenced the instant action both in their capacity as the child's guardians and as administrators of Trevell's estate (*id.*; *Freeland v Erie County*, 122 AD3d 1353 [4th Dept 2014]).

In 2013, defendants filed a motion seeking, inter alia, dismissal of the complaint in the instant action on various grounds, and Supreme Court granted that motion, dismissing the complaint in its entirety. In an earlier appeal, we modified that order by denying that motion in part and reinstating the wrongful death cause of action against

defendant County of Erie (Erie County), defendant Timothy B. Howard, Erie County Sheriff (Sheriff), and defendant Mark Wipperman, Erie County Undersheriff (Undersheriff) insofar as it is asserted by plaintiffs as administrators of Trevell's estate (*Freeland*, 122 AD3d at 1350-1351). We also reinstated the third cause of action, for federal civil rights violations under 42 USC § 1983, insofar as it is asserted by plaintiffs as administrators of Trevell's estate, against the Sheriff and Undersheriff, concluding that the cause of action is not time-barred (*id.* at 1351).

Three years after our decision with respect to the 2013 motion, defendants moved for partial summary judgment seeking dismissal of the complaint against Erie County and dismissal of the cause of action for federal civil rights violations under 42 USC § 1983 against the Sheriff and Undersheriff, who were both sued solely in their official capacities. The court denied that motion in its entirety, concluding with respect to the section 1983 cause of action that our order reinstating that cause of action against the Sheriff and Undersheriff constituted the law of the case.

Defendants moved for leave to reargue only that portion of the court's order that denied the motion for partial summary judgment with respect to the section 1983 cause of action against the Sheriff and Undersheriff. They contended that our prior determination that the cause of action is not time-barred does not constitute the law of the case with respect to whether those defendants could be sued in their official capacities. Plaintiffs now appeal from an order in which the court granted the motion for leave to reargue and, upon reargument, granted that part of defendants' motion for partial summary judgment that sought dismissal of the section 1983 cause of action against the Sheriff and the Undersheriff.

Although we agree with defendants that the court properly granted the motion for leave to reargue, we agree with plaintiffs that the court erred in awarding defendants partial summary judgment dismissing the section 1983 cause of action against the Sheriff and Undersheriff.

"The doctrine of the law of the case applies only to issues that have been judicially determined" (*Edgewater Constr. Co., Inc. v 81 & 3 of Watertown, Inc.* [appeal No. 2], 24 AD3d 1229, 1231 [4th Dept 2005], citing *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]; *see Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1798 [4th Dept 2010]). Despite the fact that defendants' motion in 2013 sought dismissal of the entire complaint, in that motion defendants did not contend that the section 1983 cause of action could not be asserted against the Sheriff and Undersheriff in their official capacities. Rather, defendants sought dismissal of the complaint on other grounds, and our decision in the prior appeal merely determined that the section 1983 cause of action is not time-barred (*Freeland*, 122 AD3d at 1351). We thus agree with defendants that the court was not required by the law of the case doctrine to deny that part of the motion seeking dismissal of that cause of action against the Sheriff and Undersheriff on grounds different from those addressed in our earlier decision. Due to the fact that the court " 'mistakenly

arrived at its earlier decision' " to deny the motion insofar as it applied to the section 1983 cause of action, it properly granted defendants' motion for leave to reargue (*Davis v Firman*, 53 AD3d 1101, 1102 [4th Dept 2008]; *see* CPLR 2221 [d] [2]; *Lahey v Lahey*, 68 AD3d 1656, 1657 [4th Dept 2009]).

We nevertheless conclude that, upon reargument, the court erred in granting that part of defendants' motion seeking summary judgment dismissing that cause of action against the Sheriff and Undersheriff. We recognize that many federal cases hold that a section 1983 cause of action against government officials is redundant or duplicative when the complaint also asserts a section 1983 cause of action against the municipality (*see e.g. Wierzbic v County of Erie*, 2018 WL 550521, *6 [WD NY, Jan. 25, 2018, No. 13-CV-978S]; *Stancati v County of Nassau*, 2015 WL 1529859, *2 [ED NY, Mar. 31, 2015, No. 14-CV-2694(JS)(ARL)]; *De Ratafia v County of Columbia*, 2013 WL 5423871, *7 [ND NY, Sept. 26, 2013, No. 1:13-CV-174 (NAM/RFT)]). Inasmuch as our prior order reinstated the section 1983 cause of action against only the Sheriff and the Undersheriff, there is no existing section 1983 cause of action against a municipality, and the wrongful death cause of action against Erie County is not duplicative of the section 1983 cause of action against the Sheriff and Undersheriff. We thus conclude that the federal cases cited by defendants are distinguishable.

We agree with plaintiffs that in state court they can assert a section 1983 cause of action against a sheriff or undersheriff in his or her official capacity. Until 1989, New York Constitution, article XIII, section 13 (a) stated that counties could not be made responsible for acts of sheriffs. Although that provision was removed via amendment in 1989, that amendment merely granted counties the ability to assume liability if the they chose to do so (*see generally Marashian v City of Utica*, 214 AD2d 1034, 1034 [4th Dept 1995]). Erie County has not passed any legislation assuming such responsibility and, as a result, cannot be responsible for the acts of the Sheriff or Undersheriff (*see Mosey v County of Erie*, 117 AD3d 1381, 1385 [4th Dept 2014]). We thus conclude that the Sheriff and the Undersheriff are the proper defendants for the section 1983 cause of action.

"The gravamen of the cause of action pursuant to 42 USC § 1983 is deprivation of property without due process of law. The essential elements of the cause of action are conduct committed by a person acting under color of state law, which deprived the plaintiff of 'rights, privileges, or immunities secured . . . by the Constitution or laws of the *United States*' " (*Bower Assoc. v Town of Pleasant Val.*, 304 AD2d 259, 262 [2d Dept 2003], *affd* 2 NY3d 617 [2004], quoting *Parratt v Taylor*, 451 US 527, 534, 535 [1981]; *see DiPalma v Phelan*, 81 NY2d 754, 756 [1992]). The Sheriff has a duty to "ensure that inmates receive adequate food, clothing, shelter, and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates' " (*Farmer v Brennan*, 511 US 825, 832 [1994]; *see Reid v Nassau County Sheriff's Dept.*, 2014 WL 4185195, *8 [ED NY, Aug. 20, 2014, No. 13-CV-1192 (SJF)(SIL)]; *see generally Frake v City of Chicago*, 210 F3d 779, 781-782 [7th Cir 2000]). Here, plaintiffs' allegations that the Sheriff and Undersheriff failed to take measures

to ensure the safety of the inmates from suicide are sufficient to state a viable cause of action under section 1983 (*see Reid*, 2014 WL 4185195 at *8; *cf. Rivera v County of Westchester*, 188 Misc 2d 746, 749-750 [Sup Ct, Westchester County 2001]). We thus conclude that the court erred in determining that the Sheriff and Undersheriff could not be sued in their official capacities, and we therefore modify the order by denying that part of the motion seeking partial summary judgment dismissing the third cause of action against the Sheriff and Undersheriff and reinstating that cause of action against them.

We do not address defendants' contention that a section 1983 cause of action can be asserted only for injunctive or prospective relief inasmuch as that contention is raised for the first time on appeal (*see Detmer v Acampora*, 207 AD2d 475, 476 [2d Dept 1994]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

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KA 18-02403

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIC HAMM, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered October 12, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that remittal is required inasmuch as County Court failed to consider his request for a downward departure from his presumptive risk level. We conclude, however, that "[the] omission by the court does not require remittal because the record is sufficient for us to make our own findings of fact and conclusions of law with respect to defendant's request" (*People v Augsbury*, 156 AD3d 1487, 1487 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). Upon our review of the record, we conclude that defendant failed to allege a mitigating circumstance that is, as a matter of law, of a kind or to a degree not adequately taken into account by the risk assessment guidelines and, to the extent that defendant adequately identified a mitigating circumstance, he failed to prove its existence by a preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 861 [2014]; *People v Voymas*, 122 AD3d 1336, 1337 [4th Dept 2014], *lv denied* 25 NY3d 913 [2015]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

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CA 19-01640

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

IVES HILL COUNTRY CLUB, INC., AND PRIME, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF WATERTOWN, JOSEPH BUTLER, JR.,
IN HIS OFFICIAL CAPACITY AS MAYOR, RYAN J.
HENRY-WILKINSON, CODY J. HORBACZ, LISA A.
L'HUILLIER RUGGIERO AND MARK C. WALCZYK, IN
THEIR OFFICIAL CAPACITIES AS COUNCIL MEMBERS,
CITY COUNCIL, RICHARD FINN, IN HIS OFFICIAL
CAPACITY AS CITY MANAGER, AND WATERTOWN GOLF
CLUB, INCORPORATED, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LEVENTHAL, MULLANEY & BLINKOFF, LLP, ROSLYN (STEVEN G. LEVENTHAL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (MITCHELL J. KATZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF WATERTOWN, JOSEPH BUTLER, JR., IN HIS OFFICIAL CAPACITY AS MAYOR, RYAN J. HENRY-WILKINSON, CODY J. HORBACZ, LISA A. L'HUILLIER RUGGIERO AND MARK C. WALCZYK, IN THEIR OFFICIAL CAPACITIES AS COUNCIL MEMBERS, CITY COUNCIL, AND RICHARD FINN, IN HIS OFFICIAL CAPACITY AS CITY MANAGER.

CONBOY, MCKAY, BACHMAN & KENDALL LLP, WATERTOWN (IAN W. GILBERT OF COUNSEL), FOR DEFENDANT-RESPONDENT WATERTOWN GOLF CLUB, INCORPORATED.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered March 5, 2019. The order denied the motion of plaintiffs for partial summary judgment, granted the cross motions of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the complaint to the extent that it seeks a declaration with respect to the 2006 Lease Agreement between defendant City of Watertown and defendant Watertown Golf Club, Incorporated (2006 lease) and granting judgment in favor of defendants as follows:

> It is ADJUDGED and DECLARED that the 2006 lease is valid,

and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking a judgment declaring that certain lease agreements between defendant City of Watertown (City) and defendant Watertown Golf Club, Incorporated (WGC) are void. In 1917, the City was deeded certain land as a gift to be used as a public park. The deed contained a restriction providing that title to the land would divest if the City no longer used it as a park. The land became the City's Thompson Park and, in 1946, a land purchase by the City enlarged the park by 148 acres. In 1965, the City leased 66.3 acres of the purchased land to WGC for a term of 21 years, thereby allowing WGC to expand its golf course. In 1983, two years before the 1965 lease was due to expire, the State Legislature retroactively approved the lease. The City thereafter extended the lease twice more, with the terms ending in 1989 and 1999, respectively. In 2000, nonparty Joseph M. Butler Sr. became Mayor of the City. At that time, he was a member of WGC's board of directors and held one share of WGC stock. That same year, the City Council approved another lease with WGC (2000 lease) having a term ending in 2009. Butler abstained from the City Council vote approving the 2000 lease, although he participated in discussions leading to the vote and executed the 2000 lease on behalf of the City. In 2006, before the expiration of the 2000 lease, Butler, who was then the president of WGC but no longer the Mayor, appeared before the City Council to participate in discussions that led to another lease (2006 lease) with a term ending in 2029.

In November 2018, plaintiffs, the owner and operator of a competing golf course, commenced this action alleging that the 2000 lease was incorporated in and extended by the 2006 lease and sought a declaration that the 2000 lease and the 2006 lease, as an extension of the 2000 lease, are void. In appeal No. 1, plaintiffs appeal from an order denying their motion for partial summary judgment on the first cause of action seeking a declaration that the 2000 lease as extended by the 2006 lease is void based on a violation of General Municipal Law § 801 and granting the cross motions of defendants for summary judgment dismissing the complaint against them. In appeal No. 2, plaintiffs appeal from an order denying their motion for leave to renew their motion for partial summary judgment.

Contrary to plaintiffs' contention in appeal No. 1, Supreme Court properly denied their motion. Even assuming, arguendo, that plaintiffs met their initial burden of establishing that the 2000 lease violated General Municipal Law § 801, we conclude that such a violation would have affected only the 2000 lease (*see generally* § 804). We reject plaintiffs' position that the 2006 lease was an extension of the 2000 lease and was therefore also tainted by the violation of section 801. It is well settled that " 'parties to a written contract may mutually agree to cancel or rescind it' " (*Dolansky v Frisillo*, 92 AD3d 1286, 1287 [4th Dept 2012]). Here, the 2006 lease does not modify or renew the 2000 lease but, instead, is a renegotiated and new agreement that shortened the lease term that had been set forth in the 2000 lease, set a new and longer lease term between the parties, set forth a new rent schedule, and contained

additional consideration between the parties (*see generally Schwartzreich v Bauman-Basch, Inc.*, 231 NY 196, 203 [1921], *rearg denied* 231 NY 602 [1921]). Thus, inasmuch as the 2000 lease has expired and the 2006 lease is a separate agreement, plaintiffs' contentions with respect to the 2000 lease are moot (*see generally Matter of Ballard v New York Safety Track LLC*, 126 AD3d 1073, 1075 [3d Dept 2015]; *City of Utica v New York Susquehanna & W. Ry. Corp.*, 46 AD3d 1355, 1356 [4th Dept 2007]). For the reasons set forth above, we also reject plaintiffs' contention in appeal No. 1 that the court erred in granting the cross motions with respect to the first cause of action.

Contrary to plaintiffs' further contention in appeal No. 1, we conclude that the court properly granted the cross motions with respect to the third cause of action, alleging violations of common-law principles concerning conflicts of interest (*see generally Matter of Zagoreos v Conklin*, 109 AD2d 281, 287 [2d Dept 1985]). Any conflict of interest ended in 2006 when the new lease was renegotiated and this lawsuit was not commenced until 2018. Thus, the third cause of action is barred by the statute of limitations (*see* CPLR 213 [1]), and we reject plaintiffs' contention that Butler's alleged conflict of interest constitutes a continuing wrong to which the statute of limitations does not apply (*see generally Matter of Shapiro v Town of Ramapo*, 98 AD3d 675, 677 [2d Dept 2012], *lv dismissed* 20 NY3d 994 [2013]).

Inasmuch as plaintiffs have failed to brief any specific arguments that the court erred in granting the cross motions with respect to the second, fourth, and fifth causes of action, we conclude that plaintiffs have abandoned any contentions in appeal No. 1 concerning those causes of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We note that, because the complaint seeks a declaration, the court erred in dismissing the complaint in its entirety and in failing to declare the rights of the parties (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]). We therefore modify the order in appeal No. 1 accordingly.

Contrary to plaintiffs' contention in appeal No. 2, the court did not abuse its discretion in denying their motion for leave to renew their prior motion (*see* CPLR 2221 [e] [2], [3]; *Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1627-1628 [4th Dept 2012]). The new facts offered by plaintiffs, which concerned alleged encroachments by WGC onto nonleased City property, were irrelevant to the first cause of action and whether the 2000 and 2006 leases were void pursuant to the General Municipal Law. Thus, the new facts could not have "change[d] the prior determination" (CPLR 2221 [e] [3]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

141

CA 19-01642

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

IVES HILL COUNTRY CLUB, INC., AND PRIME, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF WATERTOWN, JOSEPH BUTLER, JR.,
IN HIS OFFICIAL CAPACITY AS MAYOR, RYAN J.
HENRY-WILKINSON, CODY J. HORBACZ, LISA A.
L'HUILLIER RUGGIERO AND MARK C. WALCZYK, IN
THEIR OFFICIAL CAPACITIES AS COUNCIL MEMBERS,
CITY COUNCIL, RICHARD FINN, IN HIS OFFICIAL
CAPACITY AS CITY MANAGER, AND WATERTOWN GOLF
CLUB, INCORPORATED, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LEVENTHAL, MULLANEY & BLINKOFF, LLP, ROSLYN (STEVEN G. LEVENTHAL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (MITCHELL J. KATZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF WATERTOWN, JOSEPH BUTLER, JR., IN HIS OFFICIAL CAPACITY AS MAYOR, RYAN J. HENRY-WILKINSON, CODY J. HORBACZ, LISA A. L'HUILLIER RUGGIERO AND MARK C. WALCZYK, IN THEIR OFFICIAL CAPACITIES AS COUNCIL MEMBERS, CITY COUNCIL, AND RICHARD FINN, IN HIS OFFICIAL CAPACITY AS CITY MANAGER.

