SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 22, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED APRIL 22, 2022

_____	484	CA 20 01211	PASQUALINO VIRGONE V MASTERCRAFT MASONRY I, INC.
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_____	864	KA 20 00576	PEOPLE V CODY J. FOX
_____	865	KA 20 00577	PEOPLE V CODY J. FOX
_____	870	CA 20 01288	SETH O'HARROW V CASCADES CANADA, INC.
_____	971	OP 21 00726	525-527 ORISKANY ST. LLC V ONEIDA COUNTY BOARD OF
_____	1043	CA 21 00008	SETH O'HARROW V CASCADES CANADA, INC.
_____	1050	CA 20 01447	JOSE M. LAGARES V CARRIER TERMINAL SERVICES, INC.
_____	1051	CA 21 00719	JOSE M. LAGARES V CARRIER TERMINAL SERVICES, INC.
_____	1090	CA 21 00479	JOHN BLAIR In the Matter of CYNTHIA T. DOYLE
_____	1092	CA 21 00181	GLENN FREELAND V ERIE COUNTY, NEW YORK
_____	1111	CA 21 00583	JUAN PAREDES V ALEXANDER VORHAND
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_____	1167	KA 20 00949	PEOPLE V KRISTINE M. BAKER
_____	1169	KA 19 00550	PEOPLE V GARY D. BURNEY
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_____	23	CA 21 00711	CITIBANK, N.A. V THOMAS J. GIFFORD
_____	27	KA 18 00878	PEOPLE V TODD GRIFFIN
_____	28	KA 18 00879	PEOPLE V TODD GRIFFIN
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_____	74	KA 20 00237	PEOPLE V JASON M. SCOTT
_____	82	CA 21 00916	WILLIAM N. CLIFFORD In the Matter of

DANIEL CLIFFORD

_____	83	CA 21 00120	DANIEL R. SACK V CITY OF BUFFALO COMMON COUNCIL
_____	110	KA 18 01270	PEOPLE V TYRAE TATUM
_____	115	KA 19 01819	PEOPLE V ALI MUHAMMAD
_____	116	KA 19 01411	PEOPLE V ROBERT MOTHERSELL
_____	121	CA 21 00693	SHERBK, INC. V CITY OF SYRACUSE BOARD OF ZONING A
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_____	154	KA 19 01864	PEOPLE V JAMES TRALA
_____	156	KA 13 01423	PEOPLE V BOOKER ARCHIE
_____	172.1	TP 21 01449	SARAH R. V HOWARD ZUCKER
_____	179	CAF 21 00468	Mtr of KAYLA K.
_____	179.1	CAF 22 00452	STEUBEN COUNTY DEPARTMENT OF SOCIAL V KAYLA K.
_____	185	CAF 21 00561	TARA N. P.-T. V EMMA P.-T.
_____	203	KA 19 01959	PEOPLE V MICHAEL HURST
_____	218	KA 17 01629	PEOPLE V SAMI A. ALIM
_____	219	KA 17 00274	PEOPLE V TYRIEKE J. BRADLEY
_____	224	KA 17 00273	PEOPLE V TYRIEKE J. BRADLEY
_____	240	KA 20 01020	PEOPLE V SAIO BARZEE
_____	245	KA 19 02255	PEOPLE V NAHKEEN LEWIS-BUSH
_____	249	CAF 20 01380	ADDY HALL V JESUS VELEZ
_____	254	CA 21 00690	TITUS HOWELL V TIMOTHY WALLACE
_____	259	KA 19 02224	PEOPLE V MARK GATLING
_____	262	KA 20 01576	PEOPLE V CJ LOLLIE
_____	267	CA 20 00692	CARMEN J. FINOCCHI, JR. V LIVE NATION INC.
_____	268	CA 21 00363	CARMEN J. FINOCCHI, JR. V LIVE NATION INC.
_____	270	CA 21 00248	LISA PARKISON V KBM MANAGEMENT, INC.
_____	271	CA 21 00286	LISA PARKISON V KBM MANAGEMENT, INC.
_____	275	CA 21 00872	MICHAEL PACHAN V SCOTT E. BROWN
_____	278	CA 21 00247	DARRIN WINKLEY V KBM MANAGEMENT, INC.
_____	279	CA 21 00285	DARRIN WINKLEY V KBM MANAGEMENT, INC.

_____	280	TP 21 01567	LINDA MANISCALCO V S. SQUIRES
_____	282	KA 18 01058	PEOPLE V DAKOTA M. MILLER
_____	288	CAF 20 00153	Mtr of KAYDEN
_____	290	CAF 21 00295	DANIELLE M. WILLIAMS V DANIEL W. PENREE
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_____	324	KA 21 00477	PEOPLE V DUANE BAXTER
_____	325	KA 21 00478	PEOPLE V DUANE BAXTER
_____	328	KA 21 00411	PEOPLE V JUDSON WATKINS
_____	333	CAF 20 00894	Mtr of CHYNAROSE H.
_____	338	CA 21 00906	SHANE CHRISTOPHER BUCZEK V TOWN OF EVANS
_____	340	CA 21 00395	JILL DERY V THE SUNSET MOTEL
_____	348	KA 19 00950	PEOPLE V JOSHUA Q. JOHNSON
_____	351	KA 18 00715	PEOPLE V EVERSON I. PORCHEA
_____	352	KA 17 01345	PEOPLE V KAYECYNTHIELLE JOHN
_____	354	KA 21 00554	PEOPLE V DAVID F. TUSZYNSKI
_____	356	CA 21 00821	SUSAN GASTLE V KEVIN GASTLE
_____	360	CA 21 00772	CARROLS LLC V DELFIELD COMPANY, LLC
_____	363.1	CAF 20 01641	MCKENZIE ASHLEY CLEMENS V BENJAMIN RICHARD HODSON
_____	366	KA 21 01087	PEOPLE V JEREMIAH SIMMONS
_____	367	KA 21 00367	PEOPLE V SHAUN R. CRONIN
_____	375	CA 21 00729	CARRIE SANTOPIETRO V DARRYL G.
_____	378	CA 21 01333	VALERIE HOPE V BARTLETT, PONTIFF, STEWART & RHODES
_____	380	CA 21 00638	CLEARWOOD C.C. & M, LLC V NU-TECH FURNISHINGS, IN
_____	381	CA 21 00391	DORON FELDMAN V HODGSON RUSS LLP
_____	382	CA 21 00965	DORON FELDMAN V HODGSON RUSS, LLP
_____	386	CA 21 01579	SUSAN M. WEICHERT V RANDY CHARBONNEAU
_____	392	KA 15 02150	PEOPLE V ROOSEVELT SCOTT, JR.
_____	399	CA 21 00338	CAITLIN MCCANN V DAVID GORDON
_____	400	CA 21 00458	MATTHEW M. HILLMAN, SR. V STATE UNIVERSITY CONSTRU
_____	404	CA 21 01219	RYAN SIRAGUSA V MICHAEL SIRAGUSA

_____	406	CA 21 01593	OF DOE 3 V KENMORE-TOWN OF TONAWANDA
_____	419	CA 21 00495	CHARLES A. MCKAY, JR. V FINGER LAKES TRAFFIC CONTR
_____	425	CAF 19 00159	JENNIFER A. TURNER V TODD D. YONKER

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

484/21

CA 20-01211

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

PASQUALINO VIRGONE AND ANNA VIRGONE,
PLAINTIFFS-RESPONDENTS,

V ORDER

MASTERCRAFT MASONRY I, INC., ROBERTSON
STRONG APGAR ARCHITECTS, P.C.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
BOYCE EXCAVATING, CO. INC., DEFENDANT-RESPONDENT,
WILLIAM MANFREDI CONSTRUCTION CORP.,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

ROSENBAUM & TAYLOR, P.C., WHITE PLAINS (SCOTT P. TAYLOR OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT MASTERCRAFT MASONRY I, INC.

BYRNE & O'NEILL, LLP, NEW YORK CITY (MICHAEL J. BYRNE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT ROBERTSON STRONG APGAR ARCHITECTS, P.C.

HURWITZ & FINE, P.C., BUFFALO (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

SACKS & SACKS, LLP, NEW YORK CITY (DANIEL WEIR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

HANNUM FERETIC PRENDERGAST & MERLINO LLC, NEW YORK CITY (MATTHEW ZIZZAMIA OF COUNSEL), FOR DEFENDANT-RESPONDENT BOYCE EXCAVATING CO. INC.

Appeals and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), dated March 16, 2020. The order, among other things, denied the summary judgment motions of defendants Mastercraft Masonry I, Inc., Robertson Strong Apgar Architects, P.C. and William Manfredi Construction Corp.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties, and filed in the Onondaga County Clerk's Office on May 14, 2021,

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

863

KA 20-00575

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY J. FOX, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANTHONY BELLETIER, SYRACUSE, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered May 17, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of unlawful manufacture of methamphetamine in the second degree (§ 220.74 [2]). In appeal No. 3, he appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (§§ 110.00, 120.05 [2]).

With respect to all three appeals, insofar as defendant contends that his plea was not knowingly, intelligently, or voluntarily entered due to County Court's failure at the plea colloquy to adequately explain to him defense counsel's purported conflict of interest, we conclude that defendant's contention is unpreserved because he did not move to withdraw the guilty pleas or to vacate the judgments of conviction on that basis (*see People v Stafford*, 195 AD3d 1466, 1467 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]; *People v Bentley*, 191 AD3d 1392, 1392 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's further contention, with respect to appeal No. 1, we conclude that the court did not abuse its discretion in summarily denying his motion to withdraw his plea on the ground

that he was innocent of criminal possession of a weapon in the second degree. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Dale*, 142 AD3d 1287, 1289 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017] [internal quotation marks omitted]; *see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). Further, "[a] defendant is not entitled to withdraw [his] guilty plea based on a subsequent unsupported claim of innocence, where the guilty plea was voluntarily made with the advice of counsel following an appraisal of all the relevant factors" (*People v Gleen*, 73 AD3d 1443, 1444 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010] [internal quotation marks omitted]; *see People v Alexander*, 97 NY2d 482, 485 [2002]). To that end, " 'a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding' " (*People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *see generally People v Said*, 105 AD3d 1392, 1393 [4th Dept 2013], *lv denied* 21 NY3d 1019 [2013]).

Here, we conclude that the court did not abuse its discretion in summarily denying the motion because defendant's assertions of innocence are belied by his statements at the plea colloquy admitting that he unlawfully possessed a weapon on the day in question (*see Lewicki*, 118 AD3d at 1329). Additionally, defendant's assertions of innocence were entirely unsubstantiated on the motion (*see People v Stutzman*, 158 AD3d 1294, 1295-1296 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]; *Gleen*, 73 AD3d at 1444). Moreover, even if defendant had submitted evidence supporting his assertion that he was innocent of the weapons charge because the gun had been sold by the manufacturer on a date when defendant was incarcerated, thereby precluding a finding that he had purchased the gun himself, such evidence would be completely irrelevant to whether defendant *possessed* the gun on the date in question (*see* Penal Law § 265.03 [3]).

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence with respect to all three appeals (*see People v Aliotta*, 196 AD3d 1179, 1179 [4th Dept 2021]; *see generally People v Thomas*, 34 NY3d 545, 562 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Desjardins*, 196 AD3d 1177, 1177 [4th Dept 2021]), we conclude that the bargained-for aggregate sentence is not unduly harsh or severe.

With respect to appeal No. 1, we note that the court merely misstated at sentencing that defendant was a second violent felony offender, rather than a second felony offender (*see People v Bradley*, 196 AD3d 1168, 1170-1171 [4th Dept 2021]; *People v Seymor*e, 188 AD3d 1767, 1770 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Inasmuch as the certificate of conviction incorrectly reflects that defendant was sentenced as a second violent felony offender, it must be amended to reflect that he was sentenced as a second felony offender (*see*

Bradley, 196 AD3d at 1171). Additionally, we note that the certificate of conviction in appeal No. 1 incorrectly recites that defendant was convicted of criminal possession of a weapon in the second degree under Penal Law § 265.03 (1), and it must therefore be further amended to reflect that he was convicted of that crime under Penal Law § 265.03 (3) (*see People v Howard*, 92 AD3d 1219, 1220 [4th Dept 2012], *lv denied* 19 NY3d 864 [2012], *reconsideration denied* 19 NY3d 997 [2012]).

With respect to appeal No. 2, we note that at sentencing the court failed to pronounce orally a period of postrelease supervision. We therefore modify the judgment in appeal No. 2 by vacating the sentence, and we remit the matter to County Court for resentencing (*see People v Sparber*, 10 NY3d 457, 469-470 [2008]; *People v Stephens* [appeal No. 2], 160 AD3d 1473, 1474 [4th Dept 2018], *lv denied* 31 NY3d 1153 [2018]). We also note in appeal No. 2 that the court misstated at sentencing that defendant was being sentenced as a second felony offender, rather than as a second felony drug offender (*see* Penal Law § 70.70 [1] [b]; *see generally People v Manners*, 196 AD3d 1125, 1127 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]), and we therefore direct the court to correct that error on remittal.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

864

KA 20-00576

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY J. FOX, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANTHONY BELLETIER, SYRACUSE, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered May 17, 2019. The judgment convicted defendant upon a plea of guilty of unlawful manufacture of methamphetamine in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Lewis County Court for resentencing in accordance with the same memorandum as in *People v Fox* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

865

KA 20-00577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY J. FOX, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ANTHONY BELLETIER, SYRACUSE, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered May 17, 2019. The judgment convicted defendant upon a plea of guilty of attempted assault in the second degree.

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

Same memorandum as in *People v Fox* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

870/21

CA 20-01288

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

SETH O'HARROW, PLAINTIFF-RESPONDENT,

V ORDER

CASCADES CANADA, INC., GREENPAC HOLDING, LLC, GREENPAC MILL, LLC, LAFRAMBOISE GROUP, LTD., NORAMPAC INDUSTRIES, INC., JAMESTOWN CONTAINER CORPORATION, MINIMILL TECHNOLOGIES, INC., DEFENDANTS-RESPONDENTS,
VALMET, INC. FORMERLY KNOWN AS METSO PAPER USA, INC., DEFENDANT-APPELLANT,
LOTUS GROUP, USA, INC., DOING BUSINESS AS LOTUSWORKS AND KSH SOLUTIONS, INC., DEFENDANTS.

GIBSON, MCASKILL & CROSBY LLP, BUFFALO (ROBERT G. SCUMACI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO LAW, LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

MULHOLLAND MINION DAVEY MCNIFF & BEYRER, WILLISTON PARK (ERIC N. BAILEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CASCADES CANADA, INC., GREENPAC HOLDING, LLC, GREENPAC MILL, LLC, NORAMPAC INDUSTRIES, INC., JAMESTOWN CONTAINER CORPORATION AND MINIMILL TECHNOLOGIES, INC.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (DANIEL R. RYAN OF COUNSEL), FOR DEFENDANT-RESPONDENT LAFRAMBOISE GROUP, LTD.

HURWITZ & FINE, P.C., BUFFALO (STEVEN PEIPER OF COUNSEL), FOR DEFENDANT KSH SOLUTIONS, INC.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT LOTUS GROUP, USA, INC., DOING BUSINESS AS LOTUSWORKS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boneillo, III, J.), entered September 2, 2020. The order denied the motion of defendant Valmet, Inc., formerly known as Metso Paper USA, Inc. for summary judgment.

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

It is hereby ORDERED that said appeal is unanimously dismissed

without costs upon stipulation.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

971/21
OP 21-00726
PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF 525-527 ORISKANY ST. LLC,
PETITIONER,

V ORDER

ONEIDA COUNTY BOARD OF LEGISLATORS, ONEIDA
COUNTY, JOHN DOE CORPORATIONS AND JOHN DOES,
RESPONDENTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (BRIDGET O'TOOLE OF COUNSEL), FOR PETITIONER.

WHITEMAN OSTERMAN & HANNA, LLP, ALBANY (CHRISTOPHER M. MCDONALD OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent Oneida County Board of Legislators. The determination resolved to condemn certain real property.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 17, 2022,

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

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1043/21

CA 21-00008

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

SETH O'HARROW, PLAINTIFF-RESPONDENT,

V ORDER

CASCADES CANADA, INC., GREENPAC HOLDING, LLC, GREENPAC MILL, LLC, NORAMPAC INDUSTRIES, INC., JAMESTOWN CONTAINER CORPORATION, MINIMILL TECHNOLOGIES, INC., LAFRAMBOISE GROUP, LTD., DEFENDANTS-APPELLANTS, VALMET, INC., FORMERLY KNOWN AS METSO PAPER USA, INC., DEFENDANT-RESPONDENT, LOTUS GROUP, USA, INC., DOING BUSINESS AS LOTUSWORKS AND KSH SOLUTIONS, INC., DEFENDANTS.

MULHOLLAND MINION DAVEY MCNIFF AND BEYRER, WILLISTON PARK (ERIC N. BAILEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS CASCADES CANADA, INC., GREENPAC HOLDING, LLC, GREENPAC MILL, LLC, NORAMPAC INDUSTRIES, INC., JAMESTOWN CONTAINER CORPORATION, AND MINIMILL TECHNOLOGIES, INC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DANIEL R. RYAN OF COUNSEL), FOR DEFENDANT-APPELLANT LAFRAMBOISE GROUP, LTD.

CELLINO LAW, LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT G. SCUMACI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (STEVEN PEIPER OF COUNSEL), FOR DEFENDANT KSH SOLUTIONS, INC.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT LOTUS GROUP, USA, INC., DOING BUSINESS AS LOTUSWORKS.

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 1, 2020. The order denied in part the motion of defendants Cascades Canada, Inc., Greenpac Holding, LLC, Greenpac Mill, LLC, Norampac Industries, Inc., Jamestown Container Corporation, and Minimill Technologies, Inc. and the cross motion of defendant Laframboise Group, Ltd., for summary judgment.

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

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

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1050

CA 20-01447

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

JOSE M. LAGARES AND CARMEN J. RAMOS, PLAINTIFFS,

V MEMORANDUM AND ORDER

CARRIER TERMINAL SERVICES, INC., AND SPEED MOTOR EXPRESS OF WESTERN NEW YORK, INC., DOING BUSINESS AS SPEED GLOBAL SERVICES, DEFENDANTS.

CARRIER TERMINAL SERVICES, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SAHLEM'S ROOFING AND SIDING, INC., THIRD-PARTY DEFENDANT-APPELLANT.

SPEED MOTOR EXPRESS OF WESTERN NEW YORK, INC., DOING BUSINESS AS SPEED GLOBAL SERVICES, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SAHLEM'S ROOFING AND SIDING, INC., THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BAXTER SMITH & SHAPIRO, P.C., HICKSVILLE (ROBERT C. BAXTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT CARRIER TERMINAL SERVICES, INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT SPEED MOTOR EXPRESS OF WESTERN NEW YORK, INC., DOING BUSINESS AS SPEED GLOBAL SERVICES.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 29, 2020. The order and judgment, among other things, granted those parts of the motions of third-party plaintiffs seeking unconditional awards of common-law indemnification.

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

Same memorandum as in *Lagares v Carrier Term. Servs., Inc.* ([appeal No. 2] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1051

CA 21-00719

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

JOSE M. LAGARES AND CARMEN J. RAMOS, PLAINTIFFS,

V MEMORANDUM AND ORDER

CARRIER TERMINAL SERVICES, INC., AND SPEED MOTOR EXPRESS OF WESTERN NEW YORK, INC., DOING BUSINESS AS SPEED GLOBAL SERVICES, DEFENDANTS.

CARRIER TERMINAL SERVICES, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SAHLEM'S ROOFING AND SIDING, INC., THIRD-PARTY DEFENDANT-APPELLANT.

SPEED MOTOR EXPRESS OF WESTERN NEW YORK, INC., DOING BUSINESS AS SPEED GLOBAL SERVICES, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

SAHLEM'S ROOFING AND SIDING, INC., THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BAXTER SMITH & SHAPIRO, P.C., HICKSVILLE (ROBERT C. BAXTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT CARRIER TERMINAL SERVICES, INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT SPEED MOTOR EXPRESS OF WESTERN NEW YORK, INC., DOING BUSINESS AS SPEED GLOBAL SERVICES.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 24, 2020. The order granted the motion of third-party defendant insofar as it sought leave to reargue, and upon reargument, adhered to the prior determination in an order and judgment entered October 29, 2020.

It is hereby ORDERED that the order so appealed from is modified on the law by amending the order and judgment entered October 29, 2020

by adding to the first decretal paragraph immediately after the words "any judgment the plaintiffs ultimately obtain against Carrier" the following: "that is satisfied by Carrier" and adding to the third decretal paragraph immediately after the words "any judgment the plaintiffs ultimately obtain against Speed" the following: "that is satisfied by Speed" and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Jose M. Lagares (plaintiff) when, while he was replacing the roof of a building owned by defendant-third-party plaintiff Carrier Terminal Services, Inc. (Carrier), the piece of metal decking on which he was standing slipped off of its steel support beam, causing him to fall to the floor below. Defendant-third-party plaintiff Speed Motor Express of Western New York, Inc., doing business as Speed Global Services (Speed Motor), was allegedly acting as an agent of Carrier with respect to the roof replacement. Plaintiff was an employee of third-party defendant Sahlem's Roofing and Siding, Inc. (Sahlem). After this Court affirmed an order that, inter alia, granted plaintiffs' motion for partial summary judgment on the issue of Carrier's liability under Labor Law § 240 (1) (*Lagares v Carrier Term. Servs., Inc.*, 177 AD3d 1394 [4th Dept 2019]), Carrier moved for summary judgment on its claim for common-law indemnification against Sahlem and dismissing Sahlem's counterclaim and cross claim against it. Speed Motor moved for summary judgment on its claim for common-law indemnification against Sahlem and dismissing plaintiffs' second amended complaint and all cross claims and counterclaims against it, and plaintiffs cross-moved for partial summary judgment on the issue of Speed Motor's liability under Labor Law § 240 (1).

In appeal No. 1, Sahlem appeals from an order and judgment entered October 29, 2020 that granted plaintiffs' cross motion and Carrier's motion, and granted those parts of Speed Motor's motion seeking summary judgment on the issue of common-law indemnification against Sahlem and dismissing Sahlem's counterclaim and cross claim against it. In appeal No. 2, Sahlem appeals from an order entered December 24, 2020 in which Supreme Court granted Sahlem's motion for leave to reargue the order and judgment in appeal No. 1 and, upon reargument, adhered to its prior determination.

