SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 3, 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 JUNE 3, 2022

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

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KA 20-00325

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE T. YOUNG, JR., ALSO KNOWN AS DALE T. YOUNG, ALSO KNOWN AS DALE YOUNG, JR., ALSO KNOWN AS DALE THOMAS YOUNG, JR., DEFENDANT-APPELLANT.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK T. HOUSH 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 27, 2020. The judgment convicted defendant, upon a nonjury verdict, of criminal sexual act in the third degree (three counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of three counts of criminal sexual act in the third degree (Penal Law § 130.40 [2]) and one count of endangering the welfare of a child (§ 260.10 [1]). We affirm.

Defendant contends that County Court should have precluded the testimony of the People's expert on child sexual abuse accommodation syndrome (CSAAS) based on the lack of timely notice concerning the expert's testimony. We reject that contention. " 'Pretrial discovery in criminal proceedings is governed by statute,' " and defendant has "identifie[d] no statute [in effect at the time of his trial] requiring the People to provide discovery concerning the identity of the expert or the content of her testimony" (*People v Ruiz*, 159 AD3d 1375, 1376 [4th Dept 2018]; *see People v Austen*, 197 AD3d 861, 861 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]).

We also reject defendant's related contention that the court abused its discretion in admitting in evidence the testimony of the expert regarding CSAAS. Such testimony is admissible "for the purpose of explaining behavior that might be puzzling" to a trier of fact (*People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *see People v Nicholson*, 26 NY3d 813, 828 [2016]), including

the court in a nonjury trial (*see People v Williams*, 20 NY3d 579, 583-584 [2013]). Expert testimony concerning CSAAS "is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Drake*, 138 AD3d 1396, 1398 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see People v Diaz*, 20 NY3d 569, 575-576 [2013]; *Williams*, 20 NY3d at 583-584). Here, "[a]lthough some of the testimony discussed behavior similar to that alleged by the [victim] in this case, the expert spoke of such behavior in general terms" and, "[i]n addition, the [court] heard the expert testify that she was not aware of the facts of the particular case, did not speak with the [victim] and was not rendering an opinion as to whether sexual abuse took place" (*Diaz*, 20 NY3d at 575-576; *see Austen*, 197 AD3d at 862; *cf. Ruiz*, 159 AD3d at 1376-1377). Contrary to defendant's contention, we conclude that "the expert's testimony, grounded in [her] professional knowledge and training, provided relevant information outside the ken of the [trier of fact] and was properly admitted" (*Nicholson*, 26 NY3d at 829; *see Williams*, 20 NY3d at 584).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's purported failures to adequately challenge and respond to the testimony of the People's expert regarding CSAAS. We reject that contention. "There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]) and, here, defense counsel had no legitimate basis to further object to the expert's testimony as constituting improper bolstering (*see People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; *People v Englert*, 130 AD3d 1532, 1533-1534 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015], *lv denied* 26 NY3d 1144 [2016]). To the extent that defendant asserts that defense counsel was ineffective in failing to conduct an adequate cross-examination of the expert, we conclude that defendant's assertion lacks merit. Defense counsel "carefully highlighted on cross-examination that CSAAS was not a diagnostic tool for proving whether sexual abuse had occurred or whether the victims' accounts were truthful . . . and [elicited acknowledgments] that the . . . expert could give no evidence with respect to the ultimate issue of the case, i.e., defendant's guilt," and that children are capable of making false accusations (*People v Mirabella*, 187 AD3d 1589, 1590 [4th Dept 2020], *lv dismissed* 36 NY3d 930 [2020] [internal quotation marks omitted]; *see People v Maxey*, 129 AD3d 1664, 1665 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). Defendant's "simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" to demonstrate that he was denied effective assistance of counsel (*People v Flores*, 84 NY2d 184, 187 [1994]). Defendant's assertion that defense counsel was ineffective in failing to secure opposing CSAAS testimony lacks merit inasmuch as defendant "has not demonstrated that such testimony was available, that it would have assisted the [court] in its determination or that he was prejudiced by its absence" (*Meyers*, 188 AD3d at 1734 [internal quotation marks omitted]; *see Englert*, 130 AD3d at 1533).

Defendant failed to preserve for our review his contention that the People did not establish an adequate chain of custody with respect to the clothes obtained during the investigation and the DNA results derived therefrom inasmuch as he did not object to the admission of that evidence (*see People v Irizarry*, 160 AD3d 1384, 1386 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]). In any event, "[t]he testimony presented at the trial sufficiently established the authenticity of that evidence through reasonable assurances of identity and unchanged condition" (*People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007] [internal quotation marks omitted]; *see People v Julian*, 41 NY2d 340, 342-343 [1977]), and thus "any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]; *see People v Hawkins*, 11 NY3d 484, 494 [2008]).

To the extent that defendant contends that the evidence is legally insufficient to support the conviction, that contention is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). Finally, to the extent that defendant contends that the verdict is against the weight of the evidence, we reject that contention. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, even assuming, arguendo, that an acquittal would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: June 3, 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 14-01898

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON L. STOKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered June 10, 2014. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree (two counts) and reckless endangerment 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, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). 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 defendant's identity as the perpetrator (*see People v Spencer*, 191 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]). 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 as to identity (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention that he was denied effective assistance of counsel involves matters outside the record and therefore must be raised in a proceeding pursuant to CPL article 440 (*see People v Jenkins*, 197 AD3d 927, 927-928 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021]). We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

407

CA 21-00665

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

ZOOM TAN, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHERIDAN PLAZA, LLC, DEFENDANT-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (RICHARD N. FRANCO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (JAMES P. NONKES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 4, 2021. The order denied the motion of defendant for summary judgment and granted the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's cross motion, granting defendant's motion in part, and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff tenant commenced this action seeking specific performance of a lease between plaintiff and defendant landlord, alleging that defendant breached the lease by not constructing an agreed-upon buildout of the premises. Defendant counterclaimed for breach of contract, alleging that plaintiff was in default under the lease and thus defendant properly terminated the lease. Defendant moved for summary judgment dismissing the complaint and seeking an award of attorneys' fees on its counterclaim. Plaintiff cross-moved for summary judgment on its cause of action for specific performance or, alternatively, on its cause of action for breach of contract. Supreme Court denied the motion and granted the cross motion.

We agree with defendant that the court erred in granting plaintiff's cross motion and in denying that part of its motion for summary judgment seeking dismissal of the complaint, and we therefore modify the order accordingly. The lease provided that defendant could terminate the lease upon plaintiff's default, and section 27 (A) of the lease set forth events that constitute a default by the tenant, including where the tenant "shall generally not pay its debts as they become due." In support of its motion, defendant submitted evidence that plaintiff had failed to pay rent and thus was in default under

two leases between plaintiff and defendant's related entities. Defendant also submitted a letter that plaintiff had sent to some of its landlords in which it admitted that it had received default notices under some leases. We therefore conclude that defendant established plaintiff's default under the lease for generally not paying its debts as they became due, which allowed defendant to terminate the lease, and plaintiff failed to raise a question of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We reject defendant's further contention, however, that the court erred in denying that part of its motion seeking attorneys' fees under section 27 (M) of the lease. Defendant failed to meet its initial burden of establishing that the attorneys' fees provision in the lease is applicable here (*see generally id.*).

Entered: June 3, 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 20-01084

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN WHALEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, MCCARTHY LAW, KEENE VALLEY (NOREEN E. MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 20, 2020. The judgment convicted defendant upon his plea of guilty of aggravated family offense.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of aggravated family offense (Penal Law § 240.75). Initially, we agree with defendant that his waiver of the right to appeal is invalid. County Court's explanation that defendant's waiver would foreclose any review by a higher court "utterly 'mischaracterized the nature of the right [to appeal that] defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Brooks*, 187 AD3d 1587, 1588 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021] [internal quotation marks omitted]).

Defendant contends that the People failed to file a special information pursuant to CPL 200.60 alleging, inter alia, that he was previously convicted of a specified offense as defined in Penal Law § 240.75 (2) and that "at the time of the previous offense the defendant and the person against whom the offense was committed were members of the same family or household" (CPL 200.63 [1]). That procedural defect, however, was waived by defendant's guilty plea (*see People v Sanchez*, 55 AD3d 460, 460-461 [1st Dept 2008], *lv denied* 11 NY3d 930 [2009]; *People v Downs*, 26 AD3d 525, 526 [3d Dept 2006], *lv denied* 6 NY3d 847 [2006]; *People v Khan*, 291 AD2d 898, 899 [4th Dept 2002]). We further conclude that defendant's contention that the

count of the indictment to which he pleaded guilty was duplicitous is not preserved for our review and, in any event, that contention was waived by his guilty plea (*see People v Lewis*, 138 AD3d 1346, 1347-1348 [3d Dept 2016], *lv denied* 28 NY3d 1073 [2016]).

Defendant's contention that the court erred in denying his request to withdraw his plea of guilty lacks merit. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]; *see People v Manor*, 27 NY3d 1012, 1013-1014 [2016]). Here, the record establishes that the court afforded defendant the requisite "reasonable opportunity to present his contentions" (*People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Carter-Doucette*, 124 AD3d 1323, 1324 [4th Dept 2015], *lv denied* 25 NY3d 988 [2015]). Furthermore, the court did not err in denying that request inasmuch as defendant's "conclusory and unsubstantiated claim[s] of innocence [were] belied by his admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955 [4th Dept 2011]; *see People v Nichiporuk*, 170 AD3d 1597, 1598-1599 [4th Dept 2019]; *People v Williams*, 129 AD3d 1583, 1585 [4th Dept 2015], *lv denied* 26 NY3d 973 [2015]).

Defendant further contends that the presentence report (PSR) contains inaccurate information concerning the charge to which defendant pleaded guilty and that the sentence should therefore be vacated. We reject that contention. The sentencing transcript demonstrates that the court "did not rely on any materially untrue assumptions or misinformation" in the PSR when determining the appropriate sentence (*People v Dimmick*, 53 AD3d 1113, 1113 [4th Dept 2008], *lv denied* 11 NY3d 831 [2008]; *see generally People v Outley*, 80 NY2d 702, 712 [1993]). Defendant failed to preserve for our review his further contention that the court should have ordered the probation department to prepare a new PSR (*see People v Gibbons*, 101 AD3d 1615, 1616 [4th Dept 2012]; *see also People v Roberts*, 126 AD3d 1481, 1481 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *see generally* CPL 470.05 [2]; *People v Williams*, 94 AD3d 1527, 1527 [4th Dept 2012], *lv denied* 19 NY3d 1106 [2012]). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that he was deprived of effective assistance of counsel. Insofar as that contention survives defendant's plea of guilty (*see People v Pitcher*, 126 AD3d 1471, 1473 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]; *see generally People v Bethune*, 21 AD3d 1316, 1316 [4th Dept 2005], *lv denied* 6 NY3d 752 [2005]), we reject it. " '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 Oliver* [appeal No. 2], 162 AD3d 1722, 1723 [4th Dept 2018]). Here, defense counsel negotiated a favorable plea, and defendant has not demonstrated "the

absence of strategic or other legitimate explanations" for counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Taylor*, 196 AD3d 1050, 1052 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]; *People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]).

Defendant's remaining contentions do not warrant reversal or modification of the judgment on appeal.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

415

KA 19-01637

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELBRIAN GROVNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered June 5, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a 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 the judgment is not supported by legally sufficient evidence that he possessed the heroin found in the backyard of his house and that the verdict is against the weight of the evidence with respect to that element. We reject those contentions.

Pursuant to a search warrant, Syracuse police officers searched a house in which defendant resided at least some of the time. Prior to the search, officers had the house under surveillance. They observed defendant and several codefendants coming and going from the house on numerous occasions in the weeks before the search. They also saw defendant leave the house shortly before the search. During the search, the officers found a quantity of heroin hidden under a fence in the backyard of the residence. In addition, scattered throughout the house were equipment used to process the drugs, chemicals to dilute the drugs, numerous empty packages into which the processed drugs could be placed for street-level sales, cell phones, and vehicle keys. Defendant was taken into custody at a separate location. At that time, he was in a minivan with one of the residents of the house, and that vehicle was parked next to a vehicle containing another

resident. No drugs or packaging was found in the vehicles, but defendant was in possession of more than one thousand dollars. Defendant's personal property was found in a downstairs bedroom of the house, but none of the contraband or related materials were found in that bedroom. Nevertheless, documents sent to defendant at a different address were found on the kitchen table in the searched premises, along with a significant amount of drug packaging materials. Also found in the kitchen were a food processor that could be used to process drugs, additional packaging materials, lactose, and tan powder. Additional packaging material was present in other common areas near the kitchen. A police sergeant, testifying as the People's expert, indicated that lactose was used to dilute heroin, which was then packaged for individual sale in packaging materials and sold for cash. The bathroom, another common area, contained still more packaging materials and a digital scale that apparently had been used to weigh narcotics. Furthermore, during a recorded telephone call from the jail, defendant admitted ownership of two televisions in the house, one of which was in a common area near the kitchen, and he asked a relative to secure his car keys from the kitchen table.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences [that] could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial" (*People v Williams*, 84 NY2d 925, 926 [1994]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, there is "no evidence that defendant actually possessed the [drugs and drug paraphernalia], the People must establish that defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007] [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573-574 [1992]; *People v Nevins*, 196 AD3d 1110, 1111 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]). Here, the People presented evidence that the drugs found in the backyard were being processed in the kitchen of the residence in which defendant's property was located, that the drugs themselves were "readily accessible and available" to him (*People v Hyde*, 302 AD2d 101, 105 [1st Dept 2003], *lv denied* 99 NY2d 655 [2003]; *see People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]), and that recognized adulterants and drug paraphernalia were found on a table next to defendant's personal property and documents, which permits "the reasonable inference that defendant had both knowledge and possession" of the drugs and paraphernalia (*People v Tirado*, 47 AD2d 193, 195 [1st Dept 1975], *affd* 38 NY2d 955 [1976]; *see People v Slade*, 133 AD3d 1203, 1205 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]).

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 further conclude that the verdict is not against the weight of the evidence (*see People v Patterson*, 13 AD3d 1138, 1139 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]; *see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that the admission in evidence of a statement a codefendant made during another recorded jail telephone call violated defendant's rights under *Bruton v United States* (391 US 123 [1968]) and *Crawford v Washington* (541 US 36 [2004]). Defendant failed to preserve that contention for our review (*see People v Harper*, 132 AD3d 1230, 1234 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]; *People v Gilocompo*, 125 AD3d 1000, 1001 [2d Dept 2015], *lv denied* 25 NY3d 1163 [2015]). Furthermore, we conclude that defense counsel's strategic decision to consent to the admission of the entire recording constituted a waiver of any *Bruton* or *Crawford* violation (*see People v Reid*, 71 AD3d 699, 700 [2d Dept 2010], *lv denied* 15 NY3d 756 [2010]; *see also People v Serrano*, 256 AD2d 175, 176 [1st Dept 1998], *lv denied* 93 NY2d 878 [1999]).

Defendant further contends that the People deprived him of his right to present a defense by failing to preserve a video recording from the surveillance of the exterior of the front of the house before and during the search. The People established that a hidden surveillance camera failed to record several weeks of data, including the day the police searched the house. Contrary to defendant's contention, Supreme Court did not err in giving an adverse inference charge rather than dismissing the charges against defendant based on the loss of the images. It is within the sound discretion of the trial court to determine the appropriate sanction for the loss of evidence (*see People v Kelly*, 62 NY2d 516, 521 [1984]), and "[g]iven that the exculpatory value of the missing evidence is completely speculative . . . , the court did not abuse its discretion in imposing the lesser sanction" of a permissive adverse inference instruction (*People v Pfahler*, 179 AD2d 1062, 1063 [4th Dept 1992]; *see People v Page*, 105 AD3d 1380, 1381 [4th Dept 2013], *lv denied* 23 NY3d 1023 [2014]).

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted upon a plea of guilty of two counts each of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree, and it must therefore be amended to reflect that he was convicted upon a jury verdict of only one count of each crime (*see People v Raghnal*, 185 AD3d 1411, 1414 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

431

KA 21-00500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEVIN M. SECORD, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, ACTING DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 5, 2021. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

433

KA 19-00654

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN A. ZABKO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), entered March 12, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe.

Initially, contrary to defendant's contention, the record establishes that, before defendant pleaded guilty, County Court mentioned that a waiver of the right to appeal would be a condition of the plea bargain (*see People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *cf. People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]; *People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). The court also "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], *lv denied* 15 NY3d 920 [2010], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]).

Nonetheless, as defendant contends and the People correctly concede, the "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545,

559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Here, "[t]he written waiver of the right to appeal signed by defendant [at the time of the plea] and the verbal waiver colloquy conducted by [the court] together improperly characterized the waiver as 'an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief,' as well as to 'all postconviction relief separate from the direct appeal' " (*People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020], quoting *Thomas*, 34 NY3d at 565; *see People v Harlee*, 187 AD3d 1586, 1587 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]). Moreover, neither the written waiver nor the colloquy contained adequate "clarifying language . . . that appellate review remained available for certain issues," thereby "indicating . . . that the right to take an appeal was retained" (*Thomas*, 34 NY3d at 564; *see People v Parker*, 189 AD3d 2065, 2066 [4th Dept 2020], *lv denied* 36 NY3d 1122 [2021]; *People v Shantz*, 186 AD3d 1076, 1077 [4th Dept 2020]). Where, as here, the "trial court has utterly 'mischaracterized the nature of the right a defendant was being asked to cede,' [this] '[C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " (*Thomas*, 34 NY3d at 565-566; *see Harlee*, 187 AD3d at 1587; *Youngs*, 183 AD3d at 1229).

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: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

434

KA 18-00691

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMON MERCADO-GOMEZ, DEFENDANT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered December 8, 2017. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, sexual abuse in the first degree (three counts), criminal sexual act in the third degree, sexual abuse in the third degree and endangering the welfare of a child (two counts).

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, predatory sexual assault against a child (Penal Law § 130.96) and three counts of sexual abuse in the first degree (§ 130.65 [4]). We affirm.

Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Riley*, 182 AD3d 1017, 1018 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020]) because there is "a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]).

Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d

1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]; *see People v McKay*, 197 AD3d 992, 993 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Here, the jury was "entitled to credit the testimony of the People's witnesses, including that of the victim[s], over the testimony of defendant's witnesses, including that of defendant [himself]," and we perceive no reason to disturb the jury's credibility determinations in that regard (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). We conclude that there was nothing about the victims' 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]). To the extent that there were any inconsistencies in or between the two victims' testimony, we conclude that their testimony, considered either singly or together, "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]). Further, defendant's contention concerning the lack of forensic evidence corroborating the victims' testimony is unavailing "inasmuch as the testimony of [the victims] can be enough to support a conviction" (*People v Goodson*, 144 AD3d 1515, 1515-1516 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017] [internal quotation marks omitted]; *see Streeter*, 118 AD3d at 1288; *see generally 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]).

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

436

KA 16-01901

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. WILCOX, DEFENDANT-APPELLANT.

JILL PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered June 20, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury verdict of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03). On a prior appeal, we reversed the judgment, granted defendant's motion to suppress certain physical evidence, dismissed several counts of the indictment, and granted a new trial on the remaining count, which charged defendant with knowingly and unlawfully possessing heroin with the intent to sell it pursuant to Penal Law § 220.16 (1) (*People v Wilcox*, 134 AD3d 1397, 1398 [4th Dept 2015]). Defendant now appeals from the judgment convicting him, following the retrial before a jury, of a lesser included charge. We affirm.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, one of the officers who arrested defendant testified at trial that, in the course of the arrest, he observed a pill bottle fall from defendant's jacket pocket. That bottle was later determined to contain 11 doses of heroin. "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]). "The jury was entitled to credit the testimony of the People's witnesses" (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]), and we perceive no reason to disturb those credibility determinations.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

437

KA 18-01091

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. CURRY, DEFENDANT-APPELLANT.

JILL PAPERNO, ACTING 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 Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 26, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe.

We initially note that defendant is subject to an undischarged period of postrelease supervision, and thus, contrary to the contention of the People, this appeal is not moot (*cf. People v Finch*, 137 AD3d 1653, 1655 [4th Dept 2016]; *People v Heatherly*, 132 AD3d 1277, 1279 [4th Dept 2015]).

We agree with defendant that, inasmuch as Supreme Court provided him with erroneous information about the scope of the waiver of the right to appeal and failed to identify that certain rights would survive the waiver, the colloquy was insufficient to ensure that he knowingly, voluntarily and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 564-568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, the sentence is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

438

KA 19-02174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRENCE STAPLES, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 31, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at suppression court.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

439

KA 18-01534

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN S. HINES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 11, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Rodriguez*, 269 AD2d 613, 613 [2d Dept 2000]; *People v Donaldson*, 55 AD2d 844, 844 [4th Dept 1976]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

440

KAH 19-02185

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

IN THE MATTER OF THE APPLICATION OF
VICTOR K. THOMAS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

W. BURNS, ACTING SUPERINTENDENT OF MID-STATE C.F.,
RESPONDENT-RESPONDENT.

KATHRYN M. FESTINE, UTICA, FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered September 11, 2019. The order denied the application of petitioner seeking poor person status.