CONBOY, MCKAY, BACHMAN & KENDALL LLP, WATERTOWN (IAN W. GILBERT OF COUNSEL), FOR DEFENDANT-RESPONDENT WATERTOWN GOLF CLUB, INCORPORATED.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered July 19, 2019. The order denied the motion of plaintiffs for leave to renew their motion for partial summary judgment.

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

Same memorandum as in *Ives Hill Country Club, Inc. v City of Watertown* ([appeal No. 1] — AD3d — [July 24, 2020] [4th Dept 2020]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

160

CA 19-01057

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

CAROL A. DURHAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF PHILADELPHIA, PHILADELPHIA VOLUNTEER FIRE DEPARTMENT, INC., AND COLE Q. JENNE, INDIVIDUALLY AND AS EMPLOYEE OR VOLUNTEER OF THE PHILADELPHIA VOLUNTEER FIRE DEPARTMENT, INC., DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TADDEO & SHAHAN, LLP, SYRACUSE (STEVEN C. SHAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered November 7, 2018. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained in a motor vehicle accident, and she appeals from an order granting defendants' motion for summary judgment dismissing the complaint. We affirm.

On the day of the events giving rise to the action, a pregnant woman called 911 asking for emergency assistance because she was experiencing hemorrhaging. Volunteer firefighters from defendant Philadelphia Volunteer Fire Department, Inc. (fire department) took the call and responded in an ambulance owned by the fire department and defendant Village of Philadelphia. One of those firefighters was Cole Q. Jenne (defendant). When the firefighters arrived at the scene, defendant requested emergency assistance from a paramedic on duty at nearby Fort Drum, which has its own emergency service. The firefighters loaded the patient into the ambulance. Defendant drove defendants' ambulance south on Route 11, intending to rendezvous with the paramedic en route to the hospital. The paramedic was riding in another ambulance owned by the United States Army (Army ambulance), which was traveling north on the same road toward defendants' ambulance. When defendants' ambulance and the Army ambulance reached each other, defendant pulled defendants' ambulance to the shoulder of

the southbound lane with its emergency lights engaged. The Army ambulance pulled to the shoulder of the northbound lane, intending to execute a U-turn and park on the shoulder of the southbound lane behind defendants' ambulance so that the paramedic could get into defendants' ambulance and provide emergency services to the patient en route to the hospital. While the Army ambulance was attempting to execute the U-turn, it was broadsided by a truck driven by plaintiff, which was traveling northbound on the same road. In her complaint, plaintiff alleges that defendants are liable because the accident was caused by defendant's failure to select a reasonably safe area to rendezvous with the Army ambulance.

Contrary to plaintiff's contention, we conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. "[T]he reckless disregard standard of care . . . applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *see Flood v City of Syracuse*, 166 AD3d 1573, 1573 [4th Dept 2018]). Here, it is undisputed that defendant was operating an "authorized emergency vehicle" and "involved in an emergency operation" (§ 1104 [a]). Furthermore, defendant was engaged in specific conduct exempted from the rules of the road, i.e., he was parked on the shoulder of the road (*see* § 1104 [b] [1]; *cf. Hudson v Boutin*, 239 AD2d 624, 625 [3d Dept 1997]). Thus, defendant's conduct of parking defendants' ambulance on the shoulder of the road rather than selecting a safer rendezvous point is entitled to immunity unless he acted with "reckless disregard for the safety of others" (§ 1104 [e]; *see Kabir*, 16 NY3d at 220).

In its decision, however, the court noted that plaintiff had abandoned any claim that defendant acted with reckless disregard for the safety of others, and on appeal plaintiff does not dispute the court's conclusion in that regard (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We therefore conclude that the court properly granted defendants' motion and dismissed the complaint (*see Flood*, 166 AD3d at 1573-1574).

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

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

179.1

CA 19-02324

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

IN THE MATTER OF THEODORE FORSYTH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE
DEPARTMENT, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

ROTH & ROTH LLP, NEW YORK CITY (ELLIOT SHIELDS OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (STEPHANIE A. PRINCE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 3, 2019 in a proceeding pursuant to CPLR article 78. The order denied the motion of petitioner seeking, among other things, to hold respondents in contempt.

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

Same memorandum as in *Matter of Forsyth v City of Rochester* ([appeal No. 1] — AD3d — [July 24, 2020] [4th Dept 2020]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

179

CA 19-01259

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

IN THE MATTER OF THEODORE FORSYTH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE
DEPARTMENT, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

ROTH & ROTH LLP, NEW YORK CITY (ELLIOT SHIELDS OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (STEPHANIE A. PRINCE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered December 18, 2018 in a proceeding pursuant to CPLR article 78. The judgment, among other things, remitted the matter back to respondents for reconsideration of petitioner's Freedom of Information Law Request.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the judgment permitting respondents to charge petitioner a fee for the cost of reviewing and redacting the requested video footage, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to comply with his request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) for certain video footage recorded by respondent Rochester Police Department as part of its Body-Worn Camera (BWC) program. In appeal No. 1, petitioner appeals from a judgment in which Supreme Court concluded that Public Officers Law § 87 did not permit respondents to meet their FOIL obligations by providing a "blanket-blurred" video to petitioner; determined that respondents could charge a fee "directly related to the redaction of electronic records," provided the fee was not onerous; and remitted the matter to respondents for reconsideration, directing respondents to provide a privilege log to petitioner detailing which sections of the video must be redacted and the reason for such redaction. In appeal No. 2, petitioner appeals, as limited by his brief, from an order denying his application, filed within two months of the judgment, seeking, inter alia, to hold respondents in contempt for their failure to comply with

the judgment in appeal No. 1.

With respect to appeal No. 1, we agree with petitioner that respondents may not charge petitioner a fee for the costs associated with their review or redaction of the BWC footage requested by petitioner (*see Matter of Time Warner Cable News NY1 v New York City Police Dept.*, 53 Misc 3d 657, 678 [Sup Ct, NY County 2016]). We note that the Committee on Open Government has specifically opined that "if the document exists in electronic format and the agency has the authority and the ability to redact electronically, we believe it would be reasonable for the agency to provide the requested redacted copy at no charge" (Comm on Open Govt FOIL–AO–18904 [2012]). While "the advisory opinions issued by the Committee on Open Government are not binding on the courts . . . , an agency's interpretation of the statutes it administers generally should be upheld if not unreasonable or irrational" (*Matter of Weslowski v Vanderhoef*, 98 AD3d 1123, 1130 [2d Dept 2012], *lv dismissed* 20 NY3d 995 [2013] [internal quotation marks omitted]). We therefore modify the judgment by vacating that part of the judgment permitting respondents to charge petitioner a fee for the cost of reviewing and redacting the requested video footage.

Contrary to petitioner's further contention in appeal No. 1, the court did not err in remitting the matter to respondents to reconsider the request, provide a privilege log, and ultimately comply with its statutory obligations (*see Matter of Konigsberg v Coughlin*, 68 NY2d 245, 251 [1986]*; Matter of Rhino Assets, LLC v New York City Dept. for Aging, SCRIE Programs*, 31 AD3d 292, 294 [1st Dept 2006]). In view of the foregoing, petitioner's remaining contentions in appeal No. 1, including whether he is entitled to attorney's fees, are premature at this juncture.

With respect to appeal No. 2, we reject petitioner's contention that the court erred in denying that part of his application seeking a finding of contempt based on respondents' failure to comply with the judgment in appeal No. 1. " 'In order to prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt violated a clear and unequivocal mandate of the court, thereby prejudicing the movant's rights . . . The movant has the burden of proving contempt by clear and convincing evidence' " (*Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]). Here, petitioner failed to establish that the judgment in appeal No. 1 expressed an unequivocal mandate inasmuch as no deadline was contained therein (*see id.* at 1382; *cf. Matter of North Tonawanda First v City of N. Tonawanda*, 94 AD3d 1537, 1538 [4th Dept 2012]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

202

CA 19-01395

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

IN THE MATTER OF THE ARBITRATION BETWEEN
VILLAGE OF MANLIUS, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

TOWN OF MANLIUS PROFESSIONAL FIREFIGHTERS
ASSOCIATION, IAFF LOCAL #3316,
RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR PETITIONER-APPELLANT.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (RONALD G. DUNN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 5, 2019 in a proceeding pursuant to CPLR article 75. The order and judgment dismissed the petition for a stay of arbitration.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner Village of Manlius (Village) commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration of a grievance filed by respondent, the collective bargaining representative for the employees of the Village's Fire Department. Respondent filed a grievance on behalf of a Village firefighter who was denied General Municipal Law § 207-a benefits after allegedly sustaining an injury while on duty. Supreme Court dismissed the petition to stay arbitration. The court concluded that the parties' collective bargaining agreement (CBA) governed the process with respect to the grievance and the timeliness thereof and that, while the CBA contained a condition precedent to arbitration, i.e., the timely service of a grievance, an issue for the arbitrator existed whether the parties completed steps one and two of the grievance procedure under the CBA. The Village appeals.

The Village contends that the instant dispute regarding entitlement to section 207-a benefits is not arbitrable inasmuch as the CBA does not govern such disputes and thus, the CPLR, and not the CBA, applies in determining the timeliness of the dispute. We reject that contention. "It is well settled that, in deciding an application

to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim" (*Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340 [4th Dept 2014]; *see* CPLR 7501; *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 142-143 [1999]). In making that threshold determination, the court must conduct a two-part analysis. First, the court must determine whether "there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278 [2002]). Second, "[i]f no prohibition exists, [the court must] then [determine] whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519 [2007]; *see Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233 [4th Dept 2012]).

With respect to the first part of the analysis, there is no statutory, constitutional or public policy prohibition against the parties agreeing to a procedure ending in arbitration to resolve grievances concerning a section 207-a benefits determination (*see generally Matter of City of Watertown v State of New York Pub. Empl. Relations Bd.*, 95 NY2d 73, 79-81, 84-85 [2000], *rearg denied* 95 NY2d 849 [2000]). With respect to the second part of the analysis, we conclude that the court properly determined that the CBA contains a broad arbitration clause and that there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA (*see Matter of Wilson Cent. Sch. Dist. [Wilson Teachers' Assn.]*, 140 AD3d 1789, 1790 [4th Dept 2016]).

We agree with the Village, however, that the CBA contains conditions precedent to arbitration within the provisions addressing the grievance procedure and that the court should have decided whether the conditions precedent had been met. "Questions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators," except in cases involving "a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration" (*Matter of Enlarged City School Dist. of Troy [Troy Teachers Assn.],* 69 NY2d 905, 907 [1987]; *see also Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7-8 [1980]; *Matter of Triborough Bridge & Tunnel Auth. [Dist. Council 37 of Am. Fedn. of State, County & Mun. Empls., AFL-CIO]*, 44 NY2d 967, 969 [1978]). Here, compliance with the requirements of steps one and two of the grievance procedure and the time limitations for serving a grievance were conditions precedent to arbitration. Under these circumstances, we conclude that "it was for the court, and not the arbitrator, to decide whether the grievance[] had been timely [served] and completed by the . . . employee at steps one and two of the grievance procedure" (*Matter of Town of Greenburgh [Blumstein]*, 125 AD2d 315, 317 [2d Dept 1986]). Therefore, we reverse

the order and judgment, reinstate the petition, and remit the matter to Supreme Court for a hearing on the issue whether the conditions precedent to arbitration were met and thereafter for a new determination on the petition to stay arbitration (*see Matter of Niagara Frontier Transp. Auth. v Computer Sciences Corp.*, 179 AD2d 1037, 1038 [4th Dept 1992]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

270

CA 19-00298

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

IN THE MATTER OF MARK CERRONE, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD ZEMSKY, AS COMMISSIONER OF NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT,
RESPONDENT-APPELLANT.

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

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 14, 2018 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Respondent appeals from a judgment granting petitioner's petition pursuant to CPLR article 78 to, inter alia, annul a determination denying petitioner's application for recertification as a woman-owned business enterprise ([WBE]; *see* Executive Law § 310 [15]; 5 NYCRR 144.2). As an initial matter, because the judgment obligates respondent to recertify petitioner as a WBE through June 1, 2021, we reject the contention of both parties that the appeal is moot in light of a post-briefing change in petitioner's ownership structure (*see generally Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]). On the merits, we agree with respondent that the challenged determination is not arbitrary or capricious inasmuch as it was rational to determine that petitioner was not being operated by the woman claiming ownership thereof (*see Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.*, 163 AD3d 1517, 1519-1520 [4th Dept 2018], *lv denied* 32 NY3d 1191 [2019]). Petitioner's alternative ground for affirmance lacks merit (*see Matter of Casella v Crosson*, 178 AD2d 963, 963-964 [4th Dept

1991]). We therefore reverse the judgment and dismiss the petition.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

289

CA 19-01797

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

GEORGE P. GROSS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TRAVELERS INSURANCE, DEFENDANT-RESPONDENT.

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

LAW OFFICE OF JOHN WALLACE, BUFFALO (BETSY F. VISCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 25, 2019. The order granted defendant's motion to dismiss plaintiff's complaint.

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

Memorandum: In this breach of contract action, plaintiff seeks to collect supplemental uninsured/underinsured motorist (SUM) benefits under an insurance policy issued to him by defendant. Plaintiff and his wife, another insured under that policy, were injured when their vehicle was rear-ended by a vehicle operated by a nonparty tortfeasor. Plaintiff's insurance policy provided SUM coverage and bodily injury coverage, each with limits of $300,000 per person and $300,000 per accident. The tortfeasor's policy, issued by nonparty The Hartford, contained bodily injury coverage with limits of $100,000 per person and $300,000 per accident. Plaintiff settled his underlying personal injury liability claim for the tortfeasor's $100,000 per person policy limit, and plaintiff's wife settled her claim for $16,000. Plaintiff submitted a SUM claim to defendant, which denied it on the ground that plaintiff's SUM coverage was not triggered. Supreme Court agreed, and granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) on that ground. Plaintiff appeals, and we reverse.

"Insurance Law § 3420 (f) (2) was enacted to allow an insured to 'obtain the same level of protection for himself [or herself] and his [or her] passengers which he [or she] purchased to protect himself [or herself] against liability to others' " (*Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d 681, 686 [1994], quoting Mem of St Exec Dept, 1977 McKinney's Session Laws of NY at 2446). It is well settled that, "[u]nder Insurance Law § 3420 (f) (2), an insured's [SUM]

coverage is triggered when the limit of the insured's bodily injury liability coverage is greater than the same coverage in the tortfeasor's policy" (*id. at* 684). More particularly, when determining whether SUM coverage is triggered, "[t]he necessary analytical step . . . is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has" (*id.* at 687), which "requires a comparison of each policy's bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage" (*id*. at 688).

Here, a comparison of the two policies at issue, in light of the circumstances of this case, demonstrates that plaintiff would be afforded greater coverage under his policy than under the tortfeasor's policy. The tortfeasor's policy would have provided plaintiff with only $100,000 of coverage for bodily injury, whereas plaintiff's policy would have provided him with up to $300,000 of coverage for bodily injury. Although plaintiff's SUM benefits would be reduced by the amount paid to his wife under the policy's $300,000 per accident maximum, he is still afforded more coverage under his policy than under the tortfeasor's policy because the bodily injury limit for an accident in which two people are injured would be $200,000 under the tortfeasor's policy, which is less than the coverage afforded by plaintiff's policy. Consequently, the SUM provision of plaintiff's policy was triggered (*see* Insurance Law § 3420 [f] [2] [A]; *Matter of Government Empls. Ins. Co. v Lee*, 120 AD3d 497, 498-499 [2d Dept 2014]; *Jones v Peerless Ins. Co.*, 281 AD2d 888, 889 [4th Dept 2001]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

293

CA 19-00310

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

HAROLD BLACKMON, ADRIAN L. GREEN, ROBERT HUNTER, TERRY MILLER, JACKIE ROGERS, CLARENCE STACKHOUSE, PAUL LEE, THEO DERBY, WILLIAM H. RIDDICK, VICTOR YOUNG, AND ERNEST A. CROWDER, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT, JOHN DOE(S) AND JANE DOE(S), DEFENDANTS.