At the outset, we note that appeal No. 1 must be dismissed inasmuch as the order and judgment appealed from was superseded by the order in appeal No. 2 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Contrary to the contentions of Carrier and Speed Motor, Sahlem did not abandon its appeal from the order in appeal No. 2. Sahlem timely filed a notice of appeal from that order and timely perfected the appeal by filing an appellate brief under the appropriate docket number and, because the order in appeal No. 2 superseded the order and judgment in appeal No. 1, Sahlem's challenges to the court's determinations with respect to the summary judgment motions of Carrier

and Speed Motor are properly raised under appeal No. 2 (*see generally id.*). Indeed, although Sahlem's appellate brief does not explicitly challenge the order in appeal No. 2, Sahlem is not aggrieved by the part of the order that granted Sahlem leave to reargue (*see generally Edgar S. v Roman*, 115 AD3d 931, 931-932 [2d Dept 2014]), but Sahlem is aggrieved by the court's determination to adhere to the ruling in the prior order and judgment. Thus, in appeal No. 2, Sahlem appropriately challenges the court's determinations with respect to the summary judgment motions of Carrier and Speed Motor. Under these circumstances, a determination that Sahlem abandoned its appeal from the order in appeal No. 2 would be "the result of an overly strict reading of [Sahlem's] brief" (*Carlson v Porter*, 53 AD3d 1129, 1133 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]; *cf. Indus PVR LLC v MAA-Sharda, Inc.*, 140 AD3d 1666, 1667 [4th Dept 2016], *lv dismissed in part and denied in part* 28 NY3d 1059 [2016]).

In appeal No. 2, we reject Sahlem's contention that the court erred in granting the motions of Carrier and Speed Motor with respect to their claims against Sahlem for common-law indemnification. Plaintiffs obtained partial summary judgment on the issue of liability on their Labor Law § 240 (1) cause of action against Carrier, as a property owner, and against Speed Motor, as Carrier's agent. Section 240 (1) holds owners and their agents "absolutely liable for any breach of that statute even if 'the job was performed by an independent contractor over which [they] exercised no supervision or control' " (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *see Rauls v DirectTV, Inc.*, 113 AD3d 1097, 1098 [4th Dept 2014]). However, "[i]t is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]). " '[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part' " (*McKay v Weeden*, 148 AD3d 1718, 1721 [4th Dept 2017], quoting *McCarthy*, 17 NY3d at 377-378). Thus, "the one seeking indemnity must not only prove that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Grove v Cornell Univ.*, 151 AD3d 1813, 1816 [4th Dept 2017] [internal quotation marks omitted]; *see Provens v Ben-Fall Dev., LLC*, 163 AD3d 1496, 1499 [4th Dept 2018]). "The obligation of common-law indemnification runs against parties who, by virtue of their direction and supervision over the injury-producing work, were actively at fault in bringing about the injury" (*Colyer v K Mart Corp.*, 273 AD2d 809, 810 [4th Dept 2000]; *see generally Felker v Corning Inc.*, 90 NY2d 219, 226 [1997]).

Contrary to Sahlem's contention, both Carrier and Speed Motor established that they did not create or have notice of the dangerous condition. Carrier established that it purchased the building in 2004 and that it had not replaced the roof prior to the injury-producing work. Further, although Speed Motor employees had repaired the roof approximately 10 times by patching "open seams" to prevent small leaks, the director of maintenance for Speed Motor testified that none

of Speed Motor's employees replaced the decking. Additionally, Sahlem's own employees testified that the patch work completed by Speed Motor employees did not affect Sahlem's work during the roof replacement and was unrelated to the cause of plaintiff's accident. As one employee testified at his deposition, by the time the decking was exposed, the roof, and any patches that Speed Motor had applied to the roof, had already been removed. Thus, Carrier and Speed Motor established that they did not create the dangerous condition (*cf. Morris v Home Depot USA*, 152 AD3d 669, 673 [2d Dept 2017]), and Sahlem failed to raise a question of fact (*see generally Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904-905 [4th Dept 2014]).

With respect to notice, Carrier and Speed Motor provided the deposition transcripts of Sahlem's employees, who testified that it was impossible to see the condition of the metal decking until the existing roof was removed. Thus, Carrier and Speed Motor established that they did not have actual or constructive notice of the dangerous condition (*see Robles v 635 Owner, LLC*, 192 AD3d 604, 605 [1st Dept 2021]; *cf. Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266, 1268 [4th Dept 2003]), and Sahlem failed to raise a question of fact.

We reject Sahlem's contention that Carrier and Speed Motor failed to establish that Sahlem was either negligent or failed to properly supervise plaintiff. Common-law indemnification may be imposed "against those parties (i.e., indemnitors) who exercise[d] actual supervision" over the injury causing work (*McCarthy*, 17 NY3d at 378; *see Foots v Consolidated Bldg. Contrs., Inc.*, 119 AD3d 1324, 1327 [4th Dept 2014]). Here, Carrier and Speed Motor established that Sahlem exercised actual supervision over the injury causing work, and Sahlem failed to raise a question of fact (*see generally Foots*, 119 AD3d at 1327).

Finally, to the extent that the October 29, 2020 order and judgment may be read as requiring Sahlem to reimburse Carrier or Speed Motor for a judgment obtained by plaintiffs but not actually paid by either Carrier or Speed Motor, we agree with Sahlem that "the court should have conditioned summary judgment on common-law indemnification on the payment of a judgment by the parties seeking indemnification" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 940-941 [4th Dept 1995]). We therefore modify the order in appeal No. 2 accordingly.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1090

CA 21-00479

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

IN THE MATTER OF THE P. & E. T. FOUNDATION.

JOHN BLAIR, ESQ. PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

CYNTHIA T. DOYLE, ROBERT M. DOYLE, MOLLIE T. BYRNES, JOHN H. BYRNES, PETER BYRNES, MOLLIE DOYLE, DONNA OWENS, JAMES WEISS, DAVID WELBOURN AND CHARITABLE BENEFICIARIES, RESPONDENTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (KENNETH A. MANNING OF COUNSEL), FOR PETITIONER-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CYNTHIA T. DOYLE, ROBERT M. DOYLE, MOLLIE T. BYRNES, JOHN H. BYRNES, PETER BYRNES, MOLLIE DOYLE, DONNA OWENS, JAMES WEISS, AND DAVID WELBOURN.

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

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered March 30, 2021. The order, among other things, denied petitioner's motion for a preliminary injunction.

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

Memorandum: This appeal arises from a petition pursuant to SCPA 2102 (6) and 2107 (2) seeking, inter alia, to enjoin various of the respondents from removing petitioner as attorney trustee for the Peter and Elizabeth C. Tower Foundation (the Foundation), a $147 million charitable trust that provides grants to nonprofit organizations in Western New York. Surrogate's Court denied petitioner's motion for a preliminary injunction directing that he remain as attorney trustee. We have stayed enforcement of the order, allowing petitioner to remain as attorney trustee pending his appeal from the order. On appeal, petitioner contends that the Surrogate abused her discretion in denying his motion. We reject that contention and affirm.

"[B]ecause preliminary injunctions prevent the litigants from taking actions that they are otherwise legally entitled to take *in advance of an adjudication on the merits*, they should be issued cautiously" (*Uniformed Firefighters Assn. of Greater N.Y. v City of*

New York, 79 NY2d 236, 241 [1992]). We have therefore advised that preliminary injunctive relief is " 'a drastic remedy' " not routinely granted (*Sutherland Global Servs., Inc. v Stuewe*, 73 AD3d 1473, 1474 [4th Dept 2010]; *see Delphi Hospitalist Servs. LLC v Patrick*, 163 AD3d 1441, 1441 [4th Dept 2018]).

"Upon a motion for a preliminary injunction, the party seeking the injunctive relief must demonstrate by clear and convincing evidence: (1) 'a probability of success on the merits;' (2) 'danger of irreparable injury in the absence of an injunction;' and (3) 'a balance of equities in its favor' " (*Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020], quoting *Nobu Next Door, LLC v Fine Arts Hous., Inc*., 4 NY3d 839, 840 [2005]). With respect to the second requirement, it is well settled that the prospect of irreparable harm must be "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). "A motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp*., 69 AD3d 212, 216 [4th Dept 2009] [internal quotation marks omitted]).

Here, we conclude that the Surrogate did not abuse her discretion in determining that petitioner failed to establish by clear and convincing evidence that irreparable harm will ensue in the absence of injunctive relief. According to petitioner, the Foundation will be irreparably harmed if he is discharged as attorney trustee because its permanent trustees "will be unrestrained from carrying out their personal ends, including drastic measures of spending down Foundation assets, relocating the Foundation, or terminating the Foundation altogether." We disagree. Although there is evidence that the permanent trustees have discussed taking the actions referenced by petitioner, we perceive no imminent risk of any of those things happening during the pendency of this proceeding.

We note that the New York State Attorney General, who is involved in this proceeding as the statutory representative of the charitable beneficiaries of the Foundation, supports the ouster of petitioner as attorney trustee for cause and opposes his request for a preliminary injunction. The Attorney General asserts that she has the statutory authority to block the permanent trustees in the event that they take any of the actions feared by petitioner, and that she will not hesitate to step in if, as petitioner alleges, the permanent trustees seek to thwart the grantors' intent. Regardless, given that the permanent trustees would need the vote of an interim attorney trustee, among other people, to terminate the Foundation, spend down its assets or relocate its headquarters, it does not seem likely that the Attorney General will have to intervene. The interim trustee would be appointed by the Surrogate to replace petitioner and would be independent of the permanent trustees.

We therefore conclude that the irreparable harm alleged by petitioner is not imminent, if it exists at all, and that the

Surrogate therefore did not abuse her discretion in denying petitioner's motion for a preliminary injunction (*see Matter of Pilot Travel Ctrs., LLC v Town Bd. of Town of Bath*, 163 AD3d 1409, 1412 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]). In light of our determination, we do not address whether petitioner has demonstrated a probability of success on the merits and whether the equities weigh in his favor.

LINDLEY, CURRAN AND BANNISTER, JJ., concur.

CARNI, J., is not participating.

PERADOTTO, J., dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent because, contrary to the majority's conclusion, the record demonstrates that petitioner established each of the elements for a preliminary injunction enjoining respondents from removing him as attorney trustee of the Peter and Elizabeth C. Tower Foundation (Foundation), and thus that Surrogate's Court abused its discretion in denying petitioner's motion seeking that relief.

A party seeking a preliminary injunction "must establish, by clear and convincing evidence . . . , three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' " (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009], quoting *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020]). "Entitlement to a preliminary injunction 'depends upon probabilities, any or all of which may be disproven when the action is tried on the merits' " (*Destiny USA Holdings, LLC*, 69 AD3d at 216, quoting *J. A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406 [1986]). "A motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*id.*; *see Nobu Next Door, LLC*, 4 NY3d at 840).

Here, in my view, the record demonstrates that petitioner established by clear and convincing evidence that he is likely to succeed on the merits of his petition alleging that respondents lacked grounds to remove him as attorney trustee (*see generally Cangemi*, 185 AD3d at 1398-1399).

Moreover, the record also demonstrates that petitioner met his burden of establishing by clear and convincing evidence that the balance of equities are in his favor (*see id.* at 1400). The removal of petitioner as attorney trustee and the resulting prospect of a spend down of the Foundation's assets is more burdensome to petitioner and the Foundation than any harm caused to respondents in maintaining the status quo through a preliminary injunction pending a determination on the merits whether petitioner's removal is valid (*see*

id.; *Felix v Brand Serv. Group LLC*, 101 AD3d 1724, 1726 [4th Dept 2012]; *Destiny USA Holdings, LLC*, 69 AD3d at 223). Petitioner faces the possibility of being improperly removed as attorney trustee for a potentially pretextual reason, thereby losing any say in the future of the Foundation, whereas respondents will suffer no actual harm by maintaining the status quo (*see Cooperstown Capital, LLC v Patton*, 60 AD3d 1251, 1253 [3d Dept 2009]; *Vanderminden v Vanderminden*, 226 AD2d 1037, 1042 [3d Dept 1996]). In addition to the interests of the parties to the litigation, upon weighing the interests of the general public, I conclude that the prospect that the Foundation may terminate or otherwise operate in a manner inconsistent with the grantors' intent, thereby cutting off its significant grant funding to numerous Western New York charities, outweighs any harm to respondents or the Foundation, including acrimony between the trustees, pending resolution of the proceeding (*see Destiny USA Holdings, LLC*, 69 AD3d at 223).

Furthermore, in my view, contrary to the contentions of respondents, the Attorney General, and the majority, petitioner also "established by clear and convincing evidence a danger of irreparable injury in the absence of injunctive relief" (*Cangemi*, 185 AD3d at 1399). "It is an anodyne proposition that [i]rreparable injury, for purposes of equity, . . . mean[s] any injury for which money damages are insufficient" (*Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1058 [4th Dept 2020] [internal quotation marks omitted]). In that regard, "[a]n opportunity for [the nonmoving parties] to shift the balance of power and wrest complete control over [an organization] can constitute irreparable injury" (*Cooperstown Capital, LLC*, 60 AD3d at 1253; *see Yemini v Goldberg*, 60 AD3d 935, 937 [2d Dept 2009]; *Walker & Zanger v Zanger*, 245 AD2d 144, 145 [1st Dept 1997]; *Vanderminden*, 226 AD2d at 1041). Nonetheless, "[t]he prospect of irreparable harm must be 'imminent, not remote or speculative' " (*White v F.F. Thompson Health Sys., Inc.*, 75 AD3d 1075, 1077 [4th Dept 2010]).

Here, petitioner established that respondents' attempt to remove him as attorney trustee without sufficient grounds and as pretext for wresting complete control of the Foundation, with the ultimate goal of spending down its assets and terminating it, presented the prospect of irreparable injury (*see Yemini*, 60 AD3d at 937; *Cooperstown Capital, LLC*, 60 AD3d at 1253; *Walker & Zanger*, 245 AD2d at 145; *Vanderminden*, 226 AD2d at 1041). I respectfully disagree with the majority's conclusion that this harm is speculative and not imminent. During the meeting that precipitated this litigation, the permanent trustees expressly indicated their desire to take control of the Foundation. To that end, the permanent trustees sought the power to remove the attorney trustee and expressed their desire to amend the Foundation's governance documents to allow the sunset of the Foundation. Petitioner contended that the primary grantor's intent was for the Foundation to fulfill its charitable mission in Western New York in perpetuity, whereas the permanent trustees thought that the grantors' intent could be fulfilled by spending down the Foundation's assets with large grants and endowments, and then ultimately terminating the Foundation. A follow-up letter sent by an attorney for the permanent

trustees reiterated the permanent trustees' demand that petitioner draft amendments to eliminate the attorney trustee position, set conditions for the automatic termination of the Foundation, and give the trustees the right to terminate the Foundation at any time. Therefore, as petitioner contends, given the record evidence expressly indicating the permanent trustees' intent to seize full control of the Foundation and thereafter spend down its assets, there is no need to speculate as to the likely and imminent outcome to the Foundation of petitioner's removal as attorney trustee (*see Cooperstown Capital, LLC*, 60 AD3d at 1253; *cf. White*, 75 AD3d at 1077). Under these circumstances, I conclude that petitioner established the prospect of irreparable injury if, in the absence of a preliminary injunction, respondents obtain complete control of the Foundation or otherwise alter the governance documents in order to spend down the Foundation's assets (*see Landco H & L, Inc. v 377 Main Realty, Inc.* [appeal No. 1], — AD3d —, —, 2022 NY Slip Op 01695, *1 [4th Dept 2022]).

Whereas petitioner relied upon non-speculative statements in the record to establish that respondents planned to remove him as attorney trustee, thereby terminating his "ability to block certain actions[,] . . . includ[ing spending down the Foundation's] assets and dissolving the [Foundation]," that respondents sought to undertake (*Cooperstown Capital, LLC*, 60 AD3d at 1253), the majority's determination that there is no imminent risk of such irreparable harm depends entirely upon speculative contingencies and equivocal guarantees that third parties might act to prevent the harm from occurring. But petitioner's entitlement to a preliminary injunction, and the imminency of the irreparable harm, is not determined by the possibility of third-party intervention; it is enough that petitioner established by clear and convincing evidence that the Foundation is in "danger of irreparable injury in the absence of an injunction" (*Nobu Next Door, LLC*, 4 NY3d at 840). Petitioner's showing on this record that, in the absence of a preliminary injunction, respondents will have the "*opportunity* . . . to shift the balance of power and wrest complete control over [the Foundation]," is sufficient to establish the prospect of imminent irreparable harm (*Cooperstown Capital, LLC*, 60 AD3d at 1253 [emphasis added]; *see Yemini*, 60 AD3d at 937; *Walker & Zanger*, 245 AD2d at 144-145; *Vanderminden*, 226 AD2d at 1041).

Based on the foregoing, I would reverse the order and grant petitioner's motion, thereby affording him the "sensible disposition [of] maintaining the status quo" while the merits of the proceeding are litigated (*Walker & Zanger*, 245 AD2d at 144).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1092

CA 21-00181

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

GLENN FREELAND AND SUSAN FREELAND, AS ADMINISTRATORS FOR THE ESTATE OF TREVELL WALKER, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

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

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 14, 2020. The order denied the motion of defendants for summary judgment dismissing the wrongful death cause of action.

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

Memorandum: This action arises from the suicide of Trevell Walker (decedent) while he was incarcerated at the Erie County Holding Center. The facts and procedural history of this case are set forth in our decisions on the prior appeals (*Freeland v Erie County*, 122 AD3d 1348 [4th Dept 2014]; *Freeland v Erie County*, 122 AD3d 1353 [4th Dept 2014]; *Freeland v Erie County*, 185 AD3d 1490 [4th Dept 2020], *lv dismissed* 36 NY3d 1035 [2021]). Defendants now appeal from an order that denied their motion for summary judgment seeking dismissal of the wrongful death cause of action. We reject defendants' contention that Supreme Court erred in denying their motion.

As a preliminary matter, we agree with defendants that the doctrine of law of the case does not preclude their appellate contentions (*see generally Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1798 [4th Dept 2010]) inasmuch as none of our prior rulings in this case "specifically addressed [defendants'] present contention[s]" (*id.*). We conclude, however, that defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law dismissing the wrongful death cause of action.

"The elements of a cause of action to recover damages for

wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent" (*Chong v New York City Tr. Auth.*, 83 AD2d 546, 547 [2d Dept 1981]). Here, the first and fourth elements are undisputed.

With respect to the second element, and in particular the allegations against defendants Timothy B. Howard, Erie County Sheriff (Sheriff), and Mark Wipperman, Erie County Undersheriff (Undersheriff), concerning the adequacy of the mental health care received by decedent at the jail, defendants repeatedly contend either that "there is no record evidence" to support plaintiffs' claims or that plaintiffs "have provided no evidence" to support their claims. It is well settled that "[a] moving party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]; *see Rachlin v Michaels Arts & Crafts*, 118 AD3d 1391, 1392 [4th Dept 2014]). As the movants, it was defendants' burden to establish that decedent's mental health care was appropriate or that his suicide was not reasonably foreseeable (*see Iannelli v County of Nassau*, 156 AD3d 767, 768 [2d Dept 2017]; *see generally Gordon v City of New York*, 70 NY2d 839, 840-841 [1987]).

Although defendants submitted records establishing that decedent received some level of mental health care at the jail, defendants failed to establish that such care was, in fact, adequate or that decedent's suicide was not reasonably foreseeable. Moreover, the self-serving affidavits of the Sheriff and Undersheriff about their lack of knowledge of decedent's care are insufficient to establish as a matter of law that they fulfilled their statutory mandate to "receive and safely keep" decedent, i.e., a "person lawfully committed to [their] custody" (Correction Law § 500-c [4]). Such self-serving affidavits raise "question[s] of credibility for the finder of fact, not the court, to resolve" (*Wilson v Sponable*, 81 AD2d 1, 5 [4th Dept 1981], *appeal dismissed* 54 NY2d 834 [1981]).

Defendants likewise failed to establish as a matter of law that defendant Erie County (County) fulfilled its statutory duty to maintain the county jail (*see generally* County Law § 217; *Freeland*, 122 AD3d at 1350). Defendants failed to submit any evidence addressing plaintiffs' allegations that substandard housing at the Erie County Holding Center was a proximate cause of decedent's wrongful death.

We further conclude that defendants failed to establish as a matter of law that they would not have been liable to decedent had his death not ensued (*see* EPTL 5-4.1 [1]). As noted above, defendants failed to establish the absence of a wrongful act, neglect or default and, as a result, there are triable issues of fact whether decedent would have had a viable action against defendants had he survived.

Inasmuch as defendants failed to meet their initial burden on the liability issues, the burden never shifted to plaintiffs to raise a triable issue of fact in opposition thereto (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

With respect to the element regarding pecuniary loss, defendants contend that as a matter of law decedent's sole distributee, i.e., his minor child, did not sustain such a loss. "Damages in a wrongful death action are, by statute, limited to 'pecuniary injuries' suffered by the distributees of [the] decedent's estate" (*Parilis v Feinstein*, 49 NY2d 984, 985 [1980], quoting EPTL 5-4.3 [a]).

"There are four elements of compensable loss encompassed by the general term 'pecuniary loss': (1) [the] decedent's loss of earnings; (2) loss of services each survivor may have received from [the] decedent; (3) loss of parental guidance from [the] decedent; and (4) the possibility of inheritance from [the] decedent" (*Huthmacher v Dunlop Tire Corp.*, 309 AD2d 1175, 1176 [4th Dept 2003]; *see* EPTL 5-4.3). "It has long been recognized that pecuniary advantage results . . . from parental nurture and care, from physical, moral and intellectual training, and that the loss of those benefits may be considered within the calculation of 'pecuniary injury' " (*DeLong v County of Erie*, 89 AD2d 376, 386 [4th Dept 1982], *affd* 60 NY2d 296 [1983]).

"Generally, because it is difficult to provide direct evidence of wrongful death damages, the calculation of pecuniary loss 'is a matter resting squarely within the province of the jury' " (*Milczarski v Walaszek*, 108 AD3d 1190, 1190 [4th Dept 2013], quoting *Parilis*, 49 NY2d at 985). Here, defendants failed to establish as a matter of law that decedent's son had no reasonable expectation of future assistance or support from decedent (*see generally Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668 [1991]).

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

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1111

CA 21-00583

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

JUAN PAREDES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER VORHAND AND INTERNATIONAL
REALTY OF WNY LLC, DEFENDANTS-APPELLANTS.

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

JOHN J. FLAHERTY, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered April 19, 2021. The order, insofar as appealed from, denied the motion of defendants to dismiss the first, second and fourth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the fourth cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, specific performance of an installment land contract, fraud in the inducement of that contract, and fraud in the execution of that contract. Defendants appeal from an order that, inter alia, denied their motion seeking to dismiss those causes of action pursuant to CPLR 3211 (a) (1) and (7) and 3016 (b).

We agree with defendants that Supreme Court erred in denying that part of their motion seeking to dismiss plaintiff's fourth cause of action, for fraud in the execution of the contract, and we therefore modify the order accordingly. Fraud in the execution of a contract occurs when a party "was induced to sign something entirely different than what [the party] thought [he or] she was signing" (*ABR Wholesalers, Inc. v King*, 172 AD3d 1929, 1930 [4th Dept 2019] [internal quotation marks omitted]; *see Whitehead v Town House Equities, Ltd.*, 8 AD3d 367, 368 [2d Dept 2004]). Here, the complaint fails to state a cause of action for fraud in the execution because it does not allege that plaintiff was induced to sign anything other than the installment land contract that he now seeks to enforce (*see* CPLR 3211 [a] [7]). We have considered defendants' remaining contentions concerning the specific performance and fraud in the inducement causes of action and conclude that they do not require further modification

or reversal of the order.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1117

CA 21-00490

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

KIMBERLEY ALDRIDGE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GOVERNING BODY OF JEHOVAH'S WITNESSES, ET AL.,
DEFENDANTS,
AND WATCHTOWER BIBLE AND TRACT SOCIETY OF
NEW YORK, INC., DEFENDANT-APPELLANT.