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

Memorandum: Petitioner appeals from an order denying his application seeking poor person status in connection with a proposed habeas corpus proceeding. We dismiss the appeal as moot (*see generally People ex rel. Bush v Awopetu*, 187 AD3d 1580, 1580-1581 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]; *People ex rel. Luck v Squires*, 173 AD3d 1767, 1767-1768 [4th Dept 2019]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

441

CAF 20-01518

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

IN THE MATTER OF NYIBOUL M. AKOL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MAKOR AFET, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered August 28, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and physical custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts stating that the order is entered upon the default of respondent and that respondent failed to appear before Family Court, and as modified the order is affirmed without costs.

Memorandum: Respondent father appeals from an order that, inter alia, awarded sole legal and physical custody of the subject child to petitioner mother, with visitation to the father. We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" (*Matter of Abdo v Ahmed*, 162 AD3d 1742, 1743 [4th Dept 2018] [internal quotation marks omitted]). We therefore modify the order accordingly.

Contrary to the father's further contention, however, "the court did not abuse its discretion in conducting the hearing in his absence inasmuch as he appeared by counsel and had notice of the hearing" (*Matter of Williams v Richardson*, 181 AD3d 1292, 1292 [4th Dept 2020], *lv denied* 36 NY3d 911 [2021]; *see Matter of Triplett v Scott*, 94 AD3d 1421, 1422 [4th Dept 2012]).

The father additionally contends that there is not a sound and substantial basis in the record to support the court's determinations regarding custody and visitation. We reject that contention.

Although the court did not specify the factors it relied on in conducting its best interests analysis (*see Matter of Howell v Lovell*, 103 AD3d 1229, 1231 [4th Dept 2013]), "[o]ur authority in determinations of custody [and visitation] is as broad as that of Family Court . . . and where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; *see Howell*, 103 AD3d at 1231; *see also Matter of Butler v Ewers*, 78 AD3d 1667, 1667 [4th Dept 2010]; *see generally Matter of Louise E. S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). Here, after reviewing the appropriate factors (*see generally Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]), we conclude that the totality of the circumstances supports the court's determination that the subject child's best interests are served by awarding sole legal and physical custody to the mother and directing that the father have parenting time, including on alternating weekends (*see Eschbach v Eschbach*, 56 NY2d 167, 174 [1982]; *Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see generally Abdo*, 162 AD3d at 1743). We note that joint custody is inappropriate where, as here, " 'the parties have an acrimonious relationship and are unable to communicate with each other in a civil manner' " (*Matter of Kleinbach v Cullerton*, 151 AD3d 1686, 1687 [4th Dept 2017]; *see Leonard v Leonard*, 109 AD3d 126, 128 [4th Dept 2013]).

Finally, we reject the father's contention that the court improperly delegated to the mother its responsibility to set a visitation schedule (*see Hendershot v Hendershot*, 187 AD3d 1584, 1585-1586 [4th Dept 2020]; *cf. Matter of Lakeya P. v Ajja M.*, 169 AD3d 1409, 1411 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Jeffrey T. v Julie B.*, 35 AD3d 1222, 1222 [4th Dept 2006]). Here, "the record establishes that [the schedule issued by the court] is the product of the court's careful weighing of [the] appropriate factors . . . , and it has a sound and substantial basis in the record" (*Matter of Talbot v Edick*, 159 AD3d 1406, 1407 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

446

CA 21-00887

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

JACQUELINE PETRILLO, PLAINTIFF-APPELLANT,

V ORDER

BRIGHTON FIRE DISTRICT NO. 5,
DEFENDANT-RESPONDENT.

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

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered May 19, 2021. The order, among other things, dismissed plaintiff's amended complaint in its entirety.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

456

CA 21-01807

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

ALBERT G. FRACCOLA, JR., INDIVIDUALLY, ETC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

1ST CHOICE REALTY, INC., A DOMESTIC CORPORATION
IN DISSOLUTION, ET AL., DEFENDANTS,
GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI AND
PRIORE, LLP, AND THE ESTATE OF PHYLLIS FRACCOLA,
ALSO KNOWN AS PHYLLIS S. FRACCOLA, DECEASED,
DEFENDANTS-RESPONDENTS.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (PATRICK G. RADEL OF COUNSEL), FOR DEFENDANT-RESPONDENT GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI AND PRIORE, LLP.

PETER M. HOBAICA, LLC, UTICA (PETER M. HOBAICA OF COUNSEL), FOR DEFENDANT-RESPONDENT THE ESTATE OF PHYLLIS FRACCOLA, ALSO KNOWN AS PHYLLIS S. FRACCOLA, DECEASED.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered June 29, 2021. The order, among other things, denied the motion of plaintiff to vacate a prior order dismissing the complaint.

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

Memorandum: Plaintiff commenced this action individually and on behalf of others asserting various causes of action stemming from allegedly fraudulent deeds transferring property of defendant 1st Choice Realty, Inc. (1st Choice), of which plaintiff owned shares, to Phyllis Fraccola (decedent), plaintiff's now-deceased ex-wife and former business partner. Those deeds were prepared by decedent's counsel based upon a 2005 stipulation entered into by plaintiff and decedent to settle various lawsuits between them. Supreme Court dismissed the action sua sponte. Plaintiff moved to vacate the ensuing order, and now appeals from the subsequent order denying his motion. We affirm.

It is well settled that " '[u]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary

circumstances' " (*Matter of Associated Gen. Contrs. of NYS, LLC v New York State Thruway Auth.*, 159 AD3d 1560, 1560 [4th Dept 2018]; *see Ray v Chen*, 148 AD3d 568, 569 [1st Dept 2017]; *BAC Home Loans Servicing, LP v Maestri*, 134 AD3d 1593, 1593 [4th Dept 2015]). We conclude that such circumstances are present here.

Although "[p]ublic policy mandates free access to the courts . . . , a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will" (*Ritchie v Ritchie*, 184 AD3d 1113, 1117 [4th Dept 2020] [internal quotation marks omitted]; *see Caesar v HSBC Bank USA, NA*, 200 AD3d 842, 843 [2d Dept 2021]). Here, plaintiff has clearly " 'abused the judicial process by engaging in meritless, frivolous or vexatious litigation' " (*Ritchie*, 184 AD3d at 1118; *see Caesar*, 200 AD3d at 843). Plaintiff has commenced numerous actions on his behalf and on behalf of various business entities to challenge the 2005 stipulation and the deeds transferring property held by 1st Choice that were prepared after that stipulation. Based on plaintiff's repeated meritless complaints, courts have issued at least three prior orders prohibiting him from commencing actions based on the subject matter of the 2005 stipulation without prior leave of court (*see generally Sassower v Signorelli*, 99 AD2d 358, 359-360 [2d Dept 1984]). Plaintiff failed to seek permission from the court before filing this action, which clearly relates to the subject matter of the 2005 stipulation and all prior actions commenced thereafter by plaintiff. Under these circumstances, the court properly dismissed the complaint sua sponte (*see Cangro v Marangos*, 160 AD3d 580, 580 [1st Dept 2018], *appeal dismissed* 32 NY3d 947 [2018]; *Liang v Wei Ji*, 155 AD3d 1018, 1019-1020 [2d Dept 2017]; *Matter of Pavic v Djokic*, 152 AD3d 696, 697 [2d Dept 2017]; *Matter of DelVecchio v DelVecchio*, 64 AD3d 594, 595 [2d Dept 2009]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

458

CA 21-00909

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

IN THE MATTER OF JOHN HOMER, PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 1, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

459

CA 20-00971

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF MARK M. FROM CENTRAL NEW YORK PSYCHIATRIC
CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order (denominated amended order) of the Oneida County Court (Gerald Popeo, A.J.), entered January 13, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the commitment of petitioner to a secure treatment facility.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

462

KA 19-00891

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT A. COYLE, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 18, 2019. The judgment convicted defendant, upon a plea of guilty, of burglary in the third 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 his plea of guilty, of two counts of burglary in the third degree (Penal Law § 140.20), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

463

KA 20-01110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON B. ELLINGTON, DEFENDANT-APPELLANT.

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

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered August 14, 2019. The judgment convicted defendant upon a plea of guilty of kidnapping in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of kidnapping in the second degree (Penal Law § 135.20), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

474

CA 21-01071

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

MARY BETH OSTER-ERLICHMAN, PLAINTIFF-RESPONDENT,

V ORDER

BONNIE WHALEY, DEFENDANT-APPELLANT.

GOZIGIAN, WASHBURN & CLINTON, COOPERSTOWN (E.W. GARO GOZIGIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FELT EVANS, LLP, CLINTON (KENNETH L. BOBROW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 3, 2021. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

479

CA 21-00928

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

DAVID A. BYINGTON, PLAINTIFF-RESPONDENT,

V ORDER

NICHOLAS J. HULING, PHELPS SUNGAS, INC.,
DEFENDANTS-RESPONDENTS,
AND TIMOTHY LEE MOON, DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK SUGNET, P.C., WILLIAMSVILLE (JACLYN S. WANEMAKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered June 10, 2021. The order denied the motion of defendant Timothy Lee Moon for summary judgment dismissing the amended complaint and all cross claims against him.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

487

KA 17-02138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REYNALDO MELENDEZ, JR., ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered October 23, 2017. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Montgomery*, 191 AD3d 1418, 1418-1419 [4th Dept 2021], *lv denied* 36 NY3d 1122 [2021]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see People v Fontanez-Baez*, 195 AD3d 1448, 1449 [4th Dept 2021], *lv denied* 37 NY3d 971 [2021]; *Montgomery*, 191 AD3d at 1419). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence (*see Montgomery*, 191 AD3d at 1419), we nevertheless conclude that the sentence is not unduly harsh

or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

494

CA 21-01220

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

JEANNE ALEXANDER, PLAINTIFF-RESPONDENT,

V ORDER

BONITA SEELBINDER, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered August 12, 2021. The order denied the motion of defendant for summary judgment dismissing the 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: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

502

CA 21-00963

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

VICTOR ZOLADZ AND STASIA VOGEL, AS EXECUTORS OF THE ESTATE OF ESTELLE T. ZOLADZ, DECEASED, PLAINTIFFS-RESPONDENTS,

V ORDER

STEPHANIE DIJOHN, DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JASON A. GOODMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered June 11, 2021. The order, among other things, denied in part defendant's motion for summary judgment dismissing the complaint.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

504

KA 19-00887

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE CANNON, 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 (Christopher J. Burns, J.), rendered October 31, 2016. The appeal was held by this Court by order entered October 8, 2021, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (198 AD3d 1372 [4th Dept 2021], *lv dismissed* 37 NY3d 1145 [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 his plea of guilty of burglary in the first degree (Penal Law § 140.30 [3]). We previously held the case, reserved decision, and remitted the matter to Supreme Court to make and state for the record a determination whether to adjudicate defendant a youthful offender (*People v Cannon*, 198 AD3d 1372, 1372 [4th Dept 2021], *lv dismissed* 37 NY3d 1145 [2021]). Upon remittal, the court declined to adjudicate defendant a youthful offender. Contrary to defendant's contention, we conclude that the court did not abuse its discretion in denying him youthful offender status (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]). Additionally, having reviewed the applicable factors pertinent to a youthful offender adjudication (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him that status (*see Simpson*, 182 AD3d at 1047). Finally, the sentence is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

515

CA 21-00489

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

JOSEPH SARAGO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

IROQUOIS FENCE, INC., DEFENDANT-RESPONDENT,
ISKALO DEVELOPMENT CORP. AND ISKALO REAL
ESTATE PARTNERSHIP, DEFENDANTS-APPELLANTS.

ISKALO DEVELOPMENT CORP. AND ISKALO REAL
ESTATE PARTNERSHIP, THIRD-PARTY
PLAINTIFFS-APPELLANTS,

V

JANITRONICS, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

LEWIS & LEWIS, P.C., BUFFALO (ADAM DELLEBOVI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

HURWITZ & FINE, BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered March 26, 2021. The order, among other things, denied 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.

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained when he was hit on the head by a falling piece of fencing that had been sold and installed by defendant Iroquois Fence, Inc. (Iroquois Fence). The incident occurred while plaintiff was on property owned by defendants-third-party plaintiffs Iskalo Development Corp. and Iskalo Real Estate Partnership (defendants). Defendants asserted a cross claim against Iroquois

Fence for contribution and indemnification, and commenced a third-party action against plaintiff's employer, third-party defendant Janitronics, Inc., for, inter alia, contractual indemnification. Defendants now appeal from those parts of an order that denied their motion for summary judgment dismissing the complaint and cross claims against them and for summary judgment on their cross claim against Iroquois Fence and on their third-party cause of action for contractual indemnification against Janitronics, Inc. We affirm. Contrary to their contention, defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law dismissing plaintiff's negligence cause of action against them (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "It is well established that a party cannot obtain summary judgment 'by pointing to gaps in its opponent's proof' " (*Frank v Price Chopper Operating Co.*, 275 AD2d 940, 941 [4th Dept 2000]). We have reviewed defendants' remaining contentions and conclude that none warrants modification of the order.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

516

CA 21-00840

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

IN THE MATTER OF DANA HENSLEY, ON BEHALF OF HER MINOR CHILDREN AND ALL OTHERS SIMILARLY SITUATED, ET AL.,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, ET AL.,
RESPONDENTS-DEFENDANTS,
ANDREW M. CUOMO, GOVERNOR OF NEW YORK, NEW YORK STATE DEPARTMENT OF HEALTH AND NEW YORK STATE DEPARTMENT OF EDUCATION,
RESPONDENTS-DEFENDANTS-APPELLANTS.
(PROCEEDING/ACTION NO. 1.)

IN THE MATTER OF ROBERT DINERO, ON BEHALF OF HIS MINOR CHILDREN AND ALL OTHERS SIMILARLY SITUATED,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V

ORCHARD PARK CENTRAL SCHOOL DISTRICT, ET AL.,
RESPONDENTS-DEFENDANTS,
ANDREW M. CUOMO, GOVERNOR OF NEW YORK, NEW YORK STATE DEPARTMENT OF HEALTH AND NEW YORK STATE DEPARTMENT OF EDUCATION,
RESPONDENTS-DEFENDANTS-APPELLANTS.
(PROCEEDING/ACTION NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

LAW OFFICE OF TODD ALDINGER, ESQ., BUFFALO (TODD ALDINGER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an amended judgment (denominated amended order) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered May 20, 2021 in CPLR article 78 proceedings and declaratory judgment actions. The amended judgment, inter alia, declared invalid certain COVID-19 pandemic-related guidance.

It is hereby ORDERED that said appeal is unanimously dismissed without costs and the amended judgment is vacated.

Memorandum: Petitioners-plaintiffs (petitioners) commenced these hybrid CPLR article 78 proceedings and declaratory judgment actions with nearly identical petitions-complaints (petitions) challenging COVID-19 pandemic-related guidance issued by respondents-defendants New York State Department of Health (DoH) and New York State Department of Education (DoE), pursuant to continuing executive orders signed by the Governor (collectively, respondents). Respondents appeal from an amended judgment which, among other things, granted judgment in favor of petitioners on the sixth cause of action in both petitions and declared that the guidance was arbitrary and capricious insofar as it placed different social distancing restrictions on elementary and secondary schools, and insofar as it used county-wide metrics to determine whether those restrictions apply to the school districts at issue.

After the amended judgment was issued, the guidance challenged by petitioners was withdrawn by respondents, the executive orders upon which the guidance was based expired, and the statutory scheme that permitted the Governor to issue the emergency guidelines upon which the DoH and DoE relied in promulgating that guidance was replaced. Thus, the parties correctly concede that this appeal is moot (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]). Contrary to respondents' contention, the issue here is not likely to recur (*see generally id.* at 811-812; *People v Rikers Is. Corr. Facility Warden*, 112 AD3d 1350, 1351 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]), and it "is not of the type that typically evades review" (*Wisholek v Douglas*, 97 NY2d 740, 742 [2002]). Therefore, the exception to the mootness doctrine does not apply (*see Matter of Pharaohs GC, Inc. v New York State Liq. Auth.*, 197 AD3d 1010, 1011 [4th Dept 2021]; *Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1558 [4th Dept 2021]; *cf. generally Coleman v Daines*, 19 NY3d 1087, 1090 [2012]).

Finally, " 'in order to prevent [the amended] judgment which is unreviewable for mootness from spawning any legal consequences or precedent,' " we vacate the amended judgment (*Matter of Thrall v CNY Centro, Inc.*, 89 AD3d 1449, 1451 [4th Dept 2011], *lv dismissed* 19 NY3d 898 [2012], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 718 [1980]; *see Funderburke v New York State Dept. of Civ. Serv.*, 49 AD3d 809, 811-812 [2d Dept 2008]; *see also Saratoga County Chamber of Commerce*, 100 NY2d at 812).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

517

CA 21-00366

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

LG 38 DOE, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

DOUGLAS NAIL, ET AL., DEFENDANTS,
AND USA HOCKEY, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

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

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 2, 2021. The order granted in part and denied in part the motion of defendant USA Hockey, Inc. to dismiss the complaint against it.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

518

CA 21-01084

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

LG 51 DOE, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

GERALD P. HAYES, ET AL., DEFENDANTS,
WESTERN NEW YORK AMATEUR HOCKEY LEAGUE, INC.,
NEW YORK STATE AMATEUR HOCKEY ASSOCIATION, INC.,
AND USA HOCKEY, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 2, 2021. The order, among other things, granted in part and denied in part the motion of defendants USA Hockey, Inc., New York State Amateur Hockey Association, Inc., and Western New York Amateur Hockey League, Inc., to dismiss the complaint against them.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

519

CA 21-00369

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

LG 70 DOE, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

LARRY WALTER, ET AL., DEFENDANTS,
USA HOCKEY, INC., AND NEW YORK STATE AMATEUR
HOCKEY ASSOCIATION, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

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

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered March 5, 2021. The order granted in part and denied in part the motion of defendants USA Hockey, Inc., and New York State Amateur Hockey Association, Inc., to dismiss the complaint against them.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

533

CAF 21-00463

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

IN THE MATTER OF LAHNI THOMAS,
PETITIONER-APPELLANT,

V ORDER

GEOFFREY THOMAS, RESPONDENT-RESPONDENT.

IN THE MATTER OF GEOFF THOMAS,
PETITIONER-RESPONDENT,

V

LAHNI THOMAS, RESPONDENT-APPELLANT.

IN THE MATTER OF GEOFF THOMAS,
PETITIONER-RESPONDENT,

V

LAHNI E. THOMAS, RESPONDENT-APPELLANT.

IN THE MATTER OF GEOFFREY DAVID THOMAS,
PETITIONER-RESPONDENT,

V

LAHNI E. THOMAS, RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-RESPONDENT AND 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 March 23, 2021 in a proceeding pursuant to Family Court Act article 8. The order, among other things, dismissed Lahni Thomas's family offense petition.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

535

CAF 21-01146

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

IN THE MATTER OF ALVIN H.,
RESPONDENT-APPELLANT.

ONONDAGA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (SARA E. LOWENGARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered July 23, 2021 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent a juvenile delinquent.

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

Memorandum: On appeal from an order that adjudicated him to be a juvenile delinquent and placed him in the custody of the Onondaga County Department of Children and Family Services for a period of one year, respondent contends only that Family Court erred by conducting an inadequate dispositional hearing. We dismiss the appeal as moot inasmuch as the period of placement has expired (*see Matter of Sysamouth D.*, 98 AD3d 1314, 1314 [4th Dept 2012]; *Matter of Kale F.*, 269 AD2d 832, 832-833 [4th Dept 2000]) and, to the extent that the order on appeal has been superceded by a subsequent order extending respondent's placement, there is no appeal therefrom now before us (*see Matter of Joseph YY.*, 306 AD2d 584, 585 [3d Dept 2003]; *Matter of Joseph M.*, 306 AD2d 612, 612 [3d Dept 2003]; *Matter of Byron A.*, 112 AD2d 30, 30 [4th Dept 1985]). We conclude that the exception to the mootness doctrine does not apply here (*see Sysamouth D.*, 98 AD3d at 1314; *Kale F.*, 269 AD2d at 832-833; *cf. Matter of Dante P.*, 81 AD3d 1267, 1268 [4th Dept 2011]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

537

CA 21-01137

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

IN THE MATTER OF NEW YORK COALITION FOR OPEN GOVERNMENT, INC., PETITIONER-APPELLANT,

V ORDER

NIAGARA COUNTY BOARD OF ETHICS, NIAGARA COUNTY LEGISLATURE, COUNTY OF NIAGARA, REBECCA J. WYDYSH, AS CHAIRMAN OF NIAGARA COUNTY LEGISLATURE, AND JAMES SPANBAUER, AS CHAIRMAN OF NIAGARA COUNTY BOARD OF ETHICS, RESPONDENTS-RESPONDENTS.

CIVIL RIGHTS AND TRANSPARENCY CLINIC, BUFFALO (MICHAEL F. HIGGINS OF COUNSEL), FOR PETITIONER-APPELLANT.

CLAUDE A. JOERG, COUNTY ATTORNEY, LOCKPORT (KATHERINE D. ALEXANDER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 19, 2021. The order denied the application of petitioner for attorney's fees.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

538

CA 21-01270

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF DALE L., FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Oneida County Court (Walter W. Hafner, Jr., A.J.), entered August 26, 2021 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the commitment of petitioner to a secure treatment facility.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

542

CA 21-00753

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

ANNA DONISI, PLAINTIFF-RESPONDENT,

V ORDER

JOSEPH ALLEN PRICE, DEFENDANT-RESPONDENT,
HEC B. HILTABRAND, AND WHEELER TRUCKING, INC.,
DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (KAYLA E. LEONARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered April 15, 2021. The order, among other things, struck the notices to admit of defendants Hec B. Hiltabrand and Wheeler Trucking, Inc.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

549

KA 21-00724

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

EDWARD BELCER, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered December 14, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

551

KA 21-00776

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

REYNALDO A. RATCLIFFE-SIERRA, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, ACTING DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 13, 2021. The judgment convicted defendant, upon his plea of guilty, of assault 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.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

552

KA 20-01649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER A. LIBERATORE, DEFENDANT-APPELLANT.