BOSMAN LAW FIRM, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND SCHOENECK & KING, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 11, 2018. The order granted the motion of defendant City of Syracuse to dismiss the second amended complaint.

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

Memorandum: Plaintiffs, current or former employees of defendant City of Syracuse (City) in the City's Department of Public Works, commenced this action against the City and defendants "John Doe(s) and Jane Doe(s)," who were yet to be identified "supervisors and or decision makers with respect to [p]laintiffs' employment," alleging race discrimination in their employment and retaliation. The City moved to dismiss the second amended complaint pursuant to CPLR 3211 (a) (7). Supreme Court granted the motion, and we now modify.

We note at the outset that plaintiffs have abandoned any contention that the court erred in dismissing the first cause of action, for breach of contract, or the fifth or sixth causes of action, for municipal liability for a custom, policy, or practice of race discrimination and retaliation, respectively, by failing to address those causes of action in their brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). We must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Here, the City moved to dismiss the second amended complaint on the ground that plaintiffs failed to comply with the notice of claim provisions of Syracuse City Charter § 8-115 (*see Seneca One Realty, LLC v City of Buffalo*, 93 AD3d 1226, 1227 [4th Dept 2012]). Compliance with those provisions, "unless waived, is a condition precedent to the commencement of litigation against the City" (*Davis-Wallbridge, Inc. v City of Syracuse*, 71 NY2d 842, 844 [1988], *rearg denied* 72 NY2d 841 [1988]; *see Tom L. LaMere & Assoc., Inc. v City of Syracuse Bd. of Educ.*, 48 AD3d 1050, 1051 [4th Dept 2008]). In opposition to the motion, plaintiffs did not dispute that they failed to file a notice of claim, but rather argued that they were not required to do so. Thus, the issue here is whether plaintiffs were required to file a notice of claim pursuant to the Syracuse City Charter.

We agree with plaintiffs that they did not need to file a notice of claim with respect to their Federal discrimination claims under the second, seventh, and eighth causes of action (*see Felder v Casey*, 487 US 131, 151-153 [1988]; *Matter of Nicholson v City of New York*, 166 AD3d 979, 979 [2d Dept 2018]; *Matter of Clairol Dev., LLC v Village of Spencerport*, 100 AD3d 1546, 1547 [4th Dept 2012]; *Montano v City of Watervliet*, 47 AD3d 1106, 1110 [3d Dept 2008]). We therefore modify the order by denying the motion in part and reinstating those causes of action in the second amended complaint.

In contrast to the Federal claims, the State claims are subject to notice of claim requirements (*see Gorman v Sachem Cent. School Dist.*, 232 AD2d 452, 453 [2d Dept 1996]). As plaintiffs correctly assert, the notice of claim provisions of General Municipal Law §§ 50-e and 50-i are inapplicable to State claims under the Human Rights Law (*see Margerum v City of Buffalo*, 24 NY3d 721, 730 [2015]; *Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d 1458, 1460 [4th Dept 2013]). But that is because Human Rights claims "are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-i" (*Margerum*, 24 NY3d at 730; *see Picciano v Nassau County Civ. Serv. Commn.*, 290 AD2d 164, 170 [2d Dept 2001]). In contrast, Syracuse City Charter § 8-115 (3) is not limited to tort claims or claims for personal injury. It provides in relevant part that "[n]o action or special proceeding, *for any cause whatever*, . . . involving the rights or interests of the [C]ity shall be prosecuted or maintained against the [C]ity" unless a notice of claim was served on the City within three months after the accrual of such claim (*id.* [emphasis added]). The broad language of that notice of claim requirement encompasses plaintiffs' causes of action under the Human Rights Law (*see Matter of Farrell v City of Kingston*, 156 AD3d 1269, 1272 [3d Dept 2017];

Picciano, 290 AD2d at 170).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

299

KA 14-00921

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL L. MURRAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 12, 2014. The judgment convicted defendant upon a jury verdict of insurance fraud in the third degree and falsifying business records 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 insurance fraud in the third degree (Penal Law § 176.20) and falsifying business records in the first degree (§ 175.10). The conviction arises from the filing of an insurance claim for various items of property that were ostensibly destroyed in a residential fire, which was determined upon investigation to have been intentionally set.

Contrary to defendant's contention, Supreme Court did not commit reversible error in its *Molineux* ruling. Here, the evidence of defendant's prior misrepresentation on the relevant application for insurance was properly admitted in evidence to establish his intent to defraud (*see People v Berger*, 155 AD2d 951, 951 [4th Dept 1989], *lv denied* 75 NY2d 917 [1990]). We conclude that the probative value of that evidence outweighed its potential for prejudice, and "the court's limiting instruction[s] minimized any prejudice to defendant" (*People v Washington*, 122 AD3d 1406, 1408 [2014], *lv denied* 25 NY3d 1173 [2015]; *see Berger*, 155 AD2d at 951).

Defendant's additional contention that the court erred in admitting evidence of his significant debts and limited financial means is largely unpreserved for our review and, in any event, lacks merit. That evidence was relevant to whether the contents of the subject claim forms were false inasmuch as it tended to prove that

defendant did not actually own and possess in his residence the numerous expensive items of property that he claimed were destroyed in the fire, and its probative value was not substantially outweighed by the potential for prejudice (*see generally People v Harris*, 26 NY3d 1, 5 [2015]). Moreover, any error in admitting that evidence is harmless inasmuch as the proof of defendant's guilt, without reference to the error, is overwhelming, and there is no significant probability that the jury would have acquitted defendant had it not been for the error (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant further contends that the court erred in granting the People's request to instruct the jury on accessorial liability because doing so impermissibly introduced an alternative theory of liability, i.e., that he acted in concert with his wife, that was not charged in the indictment as amplified by the bill of particulars. We reject that contention. "An indictment charging a defendant as a principal is not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]; *see People v Duncan*, 46 NY2d 74, 79-80 [1978], *rearg denied* 46 NY2d 940 [1979], *cert denied* 442 US 910 [1979], *rearg dismissed* 56 NY2d 646 [1982]; *People v Gigante*, 212 AD2d 1049, 1049 [4th Dept 1995], *lv denied* 85 NY2d 909 [1995]). We therefore conclude that " 'the jury was properly instructed concerning both theories based upon the evidence adduced at trial' " (*People v Young*, 55 AD3d 1234, 1235 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008]). Contrary to defendant's contention, "the accessorial liability instruction did not introduce any new theory of culpability into the case that was inconsistent with that in the indictment, and thus his indictment as a principal provided him with fair notice of the charge[s] against him" (*id.*; *see Rivera*, 84 NY2d at 770-771).

Finally, we reject defendant's contention that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), and affording them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*id.*). Contrary to defendant's specific contention, even if he did not personally complete and sign each claim form, the evidence is legally sufficient to establish that he "*cause[d]* to be presented" a written statement containing materially false information in support of a claim for payment pursuant to an insurance policy (Penal Law § 176.05 [emphasis added]; *see* § 176.20) and "*cause[d]* a false entry in the business records of an enterprise" (§ 175.05 [1] [emphasis added]; *see* § 175.10) by meeting with the insurance company's representative and submitting to him the forms that were to be filed on defendant's behalf (*see People v Barto*, 144 AD3d 1641, 1643 [4th Dept 2016], *lv*

denied 28 NY3d 1142 [2017]; *People v Fuschino*, 278 AD2d 657, 658-659 [3d Dept 2000], *lv denied* 96 NY2d 800 [2001]; *see generally People v Abraham*, 22 NY3d 140, 147-148 [2013]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

340

KA 17-01482

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLINDA NESMITH, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered October 24, 2016. The judgment convicted defendant upon her plea of guilty of identity theft in the first degree, criminal possession of stolen property in the fourth degree (two counts) and grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, identity theft in the first degree (Penal Law § 190.80 [1]). We affirm.

Defendant's contention that the amount of restitution ordered by Supreme Court lacks a record basis is unpreserved for our review because she did not object to the imposition of restitution at sentencing or request a hearing, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Briggs*, 169 AD3d 1369, 1369-1370 [4th Dept 2019], *lv denied* 33 NY3d 974 [2019]; *People v Sapetko*, 158 AD3d 1315, 1315-1316 [4th Dept 2018], *lv denied* 31 NY3d 1017 [2018]; *People v Meyer*, 156 AD3d 1421, 1421-1422 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]).

Defendant also contends that her plea was not knowingly, voluntarily or intelligently entered because the court did not adequately inform her at the time of the plea that she would be sentenced as a second felony offender or inform her that she could controvert her purported prior felony conviction. Defendant failed to preserve that contention for our review by moving to withdraw her plea or to vacate the judgment (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]), and this case does not fall within the rare exception to the preservation requirement

(*see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, the record belies defendant's contention. Indeed, the record demonstrates that defendant was made aware at the plea hearing that she would be sentenced as a second felony offender, and that she had the opportunity at sentencing to deny the prior felony conviction or challenge its constitutionality, but declined to do so (*see People v Kopy*, 54 AD3d 441, 441 [3d Dept 2008]; *see generally People v Harris*, 61 NY2d 9, 20 [1983]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

429

KA 18-00586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PEDRO L. COLON, DEFENDANT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered November 9, 2017. The judgment convicted defendant upon a jury verdict of criminally negligent homicide and criminal possession of a weapon 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 criminally negligent homicide (Penal Law § 125.10) and criminal possession of a weapon (CPW) in the third degree (§ 265.02 [1]). At trial, the Medical Examiner testified that the victim suffered three stab wounds to the chest, the fatal blow being one that perforated his heart. Defendant took the witness stand, ostensibly to offer testimony favorable to his justification defense. Defendant testified that he stabbed the unarmed victim multiple times with a knife, once in the doorway of defendant's apartment and at least one other time in the common area of the apartment building. Then he pushed the victim, went back into his apartment, and shut the door. A police officer testified that he responded to the scene, found the victim in the street, and followed a trail of blood from the victim's body to the apartment. When the officer arrived at the apartment, defendant had just gotten out of the shower.

We agree with defendant that County Court erred in refusing to suppress his statements to the police. If a person who is subject to police interrogation "indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease" (*Miranda v Arizona*, 384 US 436, 473-474 [1966]; *see People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]). The assertion of the right to remain silent " 'must be unequivocal and unqualified' " (*People v Zacher*, 97 AD3d 1101, 1101

[4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see People v Morton*, 231 AD2d 927, 928 [4th Dept 1996], *lv denied* 89 NY2d 944 [1997]). Whether a defendant's assertion of that right was "unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding [that assertion,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*People v Glover*, 87 NY2d 838, 839 [1995]). Once invoked, the right to remain silent "must be 'scrupulously honored' " (*Ferro*, 63 NY2d at 322; *see Michigan v Mosley*, 423 US 96, 103-104 [1975]).

Here, defendant unequivocally informed the police immediately after being advised of his *Miranda* rights that "he didn't want to talk." No reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police (*see People v Douglas*, 8 AD3d 980, 981 [4th Dept 2004], *lv denied* 3 NY3d 705 [2004]). Regardless, the police continued the interrogation, thereby failing to " 'scrupulously honor[ ]' defendant's right to remain silent" (*People v Reid*, 34 AD3d 1273, 1273 [4th Dept 2006], *lv denied* 8 NY3d 884 [2007], quoting *Miranda*, 384 US at 479).

Nevertheless, the error is harmless because the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that any error in admitting defendant's statements to the police contributed to his conviction (*see People v Young*, 153 AD3d 1618, 1619 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017], *reconsideration denied* 31 NY3d 1123 [2018]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

We reject defendant's further contention that the verdict is repugnant. " '[A] verdict is repugnant only if it is legally impossible—under all conceivable circumstances—for the jury to have convicted the defendant on one count but not the other,' and, '[i]f there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case' " (*People v DeLee*, 24 NY3d 603, 608 [2014], *rearg denied* 31 NY3d 1127 [2018]). The verdict here is not repugnant because it is legally possible for a person to possess a knife with the intent to use it unlawfully against another (*see* Penal Law §§ 265.01 [2]; 265.02 [1]), but for the person to change his or her mind and subsequently engage in negligent behavior resulting in death (*see* § 125.10).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence because his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error" asserted on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349

[2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that the court erred in imposing consecutive sentences because the offenses were "committed through a single act" (Penal Law § 70.25 [2]). We reject that contention. In cases concerning consecutive sentencing in the CPW context, we employ a framework that "appropriately reflects the heightened level of integration between the possession and the ensuing substantive crime for which the weapon was used" (*People v Wright*, 19 NY3d 359, 365 [2012]). To determine whether a single act constituted both offenses under section 70.25 (2), we look to when the crime of possession was completed, i.e., both the actus reus and mens rea (*see Wright*, 19 NY3d at 365). "Only where the act of possession is accomplished before the commission of the ensuing crime and with a mental state that both satisfies the statutory mens rea element and is discrete from that of the underlying crime may consecutive sentences be imposed" (*id.*). Consecutive sentencing is permissible here because defendant's act of possessing the knife was accomplished before he used it to kill the victim and "defendant's possession [thereof] was marked by an unlawful intent separate and distinct from" his intent with respect to the homicide (*id*. at 367). Indeed, the mental state associated with the CPW count, i.e., intent to use the knife unlawfully, is discrete from the mental state associated with the homicide count, i.e., negligence (*cf. id.*).

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

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

503

KA 19-01026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERRY TOLBERT, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered April 18, 2019. The judgment convicted defendant upon a plea of guilty of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [2]). Although defendant's sole contention that County Court abused its discretion in denying his motion to withdraw the plea survives the valid waiver of the right to appeal (*see People v Dale*, 142 AD3d 1287, 1288 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]), we conclude based upon the record before us that his contention lacks merit (*see People v Gerena*, 174 AD3d 1428, 1429-1430 [4th Dept 2019], *lv denied* 34 NY3d 981 [2019]; *see generally People v Blount*, 90 NY2d 998, 999 [1997]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

574

CAF 17-01426

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

IN THE MATTER OF ANDREW D., EMILY D., SKYLER D., AND JOSEPH D.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER;

CARRIE R., RESPONDENT.

IN THE MATTER OF ANDREW D., EMILY D., SKYLER D., AND JOSEPH D.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

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

MEMORANDUM AND ORDER

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered June 19, 2017 in proceedings pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Joseph D. had abused and neglected Skyler D.

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

Same memorandum as in *Matter of Skyler D.* ([appeal No. 4] — AD3d — [July 24, 2020] [4th Dept 2020]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

575

CAF 17-01427

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

IN THE MATTER OF ANDREW D., EMILY D., SKYLER D., AND JOSEPH D.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER;

CARRIE R., RESPONDENT.

IN THE MATTER OF ANDREW D., EMILY D., SKYLER D., AND JOSEPH D.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

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

MEMORANDUM AND ORDER

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an amended order of the Family Court, Steuben County (Joseph W. Latham, J.), entered June 27, 2017 in proceedings pursuant to Family Court Act article 10. The amended order, among other things, determined that respondent Joseph D. had abused and neglected Skyler D.

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

Same memorandum as in *Matter of Skyler D.* ([appeal No. 4] — AD3d — [July 24, 2020] [4th Dept 2020]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

576

CAF 17-01428

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

IN THE MATTER OF ANDREW D., EMILY D., SKYLER D., AND JOSEPH D.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER;

CARRIE R., RESPONDENT.

IN THE MATTER OF ANDREW D., EMILY D., SKYLER D., AND JOSEPH D.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

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

MEMORANDUM AND ORDER

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered July 24, 2017 in proceedings pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Joseph D. had abused and neglected Skyler D. and that Joseph D., Andrew D. and Emily D. had been derivatively abused and neglected.

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

Same memorandum as in *Matter of Skyler D.* ([appeal No. 4] — AD3d — [July 24, 2020] [4th Dept 2020]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

577

CAF 17-02101

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

IN THE MATTER OF SKYLER D., EMILY D., ANDREW D.,
AND JOSEPH D., JR.
---------- MEMORANDUM AND ORDER
STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

JOSEPH D., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered November 16, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected and abused Skyler D. and that Joseph D., Jr., Andrew D. and Emily D. had been derivatively neglected and abused.