K&L GATES LLP, NEW YORK CITY (DANA PARKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE ZALKIN LAW FIRM, NEW YORK CITY (ELIZABETH A. CATE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered April 1, 2021. The order denied the motion of defendant Watchtower Bible and Tract Society of New York, Inc. to change the place of trial from Kings County to Monroe County.

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

Memorandum: Plaintiff commenced the instant action in Kings County pursuant to the Child Victims Act (*see* CPLR 214-g), alleging that she was sexually abused while in the care of an elder in defendant Henrietta Congregation of Jehovah's Witnesses, which has a principal place of business in Monroe County. Defendant Watchtower Bible and Tract Society of New York, Inc. (Watchtower), a not-for-profit organization allegedly involved in the oversight of congregations located within the United States, filed a motion in Monroe County Supreme Court for a change in venue to that county pursuant to CPLR 510 (1). The court denied the motion and Watchtower appeals. We affirm.

"The decision whether to grant a change of venue [pursuant to CPLR 510 (1)] is committed to the sound discretion of the trial court, and will not be disturbed absent a clear abuse of discretion" (*Robert Owen Lehman Found., Inc. v Israelitische Kultusgemeinde Wien*, 197 AD3d 865, 867 [4th Dept 2021] [internal quotation marks omitted]; *see Harvard Steel Sales, LLC v Bain*, 188 AD3d 79, 81 [4th Dept 2020]). Under the CPLR, "the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim

occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff" (CPLR 503 [a]). "The court, upon motion, may change the place of trial of an action where . . . the county designated for that purpose is not a proper county" (CPLR 510 [1]). "To effect a change of venue pursuant to CPLR 510 (1), a defendant must show both that the plaintiff's choice of venue is improper and that its choice of venue is proper" (*Matter of Zelazny Family Enters., LLC v Town of Shelby*, 180 AD3d 45, 47 [4th Dept 2019] [internal quotation marks omitted]). "Only if a defendant meets this burden is the plaintiff required to establish, in opposition, that the venue selected was proper" (*Young Sun Chung v Kwah*, 122 AD3d 729, 730 [2d Dept 2014]).

Here, although Watchtower established that the summons erroneously states that Watchtower's principal place of business was in Kings County, venue in Kings County is proper because plaintiff's amended complaint alleges that Watchtower engaged in "*significant* events or omissions *material* to . . . plaintiff's claim [against Watchtower]" in Kings County, despite the fact that "other material events," including the alleged sexual abuse, "occurred elsewhere" (*Gulf Ins. Co. v Glasbrenner*, 417 F3d 353, 357 [2d Cir 2005]; *see generally Harvard Steel Sales, LLC*, 188 AD3d at 82). Having failed to establish that plaintiff's original choice of venue was improper, the burden never shifted to plaintiff "to establish, in opposition, that the venue selected was proper" (*Young Sun Chung*, 122 AD3d at 730).

To the extent that the court's failure to address any request from Watchtower for sanctions against plaintiff's counsel could be deemed a denial of such a request (*see East Aurora Coop. Mkt., Inc. v Red Brick Plaza LLC*, 197 AD3d 874, 878 [4th Dept 2021]), that denial was not an abuse of discretion (*see Matter of Fischione v PM Peppermint, Inc.*, 197 AD3d 970, 971 [4th Dept 2021]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1167

KA 20-00949

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINE M. BAKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered January 27, 2020. The judgment convicted defendant upon her plea of guilty of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that County Court erred in imposing an enhanced sentence and that the enhanced sentence is unduly harsh and severe. We affirm.

During the plea proceeding but after she had waived her right to appeal, the court advised defendant that it would not be bound by the plea agreement to impose the promised sentence of, at most, 4½ years of imprisonment plus five years of postrelease supervision if, among other things, defendant was arrested on new charges prior to sentencing or defendant failed to appear for sentencing. The court further advised defendant that it could impose the maximum sentence if she violated either of those conditions. Defendant was arrested after entering her plea and failed to appear for one of the adjourned sentencing and *Outley* hearing dates. As a result, the court determined that defendant had violated the terms of her plea agreement and sentenced her to 5½ years in prison with five years of postrelease supervision.

Initially, we note that defendant's waiver of the right to appeal does not encompass her contentions on appeal because the court failed to advise her "of either the conduct that could result in the imposition of an enhanced sentence . . . or the potential periods of incarceration for an enhanced sentence" *before* she waived her right to

appeal (*People v Sundown*, 305 AD2d 1075, 1075-1076 [4th Dept 2003]; *see People v Semple*, 23 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 6 NY3d 852 [2006]; *cf. People v May*, 169 AD3d 1365, 1365 [4th Dept 2019]).

We nevertheless reject defendant's contention that the court erred in imposing an enhanced sentence. Defendant failed to raise in the sentencing court the contention that an enhanced sentence could not be imposed because the People did not establish her arrest, and thus that contention is unpreserved for appellate review (*see generally People v Harris*, 289 AD2d 1068, 1068 [4th Dept 2001], *lv denied* 98 NY2d 637 [2002]; *People v Miles*, 268 AD2d 489, 490 [2d Dept 2000], *lv denied* 95 NY2d 800 [2000]). Contrary to defendant's further contention, the court properly determined that there was a legitimate basis for her arrest. At the *Outley* hearing, the complainant testified that defendant brandished a knife and threatened to stab the complainant before spraying the complainant with pepper spray. The court therefore properly imposed an enhanced sentence on the basis that defendant had violated the "no-arrest condition" of her plea agreement (*People v Outley*, 80 NY2d 702, 713 [1993]; *see People v Fumia*, 104 AD3d 1281, 1281-1282 [4th Dept 2013], *lv denied* 21 NY3d 1004 [2013]). In any event, because defendant failed to appear at a scheduled sentencing date, defendant violated another condition of the plea agreement and, on that basis, the court "was no longer bound by the agreed-upon sentence" (*People v Henry*, 192 AD3d 1504, 1505 [4th Dept 2021] [internal quotation marks omitted]; *see People v Figgins*, 87 NY2d 840, 841 [1995]). Contrary to defendant's assertion, the court warned defendant at the time it adjourned sentencing and scheduled the *Outley* hearing that her failure to appear could result in an enhanced sentence. We reject defendant's alternative contention that she presented a reasonable excuse for her absence (*see People v Gonzales*, 231 AD2d 939, 940 [4th Dept 1996], *lv denied* 89 NY2d 923 [1996]).

Finally, we reject defendant's contention that the enhanced sentence is unduly harsh and severe.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1169

KA 19-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY D. BURNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered January 29, 2019. The judgment convicted defendant, upon a jury verdict, of bail jumping in the second degree.

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

Same memorandum as in *People v Burney* ([appeal No. 3] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1170

KA 19-00551

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY D. BURNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered January 29, 2019. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Same memorandum as in *People v Burney* ([appeal No. 3] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

1171

KA 19-00552

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY D. BURNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered January 29, 2019. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from three judgments convicting him, following a single jury trial, of various crimes. Defendant appeals, in appeal No. 3, from a judgment convicting him of burglary in the second degree (Penal Law § 140.25 [2]), arising from an incident in which defendant, despite a stay-away order of protection in favor of his on-again, off-again girlfriend (victim), was arrested by the police after the victim allowed him to enter her apartment, where he proceeded to take a shower and a nap. In appeal No. 1, defendant appeals from a judgment convicting him of bail jumping in the second degree (§ 215.56), arising from an incident in which he failed to appear in court on the charge related to the initial arrest. In appeal No. 2, defendant appeals from a judgment also convicting him of burglary in the second degree (§ 140.25 [2]), arising from a subsequent incident in which defendant, following a multi-day stay at a hotel with the victim who accompanied him out of fear and was not allowed to leave the hotel room, returned to the apartment. There defendant argued with the victim, stayed overnight, and had sex with the victim against her will.

As a preliminary matter, to the extent that the pro se notice of appeal states that defendant is appealing from the sentences only, rather than the entire judgment in each appeal, we exercise our

discretion in the interest of justice to treat the appeals as validly taken from the judgments (*see* CPL 460.10 [6]; *People v Boldt*, 185 AD3d 1551, 1552 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020]; *People v Flax*, 117 AD3d 1582, 1583 [4th Dept 2014]).

Defendant contends in each appeal that he was deprived of effective assistance of counsel because defense counsel, in response to defendant's pro se requests for assignment of new counsel, took an adverse position to him by disputing certain of his factual allegations, thereby creating a conflict of interest and undermining his credibility. We reject that contention.

Although "[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option . . . , the right to be represented by counsel of one's own choosing is a valued one, and a defendant may be entitled to new assigned counsel upon showing 'good cause for substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824 [1990]; *see People v Porto*, 16 NY3d 93, 99-100 [2010]). "[A] court's duty to consider . . . a motion [for substitution of counsel] is invoked only where a defendant makes a 'seemingly serious request[ ]' " for new counsel (*Porto*, 16 NY3d at 99-100; *see Sides*, 75 NY2d at 824). When a defendant's request for substitution of counsel is supported by "specific factual allegations of 'serious complaints about counsel[,]' . . . the court must make at least a 'minimal inquiry' " into " 'the nature of the disagreement or its potential for resolution' " (*Porto*, 16 NY3d at 100; *see People v Smith*, 30 NY3d 1043, 1043-1044 [2017]; *Sides*, 75 NY2d at 824-825; *People v Medina*, 44 NY2d 199, 207-208 [1978]).

The requisite inquiry includes allowing the defendant to air his or her complaints, and the court may also allow defense counsel to explain his or her performance (*see People v Washington*, 25 NY3d 1091, 1095 [2015]; *People v Nelson*, 7 NY3d 883, 884 [2006]; *People v Okolo*, 35 AD3d 1272, 1273 [4th Dept 2006], *lv denied* 8 NY3d 925 [2007]). Indeed, "[a]lthough an attorney is not obligated to comment on a client's pro se motions or arguments, he [or she] may address allegations of ineffectiveness [raised on a motion for substitution of counsel] 'when asked to by the court' and 'should be afforded the opportunity to explain his [or her] performance' " (*Washington*, 25 NY3d at 1095). Nevertheless, "[w]hile defense counsel need not support a defendant's pro se motion for the assignment of new counsel, a defendant is denied the right to [effective, conflict-free] counsel when defense counsel becomes a witness against the defendant by taking a position adverse to the defendant in the context of such a motion" (*People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]; *see Okolo*, 35 AD3d at 1273). Defense counsel "takes a position adverse to his [or her] client when stating that the defendant's motion lacks merit" (*Washington*, 25 NY3d at 1095). Conversely, defense counsel "does *not* create an actual conflict merely by 'outlining his [or her] efforts on [the] client's behalf' . . . and 'defending his [or her] performance' " (*id.*; *see Nelson*, 7 NY3d at 884; *People v Avent*, 178 AD3d 1403, 1405 [4th Dept 2019], *lv denied* 35

NY3d 940 [2020]; *People v Blackwell*, 129 AD3d 1690, 1691 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]; *Okolo*, 35 AD3d at 1273).

Here, we conclude that defense counsel's denials of defendant's open-court allegations that defense counsel used a racial slur or other language evincing racial animus in conversations with defendant did not, without more, establish that defense counsel took a position adverse to defendant on his requests for substitution of counsel or otherwise created a conflict of interest (*see Washington*, 25 NY3d at 1093-1095; *People v Gutek*, 151 AD3d 1281, 1282 [3d Dept 2017]; *see generally People v Cambronae*, 180 AD3d 557, 558 [1st Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Defense counsel briefly "denied the factual assertions but, importantly, did not take a position adverse to defendant on his request[s] for substitute counsel or otherwise, and no conflict of interest arose therefrom" (*Gutek*, 151 AD3d at 1282; *see Washington*, 25 NY3d at 1093-1095). Contrary to defendant's related contention, while it would have been better practice for defense counsel to be more circumspect in his representations to County Court even in the face of defendant's continued interruptive and accusatory behavior, we conclude that defense counsel did not take a position adverse to defendant by clarifying that he did not, in fact, inform defendant that the decision to call witnesses was up to defendant (*see Washington*, 25 NY3d at 1093-1095; *Cambronae*, 180 AD3d at 558). Defense counsel simply informed the court "what [he and defendant had] discussed" about the decision to call witnesses and, in doing so, defense counsel "never strayed beyond a factual explanation of his efforts on his client's behalf" (*Washington*, 25 NY3d at 1095; *see Cambronae*, 180 AD3d at 558).

We reject defendant's contention in each appeal that the court erred in denying his purported pretrial requests to represent himself without conducting a searching inquiry. The record establishes that defendant "did not clearly and unequivocally request to proceed pro se," i.e., defendant's statements " 'd[id] not reflect a definitive commitment to self-representation' that would trigger a searching inquiry by the trial court" (*People v Duarte*, 37 NY3d 1218, 1219 [2022], quoting *People v LaValle*, 3 NY3d 88, 106 [2004]; *see People v Gillian*, 8 NY3d 85, 88 [2006]).

Defendant also contends in each appeal that the court erred by refusing to grant an adjournment just before the beginning of jury selection to permit him to retain new counsel. That contention lacks merit. It is well settled that "the constitutional right to [a defense] by counsel of one's own choosing does not bestow upon a criminal defendant the absolute right to demand that his trial be delayed while he selects another attorney to represent him at trial. . . . Whether a continuance should be granted is largely within the discretion of the [t]rial [court]" (*People v Arroyave*, 49 NY2d 264, 271 [1980]; *see People v Goodwin*, 159 AD3d 1433, 1433-1434 [4th Dept 2018]; *People v Robinson*, 132 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]). Here, defendant "had ample opportunity to retain counsel of his own choosing before his request, and he failed to demonstrate that the requested adjournment was necessitated

by forces beyond his control and was not a dilatory tactic" (*People v Allison*, 69 AD3d 740, 741 [2d Dept 2010], *lv denied* 14 NY3d 885 [2010]; *see People v Hunter*, 171 AD3d 1534, 1535 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]). Considering "the reasonableness of the trial court's decision in light of all the existing circumstances" (*Arroyave*, 49 NY2d at 272), we conclude that the court did not abuse its discretion in refusing to grant an adjournment on the eve of trial (*see People v DeValle*, 194 AD3d 1411, 1412 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]; *Robinson*, 132 AD3d at 1409).

Contrary to defendant's further contention in appeal Nos. 2 and 3, the court did not err in permitting the People to introduce *Molineux* evidence related to prior incidents of domestic violence between defendant and the victim. The court properly concluded that the evidence "provided necessary background information on the nature of the relationship and placed the charged conduct in context" (*People v Dorm*, 12 NY3d 16, 19 [2009]; *see People v Swift*, 195 AD3d 1496, 1499 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]), and was relevant to the issue of defendant's intent (*see Dorm*, 12 NY3d at 19; *People v Womack*, 143 AD3d 1171, 1173 [3d Dept 2016], *lv denied* 28 NY3d 1151 [2017]). We further conclude that the court did not abuse its discretion in determining that the probative value of the evidence outweighed its potential for prejudice (*see Dorm*, 12 NY3d at 19*; see generally People v Alvino*, 71 NY2d 233, 242 [1987]), and that the court's repeated limiting instructions minimized any prejudice to defendant (*see People v Murray*, 185 AD3d 1507, 1508 [4th Dept 2020], *lv denied* 36 NY3d 974 [2020]; *People v Matthews*, 142 AD3d 1354, 1356 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]).

Defendant next contends in appeal Nos. 2 and 3 that the burglary conviction in each of those appeals is not supported by legally sufficient evidence because, beyond his violations of the stay-away provision of the order of protection, the evidence did not establish that he intended to violate any other provision of the order of protection or commit any other crime in the apartment. We reject that contention. "A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Kancharla*, 23 NY3d 294, 302 [2014]). In conducting a legal sufficiency review, "[w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Hampton*, 21 NY3d 277, 288 [2013]; *see People v Gordon*, 23 NY3d 643, 649 [2014]). Here, viewing the evidence in that manner, we conclude that the evidence is legally sufficient to support each burglary conviction (*see People v Lewis*, 5 NY3d 546, 551-553 [2005]; *People v Lopez*, 147 AD3d 456, 456-457 [1st Dept 2017], *lv denied* 29 NY3d 999 [2017]).

Defendant also contends in appeal Nos. 2 and 3 that the verdict is against the weight of the evidence with respect to the intent

element of the burglary charges. We agree with defendant in part. "A legally sufficient verdict . . . may be against the weight of the evidence" (*Kancharla*, 23 NY3d at 302; *see Danielson*, 9 NY3d at 349). Indeed, under a weight of the evidence review, "[e]ven if all the elements and necessary findings are supported by some credible evidence, [we] must examine the evidence further" (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]). "Unlike a sufficiency analysis, weight of the evidence review requires [that we] act, in effect, as a second jury . . . by rendering [our] own determination of the facts as proved at trial 'in light of the elements of the crime as charged to the other jurors' " (*Kancharla*, 23 NY3d at 302-303, quoting *Danielson*, 9 NY3d at 349; *see People v Romero*, 7 NY3d 633, 644 n 2 [2006]; *Bleakley*, 69 NY2d at 495). We nonetheless must accord "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495; *see Kancharla*, 23 NY3d at 303).

Here, viewing the evidence in light of the elements of the crime in appeal No. 2 as charged to the jury, even assuming, arguendo, that an acquittal on that crime would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Williams*, 169 AD3d 567, 567 [1st Dept 2019], *lv denied* 33 NY3d 1075 [2019]; *see generally Danielson*, 9 NY3d at 348-349; *Bleakley*, 69 NY2d at 495). In appeal No. 3, however, we conclude that an acquittal would not have been unreasonable and, upon "weigh[ing] conflicting testimony, review[ing] any rational inferences that may be drawn from the evidence and evaluat[ing] the strength of such conclusions" (*Danielson*, 9 NY3d at 348), we are "not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" with respect to defendant's intent to violate the order of protection beyond the stay-away provision or commit a separate crime in the apartment (*People v Delamota*, 18 NY3d 107, 117 [2011]; *see generally People v Cajigas*, 19 NY3d 697, 701-702 [2012]). We therefore reverse the judgment in appeal No. 3 and dismiss that indictment.

Contrary to defendant's further contention, the sentence imposed on the remaining counts is not unduly harsh or severe. Finally, defendant's remaining contention with respect to appeal No. 2 does not warrant reversal or modification of the judgment in that appeal and, in light of our determination in appeal No. 3, defendant's remaining contention insofar as it relates to that appeal is academic.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

23

CA 21-00711

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

CITIBANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY,
BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. GIFFORD, ALSO KNOWN AS THOMAS JAY
GIFFORD, ALSO KNOWN AS THOMAS GIFFORD,
DEFENDANT-RESPONDENT-APPELLANT,
MARLENE E. GIFFORD, ALSO KNOWN AS MARLENE
GIFFORD, ALSO KNOWN AS MARLENE LOU GIFFORD,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

ROACH & LIN, P.C., SYOSSET (MICHAEL C. MANNIELLO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered March 18, 2021. The order, among other things, granted the motion of plaintiff insofar as it sought summary judgment against defendant Thomas J. Gifford, denied the motion of plaintiff insofar as it sought summary judgment against defendant Marlene E. Gifford, and granted the cross motion of defendants Marlene E. Gifford and Thomas J. Gifford insofar as it sought dismissal of the complaint against defendant Marlene E. Gifford.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in its entirety, reinstating the complaint against defendant Marlene E. Gifford, also known as Marlene Gifford, also known as Marlene Lou Gifford, and granting the motion in its entirety and as modified the order is affirmed without costs.

Memorandum: In 1991, Thomas J. Gifford, also known as Thomas Jay Gifford, also known as Thomas Gifford, and Marlene E. Gifford, also known as Marlene Gifford, also known as Marlene Lou Gifford (defendants), executed a note secured by a mortgage on their residence. In 2011, Thomas Gifford executed an agreement (2011 Agreement) modifying the original note and, following his default on the 2011 Agreement, plaintiff commenced this foreclosure action.

Plaintiff moved for, inter alia, summary judgment on the complaint, and defendants cross-moved for summary judgment dismissing the complaint against them as barred by the statute of limitations. Plaintiff appeals from an order that, inter alia, denied that part of the motion and granted that part of the cross motion with respect to Marlene Gifford, and Thomas Gifford cross-appeals from the same order insofar as it granted that part of the motion and denied that part of the cross motion with respect to him. We agree with plaintiff on its appeal that Supreme Court erred in granting the cross motion insofar as it sought summary judgment dismissing the complaint against Marlene Gifford and in denying the motion insofar as it sought summary judgment on the complaint with respect to her, and we therefore modify the order accordingly.

Initially, we reject Thomas Gifford's assertion on his cross appeal that the court erred in denying the cross motion insofar as it sought summary judgment dismissing the complaint against him. An action to foreclose a mortgage is subject to a six year statute of limitations (*see* CPLR 213 [4]), which "begins to run on the date on which the mortgagee is entitled to demand full payment of the loan" (*McNeary v Charlebois*, 169 AD3d 1295, 1296 [3d Dept 2019]). As the movants for summary judgment, defendants bore the initial burden of establishing their "entitlement to judgment dismissing the complaint as time-barred as a matter of law" (*Caleb v Sevenson Envtl. Servs., Inc.*, 19 AD3d 1090, 1091 [4th Dept 2005]; *see Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]). Where the defendants meet their initial burden, it is incumbent upon the plaintiff to raise an issue of fact in opposition (*see Federal Natl. Mtge. Assn.*, 188 AD3d at 74; *Schreiber v Cimato* [appeal No. 2], 299 AD2d 813, 814 [4th Dept 2002]).

Here, even assuming, arguendo, that defendants met their initial burden on their cross motion, we conclude that plaintiff established in opposition that "the common-law, partial payment exception to the statute of limitations . . . ha[d] the effect of extending or renewing the statute of limitations period" (*McNeary*, 169 AD3d at 1296) with respect to Thomas Gifford. The partial payment exception "requires proof that 'there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' " (*id.* at 1297, quoting *Lew Morris Demolition Co. v Board of Educ. of City of N.Y.*, 40 NY2d 516, 521 [1976]). "If the exception is established, the statute of limitations begins to run anew from the date of the partial payment" (*id.*). For plaintiff's action to have been timely commenced, a qualifying partial payment must have been made on or after April 18, 2013. Here, plaintiff's submissions demonstrated that a payment in the amount of the monthly payment required under the terms of the 2011 Agreement was made on or about May 1, 2017. Indeed, plaintiff's submissions showed that it received multiple payments in that amount between April 2013 and May 2017, and defendants did not dispute that such payments had been made.