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

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered December 4, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that his plea was involuntarily entered because the prosecutor threatened to present the case to the grand jury the next day if he did not accept the plea offer and because County Court implicitly threatened to impose a more severe sentence if defendant was convicted after trial. Defendant failed to preserve his contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Thigpen-Williams*, 198 AD3d 1366, 1367 [4th Dept 2021]; *People v Hilton*, 115 AD3d 1358, 1359 [4th Dept 2014]). In any event, we see no basis in the record for concluding that defendant's plea was involuntarily entered. The case had been pending in local court for months before defendant pleaded guilty, and the court merely advised defendant of his maximum exposure if convicted of the most serious offense for which he was charged (*see People v Gast*, 114 AD3d 1270, 1270-1271 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]; *People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]; *People v Berezansky*, 229 AD2d 768, 769-770 [3d Dept 1996], *lv denied* 89 NY2d 919 [1996]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

565

CA 21-00542

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

ART JAYES AND ELIZABETH JAYES,
PLAINTIFFS-APPELLANTS,

V ORDER

IRISH WELDING SUPPLY CORP. AND IRISH
PROPANE CORP., DEFENDANTS-RESPONDENTS.

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

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 30, 2021. The order, among other things, granted the motion of defendants for summary judgment 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: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

55

KA 17-02069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA A. MENCEL, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), 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 (Alex R. Renzi, J.), rendered May 31, 2017. The judgment convicted defendant upon a jury verdict of kidnapping in the first degree (two counts), coercion in the first degree, unlawful imprisonment in the first degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of kidnapping in the first degree (Penal Law § 135.25 [2] [a], [c]), and one count each of coercion in the first degree (§ 135.65 [1]), unlawful imprisonment in the first degree (§ 135.10), and assault in the third degree (§ 120.00 [1]).

We reject defendant's contention that the evidence is legally insufficient to support the conviction of two counts of kidnapping in the first degree. A conviction is supported by legally sufficient evidence "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 proven beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007], quoting *People v Acosta*, 80 NY2d 665, 672 [1993]). A defendant is guilty of kidnapping in the first degree when the defendant "abducts another person and when . . . [the defendant] restrains the person abducted for a period of more than twelve hours with intent to . . . [i]nflict personal injury upon [the victim]" (Penal Law § 135.25 [2] [a]) or "[t]errorize [the victim]" (§ 135.25 [2] [c]). As relevant here, to " '[a]bduct' " someone "means to restrain a person with intent to prevent his [or her] liberation by . . . secreting or holding him [or her] in a place where he [or she] is not likely to be found" (§ 135.00 [2] [a]; *see People v Gonzalez*,

80 NY2d 146, 150 [1992]; *People v Vail*, 174 AD3d 1365, 1367 [4th Dept 2019]). Contrary to defendant's contention, the evidence is legally sufficient to support all of the elements of both charged counts of kidnapping in the first degree (*see People v Ehinger*, 152 AD2d 97, 101 [1st Dept 1989], *lv denied* 75 NY2d 812 [1990]). Although defendant contends that the People failed to establish that the victim had been abducted because the evidence showed that the victim was being held in a bedroom in her home, we conclude that "[t]he degree of likelihood or unlikelihood of discovery of the victim's hiding place simply presented a factual question for the jury to resolve in light of all the circumstances of the abduction and restraint, and is not susceptible to disposition as a matter of law on this record" (*id.*). Defendant failed to preserve for our review his remaining challenges to the legal sufficiency of the evidence with respect to the counts of kidnapping in the first degree inasmuch as those specific contentions were not raised in his motion for a trial order of dismissal (*see People v Serrano*, 196 AD3d 1134, 1134 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021], *reconsideration denied* 38 NY3d 930 [2022]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). Moreover, viewing the evidence in light of the elements of the crimes of which defendant was convicted as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We further reject defendant's contention that the count charging him with coercion in the first degree (Penal Law § 135.65 [1]) was rendered duplicitous by the testimony at trial. "[T]he rule against duplicitous counts of an indictment 'does not apply to continuing crimes' " (*People v Errington*, 121 AD3d 1553, 1554 [4th Dept 2014], *lv denied* 25 NY3d 1163 [2015]; *see People v Dalton*, 27 AD3d 779, 781 [3d Dept 2006], *lv denied* 7 NY3d 754 [2006], *reconsideration denied* 7 NY3d 811 [2006]). Contrary to defendant's contention, "coercion is a crime that can be committed by a series of acts over a period of time and can be characterized as a continuing offense" (*People v Belden*, 215 AD2d 889, 890 [3d Dept 1995], *lv denied* 86 NY2d 840 [1995]; *see generally People v First Meridian Planning Corp.*, 86 NY2d 608, 615-616 [1995]). Thus, the charge of coercion in the first degree as a continuing crime was not rendered duplicitous by evidence establishing that defendant instilled fear in the victim over a one-month period by inflicting physical and verbal abuse, as well as threatening to have her arrested or institutionalized if she failed to comply with his commands.

Defendant further contends that he was deprived of a fair trial due to several improper evidentiary rulings. We conclude that Supreme Court did not abuse its discretion in admitting into evidence text messages sent on July 6 and August 25, 2016 (*see generally People v Lofton*, 256 AD2d 1180, 1180 [4th Dept 1998], *lv denied* 93 NY2d 854 [1999]), inasmuch as the identity of the senders and receivers of the messages was sufficiently authenticated by the content of the text messages (*see People v Green*, 107 AD3d 915, 916 [2d Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *see generally People v Patterson*, 93 NY2d 80, 84-85 [1999]). To the extent that the court may have erred in

admitting in evidence text messages dated August 2, 2016 on the ground that it is unclear whether defendant was a sender or receiver of those text messages, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *Lofton*, 256 AD2d at 1180-1181).

Further, the court did not err in permitting the People to introduce into evidence letters written between the victim and the codefendants. The letters were introduced, not for the truth of the matters asserted within, but for the purpose of showing the jury the states of mind of defendant and the codefendants (*see People v Ricco*, 56 NY2d 320, 328 [1982]; *see generally People v Arnold*, 147 AD3d 1327, 1328 [4th Dept 2017], *lv denied* 29 NY3d 996 [2017]; *People v Loria*, 190 AD2d 1006, 1006 [4th Dept 1993]). In any event, any alleged error in the admission of the letters is harmless (*see generally Crimmins*, 36 NY2d at 241-242). Indeed, the information contained within those letters is largely cumulative of the victim's testimony and the communications by defendant that were admitted in evidence (*see People v Villalona*, 145 AD3d 625, 626 [1st Dept 2016], *lv denied* 29 NY3d 953 [2017]; *People v Pruitt*, 129 AD3d 517, 518 [1st Dept 2015], *lv denied* 26 NY3d 970 [2015]).

Nor did the court abuse its discretion in permitting the People to introduce into evidence the order of protection obtained by one of the codefendants against the victim (*see generally People v Barnes*, 109 AD2d 179, 184 [4th Dept 1985]; *People v Ahearn*, 88 AD2d 691, 692 [3d Dept 1982]). The order of protection was relevant to the issues at trial inasmuch as it supported the People's theory that defendant's motivation for committing the crimes against the victim was a desire to interfere with the victim's custody of her two-year-old daughter (*see generally People v Frumusa*, 29 NY3d 364, 370 [2017], *rearg denied* 29 NY3d 1110 [2017]; *People v Ayala*, 298 AD2d 397, 398 [2d Dept 2002], *lv denied* 99 NY2d 555 [2002]).

We reject defendant's contention that the court erred in permitting a psychiatric assistance officer to provide testimony describing a conversation with the victim under the prompt outcry exception to the hearsay rule. " '[P]romptness is a relative concept dependent on the facts' " of the case (*People v Rosario*, 17 NY3d 501, 512-513 [2011], quoting *People v McDaniel*, 81 NY2d 10, 17 [1993]). Given the emotional and physical abuse suffered by the victim, we conclude that the victim's statements to the psychiatric assistance officer were made "at the first suitable opportunity" (*People v Rath*, 192 AD3d 1600, 1601 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]), and we therefore reject defendant's contention that the outcry was not sufficiently prompt (*see People v Shelton*, 307 AD2d 370, 371 [2d Dept 2003], *affd* 1 NY3d 614 [2004]; *People v Reyes*, 143 AD3d 414, 414 [1st Dept 2016], *lv denied* 28 NY3d 1126 [2016]; *People v Cridelle*, 112 AD3d 1141, 1143-1144 [3d Dept 2013]).

Defendant further contends that he was denied a fair trial due to prosecutorial misconduct during summation. With respect to the sole instance of prosecutorial misconduct to which defendant objected with

"a specification of the basis for the objection" sufficient to preserve the issue for our review (*People v Beggs*, 19 AD3d 1150, 1151 [4th Dept 2005], *lv denied* 5 NY3d 803 [2005]), the court sustained the objection and issued a curative instruction. Inasmuch as "[d]efendant did not request further curative instructions or move for a mistrial with respect to th[at] objection[,] . . . the court must be deemed to have corrected the error[] to the defendant's satisfaction" (*People v Duell*, 124 AD3d 1225, 1229 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015] [internal quotation marks omitted]).

Defendant's sentence is not unduly harsh or severe.

Finally, we have reviewed defendant's remaining contentions and conclude that they are either unpreserved or without merit.

Entered: June 3, 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 18-02092

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GIANNI DEJESUS, DEFENDANT-APPELLANT.

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

LORI P. RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered July 11, 2018. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree, grand larceny in the fourth degree (two counts) and menacing in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one, three through five and seven of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), robbery in the second degree (§ 160.10 [1]), two counts of grand larceny in the fourth degree (§ 155.30 [1], [5]), and menacing in the second degree (§ 120.14 [1]).

Defendant's challenge to the legal sufficiency of the evidence with respect to the conviction of grand larceny under count four of the indictment is not preserved for our review inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged error (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Hildreth*, 199 AD3d 1366, 1367 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes of which he was convicted as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant that County Court erred in permitting the People to introduce under *People v Molineux* (168 NY 264 [1901]) evidence of defendant's alleged involvement in a burglary of the victim's home that occurred three days prior to the instant offenses as evidence that defendant intended to commit the instant offenses.

"[T]he familiar *Molineux* rule states that evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot be logically connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]). " '[W]hile such evidence may be marginally relevant to the question of the accused's guilt, its probative value is deemed to be outweighed by its potential for prejudice, and, accordingly, the evidence is excluded as a matter of judicial policy' " (*id.*). "Evidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself" (*People v Alvino*, 71 NY2d 233, 242 [1987]; *see generally People v Bradley*, 20 NY3d 128, 133-134 [2012]).

With respect to the counts of robbery in the first and second degrees, "[t]he applicable culpable standard-intent-require[s] evidence that, in using or threatening physical force, [the] defendant's conscious objective was either to compel [the] victim to deliver up property or to prevent or overcome resistence to the taking or retention thereof" (*People v Gordon*, 23 NY3d 643, 650 [2014] [internal quotation marks omitted]). Here, evidence that defendant may have been involved in an earlier burglary of the victim's home was not necessary for the jury to infer that, three days later, defendant had the intent to rob the victim. Rather, defendant's intent to forcibly steal property can be inferred from the victim's testimony that defendant, while wielding a baseball bat, directed him to comply with the demands of an unidentified masked gunman to turn over money and property. Under those circumstances, any probative value of the evidence of the prior burglary "is outweighed by its potential for prejudice" (*Cass*, 18 NY3d at 559). For the same reason, defendant's "intent to deprive another of property" (Penal Law § 155.05 [1]) as required for a conviction of grand larceny in the fourth degree (§ 155.30 [1], [5]), or intent "to place another person in reasonable fear of physical injury, serious physical injury or death" as required for a conviction of menacing in the second degree (§ 120.14 [1]) could likewise be easily inferred from the victim's testimony describing defendant's conduct during the alleged crimes. We further conclude that the error is not harmless (*see People v Powell*, 152 AD2d 918, 919 [4th Dept 1989]; *cf. People v Case*, 197 AD3d 985, 986 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2021]; *People v Bounds*, 100 AD3d 1523, 1524 [4th Dept 2012], *lv denied* 20 NY3d 1096 [2013]). Here, there is little physical evidence linking defendant to the robbery, and the victim's credibility was undermined during cross-examination. Thus, "[t]he evidence [of defendant's guilt is] not overwhelming" (*People v Coffie*, 192 AD3d 1641, 1642 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]) and, "[a]s a matter of first principle, 'unless the proof of the defendant's guilt . . . is overwhelming, there is no occasion for consideration of any doctrine of harmless error' " (*People v J.L.*, 36 NY3d 112, 124 [2020], quoting *People v Crimmins*, 36 NY2d 230, 241 [1975]). We therefore reverse the judgment and grant a new trial on counts one, three through five and seven of the indictment. Further, although our determination that the court erred with respect to the

admission of the evidence of the prior burglary is dispositive, because there will be a new trial in this case, we are compelled to note that it was also error for the court to allow the People to introduce evidence of defendant's alleged use of gang signs during the robbery (*see generally Alvino*, 71 NY2d at 242).

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

Entered: June 3, 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 20-01408

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

DAVID HERBERT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

1025 CHILI AVENUE, LLC, DEFENDANT-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (MATTHEW J. DUGGAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered October 2, 2020. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff, a paver operator employed by a nonparty, commenced this action seeking to recover damages for injuries that he allegedly sustained when he stepped off of a parked paver and onto an uneven surface on property owned by defendant. Plaintiff alleges that plaintiff's employer had an oral agreement with defendant to use defendant's property as an overnight staging area to store the paving equipment. Defendant moved for summary judgment dismissing the complaint on the ground, inter alia, that it owed no duty to plaintiff inasmuch as it did not retain possession or control over the property. Supreme Court denied the motion and defendant appeals.

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]; *see generally Giacometti v Farrell* [appeal No. 2], 133 AD3d 1387, 1390 [4th Dept 2015]). "That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of [the] property is best able to identify and prevent any harm to others' " (*Gronski*, 18 NY3d at 379, quoting *Butler v Rafferty*, 100 NY2d 265, 270 [2003]). "[A]n out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable . . . for personal injuries caused by an unsafe condition existing on the premises" (*Balash v Melrod*, 167 AD3d 1442, 1442 [4th Dept 2018] [internal quotation marks omitted]).

We conclude that the court did not err in denying defendant's motion inasmuch as defendant failed to meet its prima facie burden of establishing that it relinquished its control of the property such that it had no duty to plaintiff to remedy the allegedly defective condition (*see id.* at 1443; *see generally Rainey v Bonanno*, 178 AD3d 1394, 1394-1395 [4th Dept 2019]). In support of its motion, defendant submitted the deposition testimony of its owner who stated that he had an agreement with plaintiff's employer whereby plaintiff's employer would be permitted to store paving equipment on a specific area of defendant's property but was required to return that area of the property to the original condition. However, the owner's testimony raised an issue of fact whether the area where plaintiff's employer stored the paving equipment was indeed the area for which the agreement granted plaintiff's employer permission to do so, and thus there is a question of fact whether plaintiff's employer was obligated to maintain the area of the property where the incident occurred. Therefore, viewing the evidence in the light most favorable to plaintiff, the nonmoving party (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), we conclude that defendant failed to establish that it relinquished control of the premises to plaintiff's employer such that it owed no duty to plaintiff to remedy the allegedly defective condition (*see Gronski*, 18 NY3d at 381-382).

Inasmuch as defendant failed to meet its initial burden on the motion, we do not consider the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: June 3, 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 20-01356

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

BERNARD J. NAEGELE AND LORRIE S. NAEGELE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STEPHEN FOX, DEFENDANT-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT BERNARD J. NAEGELE.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (DANIEL K. CARTWRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT LORRIE S. NAEGELE.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered September 29, 2020. The order granted the motion of plaintiff Lorrie S. Naegele and the cross motion of plaintiff Bernard J. Naegele to dismiss defendant's counterclaim.

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

Memorandum: Plaintiffs, Bernard J. Naegele (Bernard) and Lorrie S. Naegele (Lorrie), and defendant, who own adjacent lakefront properties on Seneca Lake in the Town of Geneva (Town), are involved in an ongoing dispute over aspects of a residential construction project undertaken by defendant. Lorrie, who is also the Town Clerk, has previously been sued by defendant in her official capacity, along with others, in hybrid CPLR article 78 proceedings and civil rights actions challenging, inter alia, the Town's determination that defendant's property was in violation of certain provisions of the Town of Geneva Code (Code) (*Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576 [4th Dept 2019]). During the pendency of those hybrid proceedings and actions, the Town enacted new provisions of the Code related to zoning, and plaintiffs subsequently commenced the present action against defendant alleging various causes of action based, in part, on the new provisions of the Code and seeking, inter alia, removal of certain walls built and fill placed by defendant. Defendant interposed a counterclaim alleging pursuant to 42 USC § 1983 that plaintiffs had conspired with Town officials to violate his constitutionally protected, vested property rights. Defendant now appeals from an order that granted Lorrie's motion and Bernard's cross

motion to dismiss the counterclaim against them pursuant to CPLR 3211. We affirm.

Preliminarily, as the parties agree, Supreme Court erred as a matter of law in dismissing the counterclaim on the ground that a conspiracy claim under 42 USC § 1983 may be brought only against one acting in their official capacity, not as a private actor. Contrary to the court's determination, a litigant may "establish section 1983 liability on the part of . . . a private actor . . . [by] show[ing] that [the private actor] acted under color of State law or otherwise jointly engaged with government officials in the prohibited action" (*Freedman v Coppola*, 206 AD2d 893, 893 [4th Dept 1994]; *see Hall v City of Buffalo*, 151 AD3d 1942, 1944 [4th Dept 2017]). In that regard, "it is sufficient to establish that [the private actor] willfully participated with State actors in a conspiracy to deprive [the litigant] of [their] civil rights" (*Freedman*, 206 AD2d at 893).

We nonetheless conclude that, contrary to defendant's contention that he adequately stated a cause of action against plaintiffs in their capacities as private actors for conspiracy to violate his civil rights, plaintiffs are entitled to dismissal of the counterclaim pursuant to CPLR 3211 (a) (7). "On a motion to dismiss . . . pursuant to CPLR 3211, we must liberally construe the pleading and 'accept the facts as alleged in the [pleading] as true, accord [the nonmoving party] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]). "The allegations in a [pleading], however, cannot be vague and conclusory . . . , and [b]are legal conclusions will not suffice" (*Choromanskis v Chestnut Homeowners Assn., Inc.*, 147 AD3d 1477, 1478 [4th Dept 2017] [internal quotation marks omitted]; *see Connaughton*, 29 NY3d at 141-142). Thus, "[d]ismissal of [a pleading or cause of action] is warranted if the [pleading party] fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton*, 29 NY3d at 142).

With respect to the theory of liability raised in the counterclaim here, to state a claim against a private individual for a section 1983 conspiracy, the pleading party "must allege (1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages" (*Ciambriello v County of Nassau*, 292 F3d 307, 324-325 [2d Cir 2002]; *see Pangburn v Culbertson*, 200 F3d 65, 72 [2d Cir 1999]). Although courts "have recognized that such conspiracies are by their very nature secretive operations, and may have to be proven by circumstantial, rather than direct, evidence," "conclusory allegations of a [section] 1983 conspiracy are insufficient" to sustain a claim (*Pangburn*, 200 F3d at 72 [internal quotation marks omitted]). Thus, "[a] claim for

conspiracy to violate civil rights requires a detailed fact pleading" and a claim "containing only conclusory, vague and general allegations of a conspiracy to deprive a person of constitutional rights cannot withstand a dismissal motion" (*Kubik v New York State Dept. of Social Servs.*, 244 AD2d 606, 610 [3d Dept 1997]; *see Williams v Maddi*, 306 AD2d 852, 853 [4th Dept 2003], *lv denied* 100 NY2d 516 [2003], *cert denied* 541 US 960 [2004]).