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 father appeals in appeal Nos. 1, 2, and 3 from two orders and an amended order in which Family Court found, inter alia, that he abused and neglected his older daughter and derivatively abused and neglected his three other children. In appeal No. 4, the father appeals from an order of disposition that, among other things, placed all four children with their mother and ordered that the father have no contact with them. We note at the outset that the father's appeals from the orders and amended order in appeal Nos. 1, 2, and 3 must be dismissed inasmuch as the appeal from the dispositional order in appeal No. 4 "bring[s] up for review the propriety of the fact-finding order[s]" (*Matter of Deseante L.R. [Femi R.]*, 159 AD3d 1534, 1535 [4th Dept 2018]; *see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Contrary to the father's contention in appeal No. 4, we conclude that there is a sound and substantial basis in the record supporting the court's determination that his older daughter was neglected and abused as a result of the father's sexual abuse (*see generally* Family

Ct Act § 1046 [b] [i]; *Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). "A child's out-of-court statements may form the basis for a finding of [abuse or] neglect as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142 [2d Dept 2008]; *see* § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987], *rearg denied* 71 NY2d 890 [1988]). "Courts have considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse[or neglect] . . . , and [t]he Legislature has expressed a clear intent that a relatively low degree of corroborative evidence is sufficient in [child protective] proceedings" (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011] [internal quotation marks omitted]).

Here, the older daughter's disclosures of sexual abuse were sufficiently corroborated by the testimony of her speech therapist, a school psychologist, and a caseworker trained in forensic interviewing techniques, as well as by the child's "age-inappropriate knowledge of sexual matters" (*Matter of Liam M.J. [Cyril M.J.]*, 170 AD3d 1623, 1624 [4th Dept 2019], *lv denied* 33 NY3d 911 [2019] [internal quotation marks omitted]; *see* Family Ct Act § 1046 [a] [vi]; *Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]). Furthermore, we note that "the child gave multiple, consistent descriptions of the abuse and, [a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child[']s out-of-court statements describing [the] sexual conduct enhances the reliability of those out-of-court statements" (*Brooke T.*, 156 AD3d at 1411 [internal quotation marks omitted]).

Although the father is correct that "the court failed to comply with Family Court Act § 1051 (e) by specifying the particular sex offense perpetrated upon the child as defined in Penal Law article 130," we conclude that the error is " 'technical in nature and harmless' " (*Matter of Eden S. [Joshua S.]*, 117 AD3d 1562, 1563 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]; *see Matter of Shannon K.*, 222 AD2d 905, 906 [3d Dept 1995]). Because the older daughter was seven years old at the time of the contact, the specific offense could only be sexual abuse in the first degree (*see* Penal Law § 130.65 [3]; *Eden S.*, 117 AD3d at 1563). Contrary to the father's further contention, where, as here, the underlying crime is sexual abuse, "the court is permitted to infer the sexual gratification element from the conduct itself if that conduct involved the deviate touching of the child's genitalia," which is the case here (*Eden S.*, 117 AD3d at 1563).

We further conclude that the finding of derivative abuse and neglect with respect to the three other children is supported by a preponderance of the evidence (*see Matter of Alexia J. [Christopher W.]*, 126 AD3d 1547, 1548 [4th Dept 2015]; *Matter of Jovon J.*, 51 AD3d

1395, 1396 [4th Dept 2008]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

580

CAF 19-01159

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

IN THE MATTER OF MADELINE C., CHEYENNE M.C., AND SOPHIA C.

---------- MEMORANDUM AND ORDER

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

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

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

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

MICHELLE M. SCUDERI, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order (denominated dispositional decision) of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered May 31, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, committed the subject children to the guardianship and custody of petitioner and directed petitioner to submit a dispositional order.

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

Same memorandum as in *Matter of Cheyenne C. (James M.)* ([appeal No. 2] — AD3d — [July 24, 2020] [4th Dept 2020]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

581

CAF 19-01920

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

IN THE MATTER OF CHEYENNE C., MADELINE C.,
AND SOPHIA C.
---------- MEMORANDUM AND ORDER
JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

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

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

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

MICHELLE M. SCUDERI, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered June 18, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals in appeal No. 1 from an order (denominated dispositional decision) of Family Court that, inter alia, terminated his parental rights with respect to the subject children, freed the children for adoption, and directed petitioner to submit a dispositional order. In appeal No. 2, the father appeals from that dispositional order, which, among other things, adjudged the children to have been permanently neglected, terminated the father's parental rights, and freed the children for adoption.

Initially, we conclude that the appeal from the order in appeal No. 1 must be dismissed because it was not taken from an order of disposition and, therefore, is not appealable as of right (*see* Family Ct Act § 1112; *see generally Matter of Jerralynn R. Mc. [Scott Mc.]*, 114 AD3d 793, 794 [2d Dept 2014]; *Matter of James L.* [appeal No. 2], 74 AD3d 1775, 1775 [4th Dept 2010]). To the extent the father challenges the propriety of the order at issue in appeal No. 1, his contentions are reviewable on the appeal from the order in appeal No. 2 (*see Jerralynn R. Mc.*, 114 AD3d at 794; *see generally* CPLR 5501 [a] [1]; Family Ct Act § 1118; *Matter of Orzech v Nikiel*, 91 AD3d 1305,

1306 [4th Dept 2012]).

Contrary to the father's contention in appeal No. 2, we conclude that the record amply demonstrates that petitioner established by clear and convincing evidence that it made the requisite diligent efforts—i.e., "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child[ren]" (Social Services Law § 384-b [7] [f])—to reunite the father with the children (*see* § 384-b [7] [a]; *Matter of Sheila G.*, 61 NY2d 368, 380-381 [1984]).

The father contends that petitioner failed to meet its burden because it presented evidence of its diligent efforts only with respect to the one-year time period coinciding with the father's alleged permanent neglect of the subject children, even though petitioner was required to demonstrate that it exercised diligent efforts the entire time the children were in its custody. We reject that contention inasmuch as the statutory period for evaluating diligent efforts is "either *at least one year* or fifteen out of the most recent twenty-two months following the date such child[ren] came into the care of an authorized agency" (Social Services Law § 384-b [7] [a] [emphasis added]; *see Matter of Star Leslie W.*, 63 NY2d 136, 146 [1984]). Furthermore, even if petitioner was required to present evidence of its diligent efforts outside the identified period of the father's alleged permanent neglect, we note that, in making its determination, the court considered evidence of petitioner's diligent efforts beyond the one-year period alleged in the petition. Specifically, there was clear and convincing evidence of petitioner's continued efforts to provide services to the father, including counseling, visitation, substance abuse treatment, and anger management treatment, as well as to provide him with information regarding the children.

Moreover, "[a]n agency which has tried diligently to reunite a [parent] with [his or] her child[ren] but which is confronted by an uncooperative or indifferent parent is deemed to have fulfilled its duty" (*Star Leslie W.*, 63 NY2d at 144; *see Matter of Noah V.P. [Gino P.]*, 96 AD3d 1472, 1473 [4th Dept 2012]). Here, petitioner provided substantial evidence that the father refused to cooperate with its efforts inasmuch as he, inter alia, revoked petitioner's access to his treatment records and unilaterally terminated his participation in counseling. Thus, we conclude that "[t]he record establishes by clear and convincing evidence that, although petitioner made 'affirmative, repeated, and meaningful efforts' to assist [the father], its efforts were fruitless because [the father] was utterly uncooperative" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 901 [4th Dept 1997]; *see Sheila G.*, 61 NY2d at 385; *Matter of Paul T.D.*, 19 AD3d 1048, 1049 [4th Dept 2005]).

We reject the father's further contention that petitioner failed to establish by clear and convincing evidence that he permanently neglected the children. Permanent neglect "may be found only after it is established that the parent has failed substantially and continuously or repeatedly to maintain contact with or plan for the

future of the child[ren] although physically and financially able to do so" (*Star Leslie W.*, 63 NY2d at 142, citing Social Services Law § 384-b [7] [a]). The term " 'to plan for the future of the child[ren]' " means "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child[ren] within a period of time which is reasonable under the financial circumstances available to the parent" (§ 384-b [7] [c]; *see Matter of Orlando F.*, 40 NY2d 103, 110 [1976]).

Here, petitioner supplied evidence that the father missed a substantial portion of scheduled visits with the children. Insubstantial or infrequent contacts with the children are insufficient to show that the father maintained substantial contact with them (*see* Social Services Law § 384-b [7] [b]; *Matter of Robert Lee W.*, 198 AD2d 808, 808-809 [4th Dept 1993]). Additionally, the evidence demonstrated that the father reduced his participation in counseling services and then stopped participating altogether. He also revoked his consent to allow petitioner access to information from his counseling services. On the whole, the father's steadfast refusal to cooperate with petitioner and its service plan demonstrated his unwillingness to plan for the future of his children (*see Matter of Sonia H.*, 177 AD2d 575, 577 [2d Dept 1991]; *see generally Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341 [4th Dept 2010]; *Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]).

Moreover, we note that the evidence demonstrated that the father failed to obtain adequate and safe housing during the relevant time period (*see Matter of Eden S. [Joshua S.]*, 170 AD3d 1580, 1582-1583 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]). "[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time. Good faith alone is not enough: the plan must be realistic and feasible" (*Star Leslie W.*, 63 NY2d at 143, citing Social Services Law § 384-b [7] [c]). Here, for the first 20 months after the children were placed in petitioner's care, the father continued living with his mother, whom he described as "act[ing] like a lunatic" and who verbally assailed a caseworker. Thereafter, the father moved in with his significant other, although he admitted that her home did not have enough beds for the children to use. Petitioner was unable to conduct a home study to evaluate the adequacy of the new residence because of threats made by the father. In addition, a background check on the father's significant other did not return favorable results.

Finally, we reject the father's contention that the court abused its discretion in refusing to issue a suspended judgment. The court at the dispositional hearing is concerned only with the best interests of the children (*see* Family Ct Act § 631; *Star Leslie W.*, 63 NY2d at 147), and its determination is entitled to great deference (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]). At the time of the dispositional hearing, the children had been in foster care for 2½ years, had bonded with the foster mother, and were doing well. The

foster mother indicated her willingness to adopt the children. Although he was permitted to visit the children during this time, the father cancelled all such visits and thereby did not maintain contact with the children (*see Noah V.P.*, 96 AD3d at 1474). Moreover, he refused to address the problems that led to the children's placement with petitioner in the first place (*see Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). We therefore conclude that the court properly terminated the father's parental rights and freed the children for adoption.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

598

KA 18-00241

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUDSON WATKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 22, 2017. Defendant was resentenced upon his conviction of rape in the first degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Onondaga County Court for the filing of a new persistent violent felony offender statement and resentencing.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [3]), and he now appeals from a resentence with respect to that conviction. Defendant contends that County Court erred in resentencing him as a persistent violent felony offender. We agree. As relevant here, a person is a persistent violent felony offender when he or she "stands convicted of a violent felony offense . . . after having previously been subjected to two or more predicate violent felony convictions" (§ 70.08 [1] [a]). The sentences upon the predicate violent felony convictions "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.04 [1] [b] [iv]). However, "[i]n calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (§ 70.04 [1] [b] [v]). It is undisputed that, here, the sentences for defendant's two prior violent felony convictions were imposed more than 10 years before defendant committed the subject violent felony offense (*see* §§ 70.04 [1] [b]; 70.08 [1] [a], [b]). Thus, the prior violent felony convictions may be considered predicate violent felony convictions only in accordance with the tolling provision of section

70.04 (1) (b) (v) based upon defendant's subsequent periods of incarceration.

Because the tolling provision of Penal Law § 70.04 (1) (b) (v) is implicated, the persistent violent felony offender statement filed by the People was required to "set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation" (CPL 400.15 [2]; *see* CPL 400.16 [1], [2]). Here, however, the statement filed by the People did not comply with that requirement (*see People v Gines*, 284 AD2d 134, 135 [1st Dept 2001]; *see also People v Hamilton*, 49 AD3d 1163, 1164 [4th Dept 2008]). Moreover, contrary to the position taken by the People that the statement substantially complies with CPL 400.15, the absence of the required information deprived defendant of the requisite "reasonable notice and an opportunity to be heard" with respect to the tolling period (*People v Bouyea*, 64 NY2d 1140, 1142 [1985]; *see People v Todd*, 88 AD2d 886, 886-887 [1st Dept 1982]). We therefore reverse the resentence, and we remit the matter to County Court for resentencing, to be preceded by the filing of a new persistent violent felony offender statement (*see Hamilton*, 49 AD3d at 1164; *Gines*, 284 AD2d at 134-135; *see also People v Cortez*, 66 AD3d 431, 431-432 [1st Dept 2009]; *People v Tatta*, 177 AD2d 674, 674-675 [2d Dept 1991], *lv denied* 79 NY2d 923 [1992]). In light of our determination, we do not address defendant's remaining contentions.

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of rape in the first degree under Penal Law § 130.35 (1), and it must therefore be amended to reflect that he was charged and convicted under section 130.35 (3).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

649

CAF 18-02004

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

IN THE MATTER OF MYA N. AND SERENITY N.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REGINALD N. AND SADIE H., RESPONDENTS-APPELLANTS.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT REGINALD N.

BETZJITOMIR LAW OFFICE, BATH (SUSAN M. BETZJITOMIR OF COUNSEL), FOR RESPONDENT-APPELLANT SADIE H.

SCOTT D. CANNON, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

MICHAEL W. STIVERS, GENESEO, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered September 11, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had severely abused the older child and derivatively neglected the younger child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondents separately appeal from an order entered after a fact-finding hearing that, inter alia, adjudged that the older child was severely abused by respondents and that the younger child was derivatively neglected. Respondents are the biological parents of the younger child. Respondent father is also the biological father of the older child and respondent Sadie H. (Sadie) is her stepmother. Family Court's finding of severe abuse was based on two incidents in which the father found the older child at the bottom of the basement stairs in the morning. After the first incident, the older child sustained back and leg injuries, torso abrasions and facial bruising that was so severe that she could not open her eyes all the way. After the second incident, the child had two lacerations across the front of her neck that required significant medical attention.

With respect to the father's appeal, we conclude that he failed to preserve for appellate review his contention that the court improperly granted petitioner's request to conform the pleadings to the proof and, in any event, that contention lacks merit (*see Matter of Ashley S.*

[Rebecca S.-C.], 157 AD3d 536, 536 [1st Dept 2018]).

Contrary to the further contention of the father, a sound and substantial basis in the record exists for the court's finding that the older child was abused by the father. As relevant here, in order to sustain a finding of abuse, a petitioner must demonstrate by a preponderance of the evidence that the parent or other person legally responsible for the child's care "inflict[ed] or allow[ed] to be inflicted upon such child physical injury by other than accidental means which cause[d] or create[d] a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Family Ct Act § 1012 [e] [i]; *see* § 1046 [b] [i]).

The petitioner establishes a prima facie case of child abuse or neglect by submitting evidence that a child suffered "injuries that 'would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child' " at the time the injuries occurred (*Matter of Avery KK. [Nicholas KK.]*, 144 AD3d 1429, 1430 [3d Dept 2016], quoting Family Ct Act § 1046 [a] [ii]; *see Matter of Philip M.*, 82 NY2d 238, 243-244 [1993]; *Matter of Zarhianna K. [Frank K.]*, 133 AD3d 1368, 1369 [4th Dept 2015]). If the petitioner demonstrates a prima facie case, "it then falls to the respondents to rebut the presumption of culpability by offering a reasonable and adequate explanation for how the child sustained the injur[ies]" (*Matter of Ashlyn Q. [Talia R.]*, 130 AD3d 1166, 1167 [3d Dept 2015]; *see Philip M.*, 82 NY2d at 244).