Further, inasmuch as plaintiff also established that the partial

payment exception applied to Marlene Gifford, we agree with plaintiff's contention on its appeal that the court erred in granting the cross motion insofar as it sought summary judgment dismissing the complaint against Marlene Gifford. Defendants took title to the property in question as husband and wife without any restriction, and they thereupon became tenants by the entirety (*see Hosford v Hosford*, 273 App Div 659, 661 [4th Dept 1948]). "In an estate by the entirety the husband and wife are each seized of the entire estate, *per tout et non per my.* Each owns, not an undivided part, but the whole estate" (*Matter of Maguire*, 251 App Div 337, 339 [2d Dept 1937], *affd* 277 NY 527 [1938]). Thus, any payments made by Thomas Gifford that inured to Marlene Gifford's benefit were implicitly authorized by Marlene Gifford and worked to renew the statute of limitations as to both defendants (*see Clute v Clute*, 197 NY 439, 447 [1910]; *Ricci v Perrino*, 285 App Div 502, 504-505 [3d Dept 1955]).

We also agree with plaintiff on its appeal that it was entitled to judgment as a matter of law against defendants, and we reject Thomas Gifford's corresponding contention on his cross appeal that the court erred in granting the motion insofar as it sought summary judgment on the complaint against him. "[A] plaintiff moving for summary judgment in a mortgage foreclosure action establishes its prima facie case by submitting a copy of the mortgage, the unpaid note and evidence of default" (*Bank of N.Y. Mellon v Simmons*, 169 AD3d 1446, 1446 [4th Dept 2019] [internal quotation marks omitted]). Here, plaintiff "established its prima facie entitlement to judgment as a matter of law by submitting a mortgage, an unpaid note, and an affidavit of its employee, who averred that she reviewed the relevant papers and attested to [defendants'] default" (*HSBC Bank USA, NA v Schwartz*, 88 AD3d 961, 961 [2d Dept 2011]; *see Bank of N.Y. Mellon*, 169 AD3d at 1446). Defendants failed to raise a triable issue of fact in opposition.

"Having failed to interpose an answer which asserted the defense [of lack of standing] or to file a timely pre-answer motion raising that defense," Thomas Gifford waived his contention on his cross appeal that plaintiff lacked standing to commence the action (*HSBC Bank USA, NA*, 88 AD3d at 961).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 18-00878

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD GRIFFIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered April 25, 2017. The judgment convicted defendant upon a plea of guilty of assault in the first degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty during a single plea proceeding of, respectively, assault in the first degree (Penal Law § 120.10 [1]) and arson in the second degree (§ 150.15). We affirm in both appeals.

As defendant contends in both appeals and the People correctly concede, defendant's waiver of the right to appeal is invalid. Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant further contends in both appeals that he was denied effective assistance of counsel. "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018] [internal quotation marks omitted]; *see People v Singletary*, 51 AD3d 1334, 1335 [3d Dept 2008], *lv denied* 11 NY3d 741 [2008]). Here, defense counsel obtained favorable pleas, which resolved numerous felony charges under

two separate indictments and significantly reduced defendant's sentencing exposure. She also successfully obtained suppression of some of defendant's statements to police. Defendant has failed to demonstrate "the absence of strategic or other legitimate explanations" for defense counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]).

To the extent that defendant contends that he was denied effective assistance of counsel by defense counsel's failure to adequately communicate with him or to advise him that he faced consecutive terms of imprisonment, his contention involves matters " 'between defendant and his attorney outside the record on appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10' " (*People v Brinson*, 192 AD3d 1559, 1560 [4th Dept 2021]; *see People v Barnes*, 56 AD3d 1171, 1171-1172 [4th Dept 2008]). To the extent that defendant contends that defense counsel was ineffective for failing to satisfactorily review the appeal waiver with defendant, we conclude that "such claim is rendered moot as a result of our determination that the appeal waiver was invalid" (*People v Downs*, 194 AD3d 1118, 1119 [3d Dept 2021], *lv denied* 37 NY3d 971 [2021]). Furthermore, to the extent that defendant contends that defense counsel coerced him into pleading guilty, we conclude that his contention is "belied by his statements during the plea proceeding[]" (*People v Shanley*, 189 AD3d 2108, 2109 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021] [internal quotation marks omitted]; *see People v Manor*, 121 AD3d 1581, 1583 [4th Dept 2014], *affd* 27 NY3d 1012 [2016]).

Defendant's contention with respect to both appeals that the court erred in granting the People's motion to consolidate the two indictments for trial was forfeited by his guilty plea (*see People v Martinez*, 105 AD3d 1458, 1458 [4th Dept 2013], *lv denied* 22 NY3d 1042 [2013]; *People v Lynch*, 13 AD3d 1142, 1142-1143 [4th Dept 2004], *lv denied* 4 NY3d 800 [2005]).

Contrary to defendant's further contention in both appeals, we conclude that the sentences are not unduly harsh or severe. We have considered defendant's remaining contention raised in these appeals and conclude that it does not warrant reversal or modification of the judgments.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

28

KA 18-00879

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD GRIFFIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered April 25, 2017. The judgment convicted defendant upon a plea of guilty of arson in the second degree.

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

Same memorandum as in *People v Griffin* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-00979

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAYVION BLOUNT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 15, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]). Preliminarily, we note that defendant did not waive his right to appeal in this case. Although there was some discussion about an appeal waiver during the plea colloquy, defendant "was never . . . called upon to actually waive that right" (*People v Magee*, 200 AD3d 1619, 1619 [4th Dept 2021]).

We reject defendant's contention that County Court improperly failed to inquire into his complaints about defense counsel at sentencing. Defendant's unexplained allegations of "rude[ness]" and "belligeren[ce]" by defense counsel are precisely the sort of "vague and conclusory" claims that "do[ ] not 'trigger the court's duty to make a minimal inquiry' " (*People v Dolison*, 200 AD3d 1632, 1633 [4th Dept 2021]; *see People v El Hor*, 197 AD3d 1118, 1120 [2d Dept 2021], *lv denied* 37 NY3d 1096 [2021]; *see generally People v Franklin*, 137 AD3d 550, 551 [1st Dept 2016], *lv denied* 27 NY3d 1132 [2016]). Moreover, given that defendant "never asked to represent himself . . . , the issue of self-representation never arose and defendant's present claim that the court should have advised him of his right to proceed pro se is baseless" (*People v Pines*, 298 AD2d 179, 180 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]; *see also People v Crooks*, 95 AD3d 417, 417 [1st Dept 2012], *lv denied* 19 NY3d 995 [2012]).

By moving to withdraw his plea solely on other grounds, defendant failed to preserve his current contention that his guilty plea was involuntary on the ground that he misunderstood the terms of the plea bargain (*see People v Sarrazini*, 95 AD3d 459, 459 [1st Dept 2012], *lv denied* 19 NY3d 967 [2012]; *see generally People v Cato*, 199 AD3d 1388, 1389 [4th Dept 2021]). In any event, defendant's claimed misunderstanding of the plea bargain is "belied by the record of the plea proceedings, which establishes that [he] was fully aware of the conditions of the plea bargain" (*People v Burke*, 197 AD2d 731, 731 [3d Dept 1993]; *see Sarrazini*, 95 AD3d at 459-460; *People v Ramos*, 56 AD3d 1180, 1181 [4th Dept 2008], *lv denied* 12 NY3d 761 [2009]). Defendant "may not now claim that he misunderstood the terms of the plea bargain, which were clearly stated on the record and which are subject to but one interpretation" (*People v Ramirez*, 137 AD2d 770, 770 [2d Dept 1988], *lv denied* 71 NY2d 1031 [1988]; *see People v Howell*, 60 AD3d 1347, 1347 [4th Dept 2009]).

Finally, defendant contends that defense counsel was ineffective for making a comment that, in defendant's view, was adverse to defendant's motion to withdraw his plea. We reject that contention because defense counsel's purportedly adverse comment was made *after* the court had already denied defendant's motion to withdraw his plea (*see People v Clendinen*, 4 AD3d 116, 117 [1st Dept 2004], *lv denied* 2 NY3d 797 [2004]; *see also People v Walker*, 176 AD3d 747, 747-748 [2d Dept 2019]; *People v Martinez*, 166 AD3d 1558, 1559-1560 [4th Dept 2018]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-00788

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALTON J. ELLIS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), entered June 18, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order adjudicating him to be a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points under risk factors 3, 4 and 12, and that the court deprived him of due process when it sua sponte assessed points under risk factor 2 for having engaged in deviate sexual intercourse. We agree with defendant that the court erred in assessing points under risk factor 4, and we therefore deduct 20 points from his score on the risk assessment instrument (RAI). Doing so reduces defendant's score to 95, making him a presumptive level two risk. Neither defendant nor the People sought a departure from the presumptive risk level. We therefore modify the order by determining that defendant is a level two risk pursuant to SORA.

As a preliminary matter, we note that defendant failed to preserve his contention that the court violated his due process rights by sua sponte assessing 15 more points under risk factor 2 than requested by the People (*see People v Chrisley*, 172 AD3d 1914, 1914-1915 [4th Dept 2019]; *see generally People v Koons*, 108 AD3d 1212, 1212-1213 [4th Dept 2013]). We decline to review that contention in the interest of justice (*see People v Charache*, 32 AD3d 1345, 1345 [4th Dept 2006], *affd* 8 NY3d 829 [2007]; *cf. Chrisley*, 172 AD3d at

1915).

With respect to risk factor 12, we reject defendant's contention that the court erred in determining that he failed to accept responsibility for his crime. Although defendant admitted to the police that he had sexual contact with the victim and later defendant pleaded guilty to sexual abuse in the first degree, we agree with the court that defendant minimized his conduct when discussing his offense with the probation officer who prepared the presentence investigation report, thus warranting the assessment under risk factor 12 (*see People v Berdejo*, 192 AD3d 923, 924 [2d Dept 2021], *lv denied* 37 NY3d 912 [2021]; *People v Askins*, 148 AD3d 1598, 1599 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v Dubuque*, 35 AD3d 1011, 1011 [3d Dept 2006]). Thus, "[t]aking all of defendant's statements together, we conclude that they 'do not reflect a genuine acceptance of responsibility as required by the risk assessment guidelines' " (*Askins*, 148 AD3d at 1599).

The court erred, however, in assessing 20 points under risk factor 4 for having engaged in a continuous course of sexual misconduct. Points may be assessed under risk factor 4 if, as relevant here, the People establish by clear and convincing evidence that defendant engaged in "two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see People v Haresign*, 149 AD3d 1578, 1579 [4th Dept 2017]). Here, "[a]lthough the People presented evidence that defendant engaged in acts of sexual contact with the victim on more than one occasion, they failed to establish 'when these acts occurred relative to each other' " (*People v Edmonds*, 133 AD3d 1332, 1332 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]), and thus failed "to demonstrate that such instances were separated in time by at least 24 hours" (*People v Jarama*, 178 AD3d 970, 971 [2d Dept 2019]; *see People v Farrell*, 142 AD3d 1299, 1300 [4th Dept 2016]).

Defendant's remaining contention that the court erred in assessing points under risk factor 3 "is academic because, even without the [2]0 points at issue, defendant would still qualify as a level two risk" (*People v Robinson*, 160 AD3d 1441, 1442 [4th Dept 2018]; *see People v Riddick*, 139 AD3d 1121, 1122 [3d Dept 2016]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

57

KA 17-01071

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVONTAE BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered April 7, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, criminal possession of a weapon in the second degree, assault in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed on count three of the indictment shall run concurrently with the sentence imposed on count one of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of robbery in the first degree (Penal Law § 160.15 [4]), criminal possession of a weapon in the second degree (§ 265.03 [3]), assault in the first degree (§ 120.10 [4]), and assault in the second degree (§ 120.05 [6]), under a theory of accomplice liability (*see* § 20.00). The conviction arises from defendant's gunpoint robbery and shooting of two victims in their vehicle during an ostensible marihuana purchase arranged by his codefendant, who was convicted of the same charges (*see People v Davis*, 177 AD3d 1323, 1323 [4th Dept 2019], *lv denied* 35 NY3d 969 [2020]).

Defendant's contention that Supreme Court erred in admitting in evidence the recordings of two jail telephone calls is preserved for our review only with respect to the first recorded call (*see* CPL 470.05 [2]; *People v Bennett*, 94 AD3d 1570, 1570-1571 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012], *reconsideration denied* 19 NY3d 1101 [2012]). In any event, we conclude that defendant's contention is without merit in all respects. The recorded calls, which "tended to establish that defendant and the codefendant were acquaintances," were relevant inasmuch as "persons are more likely to commit crimes with

acquaintances than strangers" (*Davis*, 177 AD3d at 1324 [internal quotation marks omitted]). Moreover, contrary to defendant's assertions, the recorded calls were not cumulative to other evidence (*see People v Everett*, 183 AD3d 417, 419 [1st Dept 2020], *lv denied* 35 NY3d 1065 [2020]), and their probative value was not "substantially outweighed by the danger that [the evidence would] unfairly prejudice the other side or mislead the jury" (*People v Scarola*, 71 NY2d 769, 777 [1988]; *see People v Boyd*, 159 AD3d 1358, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]; *People v McIntosh*, 158 AD3d 1289, 1291 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). We note that the court's limiting instruction minimized any prejudice to defendant (*see Boyd*, 159 AD3d at 1362).

We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to meet his burden of establishing " 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]).

Next, defendant contends that the evidence is legally insufficient to establish his identity as a perpetrator of the offenses on the grounds that the eyewitness identification testimony was flawed and the prosecution lacked DNA or other forensic evidence to corroborate the eyewitness testimony. That contention is preserved for our review inasmuch as defendant's motion for a trial order of dismissal at the close of the People's case was " 'specifically directed' at the alleged error" now advanced on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]), and defendant renewed his motion at the close of all the proof (*cf. People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). Nonetheless, defendant's contention lacks merit. "Legal sufficiency review requires that we view the evidence in the light most favorable to the prosecution, and, when deciding whether a jury could logically conclude that the prosecution sustained its burden of proof, [w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Allen*, 36 NY3d 1033, 1034 [2021] [internal quotation marks omitted]; *see People v Hampton*, 21 NY3d 277, 287-288 [2013]; *People v Delamota*, 18 NY3d 107, 113 [2011]). Viewed in that light, we conclude that the evidence—including the identification testimony of the two victims, who each had a close view of defendant during the incident, identified the perpetrator as defendant from review of his social media profile shortly after the incident, and provided an in-court identification of defendant at trial—is legally sufficient to establish defendant's identity as a perpetrator of the offenses (*see People v Spencer*, 191 AD3d 1331, 1331-1332 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; *People v Perkins*, 160 AD3d 1455, 1455 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]; *People v Kindred*, 60 AD3d 1240, 1241 [3d Dept 2009], *lv denied* 12 NY3d 926 [2009]). Furthermore, given the direct and circumstantial evidence of defendant's identity, the lack of forensic evidence does not render the evidence legally insufficient (*see generally People v Randolph*, 180 AD3d 716, 717 [2d Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *People v Wilson*, 71 AD3d 1333, 1335 [3d Dept 2010]; *Kindred*,

60 AD3d at 1241).

Defendant failed to preserve for our review his further contention that the evidence is legally insufficient to support the conviction of assault in the first degree with respect to the serious physical injury element, inasmuch as he did not specifically raise that issue in his motion for a trial order of dismissal (*see Gray*, 86 NY2d at 19; *People v Moses*, 197 AD3d 951, 953 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021], *reconsideration denied* 37 NY3d 1163 [2022]; *People v Wright*, 41 AD3d 1221, 1222 [4th Dept 2007], *lv denied* 9 NY3d 928 [2007]). In any event, that contention lacks merit. Here, the female victim testified that the shooting necessitated immediate and follow-up surgeries to repair her arm and hand with hardware and a tendon transfer, with additional surgery planned, and resulted in numbness and an inability to use her fingers for common tasks, as well as the need to wear a splint to keep her fingers straight and prevent her hand from clawing, all of which persisted at the time of trial over 1½ years after the shooting. Despite the absence of medical proof, we conclude that the evidence is legally sufficient to establish that the female victim sustained serious physical injury in the form of protracted impairment of the function of a bodily organ (*see* Penal Law § 10.00 [10]; *People v Joyce*, 150 AD3d 1632, 1633 [4th Dept 2017], *lv denied* 31 NY3d 1118 [2018]; *see also People v Baker*, 156 AD3d 1485, 1485 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018], *reconsideration denied* 31 NY3d 1145 [2018]).

Contrary to defendant's further contention, 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 with respect to defendant's identity as a perpetrator (*see People v Thomas*, 176 AD3d 1639, 1640 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see Thomas*, 176 AD3d at 1640; *see generally Bleakley*, 69 NY2d at 495). Indeed, the "[i]ssues of identification and credibility, including the weight to be given to inconsistencies in testimony, were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*Thomas*, 176 AD3d at 1640 [internal quotation marks omitted]). Additionally, given the relative strength of the victims' identifications, and the corroborating circumstantial evidence that defendant and codefendant were acquaintances who acted in concert to set up and execute the robbery of the victims, we reject defendant's contention that the lack of forensic evidence renders the verdict against the weight of the evidence (*see Kindred*, 60 AD3d at 1241; *People v Lunetta*, 38 AD3d 1303, 1305 [4th Dept 2007], *lv denied* 8 NY3d 987 [2007]). We also reject defendant's contention that the conviction of assault in the first degree is against the weight of the evidence with respect to the element of serious physical injury (*see People v Felong*, 192 AD3d 1664, 1665-1666 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *see generally Joyce*, 150 AD3d at 1633).

Defendant contends that the court erred in directing that the sentence on the count of assault in the first degree (assault of the female victim) run consecutively to the sentence imposed on the count of assault in the second degree (assault of the male victim). We reject that contention. Here, our review of the record—including the evidence that three or four shots were fired, each of which constituted a separate and distinct act (*see People v McKnight*, 16 NY3d 43, 49 [2010]), as well as the circumstances surrounding the shooting such as the timing of the shots relative to the victims' positions in the vehicle and the locations of their injuries—"establishes that there was a sufficient factual basis for the court to conclude that the victims were wounded by different bullets, thereby supporting the imposition of consecutive sentences in connection with the assault convictions" (*People v Rivera*, 262 AD2d 31, 31 [1st Dept 1999], *lv denied* 93 NY2d 1025 [1999]; *see People v Munnerlyn*, 193 AD3d 981, 983 [2d Dept 2021], *lv denied* 37 NY3d 973 [2021]; *People v Holmes*, 92 AD3d 957, 957 [2d Dept 2012], *lv denied* 19 NY3d 961 [2012]; *cf. People v Banks*, 181 AD3d 973, 977 [3d Dept 2020], *lv denied* 35 NY3d 1025 [2020]; *People v Jones*, 41 AD3d 507, 508-509 [2d Dept 2007], *lv denied* 9 NY3d 877 [2007]).

We also reject defendant's contention that the court erred in directing that the sentence on the count of assault in the first degree run consecutively to the sentence imposed on the count of criminal possession of a weapon in the second degree. Here, we conclude that the record supports the inference that "there was a completed possession of the firearm for purposes of [Penal Law §] 265.03 (3) before defendant [entered the vehicle], and thus consecutive sentences were permissible" (*People v Redmond*, 182 AD3d 1020, 1023 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *see People v Brown*, 21 NY3d 739, 751 [2013]; *People v Ellison*, 151 AD3d 1905, 1906 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Evans*, 132 AD3d 1398, 1398-1399 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]).

We agree with defendant, however, that the court erred in directing that the sentence on the count of assault in the first degree run consecutively to the sentence imposed on the count of robbery in the first degree because the robbery was the predicate felony for the felony assault (*see* Penal Law § 70.25 [2]; *People v Miller*, 148 AD3d 1689, 1690 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). Inasmuch as "[t]he felony upon which felony assault is predicated is a material element of that crime," the sentence imposed on the count of assault in the first degree must run concurrently with the sentence imposed on the count of robbery in the first degree (*People v Ahedo*, 229 AD2d 588, 589 [2d Dept 1996], *lv denied* 88 NY2d 964 [1996]; *see People v Plume*, 145 AD3d 1469, 1472 [4th Dept 2016]; *see generally People v Parks*, 95 NY2d 811, 814-815 [2000]). We therefore modify the judgment accordingly.

Finally, the sentence as modified is not unduly harsh or severe.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

74

KA 20-00237

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON SCOTT, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered December 17, 2019. The judgment convicted defendant upon a jury verdict of burglary in the third degree and petit larceny.

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 burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25). We affirm.

Defendant's contention that the prosecutor violated the duty of fair dealing and undermined the integrity of the grand jury proceeding by failing to divulge that two prosecution witnesses were accomplices who had received immunity for their testimony was not raised before defendant moved to set aside the verdict pursuant to CPL 330.30 (1) and is therefore unpreserved (*see People v Sheltray*, 244 AD2d 854, 854-855 [4th Dept 1997], *lv denied* 91 NY2d 897 [1998]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Padro*, 75 NY2d 820, 821 [1990], *rearg denied* 75 NY2d 1005 [1990], *rearg dismissed* 81 NY2d 989 [1993]). In any event, we conclude that defendant's contention is without merit inasmuch as the grand jury minutes reveal that the prosecutor properly divulged the witnesses' immunity to the grand jury. Further, even assuming, arguendo, that the prosecutor erred in failing to properly divulge the witnesses' immunity to the grand jury, we conclude that the single error does not constitute a pervasive, willful pattern of bias and misconduct such that the integrity of the grand jury proceeding was compromised (*see People v Wilcox*, 194 AD3d 1352, 1355 [4th Dept 2021]; *People v Jones*, 194 AD3d 1358, 1360 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *see generally People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied*

23 NY3d 948 [2014]).

We reject defendant's further contention that County Court erred in denying his request to charge the jury that one of the prosecution's witnesses was an accomplice as a matter of law (*see generally People v Sage*, 23 NY3d 16, 24-25 [2014]; *People v Basch*, 36 NY2d 154, 157 [1975]). In light of the " 'different inferences [that] may reasonably be drawn' from the evidence" (*Sage*, 23 NY3d at 24), the court properly submitted the issue of the witness's accomplice status to the jury (*see People v Kaminski*, 90 AD3d 1692, 1692 [4th Dept 2011], *lv denied* 20 NY3d 1100 [2013]; *People v Brink*, 78 AD3d 1483, 1485 [4th Dept 2010], *lv denied* 16 NY3d 742 [2011], *reconsideration denied* 16 NY3d 828 [2011]).

Insofar as defendant contends that the People failed to present legally sufficient evidence establishing that he unlawfully entered a building or that he stole property, we conclude that he failed to preserve those contentions for our review (*see* CPL 470.05 [2]; *see generally 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]). Although "an acquittal would not have been unreasonable based on the questionable credibility of [certain prosecution witnesses] at trial" (*Brink*, 78 AD3d at 1484), " 'matters of credibility are for the jury to resolve' " (*People v Pierce*, 303 AD2d 966, 966 [4th Dept 2003], *lv denied* 100 NY2d 565 [2003]), and we cannot conclude on this record that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; *see People v Lankford*, 162 AD3d 1583, 1584 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *People v Zafuto*, 72 AD3d 1623, 1624 [4th Dept 2010], *lv denied* 15 NY3d 758 [2010]).