Here, viewing the counterclaim in the appropriate light (*see Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP*, 37 NY3d at 175), we conclude that defendant did not state a cause of action inasmuch as he "failed to substantiate his [counterclaim] 'with detailed factual information concerning the alleged conspiracy' " (*Ford v Snashall*, 285 AD2d 881, 882 [3d Dept 2001]; *see Williams*, 306 AD2d at 853). Indeed, the material allegations in the counterclaim largely consist of vague and general repetitions of defendant's prior claims that Lorrie had a conflict of interest and some unspecified communications with certain government actors "in an effort to convince them to take adverse action towards [d]efendant and/or the [p]roject," as well as bare legal conclusions that plaintiffs and the Town acted in concert and conspired to apply new zoning provisions retroactively to his property. Defendant's only arguably new allegation that handwritten notes obtained pursuant to a FOIL request of an unspecified date "indicate a meeting between [Lorrie] and otherwise [sic] with respect to the [b]reakwall and/or the [p]roperty" does not even purport to be related to communications by Lorrie as a private individual with respect to the new zoning requirements and, in any event, that allegation is generic and speculative regarding the nature of any agreement that may have been reached between Lorrie and the Town (*see Scarfone v Village of Ossining*, 23 AD3d 540, 541 [2d Dept 2005]). Moreover, as the court properly recognized, the counterclaim as asserted against Bernard lacks the requisite detailed pleading of facts, inasmuch as there are no specific allegations concerning his purported involvement in a conspiracy (*see id.*; *Williams*, 306 AD2d at 853; *Ford*, 285 AD2d at 882). Additionally, defendant improperly relies on mere speculation that plaintiffs' lawsuit itself is indicative of a conspiracy (*see Scarfone*, 23 AD3d at 541) and, inasmuch as the counterclaim lacks sufficient allegations that plaintiffs contributed to any actions by the Town, defendant has not adequately alleged "the collaborative action necessary to render [plaintiffs] liable, as . . . private citizen[s], under 42 USC § 1983" (*Payne v County of Sullivan*, 12 AD3d 807, 810 [3d Dept 2004]). In sum, defendant failed to state a cause of action because the allegations "regarding conspiracy are vague and conclusory, and fail to offer sufficient factual details regarding an agreement among [plaintiffs and the Town] to deprive [defendant] of property in the absence of due process of law, the equal protection of the laws, or privileges and immunities secured to [defendant] by the laws and the Constitution of the United States" (*Matter of Nocro, Ltd. v Russell*, 94 AD3d 894, 895 [2d Dept 2012]).

In light of our determination, we do not address the remaining

bases for the court's dismissal of the counterclaim.

Entered: June 3, 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 20-01147

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF DANIEL J. FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Oneida County Court (Gerald Popeo, A.J.), entered August 12, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, continued petitioner's confinement to a secure treatment facility.

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

Memorandum: In appeal No. 1, petitioner appeals from an order of County Court (Popeo, A.J.), entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement as defined by section 10.03 (e) and directing that petitioner continued to be confined to a secure treatment facility (*see* § 10.09 [h]). In appeal No. 2, petitioner appeals from an order of Supreme Court (Clark, J.) denying his application to proceed as a poor person with respect to a motion for reconsideration of County Court's order in appeal No. 1.

We note at the outset that appeal No. 2 must be dismissed inasmuch as respondent was not notified of petitioner's application to proceed as a poor person and "no appeal lies as of right from an ex parte order, including an order entered sua sponte . . . , and permission to appeal has not been granted" (*Juliano v Genesee Gateway, LLC*, 188 AD3d 1680, 1680 [4th Dept 2020] [internal quotation marks omitted]; *see* CPLR 5701 [c]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]).

In appeal No. 1, petitioner contends that he was deprived of an opportunity to defend himself when County Court ruled that petitioner's counsel could not disclose petitioner's Central New York Psychiatric Center (CNYPC) records to petitioner. We conclude that petitioner's contention does not present a justiciable controversy inasmuch as petitioner concedes in his appellate brief that he was given "full access" to his CNYPC records (*see People v Colucci*, 94 AD3d 1419, 1419-1420 [4th Dept 2012], *lv denied* 19 NY3d 1025 [2012]). To the extent that petitioner contends that CNYPC may have withheld certain records from petitioner pursuant to the "substantial and identifiable harm" limitation set forth in Mental Hygiene Law § 33.16 (c) (1), that contention is not properly before this Court. Mental Hygiene Law § 33.16 (c) (4) requires a facility to inform a patient if he or she has been denied access to certain records pursuant to section 33.16 (c) (1) and allows the patient to pursue an administrative review of the denial. Here, there is no evidence in the record that petitioner was provided with such notice or that, if he were provided with such notice, he exhausted his administrative remedies with respect thereto (*see generally Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 887 [4th Dept 2021]; *Sawah v Rochester St. Mary's Hosp. of Sisters of Charity*, 101 AD2d 694, 695 [4th Dept 1984], *lv dismissed* 64 NY2d 605 [1985]). In the absence of any indication that petitioner was denied any of his CNYPC records and that he exhausted his administrative remedies with respect to such denial, we "ha[ve] no discretionary power to reach" petitioner's contention (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]; *see Matter of Mixon v Wickett*, 196 AD3d 1094, 1095-1096 [4th Dept 2021]).

Contrary to petitioner's contention, we conclude that respondents established by clear and convincing evidence that petitioner is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.03 [e]). The court's determination is supported by the written reports of two experts and the hearing testimony of one of those experts (*see Matter of State of New York v Treat*, 100 AD3d 1513, 1513 [4th Dept 2012]; *Matter of State of New York v Pierce*, 79 AD3d 1779, 1781-1782 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]) and, other than petitioner's "self-serving testimony at the hearing, there was no evidence to the contrary" (*Treat*, 100 AD3d at 1513). In reaching their opinions, the experts relied upon petitioner's escalating conduct, the ineffectiveness of past punitive measures and counseling, petitioner's continued denial of culpable conduct, the lack of treatment and a relapse prevention plan, and certain assessment instrument scores (*see Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455 [2015]; *Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585-1586 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]; *see generally Matter of Wright v State of New York*, 134 AD3d 1483, 1486-1487 [4th Dept 2015]).

Entered: June 3, 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 20-01383

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

IN THE MATTER OF DANIEL J., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 1, 2020. The order denied petitioner's application to proceed as a poor person.

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

Same memorandum as in *Matter of Daniel J. v State of New York* ([appeal No. 1] — AD3d — [June 3, 2022] [4th Dept 2022]).

Entered: June 3, 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 20-01422

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

IN THE MATTER OF THE ESTATE OF FRANK I. MAIKA, DECEASED.

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

CORA A. ALSANTE, ADMINISTRATRIX OF THE ESTATE OF FRANK I. MAIKA, DECEASED, PETITIONER-RESPONDENT;

ANNE MAIKA AND PHILIP MAIKA, RESPONDENTS-APPELLANTS.

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

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Luddington, A.J.), entered March 20, 2020. The order denied the motion of respondents for summary judgment dismissing the petition and granted the petition.

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

Memorandum: In this proceeding pursuant to SCPA 2103, respondents appeal from an order that, inter alia, denied their motion for summary judgment dismissing the petition, sua sponte granted summary judgment on the petition, and set aside a deed conveying real property to respondents. We agree with respondents that Supreme Court erred.

Respondents are 2 of decedent's 12 children and were the primary caregivers for decedent, who suffered from severe disabilities, in the years preceding his death in July 2017. In February 2010, decedent executed a power of attorney authorizing five of his children, including respondent Philip Maika (Philip), to act on his behalf with respect to various transactions, including real estate transactions, but only if a majority of the appointed agents agreed on a transaction. The power of attorney did not authorize decedent's agents to make major gifts on his behalf. In March 2017, Philip and two of his siblings, acting in their capacities as decedent's attorneys-in-fact, conveyed decedent's home (property) to respondents as joint tenants, with decedent retaining a life estate in the

property. Following decedent's death, petitioner, as the appointed administrator of decedent's estate, commenced this proceeding alleging that the property had been improperly transferred to respondents and should be delivered to decedent's estate.

The court concluded that the transfer was an improper gift, relying on the presumption that "where parties are related, . . . services were rendered in consideration of love and affection, without expectation of payment" (*Mantella v Mantella*, 268 AD2d 852, 853 [3d Dept 2000] [internal quotation marks omitted]; *see Matter of Wilson*, 178 AD2d 996, 997 [4th Dept 1991]). Even assuming, arguendo, that the presumption applies to the inter vivos transfer at issue here (*see Mantella*, 268 AD2d at 852-853; *cf. Wilson*, 178 AD2d at 996-997), we conclude that respondents supported their motion with "clear, convincing and satisfactory evidence[] that there was an agreement . . . that the services would be compensated" (*Wilson*, 178 AD2d at 997). Respondents submitted, in addition to their own affidavits, affidavits from the two attorneys-in-fact who voted with Philip to transfer the property. Each averred that the transfer was intended to compensate respondents for their continued care of decedent and that respondents' services allowed decedent to remain in his home. Each further averred that she agreed to the transfer knowing that it would diminish her own share of decedent's estate. Thus, respondents rebutted the presumption and established as a matter of law that the transfer of property was not a gift (*cf. Mantella*, 268 AD2d at 852-853). Further, respondents established that the attorneys-in-fact acted within the authority delegated to them by decedent to transfer real property for his benefit, i.e., as compensation for the services that permitted him to remain in the home in accordance with his expressed wishes (*cf. Borders v Borders*, 128 AD3d 1542, 1543 [4th Dept 2015]). Petitioner failed to raise an issue of fact in response (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

All concur except SMITH and PERADOTTO, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent because we disagree with the majority on a point of law implicated in this case and, even if we were to apply the law as set forth by the majority, we would still conclude that respondents are not entitled to summary judgment dismissing the petition. We would therefore affirm.

"Where the parties are related, . . . particularly where[, as here,] the relationship is that of parent and child[ren], . . . it is presumed that the services [rendered to the parent] were rendered in consideration of love and affection, without expectation of payment" (*Matter of Wilson*, 178 AD2d 996, 997 [4th Dept 1991]). "It is incumbent upon the [party claiming compensation] to demonstrate, by clear, convincing and satisfactory evidence, that there was an agreement, express or implied, that the services would be compensated" (*id.*).

In contrast to the majority, it is our view that, when an attorney-in-fact child, whose action or vote is necessary to approve a transfer of property allegedly as compensation for services rendered to a parent, is an interested party who stands to receive such alleged

compensation, the attorney-in-fact child must rebut the presumption with evidence of the *parent's* intent to transfer the property as compensation (*see Mantella v Mantella*, 268 AD2d 852, 853 [3d Dept 2000]; *see also Matter of Curtis*, 83 AD3d 1182, 1183 [3d Dept 2011]; *Matter of Naumoff*, 301 AD2d 802, 804 [3d Dept 2003], *lv dismissed* 100 NY2d 534 [2003]). Here, however, respondents produced "no evidence of decedent's intention to compensate [them] for [their] efforts" (*Naumoff*, 301 AD2d at 804; *see Mantella*, 268 AD2d at 853). Inasmuch as respondents did not rebut the presumption, they failed to meet their initial burden on the motion, and the court properly denied their motion, granted summary judgment sua sponte on the petition, and set aside the deed conveying real property to respondents.

In any event, contrary to the majority's determination, we conclude that respondents failed to submit clear and convincing evidence that there was an agreement between respondents and the attorneys-in-fact "—whether express, implied in fact, or implied in law—that [respondents] would be reimbursed . . . for services allegedly rendered to [decedent]" (*Wilson*, 178 AD2d at 997). The clear and convincing evidence standard "requires evidence that makes it highly probable that what [a party] claims is what actually happened . . . , i.e., evidence that is neither equivocal nor open to opposing presumptions . . . , and it forbids relief whenever the evidence is loose, equivocal or contradictory" (*Matter of Monto v Zeigler*, 183 AD3d 1294, 1295 [4th Dept 2020], *lv denied* 35 NY3d 904 [2020] [internal quotation marks omitted]). Here, that standard has not been met. Respondents rely only on self-serving statements in their own affidavits and after-the-fact, hearsay statements in the affidavits of two of respondents' siblings who were attorneys-in-fact recounting prior conversations among the attorneys-in-fact, without any contemporaneous evidence to substantiate that the property transfer—which occurred during the terminal months of decedent's illness even though his will would have passed the property equally to all of his children—was intended to compensate respondents for their care of decedent (*see generally Mantella*, 268 AD2d at 853; *Matter of Barr*, 252 AD2d 875, 877 [3d Dept 1998]; *Wilson*, 178 AD2d at 997-998). Even assuming, arguendo, that respondents met that burden, we would conclude that, viewing the evidence in the light most favorable to petitioner and drawing every available inference in her favor (*see generally De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), petitioner's submissions in opposition, including the affidavit of another sibling, raise a triable issue of fact whether the household arrangements between decedent and respondents were for their mutual benefit and the services were rendered in consideration of love and affection, rather than with an expectation of compensation (*see generally Matter of Adams*, 1 AD2d 259, 262 [4th Dept 1956], *affd* 2 NY2d 796 [1957]; *Wilson*, 178 AD2d at 998).

Entered: June 3, 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 17-01711

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALI R. JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered July 31, 2017. 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 Monroe County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of one count of burglary in the second degree (Penal Law § 140.25 [2]), arising from an incident in which a residence was burglarized and the police subsequently found several fingerprints located on a piece of paper near the point of entry. A police department fingerprint examiner analyzed the evidence and testified at trial that, based on 18 points of similarity and zero points of dissimilarity between one partial print found on the piece of paper at the crime scene and an inked print taken from defendant, it was her opinion that the partial print was made by defendant's left index finger.

On cross-examination, the fingerprint examiner agreed that her opinion is subjective, that two examiners may reach different opinions when examining the same set of prints, and that verification by a second examiner, particularly blind verification, significantly increases the accuracy of fingerprint analysis. She further testified that every individual fingerprint has approximately 80 to 120 classifiable characteristics, and that every characteristic between two prints must be identical for them to be considered a match. Here, because of the limited nature of the partial print, she was only able to match 18 characteristics, meaning that it matched 15% to 22.5% of the characteristics of defendant's inked print. Further, there was no

evidence presented at trial that a second examiner had made a positive verification that the partial print was made by defendant. No other evidence was introduced at trial linking defendant to the crime.

Under these facts, we agree with defendant that the verdict is against the weight of the evidence, and we therefore reverse the judgment and dismiss the indictment. A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Where an acquittal would not have been unreasonable, we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). We conclude that an acquittal would not have been unreasonable in this case and, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.* at 349), we further conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt.

Although there are cases where a fingerprint provides support for a burglary conviction where there is additional evidence linking the defendant to the crime (*see e.g. People v Hajratalli*, 200 AD3d 1332, 1336 [3d Dept 2021]; *People v Gibson*, 199 AD3d 1335, 1336 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]), the evidence here established, at best, a subjective and unverified opinion that defendant's fingerprint shared a small number of characteristics with a partial print found at the scene. Giving the evidence the weight it should be accorded, we find that the People failed to establish, beyond a reasonable doubt, that defendant entered the residence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Gonzalez*, 174 AD3d 1542, 1546 [4th Dept 2019]).

Defendant's remaining contention is academic in light of our determination.

Entered: June 3, 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 19-01486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD BOVIO, DEFENDANT-APPELLANT.

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

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, WATERLOO (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Jason L. Cook, A.J.), rendered June 20, 2019. The judgment convicted defendant, upon a plea of guilty, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Seneca County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]). The conviction arises from the death of defendant's 3-year-old stepson (victim), against whom defendant had allegedly directed violence previously, following an incident in which defendant, in the presence of his codefendant wife in the apartment where they resided, violently pushed the victim, which caused the victim to strike his head on the floor, become nonresponsive, and ultimately die days later. Defendant contends on appeal that his plea was not knowingly and voluntarily entered because he negated the depraved indifference mens rea element of the crime in his factual recitation during the plea proceeding and County Court erred in accepting the plea without adequately curing the deficiency and in denying his subsequent motion to withdraw the plea. We agree.

Preliminarily, defendant's contention that his plea was not knowingly and voluntarily entered would survive even a valid waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Paternostro*, 188 AD3d 1675, 1676 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]). Moreover, defendant preserved his contention for our review by moving to withdraw his plea on essentially the same grounds as those advanced on appeal (*see People v Johnson*, 23 NY3d 973, 975 [2014]) and, in any event, the narrow

exception to the preservation requirement applies in this case (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Bertollini* [appeal No. 2], 141 AD3d 1163, 1164 [4th Dept 2016]).

With respect to the merits, "[w]hile 'trial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea' . . . , 'where a defendant's factual recitation negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that defendant understands the nature of the charge and that the plea is intelligently entered' " (*People v Worden*, 22 NY3d 982, 984 [2013]; *see Lopez*, 71 NY2d at 666). "Upon further inquiry, the court may accept the plea only if it determines the allocution sufficient" (*Matter of Silmon v Travis*, 95 NY2d 470, 474 n 1 [2000]; *see Lopez*, 71 NY2d at 666).

As relevant to the elements of the crime at issue here, a person is guilty of murder in the second degree pursuant to Penal Law § 125.25 (2) when, "[u]nder circumstances evincing a depraved indifference to human life, [that person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." The crime of depraved indifference murder thus contains "two mens rea elements" (*People v Barboni*, 21 NY3d 393, 401 [2013]), i.e., recklessness and depraved indifference (*id.* at 400). First, "[a] person acts recklessly with respect to a result . . . when [that person] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (§ 15.05 [3]; *see People v Lewie*, 17 NY3d 348, 356-357 [2011]). Second, with respect to depraved indifference, "at the time the crime occurred, [the person must] ha[ve] a mens rea of 'utter disregard for the value of human life,' " meaning that the person "did not care whether [the] victim lived or died" (*Barboni*, 21 NY3d at 400; *see People v Williams*, 24 NY3d 1129, 1132 [2015]; *Lewie*, 17 NY3d at 359; *People v Feingold*, 7 NY3d 288, 296 [2006]). "In other words, a person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life—that person does not care how the risk turns out" (*Lewie*, 17 NY3d at 359).

Here, we agree with defendant that, although his admissions during the plea allocution established the mens rea element of recklessness (*see* Penal Law § 15.05 [3]; *Lewie*, 17 NY3d at 356-357), his recitation of the facts underlying the charge of murder in the second degree pursuant to Penal Law § 125.25 (2) "cast significant doubt upon his guilt insofar as it negated the [second mens rea] element of depraved indifference" (*Bertollini*, 141 AD3d at 1164). In response to the court's question whether defendant did not care if harm happened to the victim or how the risk to the victim turned out, defendant stated through defense counsel that "[h]e did care for [the victim]." We conclude that defendant's statement negated the element of depraved indifference because the second mens rea element of the crime required that defendant "did not care whether [the] victim lived

or died" (*Barboni*, 21 NY3d at 400) or, in other words, that he did "not care how the risk turn[ed] out" (*Lewie*, 17 NY3d at 359). Defendant, however, conveyed during the factual recitation the exact opposite of the requisite mental state, i.e., that he did, in fact, care for the victim.

Although the People insist that defendant did not negate the depraved indifference mens rea element, none of their arguments withstand scrutiny. There is no basis to ignore defendant's statement, as the People propose, on the ground that it was voiced by defense counsel after consultation with defendant rather than by defendant himself (*see People v Goldstein*, 12 NY3d 295, 300 [2009]; *People v Benjamin*, 24 Misc 3d 103, 104 [App Term, 1st Dept 2009], *lv denied* 13 NY3d 905 [2009]). Further, although the People correctly note that defendant's statement itself was not expressly linked to any particular time period, the remark was made in the context of defendant's admission to his mental state at the time of the crime and, as defendant points out, if there was equivocation with respect to when he professed to have cared for the victim, that alone was sufficient reason for the court to conduct a further inquiry about the depraved indifference mens rea element (*see People v Lawrence*, 192 AD2d 332, 333 [1st Dept 1993], *lv denied* 81 NY2d 1075 [1993]; *see also People v Edwards*, 55 AD3d 1337, 1338 [4th Dept 2008], *lv denied* 11 NY3d 924 [2009]; *People v Castanea*, 265 AD2d 906, 907 [4th Dept 1999]).

Moreover, the People's assertion that the court performed an adequate inquiry is without merit. While the court elicited—both before and after defendant's statement—an affirmative response from defendant that he "ignored *or* simply didn't care how th[e] risk turned out" with respect to the victim (emphasis added), "that inquiry was insufficient to reestablish the negated element," and the court therefore failed to ensure that the plea was knowing and voluntary (*Bertollini*, 141 AD3d at 1164). The court's inquiry merely elicited defendant's admission that he *either* disregarded the risk, i.e., the mens rea of reckless disregard, *or* that he did not care how the risk turned out, i.e., the mens rea of depraved indifference. But the crime of depraved indifference murder requires *both* of those mental states (*see Barboni*, 21 NY3d at 400) and, inasmuch as defendant had just negated the depraved indifference mens rea element, it was incumbent upon the court to conduct a further inquiry to reestablish that specific negated element, which the court failed to do during the plea proceeding (*see Bertollini*, 141 AD3d at 1164).

To the extent that the court attempted to cure the deficiency in the plea during an additional proceeding held three days later, we agree with defendant that the effort failed. The additional proceeding did not constitute an *Alford* plea inasmuch as defendant did not admit to any of the facts proffered by the prosecutor during the additional proceeding or even acknowledge that the record before the court contained strong evidence of actual guilt; instead, defendant immediately moved to withdraw his plea, declaring his innocence and stating that he would not continue any plea allocution (*cf. People v*

Hill, 16 NY3d 811, 813-814 [2011]). In any event, even if the additional proceeding could be construed as an attempted *Alford* plea upon a strong evidence of guilt but without an admission of depraved indifference by defendant, acceptance of that plea would be inappropriate given that there is "no such thing as a 'limited' *Alford* colloquy or plea," and a court may not cure a deficiency in the allocution with respect to an element of the offense by resort to an *Alford* plea where, as here, "the record does not establish that [the defendant] was aware of the nature and character of an *Alford* plea" (*id.* at 814).

Based on the foregoing, we conclude that the court erred in accepting defendant's guilty plea and in denying his motion to withdraw the plea, and we therefore reverse the judgment of conviction, vacate the plea, and remit the matter to County Court for further proceedings on the indictment. In light of our determination, we do not address defendant's remaining contentions.