Here, as noted, petitioner presented evidence that, during both incidents, the older child was found at the bottom of the basement stairs and sustained injuries, including severe bruising and slashes to her throat. Those incidents occurred while the older child was being supervised by respondents. When the father discovered the injuries, he did not immediately seek medical treatment for the older child (*see Matter of Logan C. [John C.]*, 154 AD3d 1100, 1102-1103 [3d Dept 2017]). Moreover, petitioner presented the testimony of a physician expert, who stated that the injuries sustained by the older child in the second incident were not accidental, but were intentional. We therefore conclude that petitioner established a prima facie case of child abuse with respect to the father. In opposition to petitioner's prima facie showing, the father failed to rebut the presumption of culpability inasmuch as he failed to offer a reasonable and adequate explanation for how the older child sustained her injuries.

Contrary to the father's contention, we also conclude that the court properly determined that he severely abused the older child. Although, as both petitioner and the Attorney for the Children correctly concede, the court erred in failing to set forth the clear and convincing evidence forming the basis for that determination (*see* Family Ct Act § 1051 [e]), this Court has the authority to independently review the record and make such a finding (*see Matter of White v Byrd-McGuire*, 163 AD3d 1413, 1414 [4th Dept 2018]; *cf. Matter*

of Nicholas S. [John T.], 107 AD3d 1307, 1311 [3d Dept 2013], *lv denied* 22 NY3d 854 [2013]).

A finding of severe abuse requires clear and convincing evidence that a child was found to be abused "as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law § 10.00 (10)]" (Social Services Law § 384-b [8] [a] [i]; *see* Family Ct Act §§ 1046 [b] [ii]; 1051 [e]). Here, the older child suffered severe injuries, including cuts to her throat that required a significant amount of medical attention and serious bruising. The act of cutting the older child's throat twice demonstrates that the actor did so because he or she simply did not care whether grievous harm would result to the older child. Even assuming, arguendo, that the evidence did not establish that the father was the one who inflicted those injuries, we conclude that the evidence demonstrates that he was in the home when the older child sustained her serious physical injuries and that he offered no compelling explanation for what caused them or why he failed to seek immediate medical help for her after discovering those injuries (*see Matter of Amirah L. [Candice J.]*, 118 AD3d 792, 794 [2d Dept 2014]).

We disagree with the dissent's view that petitioner was required to present evidence that the father's delay in seeking medical treatment exacerbated the older child's injuries or complicated the older child's medical treatment. A finding of severe abuse is warranted where a parent "recklessly allow[s] [the serious physical] injuries to be inflicted under circumstances evincing a depraved indifference to human life" (*Matter of Vivienne Bobbi-Hadiya S. [Makena Asanta Malika McK.]*, 126 AD3d 545, 545 [1st Dept 2015], *lv denied* 25 NY3d 909, 1064 [2015]; *see* Social Services Law § 384-b [8] [a] [i]; *see also Matter of Mason F. [Katlin G.-Louis F.]*, 141 AD3d 764, 766-767 [3d Dept 2016], *lv denied* 28 NY3d 905 [2016]). Here, despite the fact that the father was aware of the injuries sustained by the older child after the first incident, he took no additional precautions with respect to the older child's care. Furthermore, the father's failure to seek immediate medical care after observing two severe lacerations on the older child's neck at the time of the second incident "supports the finding of severe abuse" (*Matter of Heaven C.E. [Tiara C.]*, 164 AD3d 1177, 1178 [1st Dept 2018]; *see Matter of Nyheem E. [Jamila G.]*, 134 AD3d 517, 518 [1st Dept 2015]).

On her appeal, Sadie contends that the court's finding that she abused the older child is against the weight of the evidence. We reject that contention. Petitioner made a prima facie showing that Sadie abused the older child by presenting evidence that the older child suffered from, inter alia, lacerations to the throat, an injury that "would ordinarily not occur absent an act or omission of [Sadie], and . . . that [Sadie was a] caretaker[] of the [older] child at the time the injury occurred" (*Philip M.*, 82 NY2d at 243). While Sadie attempted to meet her burden of rebutting that prima facie case by presenting testimony that she was not present in the home when the older child's injuries occurred and that the child may have been sleepwalking at the time or inflicted self-injury (*see generally Matter*

of Damien S., 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]), the court found such testimony to be incredible. Moreover, petitioner presented in rebuttal the testimony of a victim witness coordinator, who testified that the older child informed her that Sadie had cut the older child's throat with a knife. Therefore, according deference to the court's assessment of credibility, we conclude that the weight of the evidence supports the court's finding that the older child was abused by Sadie (*see generally id.* at 1384).

We further conclude that Sadie's contention that the *Lincoln* hearings violated her due process rights is unpreserved inasmuch as she did not object to the court conducting those hearings and did not object to her counsel's exclusion from those hearings (*see generally Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1146 [4th Dept 2016]; *Matter of Jennifer WW.*, 274 AD2d 778, 779 [3d Dept 2000], *lv denied* 98 NY2d 764 [2000]). Contrary to Sadie's additional contention, she has " 'failed to demonstrate that she was afforded less than meaningful representation by counsel' " (*Matter of Matthew B.*, 24 AD3d 1183, 1183 [4th Dept 2005]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

We have reviewed the remaining contentions of respondents and conclude that none warrants modification or reversal of the order.

All concur except CURRAN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent in part. I disagree with the majority's conclusion that petitioner established by clear and convincing evidence that respondent father severely abused the older child (*see* Social Services Law § 384-b [8] [a] [i]; Family Ct Act §§ 1046 [b] [ii]; 1051 [e]). Although I agree with the majority that petitioner established by clear and convincing evidence that the father evinced a depraved indifference to human life when he did not promptly seek medical attention for the lacerations to the older child's throat, I disagree with the conclusion that petitioner met its burden of establishing that the father's failure to seek such treatment "*result[ed]* in serious physical injury to the [older] child" (Social Services Law § 384-b [8] [a] [i] [emphasis added]).

In my view, the record demonstrates by clear and convincing evidence only that respondent Sadie H., the older child's stepmother, inflicted the lacerations to the older child's neck. Indeed, the child specifically identified her as the person who caused those injuries (*see generally Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551-1552 [4th Dept 2010]). Although the record also establishes that, after learning of those injuries, the father delayed seeking medical attention for the older child for about 30 minutes, there was no evidence in the record that the father's delay, although inexcusable, actually worsened the older child's injuries (*cf. Matter of Amirah L. [Candice J.]*, 118 AD3d 792, 794 [2d Dept 2014]; *see generally Matter of Dashawn W. [Antoine N.]*, 21 NY3d 36, 49 [2013]). Additionally, there was no testimony, medical or otherwise, indicating that the father's delay complicated the older child's medical treatment.

I respectfully disagree with the majority's conclusion that the father's conduct following the first incident resulted in serious physical injury based on "the fact that [he] was aware of the injuries sustained by the older child after" that incident and thereafter "took no additional precautions with respect to the older child's care." The record is devoid of evidence regarding what precautions, if any, the father took with respect to the older child's care between the first incident and the subject incident. Thus, I submit that the majority's conclusion in that regard is unsupported by the record.

I further respectfully disagree with the majority's conclusion that the father's approximately 30-minute delay in seeking medical care supports the determination that the father's inaction resulted in the older child sustaining serious physical injury. As noted above, the majority fails to causally connect the father's inaction for a period of about 30 minutes to some resulting "serious physical injury to the child" (Social Services Law § 384-b [8] [a] [i]). My emphasis on the absence of any evidence that the older child's injuries were exacerbated by the father's inaction, or that his inaction complicated the older child's medical treatment, merely illustrates the missing causal link between the father's inaction and the older child's injuries—a link that I submit the majority has supplied without any supporting evidence. Thus, given the lack of evidence that the father's inaction resulted in serious physical injury, I would modify the order by vacating the finding that the father severely abused the older child (*see generally Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642-1643 [4th Dept 2017]). I would otherwise affirm.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

660

KA 18-01930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY SULLIVAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered February 9, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that he did not validly waive the right to appeal. We agree. Here, in describing the nature of defendant's right to appeal and the breadth of the waiver of that right, County Court incorrectly stated to defendant that "by giving up your right to appeal, you are giving up the right to have a higher court . . . see if there was any legal error which brought about your conviction or . . . review any claim that your sentence was unduly harsh or unfair . . . In other words, . . . this case would end here, it would not go to a higher court." Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Thomas*, 34 NY3d 545, 559 [2019]; *see People v Lopez*, 6 NY3d 248, 256 [2006]), defendant's waiver of the right to appeal was invalid because the court erroneously characterized it as an "absolute bar" to the taking of an appeal (*Thomas*, 34 NY3d at 565). The better practice is for a court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*id*. at 567, citing NY Model Colloquies, Waiver of Right to Appeal, http://www.nycourts.gov/judges/cji/8-Colloquies/Waiver%20of%20Right%20to%20Appeal.pdf).

Although the court made an adequate record of the existence and execution of a written waiver of the right to appeal (*cf. People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015

[2018]), we nonetheless conclude that the written waiver did not cure the defects in the oral colloquy because it "muddled" the explanation of the nature and breadth of the appeal waiver. Specifically, it contained conflicting and contradictory descriptions of the rights defendant purportedly waived (*see Thomas*, 34 NY3d at 566), instead of clarifying "that appellate review remained available for certain issues, most importantly, the validity of the appeal waiver itself" (*id.* at 564).

With respect to the merits, we perceive no basis in the record to exercise our discretion to modify the sentence in the interest of justice (*see* CPL 470.15 [6] [b]). We note that defendant has previously been adjudicated a youthful offender and that his plea in this case satisfied two additional burglary charges.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

666

KA 14-02210

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLAYTON S. WHITTEMORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered August 5, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, the jury's rejection of the affirmative defense of extreme emotional disturbance (EED) was not against the weight of the evidence (*see People v Steen*, 107 AD3d 1608, 1608 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]). Contrary to defendant's further contention, the purportedly flawed understanding of EED exhibited by the People's psychiatric expert went "to the weight to be given the evidence rather than its admissibility" (*People v Taylor*, 75 NY2d 277, 291 [1990]). Thus, Supreme Court properly refused to strike the testimony of the People's expert based on his purportedly flawed understanding of EED (*see People v Pascuzzi*, 173 AD3d 1367, 1375 [3d Dept 2019], *lv denied* 34 NY3d 953 [2019]; *People v Boice*, 89 AD2d 33, 35 [3d Dept 1982]). Moreover, given the court's instructions to the jury on EED—the accuracy of which are not challenged on appeal—the court was not obligated to "tell the jury that [the People's expert] had incorrectly stated the criteria for [EED]" (*see People v Samuels*, 99 NY2d 20, 25-26 [2002]; *People v Radcliffe*, 232 NY 249, 254-255 [1921]). Finally, defendant did not preserve his contention that the People violated his due process rights by failing to correct their expert's ostensibly inaccurate testimony about EED (*see People v Rivera*, 70 AD3d 1484, 1484 [4th Dept 2010], *lv denied* 15 NY3d 756 [2010]), 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]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

686

KA 17-02025

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIKA H. POOLE, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sara Sheldon, A.J.), rendered August 7, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). Defendant contends that County Court erred in refusing to suppress evidence obtained following a traffic stop of a vehicle she was driving because the police lacked reasonable suspicion for the seizure of the vehicle inasmuch as a tip from a confidential informant (CI) did not satisfy the *Aguilar-Spinelli* test. We reject that contention. The testimony at the suppression hearing and *Darden* hearing established that defendant's parole officer received a tip from the CI that defendant was obtaining and distributing cocaine. The parole officer testified that the CI had given him information on at least three prior occasions, and the CI's information had been accurate. The CI told the parole officer that defendant would be returning to the area in a Nissan Altima with Connecticut license plates. After observing such a vehicle arrive near defendant's residence, the parole officer requested the assistance of local police in stopping it. Upon stopping the vehicle, the police found cocaine on the floor of the passenger side of the vehicle.

A search and seizure by a parolee's own parole officer is permissible so long as it is "rationally and reasonably related to the

performance of the parole officer's duty" (*People v Huntley*, 43 NY2d 175, 181 [1977]; *see People v Reed*, 150 AD3d 1655, 1655 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]). Based on the testimony at the suppression and *Darden* hearings, there was " 'credible information' " that defendant was in violation of her parole because she possessed and was selling cocaine (*People v Wheeler*, 149 AD3d 1571, 1572 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017]; *see People v Sapp*, 147 AD3d 1532, 1533 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]). "The CI's basis of knowledge and moderate indicia of the tip's reliability were adequately demonstrated[] for the purpose of establishing reasonable suspicion" justifying the traffic stop (*People v Porter*, 101 AD3d 44, 47-48 [3d Dept 2012], *lv denied* 20 NY3d 1064 [2013]; *see People v Hepburn*, 189 AD2d 914, 915 [3d Dept 1993]). Moreover, the seizure of the vehicle was reasonably related to the performance of the parole officer's duty (*see generally Huntley*, 43 NY2d at 181).

We reject defendant's further contention that the court should have suppressed a statement she made because she was subjected to custodial interrogation without being advised of her *Miranda* rights. Although defendant's statement was made when she was in police custody, it was not the product of interrogation or its functional equivalent. The transporting sheriff's deputy did not question defendant and did not deliberately elicit any statements. There was therefore no basis to suppress defendant's spontaneous statement (*see People v Lewis*, 89 AD3d 1485, 1485 [4th Dept 2011]). We have reviewed defendant's remaining contention with respect to the court's suppression ruling and conclude that it is without merit.

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]). Contrary to the further contention of defendant, the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction should be amended because it incorrectly reflects that defendant was sentenced as a second felony offender when she was actually sentenced as a second felony drug offender (*see People v Ortega*, 175 AD3d 1810, 1811 [4th Dept 2019]; *People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

687

KA 18-01628

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD HUNT, ALSO KNOWN AS CHERON HUNT,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered April 26, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

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]). The conviction arises from the discovery at a border checkpoint of a loaded handgun in a duffle bag located inside the locked truck of a vehicle in which defendant was the backseat passenger.

Initially, by failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Brooks*, 139 AD3d 1391, 1392-1393 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]). Nonetheless, " '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]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]). As charged to the jury here, a person is guilty of criminal possession of a weapon in the second degree when that person knowingly possesses any loaded firearm and such possession did not take place in such person's home or place of business (*see* Penal Law § 265.03 [3];

CJI2d[NY] Penal Law § 265.03 [3]). Such person "may be found to possess a firearm through actual, physical possession or through constructive possession" (*People v McCoy*, 169 AD3d 1260, 1262 [3d Dept 2019], *lv denied* 33 NY3d 1033 [2019]; *see* § 10.00 [8]). To establish constructive possession, "the People must show that [such person] exercised 'dominion or control' over the [firearm] by a sufficient level of control over the area in which the [firearm] is found or over the person from whom the [firearm] is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* CJI2d[NY] Physical and Constructive Possession). We note that the People did not present a case based on the automobile presumption set forth in Penal Law § 265.15 (3) and, thus, the jury was not provided with that charge (*see People v Worthington*, 150 AD3d 1399, 1401-1402 [3d Dept 2017], *lv denied* 29 NY3d 1095 [2017]).

Here, upon our independent review of the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we agree with defendant that the verdict is against the weight of the evidence inasmuch as the jury was not justified in finding beyond a reasonable doubt that defendant possessed the handgun in question (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). It is undisputed that the driver owned the vehicle and that the duffle bag belonged to him as well. The People relied on evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that the driver was excluded as a contributor thereto. Although " 'an inference could be made [from that evidence] that defendant had physically possessed the gun at some point in time' " (*People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]), that evidence alone does not establish that defendant actually possessed the handgun on the date and at the time alleged in the indictment (*see People v Graham*, 107 AD3d 1296, 1298 [3d Dept 2013]; *cf. People v Habeeb*, 177 AD3d 1271, 1274 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]).