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

82

CA 21-00916

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

IN THE MATTER OF THE ESTATE OF GERALD R. CLIFFORD

WILLIAM N. CLIFFORD AND JAMES E. MORRIS, ESQ., AS CO-EXECUTORS OF THE ESTATE OF GERALD R. CLIFFORD, DECEASED, PETITIONERS-RESPONDENTS;

DANIEL CLIFFORD, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

HARTER SECREST & EMERY LLP, ROCHESTER (JERAULD E. BRYDGES OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a decree of the Surrogate's Court, Monroe County (John M. Owens, S.), entered December 16, 2020. The decree judicially settled the final account of the executors of the Estate of Gerald R. Clifford, deceased.

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

Memorandum: On appeal from a final decree judicially settling the amended account of the executors of the Estate of Gerald R. Clifford (Estate), respondent contends that Surrogate's Court erred in concluding that he lacked standing to seek an accounting of the Estate. We conclude that the final decree should be affirmed.

When Gerald R. Clifford (decedent) passed away, he left behind a spouse and three children, including respondent. Pursuant to the terms of the will filed with the Surrogate, which are undisputed and of which we take judicial notice via NYSCEF (*see 1591 Second Ave. LLC v Metropolitan Transp. Auth.*, 202 AD3d 582, 583 [1st Dept 2022]; *Samuels v Montefiore Med. Ctr.*, 49 AD3d 268, 268 [1st Dept 2008]; *cf. Matter of Carano*, 96 AD3d 1556, 1556 [4th Dept 2012]; *see generally Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-21 [2d Dept 2009]), decedent left all of his tangible personal property to his spouse. With respect to everything else, decedent made a " 'Formula Gift' " to a "By-Pass Trust," giving "a fractional share equal to [his] Estate Tax Exemption to the Trustees of the By-Pass Trust." Pursuant to the terms of the By-Pass Trust, decedent's spouse and descendants were income beneficiaries of the trust and, upon the spouse's death, the property in the By-Pass Trust was to be distributed to decedent's descendants.

Respondent sought to compel an accounting of the Estate and filed

voluminous discovery demands on the Estate. For several months, the Estate indicated an intent to respond to the demands, but it thereafter objected to the demands as "overly broad, unduly burdensome, and/or designed solely to harass." The Estate then filed a motion seeking, inter alia, to vacate respondent's discovery demands, contending that respondent lacked standing to proceed against the Estate inasmuch as he was merely a trust beneficiary, not an actual beneficiary or executor of the Estate. The Surrogate concluded that respondent lacked standing and that the Estate had not waived its right to assert standing as a defense to the discovery demands. Based on that determination, the Surrogate dismissed respondent's discovery demands and issued its final decree.

On this appeal, respondent contends that, as a remainderperson and permissible recipient of income and principal of the By-Pass Trust, he had standing as a "person interested" in the Estate to compel an accounting of the Estate under SCPA 2205 (2) (b). We reject that contention.

Unlike SCPA 1410, only certain parties may seek a compulsory accounting of an estate under SCPA 2205 (2). One of them is a "person interested" in the estate (SCPA 2205 [2] [b]). Pursuant to SCPA 103 (39), a "person interested" in an estate is "[a]ny person entitled or allegedly entitled to share *as beneficiary in the estate* or the trustee in bankruptcy or receiver of such person" (emphasis added). In our view, the By-Pass Trust, and not respondent, is the entity that is "entitled to share as beneficiary in the estate" (*id.*; *cf. Benjamin v Morgan Guar. Trust Co. of N.Y.*, 163 AD2d 135, 136-137 [1st Dept 1990]).

Subject to certain exceptions not relevant here, "the beneficiaries of bequests in trust such as [respondent] do not normally need to be made parties [to an accounting under SCPA 2210] due to the fact that they are represented by their trustee (SCPA 2210 [7]). That trustee actually represents the persons interested in the trust and remains accountable to them on the trustee's accounting if there is a failure to properly protect their interest" (*Matter of Ziegler*, 157 Misc 2d 423, 427 [Sur Ct, NY County 1993]; *see Matter of Hunter*, 6 AD3d 117, 123 [2d Dept 2004], *affd* 4 NY3d 260 [2005]). Inasmuch as the trustees are the real parties interested in the administration of the estate, and there is a well-recognized need to avoid "vexatious litigation" (*Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 466 [1985]), we conclude that the Surrogate properly determined that respondent lacked standing to seek an accounting from the Estate.

Contrary to respondent's further contention, we conclude that the Estate did not waive its right to assert the issue of standing inasmuch as it has not yet filed a responsive pleading or a preanswer motion to dismiss (*see* CPLR 3211 [e]; *cf. Matter of Santoro v Schreiber*, 263 AD2d 953, 953 [4th Dept 1999], *appeal dismissed* 94 NY2d 817 [1999]; *see generally US Bank N.A. v Nelson*, 36 NY3d 998, 999 [2020]). Respondent further contends that the Estate is estopped from claiming that it should be relieved of its obligation to produce

requested documents. Inasmuch as that contention is raised for the first time on appeal, we conclude that the contention is not preserved for our review (*see Earley v Town of Allegany*, 298 AD2d 906, 907 [4th Dept 2002], *lv denied* 7 NY3d 713 [2006]). In any event, we further conclude that the contention lacks merit inasmuch as respondent failed to establish that he changed his position in reliance on the Estate's representations (*see Wilson v City of Buffalo*, 298 AD2d 994, 995-996 [4th Dept 2002], *lv denied* 99 NY2d 505 [2003]; *see generally Rich v Orlando*, 128 AD3d 1330, 1331 [4th Dept 2015]).

In light of our determination, respondent's remaining contention is moot.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

83

CA 21-00120

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

IN THE MATTER OF DANIEL R. SACK,
PLAINTIFF-PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO COMMON COUNCIL AND TM MONTANTE
DEVELOPMENT LLC, DEFENDANTS-RESPONDENTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CARIN S. GORDON OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT CITY OF BUFFALO COMMON COUNCIL.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JAMES P. BLENK OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT TM MONTANTE DEVELOPMENT LLC.

ARTHUR J. GIACALONE, BUFFALO, FOR PLAINTIFF-PETITIONER-RESPONDENT.

Appeals from a judgment (denominated order) of the Supreme Court, Erie County (Mark A. Montour, J.), entered December 17, 2020 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, annulled and set aside a resolution of defendant-respondent City of Buffalo Common Council.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motions are granted and the petition-complaint is dismissed.

Memorandum: Plaintiff-petitioner (plaintiff) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that defendant-respondent City of Buffalo Common Council's designation of a certain Urban Development Action Area was illegal. Defendants-respondents (defendants) moved to dismiss the petition-complaint (complaint) on, inter alia, standing grounds. Supreme Court denied the motions, holding as relevant here that plaintiff had common-law taxpayer standing, but not traditional standing, to challenge the disputed designation. The court subsequently granted judgment in plaintiff's favor. Defendants appeal, and we now reverse.

Preliminarily, we note that a CPLR article 78 proceeding "is not the proper vehicle to test the validity of a legislative enactment" such as an Urban Development Action Area designation (*Kamhi v Town of Yorktown*, 141 AD2d 607, 608 [2d Dept 1988], *affd* 74 NY2d 423 [1989]).

Plaintiff's hybrid article 78 proceeding and declaratory judgment action is thus properly a declaratory judgment action alone (*see Parker v Town of Alexandria*, 138 AD3d 1467, 1467-1468 [4th Dept 2016]; *Centerville's Concerned Citizens v Town Bd. of Town of Centerville*, 56 AD3d 1129, 1129 [4th Dept 2008]).

On the merits, we agree with defendants that plaintiff lacks common-law taxpayer standing (*see Matter of Colella v Board of Assessors of County of Nassau*, 95 NY2d 401, 410-411 [2000]; *see generally Matter of Schulz v State of New York*, 81 NY2d 336, 344-345 [1993]; *Matter of Urban League of Rochester, N.Y. v County of Monroe*, 49 NY2d 551, 554 [1980]; *Boryszewski v Brydges*, 37 NY2d 361, 362-364 [1975]). Moreover, we reject plaintiff's contention—raised as an alternative ground for affirmance—that he has traditional standing (*see Sloninski v City of New York*, 173 AD3d 801, 802 [2d Dept 2019]; *Matter of Brighton Residents Against Violence to Children v MW Props.*, 304 AD2d 53, 57 [4th Dept 2003], *lv denied* 100 NY2d 514 [2003]; *Matter of Unger v Public Health Council*, 215 AD2d 988, 989 [3d Dept 1995], *lv denied* 87 NY2d 807 [1996]; *see generally Consumers Union of U.S., Inc. v State of New York*, 5 NY3d 327, 352 [2005]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769-775 [1991]). Thus, because plaintiff has neither traditional standing nor common-law taxpayer standing to challenge the disputed designation, the court should have granted defendants' motions to dismiss the complaint on that basis (*see Colella*, 95 NY2d at 408). Defendants' remaining contentions are academic in light of our determination.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

110

KA 18-01270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRAE TATUM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 23, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the second degree, criminal possession of a weapon in the second degree (four counts) and attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), arising from a series of incidents in which shots were fired at several people from the passenger side of a moving vehicle, injuring one person and killing another. The person identified as the shooter is a member of a gang, and the shootings took place in a rival gang's territory. Defendant was apprehended driving the relevant vehicle shortly after the shooting.

On appeal, defendant contends that County Court erred in refusing to substitute counsel in place of his assigned attorney. We reject that contention.

Defendant initially contends that the court failed to conduct the requisite minimal inquiry into his complaints regarding his attorney. It is well settled that "[w]hether counsel is substituted is within the 'discretion and responsibility' of the trial judge . . . , and a court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[]' " for substitution (*People v Porto*, 16 NY3d 93, 99-100 [2010]; *see People v Sides*, 75 NY2d 822, 824 [1990]; *People v Gibson*, 126 AD3d 1300, 1301 [4th Dept 2015]). Thus, where a defendant makes "specific factual allegations of 'serious complaints about counsel' " (*Porto*, 16 NY3d at 100; *see*

Gibson, 126 AD3d at 1301-1302), "the court must make at least 'some minimal inquiry' to determine whether the defendant's claims are meritorious" (*Gibson*, 126 AD3d at 1302). Upon conducting that inquiry, the court may substitute counsel where good cause is shown (*see Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 824; *Gibson*, 126 AD3d at 1302).

Here, defendant's requests for substitution of counsel were based on conclusory assertions that defense counsel was ineffective, was not adequately presenting defendant's points, and had not spoken to defendant often enough about the case. Those assertions were insufficient to require a further inquiry by the court (*see People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]; *People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *People v Benson*, 265 AD2d 814, 814-815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]). Even assuming, arguendo, that a further inquiry was required, we nevertheless conclude that the court made a sufficient inquiry into defendant's complaints, including those concerning the alleged lack of communication between defendant and defense counsel. The court "repeatedly allowed defendant to air his concerns about defense counsel, and after listening to them reasonably concluded that defendant's vague and generic objections had no merit or substance" (*People v Linares*, 2 NY3d 507, 511 [2004]), rather they were merely generic complaints concerning strategy or lack of communication with defense counsel (*see Barnes*, 156 AD3d at 1418; *People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]).

Defendant further contends that the court erred in permitting the People to introduce certain evidence from which the jury could conclude that he was a member of a gang. We reject that contention. It is well settled that "[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]; *see People v Bailey*, 32 NY3d 70, 83 [2018]), and "[e]vidence regarding gang activity can be admitted to provide necessary background, or when it is inextricably interwoven with the charged crimes, or to explain the relationships of the individuals involved" (*People v Kims*, 24 NY3d 422, 438 [2014] [internal quotation marks omitted]; *see Bailey*, 32 NY3d at 83). Here, the evidence at issue was admissible to establish motive for the shootings and defendant's relationship with the shooter, and as part of the chain of circumstantial evidence connecting defendant to the crimes. Consequently, the court did not abuse its discretion in concluding that the probative value of the relevant evidence outweighed the potential for undue prejudice (*see Bailey*, 32 NY3d at 83; *People v Hilts*, 187 AD3d 1408, 1414-1415 [3d Dept 2020], *lv denied* 36 NY3d 973 [2020]; *People v Polk*, 84 AD2d 943, 945 [4th Dept 1981]). Moreover, "the court's prompt limiting instruction [and subsequent final instruction] ameliorated any prejudice" (*People v Emmons*, 192 AD3d 1658, 1659 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see People v Gomez*, 153 AD3d 724, 725 [2d Dept 2017], *lv denied* 30 NY3d 1060 [2017]; *see generally People v Davis*, 58 NY2d 1102, 1104 [1983]).

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

115

KA 19-01819

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALI MUHAMMAD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered October 30, 2018. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that his statements to detectives should have been suppressed as the product of an illegal arrest. We reject that contention. The People established at a suppression hearing that the detective who took defendant into custody had viewed surveillance videos in which the individual who shot the victim wore a distinctive tricolor sweatshirt and red shoes with white laces. The detective later viewed surveillance video recorded the same day at a nearby grocery store showing an individual wearing the same distinctive clothing and identified the individual as defendant. We conclude that, "once [the] detective[] viewed the surveillance videos and identified defendant as the individual wearing the [distinctive clothing], probable cause existed for his arrest" (*People v Young*, 152 AD3d 981, 983 [3d Dept 2017], *lv denied* 30 NY3d 955 [2017]; *see People v Jackson*, 168 AD3d 473, 473-474 [1st Dept 2019], *lv denied* 33 NY3d 977 [2019]).

Contrary to defendant's further contention, 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 a different verdict would have been unreasonable and thus that the

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

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

116

KA 19-01411

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT MOTHERSELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered April 3, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the plea is vacated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]), defendant contends that Supreme Court erred in refusing to suppress evidence obtained during the execution of a search warrant. We reject that contention because we conclude that the search warrant was supported by probable cause. It is well settled with respect to search warrants that "[p]robable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). Here, even assuming, arguendo, that certain information upon which the warrant was based was stale or does not pass the *Aguilar-Spinelli* test, we conclude that the remaining information in the application was sufficient to establish probable cause to believe that evidence of a crime might be found in defendant's residence. "Indeed, the evidence in defendant's trash of illegal activity, even standing alone, was sufficient to support a reasonable belief that drugs and/or evidence of drug sales

might be found in" his residence (*People v Harris*, 83 AD3d 1220, 1222 [3d Dept 2011], *lv denied* 17 NY3d 817 [2011]).

Contrary to defendant's contention, the court properly denied his motion for a *Franks/Alfinito* hearing. Defendant failed to "make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard of the truth, was included by the affiant in the [search] warrant affidavit, and . . . [that such] statement [was] necessary to the finding of probable cause" (*People v Navarro*, 158 AD3d 1242, 1243 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018] [internal quotation marks omitted]).

Defendant further contends that the court should have suppressed his statements to the police because the People failed to establish that he knowingly, voluntarily, and intelligently waived his *Miranda* rights. We reject that contention. Defendant specifically contends that the court should have credited his hearing testimony that he waived his rights only because he felt threatened by the number of officers in the room while he was questioned and due to his prior interactions with one of those officers. The court concluded that defendant's testimony to that extent was not credible, and "[i]t is well settled that the 'factual findings and credibility determinations of a hearing court are entitled to great deference on appeal, and [they] will not be disturbed unless clearly unsupported by the record' " (*People v Hinojoso-Soto*, 161 AD3d 1541, 1543 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018]; *see People v Rodas*, 145 AD3d 1452, 1452-1453 [4th Dept 2016]; *People v Hogan*, 136 AD3d 1399, 1400 [4th Dept 2016], *lv denied* 27 NY3d 1070 [2016]). Here, the record supports the court's credibility determinations, and we find no basis to reject them.

We agree, however, with defendant that his plea was not knowingly, voluntarily, and intelligently entered. Although defendant failed to preserve that contention for our review (*see People v Lodge*, 54 AD3d 875, 876 [2d Dept 2008]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). "A trial court is constitutionally required to ensure that a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences" (*People v Belliard*, 20 NY3d 381, 385 [2013]; *see People v Streber*, 145 AD3d 1531, 1532 [4th Dept 2016]), and where "a guilty plea has been induced by an unfulfilled promise, the plea must be vacated or the promise must be honored" (*People v Dame*, 100 AD3d 1032, 1034 [3d Dept 2012], *lv denied* 21 NY3d 1003 [2013]). Here, the court repeatedly promised defendant, who was proceeding pro se, that he would retain the right to appeal from all of its orders. The court reiterated that promise during the plea colloquy and did not advise defendant that he was forfeiting any challenge by pleading guilty. We conclude, however, that "[b]y pleading guilty, defendant forfeited his . . . contention that the first two counts of the indictment were duplicitous" (*People v Bower*, 27 AD3d 1122, 1123 [4th Dept 2006], *lv denied* 6 NY3d 892 [2006]). Consequently, "[i]nasmuch as the record establishes that defendant, in accepting the plea, relied on a promise of the court that could not, as a matter of law, be honored, defendant is entitled

to vacatur of his guilty plea" (*People v Smith*, 160 AD3d 1475, 1476 [4th Dept 2018]; *see People v Colon*, 151 AD3d 1915, 1919 [4th Dept 2017]; *cf. People v Rowe*, 158 AD3d 1265, 1266 [4th Dept 2018], *lv denied* 31 NY3d 1017 [2018]).

Based on our determination, we do not address defendant's contention that the sentence imposed is unduly harsh and severe.

We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

121

CA 21-00693

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

IN THE MATTER OF SHERBK, INC.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE BOARD OF ZONING APPEALS,
LMP SYRACUSE PROPERTY OWNER, LLC, AND
TEMPLE SOCIETY OF CONCORD,
RESPONDENTS-RESPONDENTS.

DOUGLAS H. ZAMELIS, COOPERSTOWN, FOR PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR RESPONDENT-RESPONDENT CITY OF SYRACUSE BOARD OF ZONING APPEALS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN R. LANGEY OF COUNSEL), FOR RESPONDENT-RESPONDENT LMP SYRACUSE PROPERTY OWNER, LLC.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR RESPONDENT-RESPONDENT TEMPLE SOCIETY OF CONCORD.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered April 9, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motions of respondents to dismiss the petition.

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

Memorandum: In this CPLR article 78 proceeding in the nature of prohibition, petitioner appeals from a judgment granting, on several grounds, the motions of respondents to dismiss the petition against them. Petitioner commenced this proceeding seeking, among other relief, a judgment prohibiting respondent City of Syracuse Board of Zoning Appeals (ZBA) from acting on an application by respondents Temple Society of Concord (Society) and LMP Syracuse Property Owner, LLC (LMP) for certain area variances concerning a parcel that the Society owned and that LMP proposed to develop. In its petition, petitioner, the owner and operator of an apartment complex on land adjoining the subject parcel, contended that the application was actually an untimely appeal from the denial of a prior application for permits to develop the subject parcel submitted by LMP and the Society to the City of Syracuse Division of Code Enforcement. Supreme Court granted respondents' motions and dismissed the petition against them

on several alternative grounds, including that the deadline applicable to appeals does not apply because the variance application was not an appeal and, with respect to the ZBA's motion, that the agency action was not ripe for review. We affirm.

Initially, we note that petitioner does not challenge the judgment insofar as it granted the ZBA's motion to dismiss the petition against it on ripeness grounds. We therefore conclude that " 'any issue with respect to that part of the [judgment] is deemed abandoned' " (*Killian v Captain Spicer's Gallery, LLC*, 140 AD3d 1764, 1767 [4th Dept 2016], *lv dismissed* 29 NY3d 981 [2017]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Even assuming, arguendo, that petitioner did not abandon its challenge to the ripeness determination, we affirm that part of the judgment for reasons stated in the decision at Supreme Court.

We reject petitioner's contention that the variance application before the ZBA was an untimely appeal and thus that the court erred in granting the motions. Contrary to petitioner's contention, General City Law § 81-a (5) (b), which requires that an appeal from any "order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of the zoning local law or ordinance" be taken within 60 days of the filing thereof, does not mandate a different result. Indeed, we reject petitioner's contention that the ZBA is only empowered to hear appeals in zoning matters and thus that the variance application must be an appeal. The General City Law provides that the jurisdiction of the ZBA shall be appellate only, "[u]nless otherwise provided by local law or ordinance" (§ 81-a [4]), and part A, section II, article 5 (3) of the City of Syracuse Zoning Rules and Regulations states that the ZBA, among other things, "shall hear, decide, grant or deny applications for variances and exceptions as herein provided." Thus, the applicable "local law or ordinance" provides that the ZBA has jurisdiction over applications for variances (General City Law § 81-a [4]) and, in holding a hearing and preparing to render a determination on the application at issue, the ZBA was determining an application rather than deciding an appeal (*see e.g. Matter of Davis v Zoning Bd. of Appeals of City of Buffalo*, 177 AD3d 1331, 1332 [4th Dept 2019]). Inasmuch as the failure to meet the appellate deadline was the sole basis for petitioner's contention that the ZBA was proceeding without or in excess of its jurisdiction, petitioner failed to state a cause of action for prohibition.

Petitioner's remaining contentions are academic in light of our determination.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

147

CA 21-01188

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

IRENE RICHARDS, EXECUTRIX OF THE ESTATE OF
LOREN J. RICHARDS, DECEASED, AND INDIVIDUALLY
AND AS SURVIVING SPOUSE OF LOREN J. RICHARDS,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(ACTION NO. 1.)

DAVID D. LAURES AND MADELYN J. LAURES,
PLAINTIFFS-RESPONDENTS,

V

AIR & LIQUID SYSTEMS CORPORATION, ET AL.,
DEFENDANTS,
AND HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.
(ACTION NO. 2.)

ROGER J. ADAMEK, EXECUTOR OF THE ESTATE OF ANN M.
ADAMEK, DECEASED, AND INDIVIDUALLY AS THE SURVIVING
SPOUSE OF ANN M. ADAMEK, PLAINTIFF-RESPONDENT,

V

HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(ACTION NO. 3.)

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

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 13, 2021. The order, among other things, denied that part of the motion of defendant Hedman Resources Limited seeking to vacate the default liability judgments granted in favor of plaintiffs.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Memorandum: Plaintiffs commenced these actions and moved for orders permitting substituted service on Hedman Resources Limited (defendant) pursuant to CPLR 311 (b). Defendant was a Canadian-based corporation that is now defunct, having stopped all business in 2007 and having its corporate charter cancelled in 2016. Supreme Court granted the motions and issued orders allowing plaintiffs to serve defendant by serving the summonses and complaints on a responsible person of suitable age and discretion at the virtual office of defendant's President and Chief Executive Officer (CEO). Defendant defaulted, and plaintiffs obtained default liability judgments against it, with the issue of damages reserved for trial. The court thereafter denied defendant's motion, brought almost five years later, insofar as it sought to vacate the default judgments and dismiss plaintiffs' complaints for lack of personal jurisdiction. We now affirm.