Entered: June 3, 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 21-00596

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

IN THE MATTER OF ROGER BUMP,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRITTANY M. RUTTER, RESPONDENT-APPELLANT.

WELCH FIRM LLP, CORNING (GEORGE J. WELCH, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

BRENNA BOYCE PLLC, ROCHESTER (ROBERT L. BRENNA, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended judgment (denominated amended decision and order) of the Steuben County Court (Chauncey J. Watches, J.), dated April 6, 2021. The amended judgment, among other things, ordered that a warrant for removal be issued.

It is hereby ORDERED that the amended judgment so appealed from is unanimously reversed on the law without costs, the petition is dismissed, and the amended warrant for removal is vacated.

Memorandum: In this summary proceeding pursuant to RPAPL 713 (3), respondent appeals from a judgment that granted petitioner's petition seeking to recover possession of certain real property and ordered that a warrant for removal be issued. We note at the outset that the judgment (denominated decision and order) from which respondent appeals was superseded by an amended judgment (denominated amended decision and order). In the exercise of our discretion, we treat the appeal as taken from the amended judgment (*see* CPLR 5520 [c]; *Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1575-1576 [4th Dept 2010], *lv dismissed in part and denied in part* 16 NY3d 760 [2011]; *Wilder v Nickbert Inc.*, 254 AD2d 819, 819 [4th Dept 1998]), and we now reverse.

Under the RPAPL, a special proceeding may be maintained when the respondent "has intruded or squatted upon the property without the permission of the person entitled to possession and the occupancy has continued without permission or permission has been revoked and notice of the revocation given to the person to be removed" (RPAPL 713 [3]). "[A] defense that [the] petitioner is not a person entitled to possession of the property is properly maintainable in this type of proceeding" (*Marrero v Escoto*, 145 Misc 2d 974, 976 [App Term, 2d Dept 1990]). Here, we agree with respondent that County Court erred in

granting the petition inasmuch as petitioner failed to establish that he was a person entitled to possession of the premises. Petitioner's own testimony established that the deed to the property that he purchased in 2019 specifically excluded "all of the tracts of, parcel of land owned in the town of Caton conveyed to Robert L. Rutter, Jr. by Warranty Deed," and respondent's proof established that the premises at issue was located on the land that had been conveyed to Robert Rutter, Jr. in the Town of Caton.

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

Entered: June 3, 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 21-01048

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

PAMELA RENFRO, INDIVIDUALLY AND DERIVATIVELY
ON BEHALF OF RENFRO-HERRALD HOSPITALITY, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANGELA HERRALD, DAVID STEITZ AND HERRALD-STEITZ
PROPERTIES, LLC, DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEFFREY F. ALLEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 25, 2021. The order, among other things, denied defendants' motion to cancel a notice of pendency and for attorneys' fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it sought to cancel the notice of pendency and as modified the order is affirmed without costs.

Memorandum: The parties entered into a business arrangement to operate an inn on real property in the Village of Fairport (property), which property was purchased by defendants Angela Herrald and David Steitz together with Steitz's mother. The parties' business plan contemplated the formation of two LLCs, one formed by plaintiff and Herrald to operate the inn's business (Hospitality LLC), and the other formed by Herrald and Steitz (Properties LLC) to which title to the property was transferred. Hospitality LLC rented the property from Properties LLC.

In 2020, as a consequence of the COVID-19 pandemic, Herrald and Steitz spoke to plaintiff about the inn's alleged financial struggles. Ultimately, Herrald and Steitz directed plaintiff to stop taking reservations for the inn, and announced their intent to use the property as their personal residence. Thereafter, Herrald and Steitz moved into the property.

Plaintiff commenced this action, asserting, inter alia, causes of action alleging that defendants breached a purported joint venture

agreement between the parties, as well as their fiduciary duties as joint venturers. Plaintiff sought, inter alia, an order directing the liquidation of the joint venture's assets, which allegedly included the property, as well as equitable distribution among the parties of the proceeds from the liquidation. Plaintiff then filed a notice of pendency on the property, and defendants filed a motion seeking to cancel the notice of pendency and for attorneys' fees. Defendants appeal, as limited by their brief, from the ensuing order insofar as it effectively denied their motion in its entirety.

"A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property" (CPLR 6501). Because the provisional remedy of a notice of pendency is an " 'extraordinary privilege' " (*5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]), the Court of Appeals has held that to be entitled to that remedy, there must be a "direct relationship" between the relief sought in the complaint and the title to or possession of the disputed property (*id.* at 321). In making that determination, a court must use "a narrow interpretation," and its "analysis is to be limited to the pleading's face" (*id.*).

Here, we agree with defendants that Supreme Court erred in denying their motion insofar as it sought to cancel the notice of pendency because there was no direct relationship between title to or possession of the property and the relief sought by plaintiff. We therefore modify the order accordingly. Reviewing the complaint on its face, we conclude that plaintiff seeks merely to enforce her purported 50% share in the joint venture and does not assert an interest in the property itself. Indeed, the complaint alleges that title to the property was, at all relevant times, held by Properties LLC, of which plaintiff was not a member. It is well settled that " 'the legal consequences of a joint venture are equivalent to those of a partnership' " (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off. & City of Oswego*, 137 AD3d 1707, 1707 [4th Dept 2016]), and thus a joint venturer's interest in a joint venture constitutes an interest in only personal property, not real property, thereby precluding recourse to a notice of pendency (*see Kheel v Kheel*, 72 AD3d 1543, 1544 [4th Dept 2010]; *Freidus v Sardelli*, 192 AD2d 578, 580 [2d Dept 1993]; *Walsh v Rechler*, 151 AD2d 473, 473 [2d Dept 1989]; *see generally Gross v Neiman*, 147 AD3d 505, 507 [1st Dept 2017]; *Liffiton v DiBlasi*, 170 AD2d 994, 994 [4th Dept 1991]).

Although in the complaint plaintiff requested that the property be sold, there is no direct relationship between the requested relief, i.e., satisfaction of plaintiff's claim on 50% of the purported joint venture's assets, and ownership or possession of the property. Plaintiff did not assert that she was entitled to 50% of the property itself, and the conclusion that sale or other disposition of the property would be necessary to satisfy her claim is speculative (*see generally Kheel*, 72 AD3d at 1544; *Freidus*, 192 AD2d at 580; *General Prop. Corp. v Diamond*, 29 AD2d 173, 175 [1st Dept 1968]).

Further, even assuming, arguendo, that plaintiff is correct in her assertion that the complaint sought to impose a constructive trust on the property, we conclude that this would still not entitle plaintiff to a notice of pendency here because her "claim does not relate directly to an interest in real property but relates rather to h[er] rights in the" joint venture (*21/23 Ave. B Realty LLC v 21&23 Ave B, LLC*, 191 AD3d 456, 458 [1st Dept 2021]).

Finally, we have reviewed defendants' remaining contention and conclude that it lacks merit.

Entered: June 3, 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 21-01075

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

IN THE MATTER OF CHRISTOPHER BIHARY AND
CHRISTINE SABUDA,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF CITY OF BUFFALO,
CITY OF BUFFALO,
RESPONDENTS-DEFENDANTS-RESPONDENTS,
DR. WENDY E. ZIMMER AND DR. JOHN M. HOURIHANE,
INTERVENORS-RESPONDENTS-DEFENDANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARC A. ROMANOWSKI OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CARIN S. GORDON OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, BUFFALO (COREY A. AUERBACH OF COUNSEL), FOR INTERVENORS-RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 22, 2021 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, granted the motions of respondent-defendant Zoning Board of Appeals of City of Buffalo and intervenors-respondents-defendants to dismiss the petition-complaint and dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motions are denied, the petition-complaint is reinstated, and respondents-defendants and intervenors-respondents-defendants are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioners-plaintiffs (petitioners) installed a driveway on a portion of their residential property without obtaining the necessary permits from respondent-defendant City of Buffalo or the required variance approvals from respondent-defendant Zoning Board of Appeals of City of Buffalo (ZBA). Petitioners subsequently applied to the ZBA for the required variances and, following public hearings in which various neighbors voiced opposition to the application, including intervenors-respondents-defendants (Intervenors), the ZBA denied the application.

Petitioners commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking to, inter alia, annul the ZBA's determination. Before answering, the ZBA and Intervenors moved to dismiss the petition-complaint (petition). Intervenors also moved for an order enjoining petitioners from using the driveway. Supreme Court granted the motions to dismiss, dismissed the petition in its entirety and, in light of its determination, denied as moot Intervenors' motion seeking injunctive relief. We reverse.

Initially, we note that this is properly only a CPLR article 78 proceeding because the relief sought by petitioners "is available under CPLR article 78 without the necessity of a declaration" (*Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1431 [4th Dept 2021]; *see generally* CPLR 7801; *Matter of O'Reilly v Grumet*, 308 NY 351, 358 [1955]; *Matter of Schultz v Town of Hopewell Zoning Bd. of Appeals*, 163 AD3d 1477, 1478 [4th Dept 2018]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 70 AD2d 1021, 1022 [3d Dept 1979], *appeal dismissed* 48 NY2d 654 [1979]).

Regarding the merits, a pre-answer motion to dismiss a CPLR article 78 petition for failure to state a cause of action "is tantamount to a demurrer, assumes the truth of the allegations of the petition, and permits no consideration of facts alleged in support of the motion" (*Hondzinski v County of Erie*, 64 AD2d 864, 864 [4th Dept 1978]; *see Matter of Ostrowski v County of Erie*, 245 AD2d 1091, 1092 [4th Dept 1997]; *see generally Matter of Mintz v City of Rochester*, 200 AD3d 1650, 1652 [4th Dept 2021]). Here, petitioners alleged in the petition that the ZBA's determination to deny their variance application was arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence, which allegations fit within a cognizable legal theory (*see generally Matter of Anderson v Town of Clarence*, 275 AD2d 930, 930-931 [4th Dept 2000]). The court therefore erred in granting the motions. We note that, to the extent the court effectively converted the motions into motions for summary judgment, it erred in doing so because it did not give the parties the requisite notice of its intent to convert those motions (*see Ostrowski*, 245 AD2d at 1092-1093).

Finally, given our reinstatement of the petition, the motion of Intervenors seeking injunctive relief is no longer moot, and we therefore remit the matter to Supreme Court to determine that motion (*see generally Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1494-1495 [4th Dept 2019]).

Entered: June 3, 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 18-02104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUES KING, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 June 1, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the omnibus motion seeking to suppress tangible property and statements are granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and resisting arrest (§ 205.30). We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure of his vehicle, and thus County Court erred in refusing to suppress the tangible property seized, i.e., the marihuana and cocaine, and defendant's statements to the police. Here, the police officers effectively seized defendant's vehicle when they pulled into a parking lot and stopped their vehicle directly in front of defendant's parked vehicle in such a manner as to prevent defendant from driving away (*see People v Jennings*, 45 NY2d 998, 999 [1978]; *People v Jennings*, 202 AD3d 1439, 1440 [4th Dept 2022]; *People v Williams*, 177 AD3d 1312, 1312 [4th Dept 2019]; *People v Suttles*, 171 AD3d 1454, 1455 [4th Dept 2019]). Police officer testimony at the suppression hearing established that, at the time the officers stopped their vehicle in front of defendant's vehicle, they had observed defendant's presence in a vehicle at 1:00 p.m. in the parking lot of an apartment complex known for drug activity and where officers believed defendant did not reside, and they were aware that defendant had a history of drug-related

convictions. Such evidence does not provide a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime (*see generally People v McIntosh*, 96 NY2d 521, 526 [2001]; *People v King*, 199 AD3d 1454, 1454 [4th Dept 2021]; *People v Rutledge*, 21 AD3d 1125, 1126 [2d Dept 2005], *lv denied* 6 NY3d 758 [2005]).

Thus, we conclude that the tangible property and defendant's statements should have been suppressed. We therefore vacate defendant's guilty plea and, "because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed" (*Suttles*, 171 AD3d at 1455 [internal quotation marks omitted]; *see Jennings*, 202 AD3d at 1440). In light of our determination, we do not address defendant's remaining contention.

Entered: June 3, 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 20-01429

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

IN THE MATTER OF ERIC M. KENNELL, SR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KAYLA L. TRUSTY, RESPONDENT-APPELLANT,
AND DANIEL DOBBS, RESPONDENT-RESPONDENT.

IN THE MATTER OF ERIC M. KENNELL, SR.,
PETITIONER-RESPONDENT,

V

KAYLA L. TRUSTY, RESPONDENT-APPELLANT.

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

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered September 25, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that petitioner shall have primary physical placement of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner filed an amended petition seeking to modify a prior custody order entered on the consent of petitioner and respondent mother. The prior custody order, inter alia, awarded the mother and petitioner joint custody of the subject child with physical placement with the mother. The mother now appeals from an order that, inter alia, modified the prior custody order by awarding primary physical placement of the child to petitioner, who is not a parent of the child. The mother has seven children, and petitioner is the father and custodial parent of the youngest two of those children.

We reject the mother's contention that petitioner failed to make the requisite showing that extraordinary circumstances existed to warrant an inquiry into whether an award of custody to a nonparent is in the child's best interests. "[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be

denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147 [4th Dept 2009] [internal quotation marks omitted]; *see Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]). "The nonparent has the burden of establishing that extraordinary circumstances exist even where, as here, 'the prior order granting custody of the child to [the] nonparent[] was made upon consent of the parties' " (*Howard*, 64 AD3d at 1147; *see Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351 [4th Dept 2006], *lv denied* 7 NY3d 717 [2006]). Here, a determination in a dispositional order entered in a Family Court Act article 10 proceeding that the mother had neglected the subject child " 'supplied the threshold showing that extraordinary circumstances' " exist (*Matter of Jackson v Euson*, 153 AD3d 1655, 1656 [4th Dept 2017]).

We agree with the mother that once petitioner established that extraordinary circumstances existed, Family Court erred by failing to determine whether petitioner met his burden of establishing that a change in circumstances had occurred since entry of the prior order granting the mother and petitioner joint custody of the child (*see generally Matter of Driscoll v Mack*, 183 AD3d 1229, 1230 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *Matter of McNeil v Deering*, 120 AD3d 1581, 1582-1583 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014]). Nevertheless, " 'this Court has the authority to independently review the record' to ascertain whether the requisite change in circumstances existed" (*Matter of Curry v Reese*, 145 AD3d 1475, 1475 [4th Dept 2016]). Here, petitioner established that since the time of the prior order, the child was subjected to physical aggression in the mother's home by some of the mother's other children. Further, while in the mother's care, the child had many unexplained absences from school and the mother failed to assist the child with his homework resulting in his need to repeat second grade. Moreover, the mother failed to comply with requirements of the prior custody order to ensure that the child is, inter alia, properly bathed and groomed and to maintain a safe and sanitary home. In addition, while the child's preference is not dispositive, " 'it is a factor to consider in determining whether there has been a change in circumstances' " (*Matter of Cheney v Cheney*, 118 AD3d 1358, 1359 [4th Dept 2014]). Here, the child expressed a strong preference to live with petitioner. Thus, we conclude that petitioner established the requisite change in circumstances (*see generally Driscoll*, 183 AD3d at 1230; *Curry*, 145 AD3d at 1476).

Finally, we conclude that the court properly determined that it is in the child's best interests for petitioner to have primary physical placement of the child (*see generally Prall v Prall*, 156 AD3d 1351, 1352 [4th Dept 2017]; *Matter of Walker v Cameron*, 88 AD3d 1307, 1308 [4th Dept 2011]). In addition to the evidence described above, the record establishes, inter alia, that petitioner has a close bond with the child and petitioner has primary physical custody of two of

the child's siblings.

Entered: June 3, 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 21-00243

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

ERIN DOUGHERTY, AS EXECUTOR OF THE ESTATE OF
THOMAS B. DOUGHERTY, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JULIUS G.S. LATORRE, M.D., DEFENDANT,
PUNEET KAPUR, M.D., AND CARMEN M. MARTINEZ, M.D.,
DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM, PLLC, SYRACUSE (RACHEL NICOLE FRIEDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU), FOR DEFENDANT-RESPONDENT PUNEET KAPUR, M.D.

RICOTTA MATTREY CALLOCCHIA MARKET & CASSERT, BUFFALO (COLLEEN K. MATTREY OF COUNSEL), FOR DEFENDANT-RESPONDENT CARMEN M. MARTINEZ, M.D.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered February 3, 2021. The order, among other things, granted the motions of defendants Puneet Kapur, M.D., and Carmen M. Martinez, M.D., for summary judgment and dismissed the complaint against them.

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

Memorandum: Decedent commenced this action seeking damages for, inter alia, injuries he sustained as a result of the alleged medical malpractice of defendants-respondents. Defendants-respondents each moved for summary judgment dismissing the complaint against them, and Supreme Court granted both motions. We note at the outset that decedent passed away during the pendency of this appeal. Although decedent's daughter, Erin Dougherty, was added as an additional plaintiff in her role as the temporary guardian of decedent's person and property prior to the motion practice at issue (*see generally* Mental Hygiene Law § 81.23 [a]), decedent's death nonetheless divests this Court of jurisdiction in this matter until a proper substitution of decedent's estate has been made by court order pursuant to CPLR 1015 (a) (*see Giroux v Dunlop Tire Corp.*, 16 AD3d 1068, 1069 [4th Dept 2005]; *see generally* Mental Hygiene Law § 81.36 [a] [3]; *Matter of Vita V. [Cara B.]*, 100 AD3d 913, 914 [2d Dept 2012]). Inasmuch as decedent's daughter has filed with this Court the appropriate letters

testamentary appointing her as executor of decedent's estate, we substitute her as the "proper part[y]" on our own motion and amend the caption accordingly (CPLR 1015 [a]; *see* CPLR 1021; *Hallinckx v Stenbeck*, 307 AD2d 915, 915 [2d Dept 2003]). We have reviewed plaintiff's contentions on appeal and affirm for reasons stated in the decision at Supreme Court.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

202

KA 18-01853

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HANZA MUHAMMAD, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PAUL J. CONNOLLY 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 (Thomas J. Miller, J.), rendered July 23, 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.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contentions, the conviction is based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and the verdict is not against the weight of the evidence when viewed independently and in light of the elements of the crimes as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Gonzalez*, 174 AD3d 1542, 1544-1545 [4th Dept 2019]).

Defendant contends that he was denied a public trial when court officers prevented spectators from entering the courtroom for the testimony of a key witness. We agree with the People that defendant's rights were not violated. The Sixth and Fourteenth Amendments to the United States Constitution provide all criminal defendants with the right to a public trial, and a court's discretion to close a courtroom to the public "must be exercised only when unusual circumstances necessitate it" (*People v Martin*, 16 NY3d 607, 611 [2011] [internal quotation marks omitted]; *see e.g. People v Colon*, 71 NY2d 410, 413-415 [1988], *cert denied* 487 US 1239 [1988]; *People v Glover*, 60 NY2d 783, 785 [1983], *cert denied* 466 US 975 [1984]).

Here, County Court did not close the courtroom and did not

intentionally exclude anyone. Concerned about distracting the jurors, however, the court had a standing policy that prohibited anyone from entering or exiting the courtroom while a witness was testifying, and the manner in which that rule was enforced by court deputies, along with a misunderstanding by spectators in the hallway waiting to enter the courtroom, led to a group of people waiting in the hallway for the doors to open while the jury was hearing testimony inside the courtroom.

Although we do not approve of the court's standing policy of essentially locking the courtroom doors while witnesses are on the stand, defendant did not object to the court's policy and does not challenge it on appeal. Instead, defendant contends that the court deputies are an extension of the court and that their malfeasance in the hallway should therefore be imputed to the court for purposes of determining whether defendant's Sixth Amendment right to a public trial was violated. We reject that contention. "A denial of the public trial right requires an affirmative act by the trial court excluding persons from the courtroom, which in effect explicitly overcomes the presumption of openness" (*People v Peterson*, 81 NY2d 824, 825 [1993]; *see People v Torres* [appeal No. 1], 97 AD3d 1125, 1127 [4th Dept 2012], *affd* 20 NY3d 890 [2012]). Here, people were excluded from the courtroom not by any affirmative act of the court, but instead by a confluence of factors outside the court's knowledge and control. Under the circumstances, we conclude that the "brief and inadvertent" closing of the courtroom (*Peterson*, 81 NY2d at 825) did not violate defendant's right to a public trial (*see People v Gonzalez*, 237 AD2d 302, 302-303 [2d Dept 1997], *lv denied* 89 NY2d 1093 [1997]).