Further, given the absence of other evidence, the People failed to establish that defendant "exercised dominion or control over the [handgun] by a sufficient level of control over the area in which [it was] found" (*People v Burns*, 17 AD3d 709, 710 [3d Dept 2005] [internal quotation marks omitted]; *see People v Diallo*, 137 AD3d 1681, 1682 [4th Dept 2016]; *cf. Ward*, 104 AD3d at 1324). In this case, defendant's mere presence in the vehicle where the handgun was found did not establish that he constructively possessed it (*see Burns*, 17 AD3d at 710; *see also People v Rolldan*, 175 AD3d 1811, 1813 [4th Dept 2019], *lv denied* 34 NY3d 1081 [2019]). Defendant was not the owner or operator of the vehicle, nor did the duffle bag in the locked trunk belong to him, and there was no evidence that defendant possessed or had access to the keys for the vehicle or that he had any access to or control over the trunk and duffle bag (*see Burns*, 17 AD3d at 711; *cf. Ward*, 104 AD3d at 1324; *People v Leader*, 27 AD3d 901, 904 [3d Dept 2006]). Contrary to the People's contention, defendant's statement to the police did not constitute an admission that he had possessed the handgun (*cf. Ward*, 104 AD3d at 1324) or that he knew about its presence in the duffle bag and, in any event, mere knowledge of the

presence of the handgun would not establish constructive possession (*see People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]; *Burns*, 17 AD3d at 711; *see generally People v Rivera*, 82 NY2d 695, 697 [1993]). We therefore reverse the judgment of conviction and dismiss the indictment.

In light of our determination, we need not consider defendant's remaining contention.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

688

KA 18-00650

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NINIMBE MITCHELL, DEFENDANT-APPELLANT.

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

NINIMBE MITCHELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 25, 2017. 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 [1]). We affirm.

Viewing the evidence in the light most favorable to the People, we reject defendant's contention in his main brief that the evidence is legally insufficient to support the conviction (*see generally* Penal Law § 20.00; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury, as well as the instruction on accomplice liability (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention in his main brief, the prosecutor did not elicit any testimony that could be reasonably construed to suggest that defendant had invoked his constitutional right to remain silent (*see People v Torres*, 125 AD3d 1481, 1483 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]; *People v Hicks*, 226 AD2d 189, 189 [1st Dept 1996], *lv denied* 88 NY2d 966 [1996]). We thus need not determine whether defendant opened the door to any such testimony.

Defendant's contention in his main brief that Supreme Court admitted irrelevant evidence is unpreserved for appellate review because he never objected to the subject evidence on that ground (*see People v Purdy*, 154 AD3d 1306, 1307-1308 [4th Dept 2017], *lv denied* 30 NY3d 1108 [2018]). Defendant's allegation in his main brief of prosecutorial misconduct on summation is likewise unpreserved because defendant did not object to the allegedly improper comment (*see People v Santiago*, 29 AD3d 466, 467 [1st Dept 2006], *lv denied* 7 NY3d 794 [2006]). We decline to exercise our power to review either contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention in his main brief that the sentence is unduly harsh and severe. Finally, contrary to defendant's contention in his pro se supplemental brief, the verdict of guilty of robbery in the first degree is not repugnant to the acquittal of felony murder (*see People v Jacobs*, 128 AD3d 850, 850-851 [2d Dept 2015], *lv denied* 26 NY3d 1009 [2015]; *People v Trotter*, 255 AD2d 925, 926 [4th Dept 1998], *lv denied* 93 NY2d 980 [1999]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

689

KA 14-00477

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE D. WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 19, 2013. The judgment convicted defendant upon his plea of guilty of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05), defendant contends that his plea was not knowingly, intelligently, and voluntarily entered because Supreme Court failed to advise him of all the constitutional rights he would be forfeiting upon pleading guilty (*see generally Boykin v Alabama*, 395 US 238, 243 [1969]). Defendant failed to preserve that contention for our review, however, inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Johnson*, 52 AD3d 1286, 1286 [4th Dept 2008], *lv denied* 11 NY3d 738 [2008]). Contrary to defendant's contention, the narrow exception to the preservation requirement does not apply under the circumstances of this case (*cf. People v Tyrell*, 22 NY3d 359, 364 [2013]; *see generally People v Conceicao*, 26 NY3d 375, 381-382 [2015]). Although the Court of Appeals in *Tyrell* vacated a guilty plea based on an unpreserved *Boykin* claim, the defendant in that case was sentenced immediately following his plea and thus did not have an opportunity to move to withdraw his plea (*see Tyrell*, 22 NY3d at 364; *see also Conceicao*, 26 NY3d at 382). Here, in contrast, defendant was sentenced more than one month after he entered his guilty plea, thus affording him ample time to bring a motion (*see People v Landry*, 132 AD3d 1351, 1352 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

699

KA 18-00288

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LINDELL COX, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (ADAM W. KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, SPECIAL PROSECUTOR, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., BUFFALO (BRIDGET RAHILLY STELLER OF COUNSEL, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 20, 2017. The judgment convicted defendant after a nonjury trial of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that the evidence is legally insufficient to establish that he knowingly possessed the contraband in question, i.e., a weapon found in his shoe. We reject that contention. As relevant here, "a person is guilty of promoting prison contraband in the first degree when . . . [, b]eing a person confined in a detention facility, he [or she] knowingly and unlawfully makes, obtains or possesses any dangerous contraband" (*id*.). "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when [the person] is aware that his [or her] conduct is of such nature or that such circumstance exists" (§ 15.05 [2]). At trial, a correction officer testified that he observed defendant making suspicious movements toward his right shoe and alerted his supervisor, who intercepted defendant moments later and found a weapon under the padding of the shoe. Based upon that testimony, we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by [County Court] on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the

weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant next contends that the court abused its discretion in denying his request to withdraw his waiver of the right to a jury trial. We reject that contention, particularly because he did not seek to withdraw the waiver until the morning of trial, when the prosecution witnesses were in court ready to testify (*see People v McQueen*, 52 NY2d 1025, 1026 [1981]; *People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Anderson*, 216 AD2d 257, 258 [1st Dept 1995], *lv denied* 86 NY2d 840 [1995]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

700

KA 13-01177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEEN ROSS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered March 15, 2013. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [3]) and CPW in the third degree (§ 265.02 [1]). The charges arose from the seizure by police officers of a loaded firearm following the stop of a vehicle in which defendant was a passenger. Defendant moved, inter alia, to suppress the firearm as the fruit of illegal police conduct. The evidence at the suppression hearing established that the parole officer of a confidential informant provided the police with a tip that two individuals would be in a specified area in a silver or gray Pontiac and would have a firearm in the vehicle. Two police officers drove to the area and located a vehicle that matched the description provided. The police stopped the vehicle based on an apparent violation of Vehicle and Traffic Law § 1163 (b). After the stop, a police officer spoke to defendant, who “was very slow to answer” routine questions and whose “[h]ands were shaking and twitching as [he] was speaking” to the officer. The officer directed defendant to exit the vehicle and then grabbed defendant’s hands, holding them behind his back. When the officer attempted to pat frisk defendant, he broke free and fled. The officers pursued him and, during the chase, defendant discarded a firearm. The officers eventually caught and arrested defendant. The abandoned firearm was recovered shortly thereafter.

Defendant contends that County Court erred in refusing to suppress the firearm. We reject that contention and conclude that the police conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). Contrary to defendant's contention, the vehicle in which defendant was riding was lawfully stopped based upon the police officers' observations of a Vehicle and Traffic Law violation (*see People v Brunson*, 145 AD3d 1476, 1477 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]). Defendant does not dispute that the officers were thereafter entitled to direct defendant to exit the vehicle as a precautionary measure (*see People v Ford*, 145 AD3d 1454, 1455 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]). Defendant contends, however, that the officers did not have the authority to attempt a pat frisk inasmuch as they lacked the requisite basis to suspect that he was concealing a weapon or that the officers were otherwise in danger. We also reject that contention. Given the evidence at the suppression hearing, we agree with the court that "the officers were authorized to conduct a pat frisk of defendant after he exited the vehicle based on defendant's suspicious and furtive conduct, as well as the information from the confidential informant that they received via [the] parole officer" (*see People v Goodson*, 85 AD3d 1569, 1569-1570 [4th Dept 2011], *lv denied* 17 NY3d 953 [2011]; *see also People v Santiago*, 142 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* 571 US 907 [2013]). We further conclude, upon our review of the sealed transcript of the *Darden* hearing, that the court properly determined that the confidential informant existed and that he provided the information to his parole officer, which was conveyed to the police officers, concerning the presence of a firearm in the vehicle occupied by defendant at the specified location (*see People v Jones*, 149 AD3d 1580, 1581 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]).

Defendant's further contention that the police were not permitted to pursue him is similarly without merit. "Although [f]light alone is insufficient to justify pursuit . . . , a defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion" (*People v Harmon*, 170 AD3d 1674, 1675 [4th Dept 2019], *lv denied* 34 NY3d 932 [2019] [internal quotation marks omitted]; *see also People v Holmes*, 81 NY2d 1056, 1058 [1993]). Here, defendant's flight, combined with the other circumstances described above, i.e., the confidential informant's tip and defendant's behavior, "provided the officer[s] with reasonable suspicion permitting pursuit" (*Harmon*, 170 AD3d at 1675; *see People v Woods*, 98 NY2d 627, 628-629 [2002]).

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

701

KA 18-01102

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN GILLIE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 26, 2018. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree, murder in the second degree and burglary in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentences of imprisonment imposed for manslaughter in the first degree under count one of the indictment and for burglary in the first degree under counts three and four of the indictment to determinate terms of 15 years and by reducing the sentence imposed for murder in the second degree under count two of the indictment to an indeterminate term of incarceration of 15 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [2]), murder in the second degree (§ 125.25 [3]), and two counts of burglary in the first degree (§ 140.30 [2], [3]). Defendant was initially indicted on two counts of murder in the second degree, specifically intentional murder (§ 125.25 [1] [count one]) and felony murder (§ 125.25 [3] [count two]), in addition to the two burglary counts. At trial, the jury found that defendant met his burden on his affirmative defense with respect to the intentional murder count by establishing that, although intentional, his killing of the victim occurred "under circumstances which [did] not constitute murder because he act[ed] under the influence of extreme emotional disturbance" that warranted "reducing murder to manslaughter in the first degree" (§ 125.20 [2]; *see* § 125.25 [1] [a] [i]).

Defendant contends that the verdict is against the weight of the evidence because the jury erred in rejecting the affirmative defense

of lack of criminal responsibility by reason of mental disease or defect (Penal Law § 40.15). Initially, we agree with defendant that a different verdict would not have been unreasonable inasmuch as the defense expert opined that defendant lacked a substantial capacity to appreciate the nature and consequences of his conduct at the time of incident (*see People v Hernandez-Beltre*, 157 AD3d 814, 816 [2d Dept 2018], *lv denied* 31 NY3d 1083 [2018]; *see generally People v Danielson*, 9 NY3d 342, 348 [2007]). Nevertheless, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), including the charge on the defense of lack of criminal responsibility by reason of mental disease or defect, we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In contrast to the defense expert, the People's expert opined that, although defendant was acting under an extreme emotional disturbance as a result of delusions, defendant nonetheless maintained sufficient continuity of thought throughout the incident and that his actions demonstrated a substantial capacity to appreciate wrongfulness (*see* § 40.15). "When there is conflicting expert evidence on the issue of criminal responsibility, the jury is generally free to accept or reject, in whole or in part, the opinion of any expert, at least in the absence of a serious flaw in the expert's testimony" (*People v Smith*, 217 AD2d 221, 234-235 [4th Dept 1995], *lv denied* 87 NY2d 977 [1996] [internal quotation marks omitted]; *see People v Stoffel*, 17 AD3d 992, 993 [4th Dept 2005], *lv denied* 5 NY3d 795 [2005]). We reject defendant's contention that the testimony of the People's expert was infected by a serious flaw (*see generally People v Fitzrandolph*, 162 AD3d 1537, 1538 [4th Dept 2018], *lv denied* 32 NY3d 1111 [2018], *reconsideration denied* 32 NY3d 1111 [2018]; *Smith*, 217 AD2d at 234-235).

Defendant contends that the verdict is inconsistent insofar as he was found guilty of both manslaughter in the first degree and felony murder in the second degree. Specifically, defendant asserts that the jury's finding with respect to count one that he intentionally killed the victim negates the jury's determination with respect to count two that defendant committed felony murder as defined by Penal Law § 125.25 (3), which, according to defendant, was intended to address only accidental or inadvertent killings committed during the course of other enumerated violent felonies (*see generally* CPL 300.30 [5]). His contention is unpreserved for our review inasmuch as defendant failed to object on that specific ground before the jurors were discharged (*see People v Strauss*, 147 AD3d 1426, 1426 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017], *reconsideration denied* 30 NY3d 953 [2017]). In any event, that contention is without merit inasmuch as we have previously rejected a similar argument that a defendant " 'may not be convicted of felony murder when burglary is the predicate felony and his . . . intent at the time of the entry [was] to commit murder' " (*People v Steen*, 107 AD3d 1608, 1609 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]). Defendant's further contention that there is legally insufficient evidence to support his felony murder conviction is unpreserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we reject that contention, as well as defendant's additional contention that the verdict on the felony

murder count is against the weight of the evidence, because those contentions are based on the erroneous argument that the verdict with respect to the manslaughter in the first degree and felony murder counts is inconsistent.

Defendant next contends that he was denied his right to a fair trial due to prosecutorial misconduct during cross-examination of the defense expert, direct examination of the People's expert, and summation. To the extent that defendant's contention is unpreserved, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We nonetheless conclude that his contention lacks merit. The prosecutor's questions during cross-examination and direct examination were permissible inasmuch as they related to an issue raised by defense counsel on direct examination (*see People v Denison*, 300 AD2d 1060, 1061 [4th Dept 2002]) and to the "competency or credibility or the validity of [the expert witness's] diagnosis or opinion" (CPL 60.55 [1]). Further, the prosecutor's comments during summation "were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Anderson*, 52 AD3d 1320, 1321 [4th Dept 2008], *lv denied* 11 NY3d 733 [2008]).

Defendant correctly concedes that his contention that the indictment was multiplicitous because it charged two counts of burglary in the first degree based on the same conduct is not preserved for our review "inasmuch as [he] failed to challenge the indictment on that ground" (*People v Fulton*, 133 AD3d 1194, 1194 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016], *reconsideration denied* 27 NY3d 997 [2016]; *see* CPL 470.05 [2]). In any event, that contention is without merit because "each count requires proof of an additional fact that the other does not" (*Fulton*, 133 AD3d at 1195 [internal quotation marks omitted]).

We agree with defendant, however, that the aggregate sentence of incarceration of 25 years to life is unduly harsh and severe under the circumstances of this case. This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]). Defendant was 20 years old at the time of the offense. His criminal history consisted of only three incidents within the year leading up to the killing, all of which stemmed from the onset of defendant's documented schizophrenia and all charges were dismissed as a result of defendant's incapacity due to mental disease or defect. Here, at trial, both experts testified that, at the time of the killing, defendant was experiencing delusions. Indeed, the People's own expert expressly recognized that defendant had a diminished capacity to understand the wrongfulness of his actions at the time and that "the action was a product of his symptoms of mental illness." We conclude that a reduction of the sentences of imprisonment imposed is appropriate under the circumstances here. Thus, as a matter of discretion in the interest of justice, we modify the judgment by

reducing the sentences of imprisonment imposed for manslaughter in the first degree under count one of the indictment and for burglary in the first degree under counts three and four of the indictment to determinate terms of 15 years, to be followed by the five years of postrelease supervision imposed by the court, and by reducing the sentence imposed for murder in the second degree under count two of the indictment to an indeterminate term of incarceration of 15 years to life.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

702

KA 17-00961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIAMOND LEWIS, ALSO KNOWN AS “FACE”, DEFENDANT-APPELLANT.

TIMOTHY HENNESSY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 8, 2016. The judgment convicted defendant upon a nonjury verdict of murder in the second degree (two counts), attempted murder in the second degree (six counts), assault in the first degree (two counts), attempted assault in the first degree, assault in the second degree (three counts) and criminal possession of a weapon in the second degree (four counts).

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

Memorandum: In this prosecution arising from four separate shootings, defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1]), six counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]), two counts of assault in the first degree (§ 120.10 [1]), one count of attempted assault in the first degree (§§ 110.00, 120.10 [1]), three counts of assault in the second degree (§ 120.05 [2]), and four counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Defendant contends that County Court erred in permitting the People to introduce extrinsic evidence to impeach the credibility of his alibi witness on a collateral issue. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Jeffries*, 278 AD2d 431, 432 [2d Dept 2000], *lv denied* 96 NY2d 759 [2001]) and, in any event, it lacks merit inasmuch as “the extrinsic evidence was used to challenge the validity of the alibi, a material issue in the case, and was therefore not limited to collateral significance” (*People v Knight*, 80 NY2d 845, 847 [1992]; *see People v Patterson*, 194 AD2d 570, 571-572 [2d Dept 1993], *lv denied* 82 NY2d 757 [1993]).