Contrary to defendant's contention, we conclude that the court providently exercised its discretion in allowing substituted service on defendant pursuant to CPLR 311 (b) (*see Safadjou v Mohammadi* [appeal No. 3], 105 AD3d 1423, 1424 [4th Dept 2013]). Substituted service pursuant to that section is permissible if service would be impracticable "under [CPLR 311 (a)] or any other law" (CPLR 311 [b]). CPLR 311 (a) (1) provides in relevant part that personal service on a corporation shall be made by delivering the summons "to an officer, director, . . . or . . . any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to [Business Corporation Law §§ 306 or 307]." Plaintiffs do not dispute that Business Corporation Law § 307, which governs service of process on an unauthorized foreign corporation, applies here. Thus, plaintiffs could have acquired personal jurisdiction over defendant by serving it pursuant to either CPLR 311 (a) (1) or Business Corporation Law § 307 (*see Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1413-1414 [4th Dept 2013]; *Van Wert v Black & Decker*, 246 AD2d 773, 774 [3d Dept 1998]). We therefore agree with defendant that plaintiffs were required to show that service was impracticable under both CPLR 311 (a) (1) and Business Corporation Law § 307 before the court could order substituted service (*see* CPLR 311 [b]).

"[A] 'plaintiff seeking to effect expedient service must make some showing that the other prescribed methods of service could not be made' " (*Markoff v South Nassau Community Hosp.*, 91 AD2d 1064, 1065 [2d Dept 1983], *affd* 61 NY2d 283 [1984]), but a plaintiff is not required to submit proof of actual prior attempts to serve the party pursuant to those methods (*see Safadjou*, 105 AD3d at 1424; *Astrologo v Serra*, 240 AD2d 606, 606 [2d Dept 1997]). Without such a showing of impracticability, a court is without power to direct expedient service (*see Joseph II. v Luisa JJ.*, 201 AD3d 43, 49 [3d Dept 2021]; *David v Total Identity Corp.*, 50 AD3d 1484, 1485 [4th Dept 2008]; *Corbo v Stephens*, 272 AD2d 502, 503 [2d Dept 2000]).

Contrary to defendant's contention, plaintiffs established that service pursuant to both CPLR 311 (a) (1) and Business Corporation Law

§ 307 would be impracticable. With respect to CPLR 311 (a) (1), plaintiffs' counsel established that he had made prior attempts to personally serve defendant's President and CEO, defendant's sole remaining officer, without success. With respect to Business Corporation Law § 307, plaintiffs submitted evidence that defendant had ceased operations in 2007 and that, since late 2007, it no longer had an office address. Plaintiffs thereby established that service pursuant to Business Corporation Law § 307 would be impracticable (*see generally Chan v Onyx Capital, LLC*, 156 AD3d 1361, 1363 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]).

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

154

KA 19-01864

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES TRALA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 30, 2018. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (six counts).

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of six counts of burglary in the third degree (Penal Law § 140.20), defendant contends that his plea was involuntarily entered because it was induced by a sentencing commitment from Supreme Court that could not legally be fulfilled. Because he did not move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve his contention for our review (*see People v Bellamy*, 170 AD3d 1652, 1653 [4th Dept 2019]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

As defendant further contends, and the People correctly concede, his waiver of the right to appeal is invalid because the court's "oral colloquy mischaracterized it as an absolute bar to the taking of an appeal" (*People v McCrayer*, 199 AD3d 1401, 1401 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we reject defendant's contentions that the court erred in refusing to suppress certain evidence as the fruit of an unlawful arrest and that the sentence is unduly harsh and severe.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

156

KA 13-01423

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOOKER ARCHIE, DEFENDANT-APPELLANT.

THE FOTI LAW FIRM, ROCHESTER (JESSICA LAUREN NACLERIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered May 16, 2013. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) 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 two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that he was denied effective assistance of counsel due to defense counsel's failure to review all of defendant's recorded jail telephone calls and defense counsel's reliance on the prosecutor's statement that the only call that was relevant was the one played to the jury (*see generally People v Harris*, 147 AD3d 1354, 1356 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). We have reviewed defendant's remaining claims of ineffective assistance of counsel, and we conclude that, because "the evidence, the law, and the circumstances [in this] case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement [has] been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's further contention that County Court erred in denying his request for a circumstantial evidence charge. That instruction was not required "because the People's case was not based entirely on circumstantial evidence" (*People v Way*, 115 AD3d 558, 558 [1st Dept 2014], *lv denied* 24 NY3d 1048 [2014]; *see People v Daddona*, 81 NY2d 990, 992 [1993]). The People offered direct evidence by way

of defendant's admissions in the recorded jail call played to the jury that he had possessed the gun and attempted to shoot the victim, but the gun had jammed (*see generally People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Rogers*, 103 AD3d 1150, 1154 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]).

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

172.1

TP 21-01449

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

IN THE MATTER OF WYATT A., A MINOR CHILD,
BY HIS NATURAL MOTHER, SARAH R., PETITIONER,

V ORDER

HOWARD ZUCKER, AS NEW YORK STATE COMMISSIONER
OF HEALTH, AND NEW YORK STATE DEPARTMENT OF
HEALTH, RESPONDENTS.

LAW OFFICE OF BERNARD V. KLEINMAN, PLLC, SOMERS (BERNARD V. KLEINMAN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Ontario County [Brian D. Dennis, A.J.], entered September 15, 2021) to review a determination of respondents. The determination denied the request of petitioner for the installation of a whole house generator.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 15 and 16, 2022,

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

179.1

CAF 22-00452

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

IN THE MATTER OF MALACHI P.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMMA P.-T., RESPONDENT-APPELLANT.

TARA P.-T., INTERVENOR-RESPONDENT.
(APPEAL NO. 2.)

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

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered March 10, 2021 in a proceeding pursuant to Family Court Act article 10. The order, among other things, directed respondent to stay away from the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the third ordering paragraph of the order of fact-finding entered March 10, 2021 is vacated, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the same memorandum as in *Matter of Kayla K. (Emma P.-T.)* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

179

CAF 21-00468

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

IN THE MATTER OF KAYLA K.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMMA P.-T., RESPONDENT-APPELLANT.

TARA P.-T., INTERVENOR-RESPONDENT.
(APPEAL NO. 1.)

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

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered March 10, 2021 in a proceeding pursuant to Family Court Act article 10. The order, among other things, directed respondent to stay away from the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the third ordering paragraph of the order of fact-finding entered March 10, 2021 is vacated, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent stepmother purports to appeal from an order of fact-finding determining that she neglected the older child and derivatively neglected the younger child and directed the entry of orders of protection in the children's favor. As a preliminary matter, we exercise our discretion to treat the stepmother's notice of appeal as valid and deem the appeal to be taken from the orders of protection entered as a result of that order, inasmuch as the orders of protection constitute the orders of disposition pursuant to Family Court Act § 1052 (a) (iv) (*see generally* CPLR 5520 [c]; *Matter of Threet v Threet*, 79 AD3d 1743, 1743 [4th Dept 2010]). Thus, in appeal No. 1, the stepmother appeals from an order of protection entered for the benefit of the oldest child and, in appeal No. 2, she appeals from an order of protection entered for the benefit of the youngest child.

In appeal No. 1, contrary to the stepmother's contention, there is a sound and substantial basis in the record for Family Court's determination that the stepmother neglected the oldest child by

inflicting excessive corporal punishment on her (*see generally* Family Ct Act § 1012 [f] [i] [B]; *Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]). "Although a parent may use reasonable force to discipline his or her child and to promote the child's welfare . . . , the infliction of excessive corporal punishment constitutes neglect" (*Balle S.*, 194 AD3d at 1395). "[A] single incident of excessive corporal punishment is sufficient to support a finding of neglect" (*Matter of Steven L.*, 28 AD3d 1093, 1093 [4th Dept 2006], *lv denied* 7 NY3d 706 [2006]; *see Balle S.*, 194 AD3d at 1395). Here, by the stepmother's own admission, the older child was complying with the stepmother's directive to go upstairs and calm down after a verbal altercation between the two. Nonetheless, the stepmother, upon reflection, decided to follow the older child upstairs and strike her in the face, breaking the older child's glasses and causing her nose to bleed for several minutes.

We conclude in appeal No. 2 that the finding of derivative neglect with respect to the younger child also has a sound and substantial basis in the record inasmuch as "the evidence with respect to the child found to be . . . neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the stepmother's] care" (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1520 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]; *see Balle S.*, 194 AD3d at 1396).

In both appeals, the stepmother contends that the court erred in issuing orders of protection in favor of the children with a duration of five years. We agree, and we therefore reverse the orders of protection in appeal Nos. 1 and 2 and vacate the third ordering paragraph of the order of fact-finding entered March 10, 2021. In an article 10 proceeding, the court may issue an order of protection, but such order shall expire no later than the expiration date of "such other order made under this part, except as provided in subdivision four of this section" (Family Ct Act § 1056 [1]). Subdivision (4) of section 1056 allows a court to issue an independent order of protection until a child's 18th birthday, but only against a person "who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household." Here, the orders of protection do not comply with Family Court Act § 1056 (1) and (4) because no other dispositional orders were issued with respect to the children at the time the court issued the orders of protection and the stepmother, although no longer living in the home, remains married to the children's mother (*see Matter of Nevaeh T. [Abreanna T.-Wilbert J.]*, 151 AD3d 1766, 1768 [4th Dept 2017]). Moreover, the court erred in issuing the dispositional orders of protection without first holding a dispositional hearing. "The Family Court Act directs that a dispositional hearing be held as a condition precedent to the entry of a dispositional order such as the order of protection granted by Family Court here" (*Matter of Suffolk County Dept of Social Services v James M.*, 83 NY2d 178, 183 [1994], citing Family Ct Act

§§ 1045, 1047, 1052 [a]; *see Matter of Jonathan M.*, 295 AD2d 513, 514 [4th Dept 2002]). In each appeal, we therefore remit the matter for such a hearing (*see James M.*, 83 NY2d at 183; *Jonathan M.*, 295 AD2d at 514).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

185

CAF 21-00561

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

IN THE MATTER OF TARA N. P.-T.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMMA P.-T., RESPONDENT-APPELLANT.

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered April 1, 2021 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner and petitioner's children.

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

Memorandum: Respondent appeals from an order of protection issued in favor of petitioner, who is respondent's wife, and petitioner's children in connection with Family Court's determination that respondent committed acts constituting various family offenses (*see* Family Ct Act § 812 [1]). We affirm. Contrary to respondent's contention, the court sufficiently stated the facts it deemed essential to its decision (*cf. Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]; *see generally* CPLR 4213 [b]; Family Ct Act § 165 [a]). The court, however, did not specify the subsections of the criminal statutes upon which it based its findings that respondent had committed the family offenses of "disorderly conduct, harassment, and aggravated harassment." Exercising our independent review power (*see Matter of Telles v Dewind*, 140 AD3d 1701, 1701 [4th Dept 2016]), we conclude that the record is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of disorderly conduct (*see* Penal Law § 240.20 [1]; *Telles*, 140 AD3d at 1702), harassment in the second degree (*see* § 240.26 [1]; *Matter of Cousineau v Ranieri*, 185 AD3d 1421, 1422 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]), and aggravated harassment in the second degree (*see* § 240.30 [1] [a]; *Matter of Paliani v Selapack*, 178 AD3d 1425, 1425-1426 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]). We have reviewed respondent's remaining contention and conclude that it

is without merit.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

203

KA 19-01959

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HURST, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 26, 2019. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree (two counts), rape in the first degree (three counts), robbery in the third degree, sexual abuse in the first degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]), three counts of rape in the first degree (§ 130.35 [1]), and one count of sexual abuse in the first degree (§ 130.65 [1]). We affirm.

We reject defendant's contention that Supreme Court erred in denying his request for access to all of the mental health records of the victim in this case. "Mental health records are discoverable where a defendant can demonstrate a good faith basis for believing that the records contain data relevant and material to the determination of guilt or innocence, a decision which will rest largely on the exercise of a sound discretion by the trial court" (*People v Tirado*, 109 AD3d 688, 688 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013], *reconsideration denied* 22 NY3d 1091 [2014] [internal quotation marks omitted]; *see generally People v Gissendanner*, 48 NY2d 543, 548 [1979]). Such "records should be disclosed only when their confidentiality is significantly outweighed by the interests of justice" (*Tirado*, 109 AD3d at 688 [internal quotation marks omitted]; *see People v Felong*, 283 AD2d 951, 952 [4th Dept 2001], *lv denied* 96 NY2d 862 [2001]).

Here, defendant requested, inter alia, all of the victim's mental health records based on the People's *Brady* disclosures indicating that the victim had made several statements during preparation for her grand jury testimony that raised concerns about her mental state. Under those circumstances, the court conducted an in camera review of the requested mental health records, and granted defendant's request in part by turning over to him approximately 50 pages of redacted mental health records. We conclude that the court did not abuse its discretion in disclosing to defendant only those select portions of the victim's mental health records because it properly "balanced defendant's 6th Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential" (*People v McCray*, 102 AD3d 1000, 1005 [3d Dept 2013], *affd* 23 NY3d 193 [2014], *rearg denied* 24 NY3d 947 [2014]; *see Gissendanner*, 48 NY2d at 549-551). In reaching our conclusion, we have ourselves reviewed the voluminous mental health records of the victim sought by defendant, and note that the court "provided an appropriate sample of documents that covers all of the victim's relevant and material mental health issues" (*McCray*, 102 AD3d at 1005). Indeed, the records sought by defendant that the court did not disclose were either wholly irrelevant to the determination of defendant's guilt or innocence (*see Tirado*, 109 AD3d at 688-689), or largely cumulative of those records that the court did, in fact, disclose to defendant (*see McCray*, 23 NY3d at 198-199). Thus, there is no " 'reasonable possibility' " that defendant would have been acquitted if the jury had access to all of the records sought by defendant (*id.* at 198).

Defendant's contention that the evidence is legally insufficient to support the conviction is unpreserved for our review because defendant's general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Turner*, 197 AD3d 997, 997 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]). 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]). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]; *see People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Here, the jury was "entitled to credit the testimony of the People's witnesses . . . over the testimony of defendant's witness[ ]," and we perceive no reason to disturb the jury's credibility determinations in

that regard (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). Although the victim obviously suffered from some mental health problems, the jury was aware of her history and diagnoses, and there was nothing about the victim's trial testimony that was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018] [internal quotation marks omitted]). Further, despite some inconsistencies in the victim's testimony, we conclude that her "testimony was not 'so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Lewis*, 129 AD3d 1546, 1548 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]; *see People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]), and any such inconsistencies merely presented issues of credibility for the jury to resolve (*see People v Cross*, 174 AD3d 1311, 1314-1315 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]). Finally, the lack of any DNA evidence does not render the verdict against the weight of the evidence (*see e.g. People v Foulkes*, 117 AD3d 1176, 1176-1177 [3d Dept 2014], *lv denied* 24 NY3d 1084 [2014]; *People v Lozada*, 41 AD3d 1042, 1043 [3d Dept 2007], *lv denied* 9 NY3d 924 [2007]), especially in light of the other physical evidence that connected defendant to the crimes in question.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 17-01629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMI A. ALIM, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS 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 (Melchor E. Castro, A.J.), rendered August 4, 2017. The judgment convicted defendant upon a jury verdict of driving while intoxicated, a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree, criminal mischief in the fourth degree (two counts), aggravated unlicensed operation of a motor vehicle in the third degree, reckless driving, leaving the scene of a property damage accident and refusal to take a breath test.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of count nine of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, among other things, driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and "refusal to take breath test" (§ 1194 [1] [b]), defendant contends that County Court erred in admitting certain evidence during the prosecutor's redirect examination of a police witness. We reject that contention.

During voir dire, defense counsel questioned the prospective jurors about whether they would feel comfortable in determining whether a person was in an intoxicated condition without having seen that person before and, in her opening statement, defense counsel indicated that the Rochester Police Officer who observed defendant and placed him under arrest had never seen him before that incident. Defense counsel also questioned the officer on cross-examination regarding the fact that he had never observed defendant prior to this arrest. On redirect examination, over defendant's objection, the court permitted the prosecutor to question the officer regarding a

subsequent occasion on which the officer interacted with defendant for 40 to 45 minutes and observed that defendant sounded clear and articulate, that he walked without staggering or stumbling, and that his eyes were clear, all of which differed from the officer's observations of defendant on the day of the incident.

Initially, we note that the evidence of the officer's observations of defendant in a non-intoxicated condition on another occasion was admissible to show that, on the day at issue here, defendant's "body's responses differed from those of a sober person" (*People v Hager*, 69 NY2d 141, 142 [1987]; *see e.g. People v Rundblad*, 154 AD2d 746, 747 [3d Dept 1989]). Furthermore, it is well settled that the "scope of redirect examination falls within the trial court's sound discretion" (*People v Greene*, 13 AD3d 991, 993 [3d Dept 2004], *lv denied* 5 NY3d 789 [2005]; *see People v Mack*, 128 AD3d 1456, 1457 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]). Even assuming, arguendo, that the evidence was otherwise inadmissible on the People's direct case, we reject defendant's contention that the court erred in concluding that defense counsel opened the door to the admission of the officer's observations on the subsequent date. The court "was well within its discretion in concluding that the course defendant wanted to take would mislead the jury, and that the jury should hear about [the officer's observations]" (*People v Massie*, 2 NY3d 179, 185 [2004]; *see People v Bedell*, 55 AD3d 1397, 1398 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]). This is not a case in which the prosecution offered evidence that was " 'remote' or 'tangential' to the subject matter the defendant brought up," and the court had ample basis for concluding that the testimony regarding the subsequent observation was " 'necessary to meet' " the impression created by the defense (*Massie*, 2 NY3d at 185; *see Bedell*, 55 AD3d at 1398). Moreover, any error in admitting the evidence was harmless inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant if the evidence had not been introduced (*see generally People v Kello*, 96 NY2d 740, 744 [2001]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Finally, we note that defendant's "refusal to submit to a breath test did not establish a cognizable offense" (*People v Bembry*, 199 AD3d 1340, 1342 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022] [internal quotation marks omitted]; *see People v Adams*, 201 AD3d 1311, 1312 [4th Dept 2022]; *see generally People v Thomas*, 46 NY2d 100, 108 [1978], *appeal dismissed* 444 US 891 [1979]). We therefore modify the judgment by reversing that part convicting defendant of count nine of the indictment and dismissing that count (*see Adams*, 201 AD3d at 1312; *People v Harris*, 201 AD3d 1327, 1327-1328 [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

219

KA 17-00274

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRIEKE J. BRADLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 3, 2017. The judgment convicted defendant upon a jury verdict of robbery in the second degree, unlawful fleeing a police officer in a motor vehicle in the third degree and reckless driving.

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, robbery in the second degree (Penal Law § 160.10 [2] [b]). We affirm.

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 as to identity (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, an acquittal would have been unreasonable on this record given the uncontested fact that defendant was apprehended, in the middle of the night, driving a car that had been carjacked about 10 minutes earlier and two miles away by a man who, as detailed in the victim's contemporaneous 911 call, looked and dressed exactly like defendant. Defendant's theory of the case—i.e., that he just happened across an abandoned vehicle that, unbeknownst to him, had been carjacked within the past 10 minutes by a different man who looked and dressed exactly like him—"is so implausible that it could not create a reasonable doubt as to defendant's guilt" (*People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]).

Defendant further contends that, by addressing him *by name* at one point during a brief colloquy concerning the victim's trial testimony,

Supreme Court unduly interjected itself into the case and irreparably tainted the victim's in-court identification. Defendant's arguments, however, are unpreserved for appellate review (*see People v Brown*, 90 AD3d 575, 576 [1st Dept 2011], *affd* 21 NY3d 739 [2013]; *People v Kennard*, 160 AD3d 1378, 1380 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]; *cf. People v Perry*, 251 AD2d 895, 896-897 [3d Dept 1998], *lv denied* 94 NY2d 827 [1999]). Under the circumstances, defendant's belated application for a mistrial—which asserted only that the court had tainted the victim's in-court identification—was inadequate to preserve that particular argument (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v McCorkle*, 272 AD2d 273, 274 [1st Dept 2000], *lv denied* 95 NY2d 936 [2000]). In any event, the court's fleeting reference to defendant by his name was innocuous and inconsequential, and it could not have prejudiced him or impacted the verdict in any sense (*see People v Robles*, 116 AD3d 1071, 1072 [2d Dept 2014], *lv denied* 24 NY3d 1088 [2014]). Contrary to defendant's assertion, the record squarely belies any comparison between the court's polite appellation in this case and the prosecutor's impermissibly suggestive conduct in *People v Powell* (67 NY2d 661, 662 [1986]).

Finally, the sentence is not unduly harsh or severe.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

224

KA 17-00273

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRIEKE J. BRADLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered January 3, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant correctly contends that he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we reject defendant's challenge to Supreme Court's refusal to suppress physical evidence (*see e.g. People v Foster*, 85 NY2d 1012, 1013-1014 [1995]; *People v Binion*, 100 AD3d 1514, 1516 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013]; *People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]; *see also People v Smith*, 185 AD3d 1203, 1204-1206 [3d Dept 2020]). Defendant's remaining contention lacks merit (*see People v Suazo*, 144 AD3d 405, 405 [1st Dept 2016], *lv denied* 28 NY3d 1189 [2017]; *People v Becoats*, 88 AD2d 766, 767 [4th Dept 1982]; *see generally People v Graves*, 85 NY2d 1024, 1027 [1995]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAIO BARZEE, DEFENDANT-APPELLANT.

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

SAIO BARZEE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 20, 2013. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). We affirm.

Initially, as defendant contends in his main brief and as the People correctly concede, defendant's waiver of the right to appeal is invalid. Here, "there is no basis [in the record] upon which to conclude that [County Court] ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]). In addition, the court mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Osborn*, 198 AD3d 1363, 1363 [4th Dept 2021], *lv denied* 37 NY3d 1163 [2022]).

Defendant contends in his main and pro se supplemental briefs that his plea was not knowingly, voluntarily, and intelligently entered because the court threatened to impose a greater sentence in the event of a conviction following trial. Although that contention would survive even a valid waiver of the right to appeal (*see People v Juarbe*, 162 AD3d 1625, 1625 [4th Dept 2018]), defendant failed to move

to withdraw his plea or to vacate the judgment of conviction on that ground and thus failed to preserve his contention for our review (*see id.* at 1625-1626; *People v Kelly*, 145 AD3d 1431, 1431 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]; *see generally People v Grimes*, 53 AD3d 1055, 1056 [4th Dept 2008], *lv denied* 11 NY3d 789 [2008]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Kelly*, 145 AD3d at 1431).