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

204

KA 20-01305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN PITTS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS MANNING LEITH 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 (Matthew J. Doran, J.), rendered September 29, 2020. The judgment convicted defendant upon his plea of guilty of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the third degree (Penal Law § 160.05). Contrary to defendant's contention, County Court properly denied his motion to dismiss the indictment on speedy trial grounds (*see generally* CPL 30.30). Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cooper*, 90 NY2d 292, 294 [1997]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018], quoting *People v Cortes*, 80 NY2d 201, 208 [1992]). Here, the People announced readiness for trial within 174 days of the commencement of the action. Thus, absent any period of postreadiness delay chargeable to the People, the People were ready for trial within the statutory period (*see* CPL 30.30 [1] [a]). Although defendant contends that the People should be charged with a period of postreadiness delay for failing to turn over the grand jury minutes within a reasonable amount of time, we reject that contention. "[W]here the People make no objection to the branch of [a defendant's] CPL 210.30 motion seeking inspection of the [g]rand [j]ury minutes, the People's obligation to produce the

[g]rand [j]ury minutes within a reasonable time begins to run from the date the defendant's CPL 210.30 motion . . . is made" (*People v Harris*, 82 NY2d 409, 413 [1993]). If the People fail to produce the grand jury minutes in a reasonable time, the period of delay beyond what is reasonable is chargeable to the People (*see id.* at 413-414; *People v McKenna*, 76 NY2d 59, 66 [1990]; *People v Lawrence*, 222 AD2d 279, 279 [1st Dept 1995], *lv denied* 88 NY2d 881 [1996]; *see also People v Johnson*, 42 AD3d 753, 754 [3d Dept 2007], *lv denied* 9 NY3d 923 [2007]). Here, the People responded to defendant's omnibus motion, wherein defendant sought, inter alia, inspection of the grand jury minutes and dismissal of the indictment pursuant to CPL 210.30, within 21 days of the date that he filed and served that motion and, in their response papers, the People noted that they had requested a copy of the grand jury minutes and that they would provide the minutes to the court once the minutes were available. The record reflects that the court was in receipt of the grand jury minutes within 46 days of defendant's filing and service of the omnibus motion. Under these circumstances, we conclude that the People provided the grand jury minutes to the court in a reasonable amount of time (*see People v Barnes*, 160 AD3d 890, 890 [2d Dept 2018], *lv denied* 31 NY3d 1145 [2018]; *People v Van Deusen*, 228 AD2d 987, 989 [3d Dept 1996]; *see also People v Harris*, 187 AD2d 1015, 1015-1016 [4th Dept 1992], *affd* 82 NY2d 409 [1993]), and thus that the court properly excluded that time period from the speedy trial calculation (*see People v Edmead*, 197 AD3d 937, 939-940 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1160 [2022]; *see also People v Rouse*, 47 AD3d 537, 538 [1st Dept 2008], *revd on other grounds* 12 NY3d 728 [2009]).

Defendant's contention regarding the People's alleged delay in filing a certificate of compliance in accordance with CPL 245.50 is unpreserved (*see* CPL 470.05 [2]; *People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Dudley*, 28 AD3d 1182, 1183 [4th Dept 2006], *lv denied* 7 NY3d 788 [2006]). Further, even assuming, arguendo, that defendant correctly contends that a seven-day period was chargeable to the People due to their delay in filing the certificate of compliance, the inclusion of that time would not have exceeded the statutory period in this case (*see* CPL 30.30 [1] [a]). Thus, contrary to defendant's further contention, "defense counsel was not ineffective in failing to move to dismiss on that ground" (*Valentin*, 183 AD3d at 1272; *see People v Brunner*, 16 NY3d 820, 821 [2011]; *People v Robinson*, 176 AD3d 533, 533 [1st Dept 2019], *lv denied* 34 NY3d 1132 [2020]).

Entered: June 3, 2022 Ann Dillon Flynn
Clerk of the Court

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

208

CA 21-00621

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

ALEXIS GONZALEZ AND JOANNA FERREIRA,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RICHARD L. MCCARVER, FALLS OF NEUSE
MANAGEMENT, LLC, NATIONAL COATINGS &
SUPPLIES, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (JESSICA E. TARIQ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered April 14, 2021. The order, among other things, denied in part plaintiffs' motion for partial summary judgment and granted the cross motion of defendants-respondents for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and reinstating the complaint against defendants-respondents, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by Alexis Gonzalez (plaintiff) when a vehicle he was driving was rear-ended by a vehicle driven by defendant Richard L. McCarver. Plaintiffs appeal from an order that, inter alia, granted the cross motion of defendants-respondents (defendants) for summary judgment dismissing the complaint against them on the ground that plaintiff did not suffer a serious injury under Insurance Law § 5102 (d) as a result of the accident due to an unexplained gap in plaintiff's treatment.

We agree with plaintiffs that Supreme Court erred in granting the cross motion based on its conclusion that there was an unexplained 14-month gap in plaintiff's treatment that was fatal to plaintiffs' causes of action (*see generally Pommells v Perez*, 4 NY3d 566, 574 [2005]). Summary judgment may be appropriate, "[e]ven where there is objective medical proof [of a serious injury], when additional

contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition" (*McCarthy v Bellamy*, 39 AD3d 1166, 1166 [4th Dept 2007] [internal quotation marks omitted]; *see Hollenbeck v Barry*, 199 AD3d 1329, 1329-1330 [4th Dept 2021]). Here, the court granted the cross motion based solely on the purported gap in plaintiff's treatment, *not* because it found that plaintiff's injuries did not constitute a serious injury under Insurance Law § 5102 (d). Thus, the primary issue on this appeal is not whether there was a serious injury, but rather whether the purported injury was caused as "a result of the accident" (PJI 2:88E, 2:88F; *see generally* Insurance Law § 5102 [d]) and, with respect to that issue, defendants bore the burden on their cross motion of establishing as a matter of law that the "chain of causation" was interrupted by the alleged gap in treatment (*Pommells*, 4 NY3d at 572).

Contrary to defendants' position on their cross motion and the court's decision, we conclude that "the record fails to establish [as a matter of law] that plaintiff in fact ceased all therapeutic treatment" during the purported 14-month gap alleged by defendants (*Cook v Peterson*, 137 AD3d 1594, 1597 [4th Dept 2016] [internal quotation marks omitted]; *see Hollenbeck*, 199 AD3d at 1330; *Ortiz v Boamah*, 169 AD3d 486, 489 [1st Dept 2019]). Indeed, the record reflects that plaintiff did not cease all treatment during the purported 14-month gap, and instead self-treated during that time with pain medications and exercises, pursuant to his physician's instructions (*see Cook*, 137 AD3d at 1597). The court also erred to the extent that it concluded that plaintiff's explanation for the purported gap in treatment was "disingenuous" because that conclusion is tantamount to a credibility determination, which is not generally permitted on a motion for summary judgment (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Cook*, 137 AD3d at 1597). In any event, we note that the issue of causation is "[t]ypically . . . one to be [resolved] by the factfinder" (*Hain v Jamison*, 28 NY3d 524, 529 [2016]).

Further, we reject defendants' contention, advanced as an alternative ground for affirmance on plaintiffs' appeal (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that the court properly granted the cross motion because plaintiff did not suffer a serious injury under Insurance Law § 5102 (d). Even assuming, arguendo, that defendants met their initial burden on the cross motion in that respect, we conclude that plaintiffs raised triable issues of fact through the affidavit of plaintiff's treating physician whether plaintiff sustained a serious injury under the significant limitation of use and permanent consequential limitation of use categories (*see Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]; *Crewe v Pisanova*, 124 AD3d 1264, 1265 [4th Dept 2015]; *Burke v Moran*, 85 AD3d 1710, 1711 [4th Dept 2011]). We therefore modify the order by denying defendants' cross motion and reinstating the complaint against them.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

209

CA 21-00220

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

IN THE MATTER OF TODD R. BRIGLIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

TODD R. BRIGLIN, PETITIONER-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Kevin M. Nasca, J.), entered December 28, 2020 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied petitioner's motion for leave to reargue, granted respondent's motion for leave to reargue and, upon reargument, dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment that denied his motion for leave to reargue, granted the motion of respondent for leave to reargue and, upon reargument, dismissed the petition. The appeal from that part of the judgment denying petitioner's motion for leave to reargue must be dismissed inasmuch as no appeal lies therefrom (*see People ex rel. Hinspeter v Artus*, 159 AD3d 1539, 1540 [4th Dept 2018], *lv dismissed* 31 NY3d 1139 [2018], *rearg denied* 32 NY3d 1042 [2018]). Because petitioner was released to parole in December 2020, the remainder of the appeal must be dismissed as moot (*see People ex rel. Luck v Squires*, 173 AD3d 1767, 1767 [4th Dept 2019]; *People ex rel. Seals v New York State Dept. of Correctional Servs.*, 32 AD3d 1262, 1263 [4th Dept 2006]). Contrary to petitioner's contention, we conclude that the exception to the mootness doctrine does not apply (*see Luck*, 173 AD3d at 1767-1768; *People ex rel. Winters v Crowley*, 166 AD3d 1525, 1525 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

213

CA 21-00253

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

END OF THE HILL, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BROCK ACRES REALTY, LLC, SCOTT BROCKLEBANK, TRAVIS BROCKLEBANK AND ONTARIO COUNTY SOIL AND WATER CONSERVATION DISTRICT, DEFENDANTS-APPELLANTS.

SCOLARO FETTER GRIZANTI & MCGOUGH, P.C., SYRACUSE (CHAIM J. JAFFE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered January 25, 2021. The order denied defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action asserting causes of action for trespass, private nuisance, and the violation of RPAPL 861. The action is based on allegations that defendants Brock Acres Realty, LLC, Scott Brocklebank, and Travis Brocklebank, by their employees, agents, or contractors, while performing work to improve drainage on an adjoining parcel of land in furtherance of a project designed by defendant Ontario County Soil and Water Conservation District, wrongfully entered plaintiff's property and caused damage to, inter alia, trees located thereon. Defendants appeal from an order that denied their motion seeking, inter alia, summary judgment dismissing the complaint.

We conclude that Supreme Court did not err in denying defendants' motion. Defendants failed to meet their initial burden of establishing entitlement to judgment as a matter of law by submitting "sufficient evidence to demonstrate the absence of any material issues of fact" with respect to any of plaintiff's causes of action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Viewing the evidence in the light most favorable to plaintiff and affording plaintiff the benefit of every reasonable inference, as we must on defendants' motion (*see Vega*

v Restani Constr. Corp., 18 NY3d 499, 503 [2012]; *Luttrell v Vega*, 162 AD3d 1637, 1637 [4th Dept 2018]), we conclude that defendants' own submissions on the motion raised numerous triable questions of material fact with respect to each of plaintiff's causes of action—particularly with respect to whether there was any wrongful entry onto plaintiff's property, an element common to all of the causes of action (*cf. Schulz v Dattero*, 104 AD3d 831, 833-834 [2d Dept 2013]; *see generally Uhteg v Kendra*, 200 AD3d 1695, 1697 [4th Dept 2021]). Moreover, it is well settled that "defendants cannot establish . . . entitlement to summary judgment dismissing the complaint [merely] by pointing to alleged gaps in plaintiff's proof" and, here, defendants plainly attempted to do just that by arguing that plaintiff failed to supply evidence in support of its three causes of action (*Godlewski v Carthage Cent. School Dist.*, 83 AD3d 1571, 1572 [4th Dept 2011]; *see DeVaul v Erie Ins. Co. of N.Y.*, 174 AD3d 1520, 1520 [4th Dept 2019]; *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]).

Because defendants failed to meet their initial burden on the motion, the burden never shifted to plaintiff, and denial of the motion "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez*, 68 NY2d at 324; *see Winegrad*, 64 NY2d at 853).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

215.1

TP 21-01106

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

IN THE MATTER OF ANDREW SEARLES, PETITIONER,

V MEMORANDUM AND ORDER

SHEILA J. POOLE, INDIVIDUALLY AND IN HER CAPACITY AS COMMISSIONER OF NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND SHEILA MCBAIN, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF STATE CENTRAL REGISTER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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, Allegany County [Thomas P. Brown, A.J.], entered July 20, 2021) to review a determination of respondents. The determination denied the application of petitioner to amend and seal an indicated report.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding to annul a determination, made after a fair hearing, denying his request to amend to unfounded an indicated report of abuse and maltreatment with respect to his girlfriend's daughter and to seal that report. At an administrative expungement hearing, a report of child abuse and maltreatment "must be established by a fair preponderance of the evidence" (*Matter of Reynolds v New York State Off. of Children & Family Servs.*, 101 AD3d 1738, 1738 [4th Dept 2012] [internal quotation marks omitted]), and "[o]ur review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner[']s] application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774 [4th Dept 2009], *lv denied* 15 NY3d 705 [2010] [internal quotation marks omitted]; *see generally Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293 [4th Dept 2008]). Here, we conclude that, contrary to petitioner's contention, the hearsay evidence of abuse and

maltreatment presented at the hearing—including testimony that the subject child told three separate individuals about the allegations forming the abuse and maltreatment—constituted substantial evidence supporting the determination (*see generally Matter of Draman v New York State Off. of Children & Family Servs.*, 78 AD3d 1603, 1603-1604 [4th Dept 2010]; *Hattie G.*, 48 AD3d at 1293). It "is not within this Court's discretion to . . . substitute its own judgment for that of the administrative finder of fact" (*Matter of Pitts v New York State Off. of Children & Family Servs.*, 128 AD3d 1394, 1395 [4th Dept 2015] [internal quotation marks omitted]). We therefore confirm the determination and dismiss the petition.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

228

CA 21-01094

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

OLIVE CYRUS, AS ADMINISTRATOR OF THE ESTATE OF
LISTON CYRUS, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER REGIONAL HEALTH AND UNITY HOSPITAL
AT PARK RIDGE, DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CLAIRE G. BOPP OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (PETER T. RODGERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 28, 2021. The order granted the motion of plaintiff for summary judgment on the issue of liability.

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

Memorandum: Plaintiff, as administrator of the estate of her husband, Liston Cyrus (decedent), commenced this medical malpractice and wrongful death action alleging, inter alia, that several of defendants' employees were negligent in the care and treatment of decedent, including in their failure to diagnose and treat his aortic dissection, and that, as a result of that negligence, decedent sustained a ruptured aorta that caused his death. Defendants appeal from an order that, among other things, granted plaintiff's motion for summary judgment on the issue of liability. We affirm.

Contrary to defendants' contention, plaintiff met her initial burden on the motion of establishing her entitlement to judgment as a matter of law (*see generally Peevey v Unity Health Sys.*, 196 AD3d 1139, 1140 [4th Dept 2021]; *Legakis v New York Westchester Sq. Med. Ctr.*, 144 AD3d 549, 549 [1st Dept 2016]; *Salter v Deaconess Family Medicine Ctr.* [appeal No. 2], 267 AD2d 976, 976-977 [4th Dept 1999]). Here, "plaintiff[] submitted the [affirmation] of a medical expert who set forth his qualifications, and who stated, after having reviewed the hospital and medical records, that . . . defendants were negligent and that their negligence affected [decedent's] condition. Moreover, . . . plaintiff['s] medical expert set forth the specific factors appearing in the hospital and medical records which led him to his conclusions. Thus, contrary to [defendants'] arguments, the

[affirmation] was sufficient to" meet plaintiff's burden on the motion (*Menzel v Plotnick*, 202 AD2d 558, 559 [2d Dept 1994]; *cf. Dziwulski v Tollini-Reichert*, 181 AD3d 1165, 1166 [4th Dept 2020], *lv denied* 37 NY3d 901 [2021]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to defendants' further contention, they failed to raise a triable issue of fact in opposition. Initially, we agree with defendants that Supreme Court erred in concluding that their expert lacked sufficient expertise to render an opinion concerning decedent's treatment, inasmuch as "[t]he specialized skills of [defendants'] expert as demonstrated through his board certifications, taken together with the nature of the medical subject matter of this action, are sufficient to support the inference that his opinion regarding decedent's treatment was reliable" (*Bell v Ellis Hosp.*, 50 AD3d 1240, 1242 [3d Dept 2008]; *see Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]). Nevertheless, even after considering the affidavit of defendants' expert, we conclude that defendants failed to raise a triable issue of fact in opposition. In his affidavit, defendants' expert failed to address the specific conclusions in the affirmation of plaintiff's medical expert and, although the affirmation of plaintiff's expert was sufficient to establish the negligence of several of defendants' employees, defendants' expert in his affidavit addressed only the allegations concerning one of those employees (*see generally Ruiz v Reiss*, 180 AD3d 623, 623-624 [1st Dept 2020]; *Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

247

KA 19-00514

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAJUAN RICHARDSON, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, 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 (Thomas J. Miller, J.), entered April 20, 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: Defendant was convicted following a jury trial 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]) for fatally shooting the victim, who at the time was in a vehicle that was stopped at an intersection. According to the People, defendant was in the front passenger seat of a green Ford Explorer that pulled up alongside the victim's vehicle and he fired six shots, striking the victim once in the chest. Defendant contends that his attorney was ineffective for failing to request a missing witness charge for two people who were in the vehicle with the victim when he was shot but who did not testify at trial. We reject that contention inasmuch as there is no indication in the record that the witnesses, both of whom refused to cooperate with the police, were in the People's control, and thus the request would have had little chance of success (*see People v Trowell*, 172 AD3d 1112, 1113 [2d Dept 2019], *lv denied* 33 NY3d 1074 [2019]; *People v Smith*, 157 AD3d 978, 982 [3d Dept 2018], *lv denied* 31 NY3d 1078 [2018]; *see generally People v Wilson*, 120 AD3d 1531, 1534 [4th Dept 2014], *affd* 28 NY3d 67 [2016], *rearg denied* 28 NY3d 1158 [2017]).

Even assuming, arguendo, that there was a legal basis for County Court to give a missing witness charge, defense counsel's failure to request the charge, standing alone, was not " 'so egregious and prejudicial' as to deprive defendant of a fair trial" (*People v Cummings*, 16 NY3d 784, 785 [2011], *cert denied* 565 US 862 [2011],

quoting *People v Turner*, 5 NY3d 476, 480 [2005]; *see generally People v Sherman*, 182 AD3d 987, 988 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]). Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of representation, we conclude that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that the court erred in admitting in evidence a firearm, which the People alleged was the murder weapon, on the ground that it was not relevant to any material issue. We reject that contention. "Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence" (*People v Scarola*, 71 NY2d 769, 777 [1988]). Here, the firearm at issue contained a latent print that matched defendant's palm print, and a prosecution witness testified that defendant admitted to him that defendant used that gun to shoot the victim. In our view, evidence that defendant's palm print was on the firearm when it was found by the police several weeks after the shooting is relevant because it links him to the murder weapon. We further conclude that the probative value of the evidence "is not outweighed by any undue prejudice to defendant" (*People v Carlson*, 184 AD3d 1139, 1140 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]; *see generally Scarola*, 71 NY2d at 777).

Defendant contends that the court also erred in admitting in evidence a ski mask seized by the police from the Ford Explorer shortly after the shooting. That contention is not preserved for our review because defendant failed to object to the admission in evidence of the ski mask at trial (*see* CPL 470.05 [2]). In any event, the contention lacks merit. The mask constituted relevant evidence because it had traces of defendant's DNA on it and was found by the police in the Explorer between the center console and the front passenger seat, where the person who fired the shots was located, and its probative value is not outweighed by its prejudicial effect (*see generally Scarola*, 71 NY2d at 777).

Defendant next contends that the court erred in playing for the jury recordings of telephone calls that he and his codefendant made from their respective prisons to the same woman at the same time, thus enabling them to communicate with each other through the intermediary. According to defendant, significant portions of the recordings are inaudible, leaving the jury to speculate as to what was said and by whom. Because defendant did not object to the recordings on the ground that they were inaudible or would invite jury speculation, he failed to preserve his contention for our review (*see* CPL 470.05 [2]; *People v Perez*, 165 AD3d 1294, 1295 [2d Dept 2018], *lv denied* 32 NY3d 1208 [2019]).

In any event, an audio "recording must be excluded from evidence only if it is so inaudible and indistinct that the jury would have to speculate concerning its contents" (*People v Lopez*, 119 AD3d 1426, 1428 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015] [internal quotation marks omitted]). Here, although there are some words on the

recordings that are indecipherable, the relevant conversation is clear. Because "the transactions [could] be generally understood by the jury," any minor problems with audibility went "to the weight of the evidence and not to its admissibility" (*People v Lewis*, 25 AD3d 824, 827 [3d Dept 2006], *lv denied* 7 NY3d 791 [2006]; *see People v McCaw*, 137 AD3d 813, 815 [2d Dept 2016], *lv denied* 27 NY3d 1071 [2016]). Under the circumstances, we conclude that the court did not abuse its discretion in admitting the recordings of the telephone calls in evidence (*see People v Dalton*, 164 AD3d 1645, 1646 [4th Dept 2018], *lv denied* 32 NY3d 1170 [2019]).

There is similarly no merit to defendant's contention that the court should have granted his request to admit in evidence a video found on the victim's cell phone. The video was taken 11 minutes before he was killed, and it indicates that he possessed a gun. Although such evidence would be relevant if defendant had pursued a justification defense, he did not do so, and there was no evidence that defendant or codefendant acted in self-defense. The court therefore properly excluded the video on the ground that it did not "tend[] to prove the existence or non-existence of a material fact, i.e., a fact directly at issue in the case" (*People v Primo*, 96 NY2d 351, 355 [2001]; *see People v Lawhorn*, 21 AD3d 1289, 1291 [4th Dept 2005]).

Defendant's contention that the evidence is not legally sufficient to support the conviction is preserved for our review only with respect to the issue of identity (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), and we reject that contention (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*).

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

Entered: June 3, 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 19-00965

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered February 4, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from the discovery of a loaded handgun in the drop ceiling of a living room in which defendant was present as a guest, defendant contends that the evidence is legally insufficient to support the conviction. We agree, and we therefore reverse the judgment and dismiss the indictment.