Defendant failed to preserve for our review his further

contention that his conviction is not supported by legally sufficient evidence inasmuch as he moved for a trial order of dismissal on grounds different from those raised on appeal (*see People v Scott*, 61 AD3d 1348, 1349 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that defendant's contention lacks merit (*see generally People v Bleakley,* 69 NY2d 490, 495 [1987]). We reject defendant's contention that the verdict is against the weight of the evidence. Even assuming, arguendo, that a different verdict would not have been unreasonable with respect to each shooting, we conclude that, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction and uniform sentence and commitment form must be amended to correct numerous clerical errors (*see People v Peyatt*, 140 AD3d 1680, 1680 [4th Dept 2016], *lv denied* 28 NY3d 935 [2016]). In particular, the certificate of conviction erroneously omits the conviction of assault in the second degree under count 11 of the indictment, lists the conviction under count 14 as attempted assault in the first degree rather than assault in the second degree, and lists count 15 as "15-1." The certificate of conviction also erroneously records a sentence under count 16 rather than under count 15, and omits the sentence under count 18. Both the certificate of conviction and the uniform sentence and commitment form must also be amended to state that the sentences on counts 1, 3, 4, 6, 8, 10, 14, and 18 shall run consecutively to each other, and that the sentences on the remaining counts shall run concurrently to each other and to all other counts.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

722

KA 16-01161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. MOORE, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. DeMarco, J.), rendered January 15, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree, manslaughter in the second degree, attempted robbery in the first degree, criminal possession of a weapon in the second degree and criminal possession of a firearm.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction of murder in the second degree and attempted robbery in the first degree is supported by legally sufficient evidence (*see People v Alexander*, 51 AD3d 1380, 1382-1383 [4th Dept 2008], *lv denied* 11 NY3d 733 [2008]). Contrary to defendant's contention, there is sufficient corroboration of his recorded statement to a police informant (*see* CPL 60.50). With respect to the count of murder in the second degree, "[t]he fact that the victim was found dead as the result of a gunshot wound is sufficient corroboration" (*People v Harper*, 132 AD3d 1230, 1231 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). With respect to the count of attempted robbery in the first degree, in addition to defendant's statement, the People submitted evidence establishing that the victim had met with defendant at the time of the shooting in order to sell marihuana to defendant, and that the victim's clothing was torn during their brief meeting, which reflected that there was a struggle between defendant and the victim. Under these circumstances, we conclude that there is sufficient evidence corroborating defendant's statement that

he had attempted to rob the victim (*see generally People v Murray*, 40 NY2d 327, 335 [1976], *rearg denied* 40 NY2d 1080 [1976], *cert denied* 430 US 948 [1977]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's decision not to call a voice recognition expert or present a sample of defendant's voice to the jury, and defense counsel's decision to present a defense that largely relied on gaps in the People's proof. We reject that contention because those purported shortcomings involve " 'matter[s] 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 generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). Although defendant contends that defense counsel was ineffective for failing to object to certain remarks during the prosecutor's opening and closing statements, the disputed statements regarding the victim's death were fair comment on the evidence (*see People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]), and the prosecutor's comments regarding the police informant who had recorded defendant's statement were a fair response to defense counsel's closing argument (*see id.; see also People v Garrow*, 171 AD3d 1542, 1546 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]). Moreover, defendant failed to demonstrate the absence of a strategic or other legitimate reason for defense counsel's decision not to object to the prosecutor's comments (*see People v Freeman*, 46 AD3d 1375, 1376 [4th Dept 2007], *lv denied* 10 NY3d 840 [2008]). Regarding defense counsel's own opening statement, "[d]efendant's complaint about defense counsel's performance during opening . . . argument[] 'merely amounts to a second-guessing of counsel's trial strategy and does not establish ineffectiveness' " (*People v Simpson*, 173 AD3d 1617, 1620 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]). Defendant failed to establish that there was no strategic or other legitimate reason for defense counsel's failure to object to testimony that the police informant had served as an informant previously (*see Freeman*, 46 AD3d at 1376), and defense counsel was not ineffective for requesting an inapplicable lesser included offense (*see generally People v Hancock*, 43 AD3d 1380, 1380-1381 [4th Dept 2007], *lv denied* 9 NY3d 1034 [2008]).

We also reject defendant's contention that County Court erred in overruling defense counsel's hearsay objections regarding testimony from a law enforcement witness and the police informant. That testimony was not admitted for its truth, but rather to complete the narrative by explaining subsequent actions taken by the witnesses, i.e., explaining how and why the police informant became involved in the investigation and how the police informant came to meet with defendant in order to record defendant's statement (*see People v Failing*, 129 AD3d 1677, 1678-1679 [4th Dept 2015], *lv denied* 26 NY3d

967 [2015]). Finally, the sentence is not unduly harsh or severe.

Mark W. Bennett

Entered: July 24, 2020

Clerk of the Court

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

723

KA 18-02436

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW E. TAFT, SR., DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered July 24, 2018. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the second degree.

Now, upon reading and filing the stipulation of discontinuance sworn to by defendant on June 18, 2020, and signed by the attorneys for the parties on June 17, 2020,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

724

KA 18-02230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERARDO QUIROS, DEFENDANT-APPELLANT.

SCOTT F. RIORDAN, AMHERST, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (ROBERT R. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sara Sheldon, A.J.), rendered September 17, 2018. The judgment convicted defendant upon a jury verdict of rape in the first degree (four counts), criminal sexual act in the first degree (three counts), criminal possession of a controlled substance in the seventh degree (two counts), assault in the third degree, endangering the welfare of a child, criminal mischief in the fourth degree and unlawful possession of marihuana.

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

Memorandum: On appeal from a judgment convicting defendant upon a jury verdict of, inter alia, four counts of rape in the first degree (Penal Law § 130.35 [1]) and three counts of criminal sexual act in the first degree (§ 130.50 [1]), defendant contends that reversal of the judgment is required because County Court erred in denying his motion to dismiss the indictment on the ground that it was rendered duplicitous by the grand jury testimony of the victim. We affirm.

"Each count of an indictment may charge one offense only" (CPL 200.30 [1]; *see People v Bauman*, 12 NY3d 152, 154 [2009]). In accordance with that section, "acts which separately and individually make out distinct crimes must be charged in separate and distinct counts . . . , and where one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous" (*People v Keindl*, 68 NY2d 410, 417-418 [1986], *rearg denied* 69 NY2d 823 [1987]; *see Bauman*, 12 NY3d at 154). The prohibition on duplicitous counts "seeks to prevent the possibility that 'individual jurors might vote to convict a defendant of that count on the basis of different offenses', in effect, permitting a conviction even though a unanimous verdict was not reached" (*People v Davis*, 72 NY2d 32, 38

[1988], quoting *Keindl*, 68 NY2d at 418). A facially valid count may nevertheless be duplicitous "where the evidence presented to the grand jury or at trial makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" (*People v Madsen*, 168 AD3d 1134, 1137-1138 [3d Dept 2019] [internal quotation marks omitted]; *see People v Dukes*, 122 AD3d 1370, 1371 [4th Dept 2014], *lv denied* 26 NY3d 928 [2015]; *People v Corrado*, 161 AD2d 658, 659 [2d Dept 1990]). Such a defect "may be cured by reference to a bill of particulars supplementing the indictment" (*Davis*, 72 NY2d at 38; *see generally People v Morris*, 61 NY2d 290, 293-294 [1984]).

Here, the victim's grand jury testimony rendered duplicitous those counts of the indictment that charged defendant with rape in the first degree and criminal sexual act in the first degree. The victim testified that as many as 10 acts of forced sexual intercourse and 30 acts of forced oral sex occurred between the middle of March and the end of April. The indictment, however, charged defendant with seven counts of rape in the first degree based upon forced sexual intercourse, each of which was alleged to have occurred during one of seven consecutive weeks during the period of March 15 to April 29, and 20 counts of criminal sexual act in the first degree based upon forced oral sex, each of which was alleged to have occurred during that same period. Because the 10 alleged acts of forced sexual intercourse and 30 alleged acts of forced oral sex could not be " 'individually related to specific counts in the indictment,' " we conclude that those counts of the indictment were duplicitous (*Madsen*, 168 AD3d at 1138; *see People v Hagenbuch*, 267 AD2d 948, 948 [4th Dept 1999], *lv denied* 95 NY2d 797 [2000]).

Nevertheless, we conclude that the court properly denied defendant's motion to dismiss the indictment. With respect to the counts of criminal sexual act in the first degree, after defendant made his motion, the prosecutor provided him with a supplemental bill of particulars that identified a precise date for each of the first 10 counts of criminal sexual act in the first degree. We conclude that dismissal of those counts is not required because the duplicity was "cured by reference to a bill of particulars supplementing the indictment" (*Davis*, 72 NY2d at 38). To the extent that defendant contends that reversal is required because the supplemental bill of particulars changed the People's theory with respect to some of those counts, defendant failed to preserve his contention for our review (*see People v Osborne*, 63 AD3d 1707, 1708 [4th Dept 2009], *lv denied* 13 NY3d 748 [2009]; *see generally People v Allen*, 24 NY3d 441, 449-450 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

With respect to the counts of rape in the first degree, although the duplicity of those counts was left unaddressed by the supplemental bill of particulars, before trial, the prosecutor provided defendant with a document styled as a "trial indictment," which indicated that the People intended to prove a specific instance with respect to each of the counts on which defendant was ultimately convicted (*see People*

v Sulkey, 195 AD2d 1026, 1027 [4th Dept 1993], *lv denied* 82 NY2d 759 [1993]). In addition, the People provided evidence of those specific instances of forced sexual intercourse at trial by offering the testimony of the victim (*see id.*). The victim's testimony was detailed, graphic, and corroborated by receipts, photographs, and emails that allowed the victim to pinpoint the precise dates on which each of those incidents of forced sexual intercourse occurred. "Because defendant was convicted only of those counts of [rape in the first degree] where pretrial notice of specific instances was given and where those specific instances were proved at trial" (*id.*), we conclude that dismissal of those counts as duplicitous was not required.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

728

CAF 18-01128

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

IN THE MATTER OF SUSAN JOHNSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LATIKA WELLINGTON, RESPONDENT-APPELLANT,
AND EVAN JOHNSON, RESPONDENT-RESPONDENT.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered May 7, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject child.

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

Memorandum: On appeal from an order granting sole custody of the subject child to petitioner, who is the child's paternal grandmother (grandmother), respondent mother contends that there was no showing of extraordinary circumstances warranting an inquiry into whether an award of custody to a nonparent is in the child's best interests. We reject that contention.

It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [4th Dept 1998], quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]; *see Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147 [4th Dept 2009]).

Here, the record established that the mother relinquished her superior right to custody through her persistent neglect of the child and because she voluntarily abandoned custody of the child to the grandmother. The evidence adduced at the fact-finding hearing established that the mother has "failed either to maintain *substantial*, repeated and continuous contact with [the] child or to plan for the child's future" (*Matter of Suarez v Williams*, 26 NY3d 440, 450 [2015] [internal quotation marks omitted]; *see Matter of*

Barnes v Evans, 79 AD3d 1723, 1723-1724 [4th Dept 2010]; *cf. Matter of Ferguson v Skelly*, 80 AD3d 903, 905 [3d Dept 2011], *lv denied* 16 NY3d 710 [2011]). Family Court's determination to credit the grandmother's testimony over the mother's in determining the existence of extraordinary circumstances is entitled to great deference and we see no reason to disturb that credibility determination (*see Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]).

Here, the record establishes that, since she left the family home and ceased caring for the child, the mother has only sporadically visited the child, has not communicated with the grandmother about the child or his care, does not provide financial support for the child, and has not stayed informed about the child's health and education. The evidence at the hearing also established that the grandmother has provided the child with a safe and stable home environment, which the mother has not been able to replicate. Indeed, the evidence showed that the mother does not have adequate supplies for the child and does not know the child's clothing size (*see Matter of Debra SS. v Brian TT.*, 163 AD3d 1199, 1200-1202 [3d Dept 2018]; *Matter of DellaPiana v DellaPiana*, 161 AD3d 1228, 1229 [3d Dept 2018]; *Matter of Diane FF. v Faith GG.*, 291 AD2d 671, 672 [3d Dept 2002]). Thus, the court properly determined that the grandmother met her burden of establishing that extraordinary circumstances existed (*see Matter of Komenda v Dininny*, 115 AD3d 1349, 1350 [4th Dept 2014]). The mother does not challenge the merits of the court's determination that the child's best interests are served by awarding sole custody to the grandmother.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 24, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED JULY 24, 2020

_____	854	CA 18 01438	DANIEL M. GOODYEAR In the Matter of FREDERICK J. YOUNG
_____	1160	CA 19 00635	SNYDER CORP. V FITNESS RIDGE WORLDWIDE, LLC
_____	1161	CA 19 01052	SNYDER CORP. V FITNESS RIDGE WORLDWIDE, LLC
_____	1200	KA 19 00378	PEOPLE V JONATHAN E. BOLDT
_____	1213	CA 18 02049	AMALFI, INC. V 428 CO. INC.
_____	37	CA 19 00367	CHRISTINE C. BINGHAM V TOWN OF WHEATFIELD
_____	41	CA 18 01432	NED E. DEAN, JR. V TOWN OF POLAND ZONING BOARD OF
_____	58	CA 19 01660	CHARLES D. J. V CITY OF BUFFALO
_____	64	CA 19 00438	GLENN FREELAND V ERIE COUNTY
_____	92	KA 18 02403	PEOPLE V DOMINIC HAMM
_____	140	CA 19 01640	IVES HILL COUNTRY CLUB, INC. V CITY OF WATERTOWN
_____	141	CA 19 01642	IVES HILL COUNTRY CLUB, INC. V CITY OF WATERTOWN
_____	160	CA 19 01057	CAROL A. DURHAM V VILLAGE OF PHILADELPHIA
_____	179	CA 19 01259	THEODORE FORSYTH V CITY OF ROCHESTER
_____	179.1	CA 19 02324	THEODORE FORSYTH V CITY OF ROCHESTER
_____	202	CA 19 01395	VILLAGE OF MANLIUS V TOWN OF MANLIUS PROFESSIONAL
_____	270	CA 19 00298	MARK CERRONE, INC. V HOWARD ZEMSKY
_____	289	CA 19 01797	GEORGE P. GROSS V TRAVELERS INSURANCE
_____	293	CA 19 00310	HAROLD BLACKMON V VICTOR YOUNG
_____	299	KA 14 00921	PEOPLE V TERRELL L. MURRAY
_____	340	KA 17 01482	PEOPLE V MARLINDA NESMITH
_____	429	KA 18 00586	PEOPLE V PEDRO L. COLON
_____	503	KA 19 01026	PEOPLE V PERRY TOLBERT

_____	574	CAF 17 01426	Mtr of ANDREW D.
_____	575	CAF 17 01427	Mtr of ANDREW D.
_____	576	CAF 17 01428	Mtr of ANDREW D.
_____	577	CAF 17 02101	Mtr of SKYLER D.
_____	580	CAF 19 01159	Mtr of MADELINE C.
_____	581	CAF 19 01920	Mtr of CHEYENNE C.
_____	598	KA 18 00241	PEOPLE V JUDSON WATKINS
_____	649	CAF 18 02004	Mtr of MYA N.
_____	660	KA 18 01930	PEOPLE V COREY SULLIVAN
_____	666	KA 14 02210	PEOPLE V CLAYTON S. WHITTEMORE
_____	686	KA 17 02025	PEOPLE V ERIKA H. POOLE
_____	687	KA 18 01628	PEOPLE V GERALD HUNT
_____	688	KA 18 00650	PEOPLE V NINIMBE MITCHELL
_____	689	KA 14 00477	PEOPLE V EDDIE D. WILLIAMS
_____	699	KA 18 00288	PEOPLE V LINDELL COX
_____	700	KA 13 01177	PEOPLE V RASHEEN ROSS
_____	701	KA 18 01102	PEOPLE V CHRISTIAN GILLIE
_____	702	KA 17 00961	PEOPLE V DIAMOND LEWIS
_____	722	KA 16 01161	PEOPLE V ROBERT L. MOORE, II
_____	723	KA 18 02436	PEOPLE V MATTHEW E. TAFT, SR.
_____	724	KA 18 02230	PEOPLE V GERARDO QUIROS
_____	728	CAF 18 01128	SUSAN JOHNSON V LATIKA WELLINGTON

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

854/19

CA 18-01438

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

IN THE MATTER OF LAURENCE R. GOODYEAR,
DECEASED.