Defendant's additional challenges in his pro se supplemental brief to the voluntariness of his plea are likewise not preserved for our review (*see People v White*, 156 AD3d 1489, 1490 [4th Dept 2017], *lv denied* 31 NY3d 988 [2018]). Defendant also failed to preserve for our review the contention in his pro se supplemental brief that the court was biased against him and should have recused itself (*see* CPL 470.05 [2]; *People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *People v Wyzykowski*, 120 AD3d 1603, 1603 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]; *People v Jones*, 79 AD3d 1773, 1773-1774 [4th Dept 2010], *lv denied* 16 NY3d 832 [2011]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends in his pro se supplemental brief that he was denied effective assistance of counsel, which rendered his plea involuntary, because his attorneys, among other things, failed to properly investigate, did not adequately seek discovery, failed to move to suppress certain evidence, provided improper advice, and coerced him into pleading guilty. Defendant's contention survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[s'] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Johnson*, 195 AD3d 1420, 1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]). Here, defendant's contention "is based, in part, on matter appearing on the record and, in part, on matter outside the record, and, thus, constitutes a mixed claim of ineffective assistance" (*Johnson*, 195 AD3d at 1421 [internal quotation marks omitted]; *see People v Frazier*, 63 AD3d 1633, 1634 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]). Where, as here, "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the [mixed] claim' " to the extent it survives the guilty plea (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]; *see Johnson*, 195 AD3d at 1422; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants modification or

reversal of the judgment.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-02255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAHKEEN LEWIS-BUSH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 29, 2019. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, attempted assault in the first degree and criminal possession of a weapon in the second degree (six 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 directing that the sentences on all counts shall run concurrently with respect to each other, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and six counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant's conviction stems from his conduct in driving a vehicle in which the codefendants were passengers and parking that vehicle near a gas station, where he waited while the codefendants exited the vehicle, walked to the gas station, and opened fire on a vehicle that was parked there with the driver inside. When the codefendants ran back to defendant's vehicle, police officers in a nearby patrol car quickly apprehended defendant and the codefendants.

Defendant contends that County Court failed to perceive its discretion under CPL 210.20 (4) when it granted the People's request to resubmit the matter to a second grand jury. Defendant failed to preserve that contention for our review (*see* CPL 470.15 [6] [a]), and we conclude that it is without merit in any event (*see generally People v Lewis*, 138 AD3d 1495, 1495-1496 [4th Dept 2016], *lv denied* 28 NY3d 932 [2016]). Although the court cited to an incorrect statute in

granting the People's motion, the order shows that the court was aware that it had the discretion to grant or deny the motion. We reject defendant's further contention that the prosecutor's opening statement was deficient. The opening statement "sufficiently set forth the charges and facts that the People expected to prove" (*People v Manchester*, 123 AD3d 1285, 1288 [3d Dept 2014], *lv denied* 26 NY3d 931 [2015]; *see People v Kurtz*, 51 NY2d 380, 384 [1980], *cert denied* 451 US 911 [1981]; *People v Nuffer*, 70 AD3d 1299, 1300 [4th Dept 2010]).

Defendant contends that the evidence is legally insufficient because the People failed to establish that he shared a community of purpose with the codefendants, who were the actual shooters, and failed to establish that the victim was the intended target. Defendant's latter contention is not preserved for our review because he did not raise that ground in support of his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Carpenter*, 187 AD3d 1556, 1557-1558 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]), and we otherwise reject his contention. Surveillance video showed defendant driving into the gas station at the same time that the victim entered that same gas station from another entrance. Defendant drove his vehicle slowly past a gas pump and exited the lot, then drove the vehicle to an adjacent street and stopped the vehicle abruptly, just past the station. Defendant never put the vehicle in park as he waited for the codefendants to return to the vehicle. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant was a knowing accomplice to the attempted murder of the victim (*see People v McGee*, 87 AD3d 1400, 1401-1402 [4th Dept 2011], *affd* 20 NY3d 513 [2013]; *People v Griffin*, 145 AD3d 1551, 1552 [4th Dept 2016]; *see generally People v Scott*, 25 NY3d 1107, 1109-1110 [2015]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that the court erred in denying his request for a missing witness charge with respect to the victim. "A missing witness charge is appropriate when three conditions are met. First, the witness's knowledge must be material to the trial . . . Second, the witness must be expected to give noncumulative testimony favorable to the party against whom the charge is sought . . . Third, the witness must be available to that party" (*People v Smith*, 33 NY3d 454, 458 [2019] [internal quotation marks omitted]). Here, defendant met his initial burden of demonstrating "(1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, (2) that such witness can be expected to testify favorably to the opposing party, and (3) that such party has failed to call the witness to testify" (*id.* at 458-459 [internal quotation marks omitted]). The People, however, established that the charge "would not be appropriate" because the witness was unavailable (*id.* at 459; *see People v Mayes*, 200 AD3d 718, 719 [2d Dept 2021], *lv denied* 38

NY3d 929 [2022]; *see generally People v Gonzalez*, 68 NY2d 424, 428 [1986]). The People explained that they had intended to call the victim as a witness, but he did not appear at trial as scheduled. The court granted the People an adjournment and issued a material witness warrant. At the adjourned date, the People set forth their attempts to locate the victim, which were unsuccessful. The court determined that the People had exercised due diligence, and we conclude that the court did not err in denying defendant's request (*see People v Williams*, 94 AD3d 1555, 1556 [4th Dept 2012]; *People v Mobley*, 77 AD3d 488, 489 [1st Dept 2010], *lv denied* 15 NY3d 954 [2010]).

Defendant contends that he was denied effective assistance of counsel because defense counsel failed to call certain witnesses who would have provided exculpatory testimony. We reject that contention. The record supports the conclusion that defense counsel had strategic and legitimate reasons for not calling those witnesses inasmuch as there were concerns with respect to their credibility (*see People v Addison*, 199 AD3d 1321, 1325 [4th Dept 2021]; *see generally People v Nicholson*, 26 NY3d 813, 831 [2016]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we further conclude, contrary to the remaining claims of ineffective assistance of counsel raised by defendant, that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant contends that the court failed to make a sufficient inquiry regarding an actual conflict of interest, which defendant did not waive, with respect to the representation of the victim by the same attorney who represented defendant during posttrial proceedings. Contrary to defendant's contention, there existed in this case only a potential conflict of interest, not an actual conflict of interest (*see generally People v Sanchez*, 21 NY3d 216, 222-223 [2013]; *People v Solomon*, 20 NY3d 91, 97-98 [2012]). That attorney was not assigned to represent defendant in this matter until after the conclusion of defendant's trial, and there was no indication that the attorney was still representing the victim at that time. With respect to the potential conflict of interest, defendant failed to establish that the potential conflict "actually operated on the defense" (*Sanchez*, 21 NY3d at 223; *see People v McCutcheon*, 109 AD3d 1086, 1087 [4th Dept 2013], *lv denied* 22 NY3d 1042 [2013]; *People v Lewis*, 97 AD3d 1097, 1098 [4th Dept 2012], *lv denied* 19 NY3d 1103 [2012]), and thus reversal is not required.

Defendant contends that the court erred in failing to hold a hearing on his CPL 330.30 (1) motion to set aside the verdict on the ground of ineffective assistance of counsel. We reject that contention. Defendant's allegations in his motion papers concerned matters outside the record, and the court "lacked the authority to consider facts not appearing on the record" in determining the motion (*People v Green*, 92 AD3d 894, 896 [2d Dept 2012], *lv denied* 19 NY3d 961 [2012]; *see People v Hardy*, 49 AD3d 1232, 1233 [4th Dept 2008], *affd* 13 NY3d 805 [2009]).

Finally, we agree with defendant that the sentence is unduly

harsh and severe, particularly considering the disparity between the plea offer and the sentence received. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently with each other (*see* CPL 470.15 [6] [b]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 20-01380

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

IN THE MATTER OF ADDY HALL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JESUS VELEZ, RESPONDENT-RESPONDENT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR PETITIONER-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-RESPONDENT.

EDWARD J. MARTIN, LOCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered September 28, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject children to respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, among other things, modified a prior order of custody and visitation by prohibiting any contact between the parties' children and the mother's male friend. We affirm.

As a preliminary matter, we note that the mother failed to include the prior order in the record on appeal. Although " 'omission from the record on appeal of the order sought to be modified ordinarily would result in dismissal of the appeal . . . , there is no dispute' concerning the custody [and visitation] provisions contained in that order," and we may therefore reach the merits of the issue raised on this appeal (*Matter of Gilman v Gilman*, 128 AD3d 1387, 1387 [4th Dept 2015]; *see Matter of Carey v Windover*, 85 AD3d 1574, 1574 [4th Dept 2011], *lv denied* 17 NY3d 710 [2011]).

We reject the mother's contention that Family Court erred in determining that it is in the best interests of the subject children to prohibit her friend from having contact with them. "Family Court is 'afforded wide discretion in crafting an appropriate visitation schedule' . . . and 'has the power to impose restrictions on [the children's] interactions with third parties during visitation if it is in the child[ren]'s best interests to do so' " (*Matter of David J. v Leeann K.*, 140 AD3d 1209, 1212 [3d Dept 2016]; *see Matter of Chromczak*

v Salek, 173 AD3d 1750, 1751-1752 [4th Dept 2019]). Here, the evidence in the record establishes that the mother's friend engaged in acts of violence in the presence of the children, repeatedly used drugs with the mother and, along with the mother, frequently and flagrantly violated the court's temporary order that the children not be in his presence. Consequently, the court properly determined that allowing the mother's friend to have contact with the children created an unnecessary risk to their health and well-being (*see Chromczak*, 173 AD3d at 1752). We thus conclude that the court's determination that it is in the children's best interests to have no contact with the mother's friend has a sound and substantial basis in the record (*see Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1755 [4th Dept 2020]; *see generally Matter of Schram v Nine*, 193 AD3d 1361, 1362 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

254

CA 21-00690

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

TITUS HOWELL, PLAINTIFF-APPELLANT,

V ORDER

TIMOTHY WALLACE AND BARBARA WALLACE,
DEFENDANTS-RESPONDENTS.

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (STACY A. MARRIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered April 21, 2021. The order, among other things, denied in part plaintiff's motion for summary judgment.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

259

KA 19-02224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK GATLING, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Wayne County Court (Richard M. Healy, J.), dated October 16, 2019. The appeal was held by this Court by order entered November 20, 2020, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (188 AD3d 1765 [4th Dept 2020]). The proceedings were held and completed.

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

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant, who relocated to New York State having been previously convicted of a sex offense in Connecticut, appeals from an order (written order) determining that he is a level two risk. We previously held this case, reserved decision, and remitted the matter to County Court for compliance with Correction Law § 168-n (3) (*People v Gatling*, 188 AD3d 1765 [4th Dept 2020]). Although the court's written order did not set forth the "findings of fact and conclusions of law on which the determinations are based" (§ 168-n [3]; *see Gatling*, 188 AD3d at 1765), we conclude that the written order together with the court's oral findings and conclusions on remittal "are clear, supported by the record and sufficiently detailed to permit intelligent appellate review" (*People v Houck*, 170 AD3d 1642, 1642 [4th Dept 2019], *lv denied* 33 NY3d 910 [2019] [internal quotation marks omitted]; *see People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016]; *People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013]).

We reject defendant's contention that the court erred in refusing to grant him a downward departure from his presumptive risk level. Defendant correctly asserts that a prolonged period at liberty without any reoffending sexual conduct constitutes a mitigating circumstance

that is, "as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines" (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Edwards*, 200 AD3d 1594, 1595 [4th Dept 2021]; *People v Sotomayer*, 143 AD3d 686, 687 [2d Dept 2016]; *see also People v Burgess*, 191 AD3d 1256, 1256-1257 [4th Dept 2021]). We conclude, however, that defendant failed to establish by a preponderance of the evidence the existence of that mitigating circumstance in this case inasmuch as the record establishes that he was incarcerated or otherwise under supervision for numerous offenses and violations for extensive periods of time between the underlying sex offense and his sex offender designation in New York State (*see People v Yglesias*, 180 AD3d 821, 823 [2d Dept 2020], *lv denied* 35 NY3d 910 [2020]; *People v Sprinkler*, 162 AD3d 802, 803 [2d Dept 2018], *lv denied* 32 NY3d 907 [2018]). Moreover, even if defendant surmounted the first two steps of the analysis (*see generally Gillotti*, 23 NY3d at 861), upon weighing the mitigating circumstance against the aggravating circumstances—most prominently defendant's " 'overall criminal history' " (*People v Duryee*, 130 AD3d 1487, 1488 [4th Dept 2015]), including his prior failures to register as a sex offender in Connecticut (*see People v Perez*, 158 AD3d 1070, 1071 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018])—we conclude that the totality of the circumstances establishes that defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism (*see Burgess*, 191 AD3d at 1257; *see generally People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

262

KA 20-01576

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CJ LOLLIE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered August 26, 2020. The judgment convicted defendant upon his plea of guilty of assault 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 plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that his waiver of the right to appeal is invalid, that he was improperly sentenced as a second felony offender, and that his negotiated sentence is unduly harsh and severe. We conclude that, during the plea colloquy, Supreme Court "made clear to defendant that the right to appeal was separate and distinct from the other rights that are automatically forfeited upon a plea of guilty" (*People v Johnson*, 140 AD3d 1738, 1738 [4th Dept 2016]) and specifically informed defendant that the waiver of the right to appeal precluded him from challenging the severity of the bargained-for sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]; *People v Fowler*, 134 AD3d 1529, 1530 [4th Dept 2015], *lv denied* 27 NY3d 996 [2016]). Consequently, defendant knowingly, voluntarily, and intelligently waived the right to appeal (*see generally Lopez*, 6 NY3d at 256), and the valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

With respect to defendant's contention that he was improperly sentenced as a second felony offender, the People correctly concede that a challenge to the legality of the sentence is not foreclosed by the valid waiver of the right to appeal (*see Lopez*, 6 NY3d at 255;

People v Lopez, 164 AD3d 1625, 1625 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

Defendant contends that he was improperly sentenced as a second felony offender because the federal predicate conviction is not the equivalent of a New York felony, but he failed to preserve that contention for our review (*see People v Wingfield*, 181 AD3d 1253, 1254 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], *reconsideration denied* 35 NY3d 1098 [2020]), and it does not fall within the narrow exception to the preservation rule that applies "when a sentence's illegality is readily discernible from the trial record" (*People v Santiago*, 22 NY3d 900, 903 [2013]). Indeed, the record submitted to this Court is insufficient to determine whether the federal conviction is the equivalent of a New York felony. Inasmuch as, under these circumstances, "[a] CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as 'unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20 [1]), and a determination of second felony offender status is an aspect of the sentence" (*People v Jurgins*, 26 NY3d 607, 612 [2015]), we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see Wingfield*, 181 AD3d at 1254; *cf. People v Hall*, 149 AD3d 1610, 1610 [4th Dept 2017]).

Defendant also contends that he was improperly sentenced as a second felony offender because the predicate felony offender statement failed to include the requisite tolling periods. Defendant, however, failed to preserve that contention and it is not reviewable under the narrow illegal sentence exception to the preservation requirement because the illegality of the sentence is "not 'readily discernible from the trial record' " (*People v Lashley*, 37 NY3d 1140, 1141 [2021]).

Defendant further failed to preserve for our review his contention that he was not properly sentenced as a second felony offender because the court failed to inform him of his right to contest the predicate conviction (*see People v Manigault*, 145 AD3d 1428, 1430 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]; *People v Irvin*, 111 AD3d 1294, 1296-1297 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014], *reconsideration denied* 26 NY3d 930 [2015]; *see generally* CPL 400.21 [3]). In any event, that contention lacks merit. Defendant acknowledged his prior conviction and we conclude that "the record establishes that defendant had an opportunity to controvert the allegations in the second felony offender statement but did not do so" (*Manigault*, 145 AD3d at 1430; *see Irvin*, 111 AD3d at 1297; *cf. People Davis* [appeal No. 1], 226 AD2d 1081, 1081 [4th Dept 1996], *lv denied* 88 NY2d 935 [1996]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to raise any challenge to the predicate felony offender statement (*see People v Barton*, 200 AD2d 888, 888 [3d Dept 1994], *lv denied* 83 NY2d 849 [1994]; *see also People v Crippa*, 245 AD2d 811, 812 [3d Dept 1997], *lv denied* 92 NY2d 850 [1998]). Here, defense counsel

negotiated a plea that "substantially reduced defendant's exposure to a much more lengthy term of imprisonment" (*Barton*, 200 AD2d at 888). We conclude that "[i]n negotiating the plea in question, it cannot be said that defense counsel did not provide meaningful representation" (*id.*; *see generally People v Baldi*, 54 NY2d 137, 146-147 [1981]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

267

CA 20-00692

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

CARMEN J. FINOCCHI, JR., AND KIM ELAINE FINOCCHI, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LIVE NATION INC., AND CPI TOURING (GENESIS-USA), LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (ANTHONY F. DESTEFANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Mark A. Montour, J.), entered February 10, 2020. The order and judgment dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted, the verdict is set aside, the Labor Law § 240 (1) claim is reinstated, judgment on liability is granted to plaintiffs on that claim, and a new trial is granted on damages only.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Carmen J. Finocchi, Jr. (plaintiff) when he was loading boxes of rigging equipment into a truck following a concert. After we determined on a prior appeal that there were triable issues of fact precluding summary judgment in defendants' favor with respect to the Labor Law § 240 (1) claim (*Finocchi v Live Nation Inc.*, 141 AD3d 1092, 1094 [4th Dept 2016]), the matter proceeded to a nonjury trial. Following that trial, Supreme Court dismissed the complaint on the ground that plaintiff's failure to use an appropriate safety device, i.e., a forklift, was the sole proximate cause of his injuries.

In appeal No. 1, plaintiffs appeal from the order and judgment dismissing their complaint. They contend that plaintiff's choice not to use a forklift cannot be deemed the sole proximate cause of his injuries, inasmuch as he did not forgo the available safety device "for no good reason" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). In appeal No. 2, plaintiffs appeal from the court's subsequent order that denied their motion to set aside the verdict

pursuant to, inter alia, CPLR 4404 (b).

Initially, inasmuch as the appeal from the order and judgment in appeal No. 1 brings up for review the propriety of the order in appeal No. 2, we dismiss appeal No. 2 (*see generally* CPLR 5501 [a] [2]; *Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.*, 192 AD3d 1608, 1608 [4th Dept 2021]; *Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

With respect to appeal No. 1, we agree with plaintiffs that the court erred in denying their posttrial motion inasmuch as the court's determination that plaintiff's choice to forgo using a forklift was the sole proximate cause of the accident could not be reached under any fair interpretation of the evidence (*see generally Burke v Women Gynecology & Childbirth Assoc., P.C.*, 195 AD3d 1393, 1394 [4th Dept 2021]; *Trimarco v Data Treasury Corp.*, 146 AD3d 1008, 1009 [2d Dept 2017]; *Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170 [4th Dept 2005]).

"To establish a sole proximate cause defense, a defendant must demonstrate that the plaintiff had adequate safety devices available; that [the plaintiff] knew both that they were available and that he [or she] was expected to use them; that [the plaintiff] chose *for no good reason* not to do so; and that had [the plaintiff] not made that choice he [or she] would not have been injured" (*Schutt v Bookhagen*, 186 AD3d 1027, 1028 [4th Dept 2020], *appeal dismissed* 36 NY3d 939 [2020] [emphasis added and internal quotation marks omitted]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 290-292 [2003]).

Here, although defendants established that there was an available safety device, i.e., a forklift, and that plaintiff knew that it was available and that he was expected to use it, plaintiffs established that the stage manager instructed plaintiff and his coworkers to lift the box manually. Regardless of whether that stage manager was plaintiff's actual supervisor, plaintiff was under no obligation to demand safer methods for moving the box (*see Greene v Raynors Lane Prop. LLC*, 194 AD3d 520, 522 [1st Dept 2021]; *Orellana v 7 W. 34th St., LLC*, 173 AD3d 886, 888 [2d Dept 2019]; *Gutierrez v 451 Lexington Realty LLC*, 156 AD3d 418, 419 [1st Dept 2017]). To expect plaintiff to refuse the stage manager's demands "overlooks the realities of construction work" (*Gutierrez*, 156 AD3d at 419).

"When faced with an . . . instruction to use an inadequate device [or no device at all], many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]). Even assuming, arguendo, that plaintiff should have refused the stage manager's demand, we conclude that, at most, plaintiff's "alleged conduct would amount only to comparative fault and . . . [could not] bar recovery under the statute" (*Schutt*, 186 AD3d at 1029

[internal quotation marks omitted]).

We also reject defendants' contention, raised as an alternative ground for affirmance, that plaintiff was not performing work covered under Labor Law § 240 (1) at the time he sustained his injuries. As plaintiffs correctly contend and the court properly determined, the work performed by plaintiff was covered work, inasmuch as it was ancillary to the demolition of a structure, i.e., the stage, and plaintiff was a member of the demolition team (*see Hensel v Aviator FSC, Inc.*, 198 AD3d 884, 886 [2d Dept 2021]; *see also Ruiz v 8600 Roll Rd.*, 190 AD2d 1030, 1031 [4th Dept 1993]; *see generally Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 883 [2003]).

Inasmuch as this Court has the authority to review the record and grant judgment as we deem warranted by the facts (*see Dryden Mut. Ins. Co. v Goessl*, 117 AD3d 1512, 1513 [4th Dept 2014], *affd* 27 NY3d 1050 [2016]; *Brooks v New York State Thruway Auth.*, 73 AD2d 767, 768 [3d Dept 1979], *affd* 51 NY2d 892 [1980]; *Rote v Gibbs*, 195 AD3d 1521, 1523-1524 [4th Dept 2021], *appeal dismissed* 37 NY3d 1106 [2021]), we reverse the order and judgment, grant the posttrial motion, set aside the verdict, reinstate the Labor Law § 240 (1) claim, grant judgment on liability in favor of plaintiffs on that claim, and remit the matter for a trial on damages only.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00363

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

CARMEN J. FINOCCHI, JR. AND KIM ELAINE FINOCCHI, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LIVE NATION INC., AND CPI TOURING (GENESIS-USA), LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (ANTHONY F. DESTEFANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 9, 2021. The order denied plaintiffs' motion to set aside the court's verdict following a nonjury trial.

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

Same memorandum as in *Finocchi v Live Nation Inc.* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

270

CA 21-00248

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

LISA PARKISON, AS CHAIR OF WAYNE FINGER LAKES SCHOOL WORKERS' COMPENSATION PLAN, PLAINTIFF-RESPONDENT,

V ORDER

KBM MANAGEMENT, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, ROCHESTER, RIVKIN RADLER LLP, UNIONDALE (EVAN H. KRINICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (J. Scott Odorisi, J.), entered January 15, 2021. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment and awarded plaintiff money damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

271

CA 21-00286

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

LISA PARKISON, AS CHAIR OF WAYNE FINGER LAKES SCHOOL WORKERS' COMPENSATION PLAN, PLAINTIFF-RESPONDENT,

V ORDER

KBM MANAGEMENT, INC., DEFENDANT-APPELLANT. (APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, ROCHESTER, RIVKIN RADLER LLP, UNIONDALE (EVAN H. KRINICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wayne County (J. Scott Odorisi, J.), entered February 18, 2021. The judgment awarded plaintiff money damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of J.F. Braun & Sons [Melo]*, 68 AD2d 831, 831 [1st Dept 1979]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

275

CA 21-00872

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

MICHAEL PACHAN AND MIRANDA PACHAN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SCOTT E. BROWN, DEFENDANT-RESPONDENT.