As relevant here, a person is guilty of criminal possession of a weapon in the second degree when that person knowingly possesses any loaded firearm and possession did not take place in that person's home or place of business (*see* Penal Law § 265.03 [3]; CJI2d[NY] Penal Law § 265.03 [3]). A person "may be found to possess a firearm through actual, physical possession or through constructive possession" (*People v McCoy*, 169 AD3d 1260, 1262 [3d Dept 2019], *lv denied* 33 NY3d 1033 [2019]; *see* Penal Law § 10.00 [8]). To establish constructive possession, "the People must show that [such person] exercised 'dominion or control' over the [firearm] by a sufficient level of control over the area in which the [firearm] is found or over the person from whom the [firearm] is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* CJI2d[NY] Constructive Possession).

Here, viewing the evidence in the light most favorable to the People (*see People v Diaz*, 15 NY3d 764, 765 [2010]), we agree with defendant that the evidence is legally insufficient to establish that he constructively possessed the firearm. A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession, and it is undisputed here that defendant had no connection to the apartment other than being there for a brief period of time for the purpose of gambling (*see People v Rolldan*, 175 AD3d 1811, 1813 [4th Dept 2019], *lv denied* 34 NY3d 1081 [2019]). Further, the People failed to establish that defendant "exercised dominion or control over the [handgun] by a sufficient level of control over the area in which [it was] found" (*People v Burns*, 17 AD3d 709, 710 [3d Dept 2005] [internal quotation marks omitted]).

Contrary to the People's contention, defendant's contemporaneous text messages did not evince defendant's consciousness of guilt and, in any event, "mere knowledge of the presence of the handgun would not establish constructive possession" (*People v Hunt*, 185 AD3d 1531, 1533 [4th Dept 2020]; *see People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]; *Burns*, 17 AD3d at 711]; *see generally People v Rivera*, 82 NY2d 695, 697 [1993]). Further, although evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that other individuals in the apartment were excluded as contributors thereto would support an inference that defendant physically possessed the gun at some point in time (*see Hunt*, 185 AD3d at 1532-1533), we conclude that it was not sufficient to support an inference that defendant had constructive possession of the weapon at the time that it was discovered (*cf. People v Crowley*, 188 AD3d 1665, 1666 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]).

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

All concur except LINDLEY, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), I conclude that the evidence is legally sufficient to support the conviction of criminal possession of a weapon in the second degree (*see* Penal Law § 265.03 [3]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the offense as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), I conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The record establishes that defendant was one of several people in a room where the weapon was found in the drop ceiling directly above the table at which defendant and others had been playing cards. Of all the people located in the residence that night, only defendant had DNA matching a DNA profile on the weapon. In addition, within moments of the time that police officers located the weapon, defendant texted another person and stated that he was "going to jail" and that

his text messages from that night should be deleted.

To meet their burden of proving defendant's constructive possession of the weapon, the People were required to establish that defendant exercised dominion or control over the weapon by a sufficient level of control over the area in which it was found (*see People v Manini*, 79 NY2d 561, 573-574 [1992]; *People v McIver*, 107 AD3d 1591, 1592 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]). Although "[a] defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession" (*People v Rolldan*, 175 AD3d 1811, 1813 [4th Dept 2019], *lv denied* 34 NY3d 1081 [2019]; *see People v Diallo*, 137 AD3d 1681, 1682 [4th Dept 2016]), I conclude that "the evidence in this case 'went beyond defendant's mere presence in the [room in the] residence . . . and established' a particular set of circumstances from which a jury could infer possession" (*People v Boyd*, 145 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *see People v Bundy*, 90 NY2d 918, 920 [1997]; *cf. Rolldan*, 175 AD3d at 1813).

The People established that the likelihood of a randomly-selected individual other than defendant matching the major component of the DNA profile taken from the weapon was less than one in 52.9 octillion. All other individuals present in the room on the night the weapon was seized were excluded as sources of the major component of the DNA profile taken from the weapon. Although the fact that a defendant's DNA is found on a weapon is merely evidence that the defendant possessed the weapon "at some point in time" (*People v Crowley*, 188 AD3d 1665, 1666 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]), the People's evidence raised a reasonable inference that the possession took place that night. Defendant was found within feet of the weapon on the same date and at the same time it was located in the ceiling tiles directly above where defendant had been playing cards (*see People v Barnes*, 197 AD3d 977, 978 [4th Dept 2021], *lv denied* 37 NY3d 1058 [2021]; *People v Long*, 100 AD3d 1343, 1344 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]), and there is no requirement that the People establish that the defendant "had 'exclusive access' to the area" in which the weapon was located (*Boyd*, 145 AD3d at 1482).

Finally, although defendant did not directly admit possession of the gun to the recipient of his text messages, the timing and content of those messages evince a consciousness of guilt (*see People v Jefferson*, 125 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]). Aside from the seizure of the gun, there was no evidence at trial of any other reason for defendant to fear that he could be going to jail.

Overall, viewing the "total picture" of the evidence (*People v Easley*, 42 NY2d 50, 57 [1977]) in the light most favorable to the People (*see Contes*, 60 NY2d at 621), I conclude that 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 (*see generally Danielson*, 9 NY3d at 349) and that the verdict is not against the weight of the evidence (*see generally*

Bleakley, 69 NY2d at 495). Inasmuch as I conclude that defendant's remaining contentions do not warrant modification or reversal of the judgment, I would affirm the judgment.

Entered: June 3, 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 20-01382

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

DEBORAH A. LITTLE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEELCASE, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (PHILIPP L. RIMMLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAWORTH BARBER & GERSTMAN, LLC, NEW YORK CITY (TARA C. FAPPIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered September 25, 2020. The order, among other things, granted the motion of defendant Steelcase, Inc. insofar as it sought summary judgment and dismissed plaintiff's amended complaint.

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

Memorandum: Plaintiff commenced this products liability action in May 2009 seeking damages for injuries she sustained when the chair she was sitting on collapsed. Although the parties engaged in some discovery, the case languished for many years. In early 2018, Steelcase, Inc. (defendant) served supplemental demands for authorization to obtain plaintiff's medical records. Plaintiff provided authorizations, but limited their scope to records relating to the treatment of her back and neck, even though she alleged other physical ailments in her interrogatories. In February 2019, defendant moved pursuant to CPLR 3126 to strike the amended complaint based on plaintiff's failure to comply with discovery demands. In the alternative, defendant sought an order compelling plaintiff to comply with outstanding discovery, with the failure to do so resulting in a self-executing order of preclusion. At oral argument of the motion in October 2019, Supreme Court indicated that it would grant defendant's alternative request for relief, and plaintiff's counsel agreed to prepare an order in accordance with the court's decision.

On March 6, 2020, plaintiff provided authorizations for several of her treatment providers, but the authorizations contained limitations and restrictions. On March 10, 2020, the court issued an order (March 2020 order) granting defendant's motion and directing plaintiff to provide authorizations for her treatment providers,

"without restrictions as to date or body parts, no later than April 10, 2020." The order further provided that plaintiff's failure to comply "shall result in a self-executing order of preclusion as to this outstanding discovery for all purposes in this litigation." At a court conference on July 1, 2020, defendant indicated that it would be making a motion pursuant to CPLR 3126 based on the defective authorizations. Plaintiff provided new authorizations on or about July 2, 2020.

In August 2020, defendant moved for an order pursuant to CPLR 3126 striking the amended complaint based on plaintiff's failure to comply with the March 2020 order and pursuant to CPLR 3212 granting summary judgment on the ground that plaintiff could not establish her claim for damages. In opposition, plaintiff's counsel explained that the person in his office who prepared the March 6 medical authorizations was not given instructions on how to prepare the documents and was not aware of the motion practice governing the scope of the authorizations or how to complete them in compliance with the proposed March 2020 order. He characterized the March 6 authorizations as a "mistake." He further averred that the July authorizations "correct[ed] the mistakes." Plaintiff argued that the motion should be denied because the deadline in the March 2020 order was tolled or stayed by Executive Order [A. Cuomo] 202.8 (9 NYCRR 8.202.8) (Executive Order 202.8) and Administrative Order 71/20, both issued in response to the COVID-19 pandemic. The court held that plaintiff failed to comply with the March 2020 order and, pursuant to the self-executing provision of preclusion, plaintiff was now precluded from offering any evidence regarding her damages and causation of such alleged damages. The court therefore granted that part of the motion pursuant to CPLR 3212 and dismissed the amended complaint. Plaintiff appeals, and we affirm.

The conditional order of preclusion was "self-executing and [plaintiff's] failure to produce [the requested] items on or before the date certain rendered it absolute" (*Burton v Matteliano*, 98 AD3d 1248, 1250 [4th Dept 2012] [internal quotation marks omitted]). Plaintiff did not cross-move for vacatur of the March 2020 order and, in any event, failed to establish both "a reasonable excuse for the failure to produce the requested items and . . . the existence of a meritorious claim" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]; *see Foster v Dealmaker, SLS, LLC*, 63 AD3d 1640, 1641 [4th Dept 2009], *lv denied* 15 NY3d 702 [2010]; *Koski v Ryder Truck*, 244 AD2d 872, 872 [4th Dept 1997]). Because plaintiff is now precluded from offering evidence regarding damages and causation, the court properly granted that part of the motion seeking summary judgment dismissing the amended complaint (*see Gibbs*, 16 NY3d at 82; *Foster*, 63 AD3d at 1641).

Contrary to plaintiff's contention, neither Administrative Order 71/20 nor Executive Order 202.8 tolled the deadline imposed by the March 2020 order. On March 19, 2020, in response to the COVID-19 pandemic, Chief Administrative Judge Lawrence K. Marks issued Administrative Order 71/20, which provided with respect to civil discovery: "Where a party, attorney or other person is unable to meet discovery or other litigation schedules (including dispositive motion

deadlines) for reasons related to the coronavirus health emergency, the parties shall use best efforts to postpone proceedings by agreement and stipulation for a period not to exceed 90 days. Absent such agreement, the proceedings shall be deferred until such later date when the court can review the matter and issue appropriate directives. In no event will participants in civil litigation be penalized if discovery compliance is delayed for reasons related to the coronavirus public health emergency." Here, plaintiff failed to establish that her noncompliance with the deadline set forth in the March 2020 order was for reasons related to the COVID-19 pandemic. Rather, plaintiff's opposition to the motion showed that the failure to comply was due to law office failure unrelated to the pandemic.

We further conclude that Executive Order 202.8 is inapplicable here. On March 20, 2020, Governor Cuomo issued that order which provided, in relevant part, that "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state . . . or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020." The tolling period was extended several times by subsequent executive orders. We conclude that responding to a discovery demand by the deadline set forth in the March 2020 order does not constitute the "filing" or "service" of a "proceeding." It is apparent that Executive Order 202.8 tolls statutes of limitations but not deadlines set forth in discovery orders (*see* Siegel & Connors, NY Prac § 353 [Cumulative Supplement] [6th ed 2018]). The tolling of discovery is "the aim of" Administrative Order 71/20 (*id.*), as set forth above.

Entered: June 3, 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 21-00847

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

CHARLES N. MCLOUGHLIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, SYRACUSE (JAMES P. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 7, 2021. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving collided with a police vehicle operated by Jacob R. Breen, a police officer employed by the City of Syracuse Police Department (SPD). At the time of the accident, Officer Breen was responding to a police call of an armed man threatening suicide. Relying on the emergency doctrine affirmative defense, defendant moved for summary judgment dismissing the complaint. Supreme Court denied the motion insofar as it sought dismissal of the first cause of action, which alleged that defendant was liable for Breen's negligent, careless, and reckless operation of the police vehicle, determining that there were triable issues of fact whether Breen's conduct should be governed by the reckless disregard standard of care applicable to an authorized emergency vehicle involved in an emergency operation (*see* Vehicle and Traffic Law § 1104 [e]) or by ordinary negligence principles. Defendant appeals, and we now affirm.

Defendant contends that the court erred in finding triable issues of fact whether Breen's conduct should be measured by the reckless disregard standard of care. We disagree. Vehicle and Traffic Law § 1104 provides drivers of authorized emergency vehicles, when involved in emergency operations, four enumerated privileges, one of which is the privilege to "[e]xceed the maximum speed limits so long as [the driver] does not endanger life or property" (§ 1104 [b] [3]).

When such a driver is engaged in privileged conduct, that driver must nevertheless operate the vehicle "with due regard for the safety of all persons" and is not protected "from the consequences of his [or her] reckless disregard for the safety of others" (§ 1104 [e]). Thus, in order for the reckless disregard standard of care to apply, the vehicle must be an emergency vehicle involved in an emergency operation and the driver's operation must involve one of the four specified types of privileged conduct (*see Kabir v County of Monroe*, 16 NY3d 217, 223-224 [2011]; *Torres-Cummings v Niagara Falls Police Dept.*, 193 AD3d 1372, 1374 [4th Dept 2021]). Operators of such vehicles are "answerable in damages if their reckless exercise of a [specified] privilege . . . causes personal injuries or property damage" (*Kabir*, 16 NY3d at 224; *see* § 1104 [e]). "Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence" (*Kabir*, 16 NY3d at 220; *see Torres-Cummings*, 193 AD3d at 1374).

Here, defendant established as a matter of law that Breen was operating a qualifying emergency vehicle (*see Levere v City of Syracuse*, 173 AD3d 1702, 1702-1703 [4th Dept 2019]; *Flood v City of Syracuse*, 166 AD3d 1573, 1573 [4th Dept 2018]; *Allen v Town of Amherst*, 8 AD3d 996, 997 [4th Dept 2004]) and that Breen was involved in an emergency operation, regardless of whether his partner personally deemed the situation to be an emergency (*see* Vehicle and Traffic Law § 114-b; *Criscione v City of New York*, 97 NY2d 152, 158 [2001]; *Lacey v City of Syracuse*, 144 AD3d 1665, 1666 [4th Dept 2016], *lv denied* 32 NY3d 913 [2019]; *Allen*, 8 AD3d at 997).

Nevertheless, defendant failed to establish as a matter of law that Breen's operation of the vehicle involved one of the four types of privileged conduct. Defendant's own submissions raised triable issues of fact whether Breen was speeding, and there is no evidence that Breen's operation of the vehicle involved any of the other three types of privileged conduct. Resolution of that factual issue "will determine the standard of care by which the factfinder must evaluate" Breen's conduct (*Oddo v City of Buffalo*, 159 AD3d 1519, 1521 [4th Dept 2018]; *see Santana v City of New York*, 169 AD3d 578, 578-579 [1st Dept 2019]; *see generally Kabir*, 16 NY3d at 220). Inasmuch as defendant failed to meet its initial burden on the motion of establishing the standard of care by which Breen's conduct should be evaluated, the burden never shifted to plaintiff to raise triable issues of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore do not address defendant's contentions concerning plaintiff's opposition to the motion on the issue of the applicable standard of care.

Defendant further contends that, regardless of whether the reckless disregard or ordinary negligence standard of care applies, defendant cannot be held liable for the accident. We reject that contention. Even assuming, arguendo, that defendant established as a matter of law that Breen was neither reckless nor negligent in his operation of the police vehicle, we conclude that plaintiff raised triable issues of fact through the affidavit of his expert.

Although there was evidence that Breen used " 'precautionary measures' " (*McElhinney v Fitzpatrick*, 193 AD3d 1409, 1409 [4th Dept 2021]; *see Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]), there is also evidence that Breen violated one or more SPD policies regarding the use of lights and sirens when responding to certain calls. While the violation of internal policies or regulations is not dispositive, it is "an important . . . factor in determining whether [Breen] . . . acted recklessly" (*Saarinen v Kerr*, 84 NY2d 494, 503 n 3 [1994]; *see Allen v Town of Amherst*, 294 AD2d 828, 829 [4th Dept 2002], *lv denied* 3 NY3d 609 [2004]; *cf. Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *Green v Zarella*, 153 AD3d 1162, 1163 [1st Dept 2017]). Here, plaintiff's expert opined that Breen's excessive speed in the right-hand lane, in an area of heavy traffic, without a siren, and possibly without lights, violated departmental regulations and was in reckless disregard for the safety of others (*see Allen*, 294 AD2d at 829).

Inasmuch as the "reckless disregard standard demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims" (*Frezzell v City of New York*, 24 NY3d 213, 217 [2014] [internal quotation marks omitted]), we conclude that the triable issues of fact whether Breen acted recklessly necessarily raise triable issues of fact whether Breen acted negligently in the event Breen's conduct is to be judged under principles of ordinary negligence.

Entered: June 3, 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 21-01664

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

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

V MEMORANDUM AND ORDER

BOBBY P., AN INMATE IN THE CUSTODY OF THE
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (JOSEPH BETAR OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered November 12, 2021 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the motion of Mental Hygiene Legal Service to withdraw as counsel for respondent.

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

Memorandum: Respondent, a convicted sex offender, appeals from an order denying the motion of Mental Hygiene Legal Service (MHLS) to withdraw as his appointed counsel in this Mental Hygiene Law article 10 proceeding (*see generally* CPLR 5511; *Auerbach v Bennett*, 47 NY2d 619, 627-629 [1979]). We reverse. Contrary to Supreme Court's determination, nothing in section 10.06 (c) limits a trial court's well established discretion to substitute or disqualify appointed counsel in appropriate circumstances (*see generally Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). Nor, contrary to the assumption of the court and respondent, is the disposition of MHLS's motion controlled by a mechanistic application of the Rules of Professional Conduct (*see Niesig v Team I*, 76 NY2d 363, 369-370 [1990]; *see generally* § 10.06 [c]). Rather, withdrawal or disqualification of counsel "may be warranted based on a mere appearance of impropriety" even in the absence of an actual conflict of interest (*Halberstam v Halberstam*, 122 AD3d 679, 679-680 [2d Dept 2014]; *see McCutchen v 3 Princesses & AP Trust Dated Feb. 3, 2004*, 138 AD3d 1223, 1226 [3d Dept 2016]). Under the unique circumstances of this case, we exercise our own discretion to grant MHLS's motion to withdraw "so as to avoid even the appearance of impropriety" on MHLS's part (*McCutchen*, 138 AD3d at 1227 [internal quotation marks omitted]; *see Burton v Burton*, 139 AD2d 554, 554 [2d Dept 1988]; *see generally*

Matter of Von Bulow, 63 NY2d 221, 224 [1984]). In light of our determination, we need not decide whether MHLS is actually prohibited by the Rules of Professional Conduct from representing respondent under these circumstances.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

281

KA 20-00459

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAMEL DAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 5, 2020. The judgment convicted defendant upon his plea of guilty of attempted gang assault in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him upon his plea of guilty of two counts of attempted gang assault in the second degree (Penal Law §§ 110.00, 120.06) and, in appeal No. 2, he appeals from a further judgment convicting him upon his guilty plea of one count of bail jumping in the second degree (§ 215.56). In both appeals, defendant challenges the voluntariness of his pleas of guilty and he also contests the validity of his waiver of the right to appeal, but because the challenge to the voluntariness of his pleas would survive even a valid waiver of the right to appeal, we need not address the validity of that waiver (*see People v Judy*, 191 AD3d 1454, 1455 [4th Dept 2021], *lv denied* 36 NY3d 1121 [2021]).

Defendant contends in both appeals that County Court erred in denying, without a hearing, his motion to withdraw the pleas because they were not voluntarily entered due to incorrect advice given by defense counsel. In support of that motion, defendant alleged that defense counsel told him that he had no chance of achieving a better result at trial than the result offered in the plea agreement because he was likely to be convicted at trial of attempted gang assault in the second degree. Defense counsel confirmed that defendant had been so advised. Defendant further alleged that he later learned that such a conviction at trial would have been impossible because it is a nonexistent offense (*see People v Delacruz*, 177 AD3d 541, 542 [1st Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *see generally People v*

Prescott, 95 NY2d 655, 659 [2001]), and he stated in court that he would not have pleaded guilty had he known that he could not have been convicted at trial of attempted gang assault in the second degree.

Initially, we agree with defendant that "attempted gang assault in the second degree is a legal impossibility for trial purposes . . . , as 'there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended' " (*Matter of Cisely G.*, 81 AD3d 508, 508 [1st Dept 2011], quoting *People v Campbell*, 72 NY2d 602, 605 [1988]). Based on that law and our review of the record, we further agree with defendant that the advice of defense counsel regarding the possibility of a conviction at trial of attempted gang assault in the second degree was erroneous.

Nevertheless, "[i]t is well settled that permission to withdraw a guilty plea rests largely within the court's discretion" (*People v Henderson*, 137 AD3d 1670, 1670 [4th Dept 2016]). "Whether a plea was knowing, intelligent and voluntary is dependent upon a number of factors 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' . . . That the defendant allegedly received inaccurate information regarding [the possibility of a conviction at trial and the resulting impact upon] his possible sentence exposure is another factor which must be considered by the court, but it is not, in and of itself, dispositive" (*People v Garcia*, 92 NY2d 869, 870 [1998]; *see generally People v Mack*, 140 AD3d 791, 792 [2d Dept 2016], *lv denied* 28 NY3d 933 [2016]; *People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). "Where . . . the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required" (*People v Brown*, 14 NY3d 113, 116 [2010]). Here, we conclude that "the circumstances raise a genuine factual issue as to the voluntariness of the plea that could only be resolved after a hearing" (*id.* at 118). Consequently, we hold the case, reserve decision, and remit the matters to County Court for a hearing to resolve that issue.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

284

KA 17-00494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYQUAUN J. FRANCIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 21, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

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

Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Metales*, 171 AD3d 1562, 1564 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019]).