DANIEL M. GOODYEAR AND WENDY GRISWOLD,
PETITIONERS-RESPONDENTS,

ORDER

V

FREDERICK J. YOUNG, BEVERLY H. YOUNG, JOHN F. YOUNG, JAMES R. YOUNG, JEFFREY K. YOUNG, F.J. YOUNG COMPANY, JKLM ENERGY, LLC, AND TILDEN MARCELLUS, LLC, RESPONDENTS-APPELLANTS.

MEYER, UNKOVIC & SCOTT LLP, PITTSBURGH, PENNSYLVANIA (DAVID G. OBERDICK, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), WOODS OVIATT GILMAN LLP, ROCHESTER (BRIAN D. GWITT OF COUNSEL), AND PEPPER HAMILTON LLP (ANDREW P. ZAPPIA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered June 25, 2018. The order, among other things, granted the motion of respondents for leave to reargue and, upon reargument, clarified a prior decision.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 26 and July 6, 2020,

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

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

1160

CA 19-00635

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

SNYDER CORP., BEAVER HOLLOW WELLNESS LLC,
AND FRW BEAVER HOLLOW MANAGEMENT, LLC,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

FITNESS RIDGE WORLDWIDE, LLC, LAWRENCE S. BOND,
LESLEY A. CAREY, DAVID M. MARSHALL, KENNETH M.
PRESSBERG, ARI D. BASS, ROGER W. BULLOCH, SCOTT R.
BULLOCH, MATTHEW S. HAGLER, DEFENDANTS-RESPONDENTS,
FITNESS RIDGE, LLC, DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (JOANNA J. CHEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Wyoming County (Deborah A. Chimes, J.), entered October 26, 2018. The order granted in part and denied in part the motion of defendants-respondents and defendant-respondent-appellant to compel arbitration and stay all claims, and to dismiss plaintiffs' amended complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 2, 2020,

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

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

1161

CA 19-01052

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

SNYDER CORP., BEAVER HOLLOW WELLNESS LLC,
AND FRW BEAVER HOLLOW MANAGEMENT, LLC,
PLAINTIFFS-APPELLANTS,

V ORDER

FITNESS RIDGE WORLDWIDE, LLC, FITNESS
RIDGE, LLC, LAWRENCE S. BOND, LESLEY A.
CAREY, DAVID M. MARSHALL, KENNETH M.
PRESSBERG, ARI D. BASS, ROGER W. BULLOCH,
SCOTT R. BULLOCH, MATTHEW S. HAGLER,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (JOANNA J. CHEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Deborah A. Chimes, J.), entered May 9, 2019. The order stayed all claims remaining in this action pending arbitration.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 2, 2020,

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

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

1200

KA 19-00378

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN E. BOLDT, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MOLLIE DAPOLITO OF COUNSEL), DAVISON LAW OFFICE PLLC, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered February 6, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Ontario County Court for further proceedings pursuant to CPL 460.50 (5).

Memorandum: In July 2015, defendant pleaded guilty to two counts of felony driving while intoxicated (DWI) (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]) and one count of felony driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs (DWAI) (§§ 1192 [4-a]; 1193 [1] [c] [i] [A]). County Court sentenced defendant to six months of imprisonment and five years of probation on each count. Several years later, after serving the imprisonment portion of his sentence, defendant admitted that he had violated the conditions of his probation. He now appeals from a judgment that revoked his sentence of probation and sentenced him to concurrent indeterminate terms of imprisonment. We affirm.

As a preliminary matter, although the notice of appeal states that defendant is appealing "from a guilty plea" and "his sentence, thereupon," we exercise our discretion to treat the appeal as taken from the judgment revoking defendant's sentence of probation and imposing a sentence of imprisonment (*see* CPL 460.10 [6]; *see generally People v Hennigan*, 145 AD3d 1528, 1528 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017]).

Defendant contends that his original sentence was not a traditional split sentence under Penal Law § 60.01 (2) (d). It is his

position that the court imposed a sentence under section 60.21 with respect to the DWI counts and, because he believes that the court ordered that the sentences imposed on each count were to run concurrently with each other, defendant also takes the position that the court effectively directed that the period of probation was to run consecutively to the period of imprisonment for each count, including the DWAI count. Courts have held that, where a defendant is originally sentenced pursuant to section 60.21 and then later violates the terms of his or her probation or conditional discharge after fully serving his or her term of incarceration, the defendant cannot be sentenced to an additional term of incarceration without violating the rule against multiple punishments for the same offense (*see People v Arvidson*, 159 AD3d 1198, 1198-1199 [3d Dept 2018]; *People v Zirbel*, 159 AD3d 1545, 1546-1547 [4th Dept 2018]; *People v Coon*, 156 AD3d 105, 106-108 [3d Dept 2017], *lv denied* 31 NY3d 1080 [2018]; *see generally People v Biggs*, 1 NY3d 225, 228-229 [2003]). Defendant thus contends that, inasmuch as he completed the imprisonment portion of his original sentence, the court was not authorized to impose an additional sentence of imprisonment upon his admission that he violated the conditions of his probation. We reject that contention.

Contrary to defendant's contention, he was not originally sentenced to a term of imprisonment under Penal Law § 60.21 with respect to any of the three counts. That section provides, in pertinent part, that "[n]otwithstanding [section 60.01 (2) (d)], when a person is to be sentenced upon a conviction for a violation of [Vehicle and Traffic Law § 1192 (2), (2-a) or (3)], the court *may* sentence such person to a period of imprisonment *authorized by article seventy* of this title and shall sentence such person to a period of probation or conditional discharge" (§ 60.21 [emphasis added]). The probation or conditional discharge imposed pursuant to section 60.21 is to run consecutively to any period of imprisonment imposed pursuant to article 70. Here, however, defendant was not sentenced to a period of imprisonment pursuant to Penal Law article 70. Rather, he was sentenced on each count to a traditional split sentence pursuant to Penal Law § 60.01 (2) (d), with the period of probation running concurrently with the period of imprisonment. Thus, Penal Law § 60.21 is inapplicable to this case and does not preclude the imposition of a sentence of imprisonment upon the revocation of probation (*cf. Zirbel*, 159 AD3d at 1546-1547; *Coon*, 156 AD3d at 106-108). We note that where, as was originally the case here, a court chooses to impose a split sentence under Penal Law § 60.01 (2) (d), or chooses to impose a sentence of probation only, it may impose an ignition interlock device as a condition of probation (*see* § 65.10 [1]).

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

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court

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

1213

CA 18-02049

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

AMALFI, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

428 CO., INC., ET AL., DEFENDANTS,
FIRST AMHERST DEVELOPMENT GROUP, LLC, AND
SS RESTAURANT BUILDING, LLC,
DEFENDANTS-APPELLANTS.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (CHARLES C. RITTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 3, 2018. The order and judgment, among other things, granted in part plaintiff's motion for summary judgment and denied the cross motion of defendants First Amherst Development Group, LLC and SS Restaurant Building, LLC for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting in part the cross motion of defendants-appellants and dismissing the fifth cause of action, and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Pursuant to an agreement with defendant 428 Co., Inc. (428 Co.), plaintiff held a right of first refusal to purchase a commercial building, in which plaintiff operates a restaurant, "at the same price and on the same terms" as any "bona fide" offer. Plaintiff commenced the instant action to enforce that contractual right after 428 Co. allegedly sold the subject property to defendant SS Restaurant Building, LLC (SS) pursuant to a bona fide transaction without honoring plaintiff's right of first refusal.

On a prior appeal, we reversed insofar as appealed from an order and judgment granting defendants' respective motions for summary judgment dismissing the complaint against them (*Amalfi, Inc. v 428 Co., Inc.*, 153 AD3d 1610, 1610 [4th Dept 2017]). We concluded that, "[u]nder the doctrine of tax estoppel," 428 Co. and SS were estopped from taking a position contrary to the sworn statements in a Real Property Transfer Report (RPT Report) wherein they certified that the

transfer of the subject property was not a " 'sale between related companies or partners in business,' " thereby swearing that they were not controlled by the same person (*id.* at 1610-1611). Thus, we held that 428 Co. and SS could not take the position that the transfer of the subject property was not a bona fide sale because 428 Co. and SS were actually controlled by the same person (*id.* at 1611). Furthermore, we held that sworn statements in the RPT Report also estopped defendants from asserting that various mortgage assumptions worth over $2 million constituted part of the purchase price of the restaurant (*id.*).

Following this Court's prior decision, Supreme Court granted in part plaintiff's motion for summary judgment and denied defendants' respective cross motions for summary judgment. The court held, inter alia, that 428 Co. breached the lease agreement by failing to honor plaintiff's right of first refusal, that, despite plaintiff's failure to record the right of first refusal, SS was not a good faith purchaser because it either knew or should have known about plaintiff's right, and that the lease agreement's subordination clause applied only to the amount of the mortgage at the time of the improper transfer between 428 Co. and SS. Thus, the court, in effect, ordered specific performance of the right of first refusal and rescission of the improper transfer of the property, and further ordered, inter alia, that, if plaintiff exercises its option to purchase the property, then SS must reimburse plaintiff for rent paid by plaintiff since the time the option should have been honored. Defendant First Amherst Development Group, LLC and SS (collectively, SS defendants) appeal.

Initially, we reject the SS defendants' contention that the court erred in determining that the subject property was transferred pursuant to a bona fide sale for purposes of triggering plaintiff's right of first refusal. We conclude that plaintiff met its initial burden in that respect by citing our prior decision, which establishes that the SS defendants are estopped from arguing that the transfer of the subject property was not bona fide (*id.* at 1610-1611), and submitting the RPT Report, which contains the relevant sworn statements. Plaintiff therefore established that there are no issues of fact whether the sale of the property by 428 Co. to SS was bona fide for the purposes of triggering plaintiff's right of first refusal and, in opposition, defendant failed to raise any triable issues of fact in that respect (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We also reject the SS defendants' contention that the court erred in determining that SS was not protected by the recording statute (Real Property Law § 291). It is well settled that the recording statute protects a good faith purchaser for value from an unrecorded interest in a property, provided that the purchaser's interest is first to be duly recorded (*see id.*; § 294; *Vanderbilt Brookland, LLC v Vanderbilt Myrtle, Inc.*, 147 AD3d 1106, 1109 [2d Dept 2017]). "The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead

a reasonably prudent purchaser to make inquiries concerning such" (*Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709 [2d Dept 1997], *lv dismissed* 91 NY2d 921 [1998], *rearg denied* 91 NY2d 949 [1998]; *see Vanderbilt Brookland, LLC*, 147 AD3d at 1109-1110; *Tanzini v Sunset Beach Prop. Owners Assn.*, 195 AD2d 984, 985 [4th Dept 1993], *lv denied* 82 NY2d 665 [1994]). There is no dispute that plaintiff did not record the operative lease containing the right of first refusal at issue here. Thus, SS is not chargeable with record notice of the lease or plaintiff's right of first refusal, and plaintiff therefore had the initial burden on its motion of establishing that SS had either actual or constructive notice of the lease and plaintiff's right of first refusal (*see generally Farrell v Sitaras*, 22 AD3d 518, 521-522 [2d Dept 2005]). Here, we conclude that plaintiff met that burden by submitting evidence establishing that the same person had almost unilaterally controlled, managed, or owned both SS and 428 Co. for over 10 years at the time of the transfer and that, as a result, SS had actual notice of the lease and plaintiff's right of first refusal (*cf. 487 Elmwood v Hassett*, 83 AD2d 409, 413 [4th Dept 1981], *appeal dismissed* 55 NY2d 1037 [1982]). Indeed, plaintiff submitted evidence establishing that the person had a substantial, long-term involvement in matters that centered on the original lease, that he was substantially involved in negotiating and executing a first amendment to the original lease, and that he corresponded with plaintiff twice to facilitate renewal of the lease. We further conclude that, in opposition, the SS defendants did not submit any evidence raising a triable issue of fact regarding the issue of actual notice (*see generally Zuckerman*, 49 NY2d at 562).

Contrary to the SS defendants' further contention, we conclude that the court properly determined that only that portion of the consolidated mortgage that was on the property at the time of the improper transfer has priority over the lease and plaintiff's right of first refusal. "Under New York's Recording Act . . . , a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value, and records its mortgage first without actual or constructive knowledge of the prior mortgage" (*Mortgage Elec. Registration Sys., Inc. v Rambaran*, 97 AD3d 802, 803 [2d Dept 2012] [internal quotation marks omitted]; *see* Real Property Law § 291). Here, we conclude that plaintiff established its entitlement to summary judgment on this issue by submitting evidence demonstrating that SS was not a good faith purchaser inasmuch as SS was aware of the right and yet proceeded with the property transfer and the mortgage consolidation anyway (*see generally Mortgage Elec. Registration Sys.*, 97 AD3d at 803-804). We further conclude that, in opposition, the SS defendants did not raise a triable issue of fact in that respect (*see generally Zuckerman*, 49 NY2d at 562).

Nevertheless, we agree with the SS defendants that the court erred in denying their cross motion for summary judgment with respect to the cause of action for tortious interference with contract, and we therefore modify the order and judgment accordingly. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that

contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *see Canandaigua Natl. Bank & Trust Co. v Acquest S. Park, LLC*, 170 AD3d 1663, 1664-1665 [4th Dept 2019]). Here, we conclude that the SS defendants met their initial burden on their cross motion with respect to that cause of action by submitting evidence establishing that SS did not intentionally induce 428 Co. to breach the lease (*see generally Rapp Boxx v MTV, Inc.*, 226 AD2d 324, 324-325 [1st Dept 1996]; *Costanza Constr. Corp. v City of Rochester*, 135 AD2d 1111, 1112 [4th Dept 1987]). We further conclude that, in opposition, plaintiff did not raise an issue of fact in that respect (*see generally Zuckerman*, 49 NY2d at 562).

We reject, however, the SS defendants' related contention that the dismissal of the tortious interference with contract cause of action means that plaintiff is not entitled to rescission of the improper transfer. Here, plaintiff sought only damages, and did not seek equitable relief, in connection with its tortious interference with contract cause of action. Plaintiff pleaded rescission of the improper transfer as a separate cause of action, and rescission may, as here, be separately alleged in its own right, and not merely as a remedy, under appropriate circumstances (*see K.S. & S. Rest. Corp. v Yarbrough*, 104 AD2d 486, 487 [2d Dept 1984]; *Tompkins v Veigel*, 8 AD2d 929, 930 [4th Dept 1959]).

We also reject the SS defendants' contention that an express contract requiring plaintiff to pay rent to SS during the relevant time frame precludes plaintiff's unjust enrichment cause of action (*see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Pelusio Canandaigua, LLC v Genesee Regional Bank*, 145 AD3d 1557, 1558 [4th Dept 2016]). Although the record reflects that plaintiff entered into a written settlement agreement with SS, which permitted plaintiff to continue operating the restaurant on the premises and required it to pay rent pending appeal, that agreement also established that the parties reserved the right to seek "alternative or additional claims or defenses" following the appeal. Moreover, the agreement specifically stated that it "shall not be admissible" for the purpose for which the SS defendants seek to use it in this action. We therefore conclude that the court properly determined that plaintiff is entitled to reimbursement of rental payments on its unjust enrichment cause of action. Under the circumstances of this case, however, we remit the matter to Supreme Court to determine the amount of such damages.

Entered: July 24, 2020

Mark W. Bennett
Clerk of the Court