VANDETTE PENBERTHY LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HAGELIN SPENCER LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 14, 2021. The order denied plaintiffs' motion for summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is granted.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Michael Pachan (plaintiff) when he was shot by defendant while plaintiff and a friend were turkey hunting. Defendant, who was also turkey hunting, set up decoys and waited. He "saw something black" as well as "white" and, believing the object to be a male turkey, fired his shotgun, hitting both plaintiff and his friend. As a result of that incident, defendant was convicted upon a plea of guilty of attempted assault in the third degree (Penal Law §§ 110.00, 120.00). Plaintiffs moved for summary judgment on the issue of negligence, contending that defendant was negligent as a matter of law because he failed to confirm that the object he shot at was a turkey and that he is collaterally estopped, by virtue of his conviction, from relitigating the issue of his negligence. Supreme Court denied the motion. Plaintiffs appeal and we reverse.

We conclude that plaintiffs are entitled to summary judgment on the issue of negligence. We agree with plaintiffs that they established as a matter of law that defendant was negligent by failing to exercise the degree of care that a reasonable person "of ordinary prudence would exercise under the circumstances, commensurate with . . . the known dangers and risks reasonably to be foreseen" (*Mikula v Duliba*, 94 AD2d 503, 506 [4th Dept 1983]), and that defendant failed to raise an issue of fact in response. We also agree with plaintiffs

that triable issues of fact regarding plaintiff's comparative negligence do not preclude an award of summary judgment in plaintiffs' favor on the issue of defendant's negligence (*see Rodriguez v City of New York*, 31 NY3d 312, 323-325 [2018]).

To the extent that our prior determination in *Jacobs v Kent* (303 AD2d 1000, 1001 [4th Dept 2003]) holds otherwise, we note that our decision was issued before the Court of Appeals decided *Rodriguez*. The Court in *Rodriguez* concluded that a plaintiff may obtain summary judgment on the issue of a defendant's liability without establishing the absence of the plaintiff's comparative negligence (*see* 31 NY3d at 323). The Court of Appeals reasoned that "comparative negligence is *not* a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence" (*id.* at 320). Indeed, as CPLR 1411 "plainly states" (*Rodriguez*, 31 NY3d at 320), "[i]n any action to recover damages for personal injury, . . . the culpable conduct attributable to the [plaintiff] . . . shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion . . . attributable to the [plaintiff]" (CPLR 1411).

In light of our determination, we do not address plaintiffs' collateral estoppel contention.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

278

CA 21-00247

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

DARRIN WINKLEY, AS PRESIDENT OF ROCHESTER AREA SCHOOLS WORKERS' COMPENSATION PLAN, PLAINTIFF-RESPONDENT,

V ORDER

KBM MANAGEMENT, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.)

GOLDBERG SEGALLA LLP, ROCHESTER, RIVKIN RADLER LLP, UNIONDALE (EVAN H. KRINICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 15, 2021. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment and awarded plaintiff money damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

279

CA 21-00285

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

DARRIN WINKLEY, AS PRESIDENT OF ROCHESTER AREA SCHOOLS WORKERS' COMPENSATION PLAN, PLAINTIFF-RESPONDENT,

V ORDER

KBM MANAGEMENT, INC., DEFENDANT-APPELLANT. (APPEAL NO. 2.)

GOLDBERG SEGALLA LLP, ROCHESTER, RIVKIN RADLER LLP, UNIONDALE (EVAN H. KRINICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered February 17, 2021. The judgment awarded plaintiff money damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of J.F. Braun & Sons [Melo]*, 68 AD2d 831, 831 [1st Dept 1979]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

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TP 21-01567

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

IN THE MATTER OF LINDA MANISCALCO, PETITIONER,

V ORDER

S. SQUIRES, SUPERINTENDENT, ALBION CORRECTIONAL FACILITY, RESPONDENT.

LINDA MANISCALCO, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [Sanford A. Church, A.J.], entered October 25, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

282

KA 18-01058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAKOTA M. MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Brian D. Dennis, A.J.), rendered September 5, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree and manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [4]) and manslaughter in the first degree (§ 125.20 [4]), defendant contends that he was denied a fair trial by prosecutorial misconduct. Defendant failed to preserve for our review his contention with respect to the majority of the alleged instances of misconduct inasmuch as he did not object to any of those alleged instances (*see People v Johnson*, 133 AD3d 1309, 1311 [4th Dept 2015], *lv denied* 27 NY3d 1000 [2016]; *People v Paul*, 78 AD3d 1684, 1684-1685 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]), and we decline to exercise our power to review defendant's contention with respect to those instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the instances of alleged prosecutorial misconduct that are preserved for our review, we agree with defendant that the People's use of defendant's pretrial silence was improper (*see generally People v Pavone*, 26 NY3d 629, 639 [2015]; *People v Williams*, 25 NY3d 185, 191 [2015]), but we conclude that the error is harmless (*see Pavone*, 26 NY3d at 643, 646; *Johnson*, 133 AD3d at 1311-1312).

Defendant contends that County Court erred in denying his for-cause challenges to two prospective jurors. Even assuming, arguendo, that the court erred, we conclude that the error does not require reversal because defendant had not exhausted his peremptory challenges

at the time of the challenges for cause, and the People, not defendant, exercised peremptory challenges to remove those prospective jurors (*see* CPL 270.20 [2]; *People v Smith*, 200 AD3d 1689, 1690-1691 [4th Dept 2021], *lv denied* — NY3d — [Mar. 9, 2022]). Contrary to defendant's further contention, the court did not abuse its discretion in refusing to allow the jurors to take notes (*see People v Egan*, 6 AD3d 1203, 1204 [4th Dept 2004], *lv denied* 3 NY3d 639 [2004]; *People v Thornton*, 4 AD3d 561, 563 [3d Dept 2004], *lv denied* 2 NY3d 808 [2004]) and allowing certain photographs in evidence (*see People v White-Span*, 182 AD3d 909, 914 [3d Dept 2020], *lv denied* 35 NY3d 1071 [2020]; *People v Morris*, 138 AD3d 1408, 1409-1410 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

288

CAF 20-00153

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

IN THE MATTER OF THE ADOPTION OF KAYDEN.

MISTY G. AND JOHN B., PETITIONERS-RESPONDENTS,

ORDER

V

NICHOLAS G., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered December 31, 2019. The order, among other things, adjudged that respondent's consent to the adoption of the subject child is not required and that it is in the child's best interests to be adopted by petitioner John B.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

290

CAF 21-00295

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

IN THE MATTER OF DANIELLE M. WILLIAMS,
PETITIONER-RESPONDENT,

V ORDER

DANIEL W. PENREE, RESPONDENT-APPELLANT.

TRACY L. PUGLIESE, CLINTON, FOR RESPONDENT-APPELLANT.

ANTHONY BELLETIER, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered December 2, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted unsupervised parenting time to petitioner.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

302

KA 20-01438

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH MONTGOMERY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 13, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and, in appeal No. 2, he appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (§ 120.05 [7]). In both appeals, defendant contends that his waivers of the right to appeal are invalid and that the sentences are unduly harsh and severe. Even assuming, arguendo, that defendant's waivers of the right to appeal from the judgments are invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus do not preclude our review of his challenge to the severity of his sentences (*see People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

303

KA 20-01439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH MONTGOMERY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 13, 2020. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Same memorandum as in *People v Montgomery* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

324

KA 21-00477

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUANE BAXTER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 15, 2021. The judgment convicted defendant, upon a plea of guilty, of aggravated criminal contempt.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of aggravated criminal contempt (Penal Law § 215.52 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (§ 265.03 [3]). The two pleas were entered in a single plea proceeding. In both appeals, defendant contends that his waiver of the right to appeal is invalid and that his sentences are unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as the People concede, we perceive no basis in the record to exercise our power to modify the negotiated sentences as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

325

KA 21-00478

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DUANE BAXTER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 15, 2021. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Baxter* ([appeal No. 1] — AD3d — [Apr. 22, 2022] [4th Dept 2022]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

328

KA 21-00411

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JUDSON WATKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 24, 2021. Defendant was resentenced upon his conviction of rape in the first degree.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

333

CAF 20-00894

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

IN THE MATTER OF CHYNAROSE H. AND ANYLA H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

KEONA O., RESPONDENT-APPELLANT,
AND BASHAR H., RESPONDENT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 30, 2020 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondents derivatively severely abused the subject children.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

338

CA 21-00906

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

SHANE CHRISTOPHER BUCZEK, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF EVANS, TOWN OF CHEEKTOWAGA, TOWN OF BRANT, ERNEST P. MASULLO, NATHAN A. MILLER, PETER A. SMITH, GRANT ZAJAS, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

SHANE CHRISTOPHER BUCZEK, PLAINTIFF-APPELLANT PRO SE.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (KARL E. DANIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TOWN OF EVANS, NATHAN A. MILLER AND PETER A. SMITH.

COLUCCI & GALLAHER, P.C., BUFFALO (MARC S. SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF CHEEKTOWAGA.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF BRANT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered January 13, 2021. The order, insofar as appealed from, denied plaintiff's motion for "Rehearing . . . including any motion to Reargue".

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see St. James Plaza v Notey*, 183 AD2d 766, 766 [2d Dept 1992]; *see generally Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

340

CA 21-00395

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

JILL DERY, AS ADMINISTRATRIX OF THE ESTATE OF
LANCE W. DERY, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

THE SUNSET MOTEL, THE ESTATE OF DOUGLAS M. BEZON,
DECEASED, LYNN A. BEZON, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE OKAY LAW FIRM, BATAVIA (M. KIRK OKAY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered March 12, 2021. The order, among other things, denied in part the motion of defendants The Sunset Motel, The Estate of Douglas M. Bezon and Lynn A. Bezon to dismiss the complaint.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

348

KA 19-00950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA Q. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered October 18, 2017. The appeal was held by this Court by order entered March 19, 2021, decision was reserved and the matter was remitted to Supreme Court, Ontario County, for further proceedings (192 AD3d 1612 [4th Dept 2021]). The proceedings were held and completed.

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 two counts of assault in the first degree (Penal Law § 120.10 [1], [4]), two counts of assault in the second degree (§ 120.05 [2], [6]), four counts of burglary in the first degree (§ 140.30 [1], [2], [3], [4]), and four counts of robbery in the first degree (§ 160.15 [1], [2], [3], [4]). The conviction arises from a home invasion robbery by two perpetrators during which one victim was struck in the head with the end of a shotgun and another victim was shot in the abdomen, rendering him paraplegic. We previously held this case, reserved decision, and remitted the matter to Supreme Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had reserved decision but failed to rule (*People v Johnson*, 192 AD3d 1612 [4th Dept 2021]). Upon remittal, the court denied the motion, and we now affirm.

Defendant contends that the evidence is legally insufficient to establish his identity as one of the perpetrators and the unlawful entry element of the burglary charges. Initially, defendant's contention that the evidence is legally insufficient to support the conviction is not preserved for our review inasmuch as his general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v McDermott*,

200 AD3d 1732, 1733 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022]). In any event, that contention lacks merit. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion" (*People v Bleakley*, 69 NY2d 490, 495 [1987]) that defendant was one of the two perpetrators (*see People v Alston*, 174 AD3d 1349, 1350 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019], *reconsideration denied* 34 NY3d 1014 [2019], *cert denied* — US —, 140 S Ct 2530 [2020]) and that defendant unlawfully entered the dwelling (*see People v Miller*, 32 NY2d 157, 159 [1973]; *People v Wright*, 1 AD3d 707, 707-708 [3d Dept 2003], *lv denied* 1 NY3d 636 [2004]; *see generally People v Mosley*, 200 AD3d 1664, 1665-1666 [4th Dept 2021]).

Additionally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence with respect to his identity as one of the perpetrators (*see People v Settles*, 192 AD3d 1510, 1511-1512 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]) and his unlawful entry (*see People v Curran*, 139 AD3d 1085, 1086 [2d Dept 2016], *lv denied* 31 NY3d 1080 [2018]; *Wright*, 1 AD3d at 708). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

351

KA 18-00715

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERSON I. PORCHEA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered February 7, 2018. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of robbery in the first degree (Penal Law § 160.15 [4]). Preliminarily, as defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. County Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Shanks*, 37 NY3d 244, 253 and n [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

352

KA 17-01345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KAYECYNTHIELLE A. JOHN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 6, 2016. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

354

KA 21-00554

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID F. TUSZYNSKI, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ADAM AMIRAULT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (Kristina Karle, J.), dated March 12, 2021. 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.

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

356

CA 21-00821

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

SUSAN GASTLE, PLAINTIFF-APPELLANT,

V ORDER

KEVIN M. GASTLE, DEFENDANT-RESPONDENT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MATTINGLY CAVAGNARO LLP, BUFFALO (CHRISTOPHER S. MATTINGLY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

MICHELLE G. CHAAS, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 19, 2021 in a divorce action. The judgment, among other things, awarded the parties joint legal and physical custody of the subject children.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

360

CA 21-00772

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

CARROLS LLC, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

DELFIELD COMPANY, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

AKERMAN LLP, CHICAGO, ILLINOIS (CATHERINE A. MILLER, OF THE ILLINOIS BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

RIVKIN RADLER LLP, UNIONDALE (MERRIL S. BISCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 17, 2021. The order granted in part and denied in part the motion of defendant to dismiss various causes of action in the amended complaint.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

363.1

CAF 20-01641

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

IN THE MATTER OF MCKENZIE ASHLEY CLEMENS,
PETITIONER-RESPONDENT,

V ORDER

BENJAMIN RICHARD HODSON, RESPONDENT-APPELLANT.

IN THE MATTER OF BENJAMIN RICHARD HODSON,
PETITIONER-APPELLANT,

V

MCKENZIE ASHLEY CLEMENS, RESPONDENT-RESPONDENT.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (ROBERT S. ROSBOROUGH, IV, OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

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

Appeal from an order of the Family Court, Lewis County (Anthony M. Neddo, A.J.), entered November 20, 2020 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted primary physical custody of the subject child to petitioner-respondent.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

366

KA 21-01087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMIAH SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered July 4, 2021. 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 Supreme Court failed to consider his request for a downward departure from his presumptive risk level. Although we agree with defendant that the court failed to consider his request, we conclude 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]; *see People v Hamm*, 185 AD3d 1493, 1494 [4th Dept 2020], *lv denied* 35 NY3d 916 [2020]; *cf. People v Davis*, 145 AD3d 1625, 1626 [4th Dept 2016], *lv dismissed* 29 NY3d 976 [2017]). Even assuming, arguendo, that defendant identified a mitigating factor that was of a kind or to a degree not adequately taken into account by the guidelines (*see People v Gillotti*, 23 NY3d 841, 861 [2014]), however, we conclude that defendant did not "adduce[] sufficient evidence to meet [his] burden of proof in establishing that the alleged . . . mitigating circumstance[] actually exist[ed]" (*id*.; *see Hamm*, 185 AD3d at 1494).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

367

KA 21-00367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAUN R. CRONIN, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 2, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the second degree.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

375

CA 21-00729

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

IN THE MATTER OF THE APPLICATION OF CARRIE SANTOPIETRO, UNIT CHIEF OF CENTRAL NEW YORK PSYCHIATRIC CENTER, MARCY CORRECTIONAL FACILITY SATELLITE UNIT, PETITIONER-RESPONDENT,

V ORDER

DARRYL G., A PATIENT AT MARCY CORRECTIONAL FACILITY, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered March 18, 2021 in a proceeding pursuant to Mental Hygiene Law § 33.03. The order authorized petitioner to medicate respondent.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

378

CA 21-01333

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

VALERIE HOPE, PLAINTIFF-APPELLANT,

V ORDER

BARTLETT, PONTIFF, STEWART & RHODES, P.C., AND JOHN D. WRIGHT, ESQ., AS PRINCIPAL OF BARTLETT, PONTIFF, STEWART & RHODES, P.C., COUNSEL OF BARTLETT, PONTIFF, STEWART & RHODES, P.C., AND INDIVIDUALLY, DEFENDANTS-RESPONDENTS.

VALERIE HOPE, PLAINTIFF-APPELLANT PRO SE.

BARTLETT, PONTIFF, STEWART & RHODES, P.C., GLENS FALLS (MALCOLM B. O'HARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Warren County (Robert J. Muller, J.), entered July 17, 2020. The order, among other things, granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

380

CA 21-00638

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

CLEARWOOD C.C. & M., LLC,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

NU-TECH FURNISHINGS, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

SHEATS & BAILEY, PLLC, LIVERPOOL (ANTHONY C. GALLI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF JOHN CARAVELLA, P.C., UNIONDALE (JOHN J. CARAVELLA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered April 6, 2021. The order denied defendant’s motion for summary judgment and denied plaintiff’s cross motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 16, 2022,

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

381

CA 21-00391

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

DORON FELDMAN AND DEBORAH ANN FELDMAN,
PLAINTIFFS-APPELLANTS,

V ORDER

HODGSON RUSS, LLP, AND DANIEL C. OLIVERIO, ESQ.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

ZOLDAN ASSOCIATES, LLC, BALA CYNWYD, PENNSYLVANIA (KENNETH J. ZOLDAN, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 5, 2021. The order granted the motion of defendants to dismiss the amended complaint and dismissed the amended complaint.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

382

CA 21-00965

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

DORON FELDMAN, PLAINTIFF,
AND DEBORAH ANN FELDMAN, PLAINTIFF-APPELLANT,

V ORDER

HODGSON RUSS, LLP, AND DANIEL C. OLIVERIO, ESQ.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

ZOLDAN ASSOCIATES, LLC, BALA CYNWYD, PENNSYLVANIA (KENNETH J. ZOLDAN, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered June 23, 2021. The order denied the motion of plaintiff Deborah Ann Feldman for leave to renew.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

386

CA 21-01579

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

SUSAN M. WEICHERT AND ROBERT M. WEICHERT,
PLAINTIFFS-APPELLANTS,

V ORDER

RANDY CHARBONNEAU, DEFENDANT-RESPONDENT,
AND MICKEY GARDNER, DEFENDANT.

SUSAN M. WEICHERT, PLAINTIFF-APPELLANT PRO SE.

ROBERT M. WEICHERT, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 27, 2021. The order, among other things, denied plaintiffs' motion for recusal.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

392

KA 15-02150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROOSEVELT SCOTT, JR., DEFENDANT-APPELLANT.

TULLY RINCKEY PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 12, 2015. The judgment convicted defendant, upon a plea of guilty, of assault in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]) and assault in the second degree (§ 120.05 [2]). We affirm.

Defendant contends that defense counsel was ineffective as a result of the alleged disagreements and disputes that occurred between the two during the course of the representation, which rendered defendant's decision to plead guilty involuntary. Defendant's contention survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]; *People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]). Here, we conclude that, to the extent that it survives his guilty plea, defendant's contention lacks merit inasmuch as defendant "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]).

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

399

CA 21-00338

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

CAITLIN MCCANN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID GORDON, DEFENDANT-APPELLANT.

DAVID GORDON, DEFENDANT-APPELLANT PRO SE.

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (EVA BRINDISI PEARLMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered February 10, 2021. The order, inter alia, granted the motion of plaintiff for summary judgment on the issue of liability on her defamation cause of action and denied defendant's cross motion to dismiss the complaint.

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

Memorandum: Defendant appeals from an order that, inter alia, granted plaintiff's motion for summary judgment with respect to liability on her defamation cause of action and denied defendant's cross motion to dismiss the complaint. "The right to appeal from an intermediate order terminates with the entry of a final judgment" (*City of Syracuse v COR Dev. Co., LLC*, 147 AD3d 1510, 1510 [2017] [internal quotation marks omitted]; *see Matter of Aho*, 39 NY2d 241, 248 [1976]). Because the record of this case in the New York State Courts Electronic Filing System establishes that a final judgment was entered on January 7, 2022, of which we take judicial notice (*see 1591 Second Ave. LLC v Metropolitan Transp. Auth.*, 202 AD3d 582, 583 [1st Dept 2022]), defendant's appeal from the intermediate order must be dismissed (*see McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]; *see generally Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

400

CA 21-00458

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

MATTHEW M. HILLMAN, SR., PLAINTIFF-RESPONDENT,

V ORDER

STATE UNIVERSITY CONSTRUCTION FUND,
LPCIMINELLI, INC., FNUB, INC., FNUB, LLC,
DEFENDANTS-RESPONDENTS,
AND HUBER CONSTRUCTION, INC., DEFENDANT-APPELLANT.

STATE UNIVERSITY CONSTRUCTION FUND,
LPCIMINELLI, INC., FNUB, INC., AND FNUB, LLC,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

HUBER CONSTRUCTION, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE, GANNON, ROSENFARB & DROSSMAN, NEW YORK CITY (LISA L. GOKHULSINGH OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered February 2, 2021. The order, among other things, denied the motion of defendant-third-party defendant Huber Construction, Inc. for summary judgment and granted in part the motion of defendants-third-party plaintiffs for summary judgment.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

404

CA 21-01219

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

RYAN SIRAGUSA, PLAINTIFF-APPELLANT,

V ORDER

MICHAEL SIRAGUSA, DEFENDANT-RESPONDENT.

THOMAS J. RZEPKA, PLLC, ROCHESTER (THOMAS J. RZEPKA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARK D. GORIS, CAZENOVIA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered February 4, 2021. The order granted the motion of defendant for summary judgment and denied plaintiff's cross motion for partial summary judgment.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

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

406

CA 21-01593

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

OF DOES 3-6, ET AL., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL DISTRICT, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 7, 2021. The amended order denied the motion of defendant to preclude the use of certain deposition testimony.

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

Memorandum: Plaintiffs commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g), alleging that they were sexually abused by a fifth grade teacher between 1963 and 1992, while attending school at the Herbert Hoover Elementary School within defendant. Defendant moved pretrial for an order determining that the teacher at issue is incompetent to testify due to dementia, and precluding any further use of that teacher's deposition testimony, and defendant now appeals from an amended order denying the motion. "Generally, an order denying a motion in limine, even when 'made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1285 [4th Dept 2015]; *see Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [4th Dept 2009]). Here, no appeal lies as of right from the amended order inasmuch as it "merely adjudicates the admissibility of evidence" and does not affect a substantial right (*Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224 [4th Dept 2003]; *see* CPLR 5701 [a] [2] [v]). Consequently, the appeal must be dismissed (*see Shahram v St. Elizabeth School*, 21 AD3d 1377, 1378 [4th Dept 2005]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

419

CA 21-00495

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

CHARLES A. MCKAY, JR., PLAINTIFF-RESPONDENT,

V ORDER

FINGER LAKES TRAFFIC CONTROL LLC,
DEFENDANT-APPELLANT,
SENECA STONE CORPORATION, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (ELIZABETH K. OGNENOVSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered March 25, 2021. The order, among other things, denied the motion of defendant Finger Lakes Traffic Control LLC for summary judgment.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

425

CAF 19-00159

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

IN THE MATTER OF JENNIFER A. TURNER,
PETITIONER-APPELLANT,

V ORDER

TODD D. YONKER, RESPONDENT-RESPONDENT.

TYSON BLUE, MACEDON, FOR PETITIONER-APPELLANT.

MICHAEL R. MILLER, NEWARK, FOR RESPONDENT-RESPONDENT.

ROBERT A. DINIERI, CLYDE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered November 28, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded custody to respondent.

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

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court