Defendant's contention that Supreme Court erred in its *Molineux* ruling with respect to evidence of an uncharged crime is not preserved for our review because defendant did not challenge that evidence in opposition to the People's application to introduce *Molineux* evidence or otherwise object to the admission thereof (*see People v Green*, 196 AD3d 1148, 1150 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]; *People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]) and we decline to exercise our power to review that contention as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's related contention that defense counsel was ineffective for failing to object to the introduction of that evidence. "[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's" failure to object to the *Molineux* evidence, and defendant failed to meet that burden (*People v Conley*, 192 AD3d 1616, 1620 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021] [internal quotation marks omitted]; *see also People v Williams*, 107 AD3d 1516, 1516-1517 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]). Nor was defense counsel ineffective for failing to request a circumstantial evidence charge. "It is well settled that a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence" (*People v Hardy*, 26 NY3d 245, 249 [2015]). "By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*id.*). Here, given the officers' testimony regarding their observations of defendant, a circumstantial evidence charge was not required (*see generally People v Lawrence*, 186 AD2d 1016, 1016-1017 [4th Dept 1992], *lv denied* 81 NY2d 790 [1993]) and, therefore, defense counsel was not ineffective for failing to request it (*see People v Smith*, 145 AD3d 1628, 1630 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

286

KA 20-00458

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAMEL DAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 5, 2020. The judgment convicted defendant upon his plea of guilty of bail jumping in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings in accordance with the same memorandum as in *People v Davis* ([appeal No. 1] — AD3d — [June 3, 2022] [4th Dept 2022]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

291

CA 21-01044

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

2006905 ONTARIO INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOODRICH AEROSPACE CANADA, LTD., AND DINO SOAVE,
DEFENDANTS-RESPONDENTS.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (DANIEL J. BOBBETT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (PHILIP M. GULISANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 22, 2021. The order, among other things, denied plaintiff's motion for leave to renew its prior motion insofar as it sought partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, fraud allegedly arising from failed negotiations regarding the renewal of a contract to supply parts. On a prior appeal, we affirmed an order denying that part of plaintiff's motion, which plaintiff made before taking depositions, seeking "partial summary judgment on certain elements of its fraud cause of action, i.e., the elements requiring a material misrepresentation of fact, knowledge of its falsity, and an intent to induce reliance" (*2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 197 AD3d 1008, 1008-1009 [4th Dept 2021]). After depositions and other discovery occurred, plaintiff moved for leave to renew its prior motion insofar as the prior motion sought partial summary judgment. Plaintiff now appeals from an order that, among other things, denied its motion for leave to renew, and we affirm.

Contrary to plaintiff's contention, Supreme Court properly denied leave to renew. As relevant here, a motion for leave to renew must be "based upon new facts not offered on the prior motion that would change the prior determination," and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 134 AD3d 1418, 1419 [4th Dept 2015]; *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170 [4th Dept

2008], *lv denied* 11 NY3d 825 [2008]). Here, in support of its motion for leave to renew, plaintiff submitted deposition transcripts containing facts relevant to the prior motion. The only justification proffered by plaintiff for failing to present those facts in support of the prior motion is that depositions had not yet been conducted. As we have previously stated, a motion for leave to renew "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Welch Foods v Wilson*, 247 AD2d 830, 831 [4th Dept 1998] [internal quotation marks omitted]; *see Heltz v Barratt*, 115 AD3d 1298, 1300 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]). Thus, as the moving party, plaintiff " 'bore the burden of proving that the new evidence [it] sought to present could not have been discovered earlier with due diligence and would have led to a different result' " (*Centerline/Fleet Hous. Partnership, L.P.-Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1598 [4th Dept 2019]). Here, plaintiff failed to meet that burden because "nothing prevented [it] from conducting discovery, including depositions, prior to moving for [partial] summary judgment" (*id.*). Thus, plaintiff "failed to provide a reasonable justification for not procuring the deposition testimony before moving for [partial] summary judgment" (*id.*; *see Lucky's Real Estate Group, LLC v Powell*, 189 AD3d 1202, 1205 [2d Dept 2020]; *Justino v Santiago*, 116 AD3d 411, 411 [1st Dept 2014]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

295

CA 21-00115

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

DINA BARDSLEY AND MICHAEL BARDSLEY, HER HUSBAND, INDIVIDUALLY, AND AS CLASS REPRESENTATIVE PLAINTIFFS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC, AND INDUSTRIAL MATERIALS RECYCLING, LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (ZACHARY C. OSINSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT INDUSTRIAL MATERIALS RECYCLING, LLC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 19, 2021. The order denied the motion of plaintiffs for class certification.

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

Memorandum: Plaintiffs commenced this action, individually and on behalf of purported classes of similarly situated plaintiffs seeking damages from a multi-day warehouse fire caused by defendants' alleged negligence. In appeal No. 1, plaintiffs appeal from an order denying their motion for, among other things, class certification. Following entry of that order, Supreme Court granted plaintiffs leave to reargue their motion and, upon reargument, adhered to its earlier determination denying plaintiffs' motion for class certification in its entirety. In appeal No. 2, plaintiffs appeal from that subsequent order insofar as it "denied class certification relative to the personal injury claims."

Initially, we conclude that appeal No. 1 should be dismissed inasmuch as the order in appeal No. 2 superceded the order in appeal No. 1 (*see Matter of William Mattar, P.C. v Hall*, 199 AD3d 1416, 1417 [4th Dept 2021]; *see generally Loafin' Tree Rest. v Pardi* [appeal No.

1], 162 AD2d 985, 985 [4th Dept 1990]).

In appeal No. 2, plaintiffs contend that the court erred in denying their motion insofar as it sought class certification of a personal injury subclass. We reject that contention. "[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229 [4th Dept 2008], *lv denied in part and dismissed in part* 10 NY3d 910 [2008]). "Class action is appropriate only if all five of the requirements are met . . . and the burden of establishing those requirements is on the party seeking certification" (*Ferrari v National Football League*, 153 AD3d 1589, 1591 [4th Dept 2017]).

Plaintiffs failed to establish a "predominance of common questions over individual questions" (*id.*; *cf. DeLuca v Tonawanda Coke Corp.*, 134 AD3d 1534, 1535-1536 [4th Dept 2015]). Here, plaintiffs allege that members of the personal injury subclass suffered a variety of medical ailments as a result of the multi-day warehouse fire, including brain cancer, asthma, and osteoarthritis. Thus, although there may be common questions with respect to defendants' negligence (*see DeLuca*, 134 AD3d at 1535), a determination of whether such negligence caused the injuries alleged with respect to each plaintiff will require detailed individualized assessments of each plaintiff's medical history, including preexisting conditions (*see generally Rife*, 48 AD3d at 1230). "[T]he necessity of conducting such individual inquiries would become the predominant focus of the litigation, rendering the litigation extremely difficult if not impossible to manage" (*Matter of Long Is. Power Auth. Hurricane Sandy Litig.*, 200 AD3d 1040, 1043 [2d Dept 2021]; *see Geiger v American Tobacco Co.*, 277 AD2d 420, 420 [2d Dept 2000], *lv dismissed* 96 NY2d 754 [2001]). In light of that conclusion, plaintiffs' remaining contentions regarding the personal injury subclass are academic.

Inasmuch as plaintiffs limited their appeal by the terms of the notice of appeal to the court's denial of the motion with respect to class certification of only the personal injury subclass, plaintiffs have waived their right to appeal the court's order insofar as it denied the motion with respect to certification of the property damage subclass (*see Central Buffalo Project Corp. v Edison Bros. Stores*, 205 AD2d 295, 298 [4th Dept 1994]). Further, by failing to address the alleged medical monitoring subclass in their brief, plaintiffs have abandoned any contention that the court erred in denying the motion with respect to certification of that subclass (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

296

CA 21-01009

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

DINA BARDSLEY AND MICHAEL BARDSLEY, HER HUSBAND, INDIVIDUALLY, AND AS CLASS REPRESENTATIVE PLAINTIFFS, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC, AND INDUSTRIAL MATERIALS RECYCLING, LLC, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NIXON PEABODY LLP, ROCHESTER (ZACHARY C. OSINSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT INDUSTRIAL MATERIALS RECYCLING, LLC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), dated May 10, 2021. The order, among other things, granted the motion of plaintiffs insofar as it sought leave to reargue their prior motion for class certification and, upon reargument, adhered to the prior order denying plaintiffs' motion for class certification.

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

Same memorandum as in *Bardsley v Great Lakes Indus. Dev., LLC* ([appeal No. 1] — AD3d — [June 3, 2022] [4th Dept 2022]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

304

KA 16-00442

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY FRANKLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY FRANKLIN, DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 17, 2015. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (four counts) and endangering the welfare of a child.

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 imposed for predatory sexual assault against a child under counts one, three, and five of the indictment shall run concurrently with each other and reducing the sentence imposed for predatory sexual assault against a child under count seven of the indictment to an indeterminate term of imprisonment of 10 years to life, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of predatory sexual assault against a child (Penal Law § 130.96). In appeal No. 2, defendant appeals, by permission of this Court, from an order that, inter alia, denied without a hearing his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction on the ground that he was denied effective assistance of counsel. Defendant contends in his pro se supplemental brief in appeal No. 1 that he was denied effective assistance of counsel. Defendant contends in his main brief in appeal No. 2 that County Court erred in denying the motion without a hearing. We reject those contentions.

Where, as here, "an ineffective assistance of counsel claim involves . . . 'mixed claims' relating to both record-based and nonrecord-based issues . . . [, such] claim may be brought in a

collateral proceeding, *whether or not* the [defendant] could have raised the claim on direct appeal" (*People v Evans*, 16 NY3d 571, 575 n 2 [2011], *cert denied* 565 US 912 [2011]; *see People v Streeter*, 194 AD3d 1407, 1408 [4th Dept 2021], *lv denied* 37 NY3d 974 [2021], *reconsideration denied* 37 NY3d 1029 [2021]; *People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]). "In such situations, i.e., where 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 claim *in its entirety*' " (*Wilson*, 162 AD3d at 1592). "That is because each alleged shortcoming or failure by defense counsel should not be viewed as a separate ground or issue raised upon the motion"; rather, the claim of ineffective assistance of counsel "constitutes a single, unified claim that must be assessed in totality" (*id.* [internal quotation marks omitted]; *see Streeter*, 194 AD3d at 1408). Thus, as the People correctly concede, the court erred to the extent that it denied defendant's motion as procedurally barred (*see Wilson*, 162 AD3d at 1592).

We nonetheless conclude that the court properly denied the motion on the merits. It is well settled that a claim of ineffective assistance "requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics" (*People v Rivera*, 71 NY2d 705, 708-709 [1988]; *see People v Kates*, 162 AD3d 1627, 1632 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019], *cert denied* — US —, 141 S Ct 117 [2020]). Here, defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for trial counsel's alleged shortcomings (*Rivera*, 71 NY2d at 709), and defendant's mere disagreement with trial counsel's strategy was insufficient to establish that trial counsel was ineffective (*see id.* at 708-709; *Kates*, 162 AD3d at 1632). Indeed, trial counsel "cannot be deemed ineffective for failing to pursue a strategy or defense that had little or no chance of success" (*People v Crampton*, 201 AD3d 1020, 1024 [3d Dept 2022], *lv denied* 37 NY3d 1160 [2022]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Moreover, we conclude that the court, upon considering the merits, properly denied the motion without a hearing, pursuant to CPL 440.30 (4) (b) and (d) (*see Streeter*, 194 AD3d at 1408-1409; *People v Atkins*, 107 AD3d 1465, 1466 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]).

Defendant failed to preserve for our review his contention in his main brief in appeal No. 1 that the sentence constitutes cruel and unusual punishment (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Archibald*, 148 AD3d 1794, 1795 [4th Dept 2017], *lv denied* 29 NY3d 1075 [2017]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We agree, however, with the contention in defendant's main brief in appeal No. 1 that the sentence is unduly harsh and severe. "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the

crime[s] charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*People v Farrar*, 52 NY2d 302, 305 [1981]). Here, although defendant's conduct was—as aptly described by the court at sentencing, in particular consideration of its impact on the victim—undeniably heinous and despicable, we conclude that the aggregate prison sentence of 80 years to life is not justified under the circumstances of this case. The record indicates, and the People do not dispute, that defendant had no prior criminal history (*cf. People v Russell*, 155 AD3d 1432, 1434 [3d Dept 2017], *lv denied* 30 NY3d 1119 [2018]; *People v Eriksen*, 145 AD3d 1110, 1113 [3d Dept 2016], *lv denied* 28 NY3d 1183 [2017]). In contrast to the aggregate sentence imposed by the court, which effectively guarantees a life sentence without the possibility of parole, we conclude that a prison sentence aggregating to 30 years to life is an appropriate sanction for the crimes committed here (*see e.g. People v Sorrell*, 108 AD3d 787, 788, 794 [3d Dept 2013], *lv denied* 23 NY3d 1025 [2014]; *People v Leddick*, 89 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 19 NY3d 1027 [2012]; *People v Beauharnois*, 64 AD3d 996, 997-998, 1001 [3d Dept 2009], *lv denied* 13 NY3d 834 [2009]). A sentence of such length accounts for the nature of the crimes and the circumstances of defendant, and will serve the purpose of societal protection while also providing an incentive and opportunity for defendant to achieve and demonstrate rehabilitation in the future (*see generally Farrar*, 52 NY2d at 305-306). We therefore modify the judgment accordingly.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

305

KA 18-02096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN EVANS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), 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 February 28, 2017. The judgment convicted defendant after a nonjury trial of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]). Initially, we conclude that defendant "failed to preserve for our review his contention that he did not knowingly, voluntarily and intelligently waive the right to a jury trial inasmuch as he did not challenge the adequacy of his allocution with respect to the waiver" (*People v White*, 43 AD3d 1407, 1407 [4th Dept 2007], *lv denied* 9 NY3d 1010 [2007]; *see People v Dibble*, 176 AD3d 1584, 1585 [4th Dept 2019], *lv denied* 34 NY3d 1077 [2019]). In any event, defendant's contention lacks merit. The record establishes that defendant "was advised of, understood and knowingly waived his right to a jury trial, after discussing it with counsel and signing a written waiver of jury trial in open court" (*People v Harris*, 139 AD3d 1244, 1246 [3d Dept 2016], *lv denied* 28 NY3d 930 [2016]; *see People v Wegman*, 2 AD3d 1333, 1334 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]). To the extent defendant claims he was denied effective assistance of counsel when deciding whether to waive his right to a jury trial, that contention involves matters outside the record on appeal and therefore must be raised by way of a CPL article 440 motion.

Contrary to defendant's further contention, we conclude, after

viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the third degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), that the verdict on that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that Supreme Court erred in determining that he is not entitled to youthful offender treatment. Before trial, defense counsel requested that the court consider adjudicating defendant a youthful offender (*see generally* CPL 720.10 [2] [a] [ii]; [3] [i]). At sentencing, however, defense counsel failed to seek such an adjudication. Nevertheless, the court, at sentencing, stated that it "did not find any mitigating circumstances that would support a youthful offender status." Defense counsel did not object to the denial of youthful offender status. On appeal, defendant contends that the court erred in concluding that there were no mitigating circumstances. Even assuming, arguendo, that defendant's contention is preserved for our review (*cf. People v Lang*, 178 AD3d 1362, 1363 [4th Dept 2019], *lv denied* 34 NY3d 1160 [2020]; *People v Ficchi*, 64 AD3d 1195, 1195 [4th Dept 2009], *lv denied* 13 NY3d 859 [2009]), we conclude that the court did not err in determining that there were no "mitigating circumstances that *bear directly upon the manner in which the crime was committed*" (CPL 720.10 [3] [i] [emphasis added]; *see generally* CPL 720.10 [2] [a] [ii]; *People v Meridy*, 196 AD3d 1, 7 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]).

Viewing the evidence, the law, and the circumstances in totality and as of the time of representation, we also reject defendant's contention that he was denied meaningful representation at sentencing (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). In particular, defendant was not denied effective assistance of counsel based on defense counsel's failure to pursue a youthful offender adjudication at sentencing (*see People v Cox*, 75 AD3d 1136, 1136 [4th Dept 2010], *lv denied* 15 NY3d 919 [2010]; *see also People v Ayala*, 194 AD3d 1255, 1257-1258 [3d Dept 2021], *lv denied* 37 NY3d 970 [2021]).

Finally, we conclude that the sentence imposed on the conviction of criminal possession of a weapon in the second degree is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

307

KA 18-00138

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILFREDO ARROYO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered December 1, 2017. The judgment convicted defendant, upon a plea of guilty, of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the third degree (Penal Law § 160.05). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Montgomery*, 191 AD3d 1418, 1418-1419 [4th Dept 2021], *lv denied* 36 NY3d 1122 [2021]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see Montgomery*, 191 AD3d at 1419; *People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless

conclude that the sentence is not unduly harsh or severe.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

308

KA 19-02142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS O. HILL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN 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 7, 2018. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, burglary in the first degree (two counts), robbery in the first degree, attempted robbery in the first degree, robbery in the second degree (two counts), attempted robbery in the second degree (two counts), assault in the second degree (two counts), and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of attempted murder in the second degree under count one of the indictment and dismissing that count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of burglary in the first degree (§ 140.30 [2], [4]), robbery in the first degree (§ 160.15 [4]), and attempted robbery in the first degree (§§ 110.00, 160.15 [4]). Defendant's conviction stems from a burglary and robbery that occurred at the residence of a husband and wife shortly after they returned home one evening. Defendant fought with the husband outside the home, during which a gun that defendant was holding was fired, and the codefendant assaulted the wife inside the home.

Defendant contends that the verdict is against the weight of the evidence with respect to his identity as one of the perpetrators. Even assuming, arguendo, that an acquittal would not have been unreasonable, we conclude that, 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]), the verdict is not against the weight of the

evidence as to identity (*see People v Johnson*, 195 AD3d 1510, 1510-1511 [4th Dept 2021]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, the evidence included defendant's detailed confession to the crimes, and we conclude that his testimony at trial that the police had told him what to say in the few minutes before the interview started was incredible (*see People v Coggins*, 198 AD3d 1297, 1298-1299 [4th Dept 2021]).

We reject defendant's further contention that the evidence of intent is legally insufficient to support the conviction of attempted murder in the second degree. The husband testified that the perpetrator fired a gun three times while the gun was pointed at his head. "It is well established that [i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Torres*, 136 AD3d 1329, 1330 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016], *cert denied* — US —, 137 S Ct 661 [2017] [internal quotation marks omitted]; *see People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). 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 defendant's intent to kill (*see generally Bleakley*, 69 NY2d at 495).

We reach a different conclusion, however, on defendant's contention that the verdict with respect to attempted murder is against the weight of the evidence. The encounter between defendant and the husband was depicted on a surveillance video, which shows a prolonged physical struggle between the two men during which there were numerous times when defendant had the opportunity to fire the gun at the husband but did not. Although the video shows that the gun fired once during that struggle, there is a rational inference based on the video and the husband's testimony that the gun accidentally discharged. The fight ended when the husband wrestled defendant to the ground and removed defendant's mask. According to the husband's trial testimony, he was bleeding and asked defendant to let him call an ambulance. Defendant agreed and asked the husband, who was still on top of defendant, to let him go. The husband complied, telling defendant to take a bag containing money that the husband had dropped on the ground and leave. Defendant picked up the bag, while still holding the gun, and left. Viewing the evidence in light of the elements of attempted murder in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict with respect to that count is against the weight of the evidence, because the People failed to prove beyond a reasonable doubt that defendant intended to kill the husband (*see generally Bleakley*, 69 NY2d at 495; *People v Bailey*, 94 AD3d 904, 905 [2d Dept 2012], *lv denied* 19 NY3d 957 [2012]). We therefore modify the judgment by reversing that part convicting defendant of attempted murder in the second degree under count one of the indictment and dismissing that count of the indictment.

Defendant's remaining contention is not preserved for our review because defendant failed to raise it in his motion for a trial order

of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Barrett*, 188 AD3d 1736, 1739 [4th Dept 2020]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

309

KA 19-01187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY FRANKLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Oneida County Court (Robert Bauer, J.), dated May 20, 2019. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Franklin* ([appeal No. 1] — AD3d — [June 3, 2022] [4th Dept 2022]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

310

KA 20-00295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. MAHARREY, 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 a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered November 13, 2019. The judgment convicted defendant upon a jury verdict of assault in the second degree, assault on a police officer, disorderly conduct and harassment 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 following a jury trial of, inter alia, assault in the second degree (Penal Law § 120.05 [3]) and assault on a police officer (§ 120.08). Contrary to defendant's contention, 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 the police officer sustained a serious physical injury as required for the conviction under section 120.08 (*see* § 10.00 [10]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The officer testified that he suffered a broken nose and post-concussion syndrome as a result of the altercation with defendant. The injuries resulted in significant breathing problems, necessitating two surgeries, and significant headaches that were ongoing at the time of trial (*see People v Messam*, 101 AD3d 407, 407-408 [1st Dept 2012], *lv denied* 20 NY3d 1102 [2013]; *People v Diaz*, 254 AD2d 36, 36 [1st Dept 1998], *lv denied* 92 NY2d 1031 [1998]; *People v Bell*, 112 AD2d 27, 27 [4th Dept 1985]; *cf. People v Rosado*, 88 AD3d 454, 454-455 [1st Dept 2011], *lv denied* 18 NY3d 928 [2012]).

Before trial, defendant moved for a subpoena duces tecum seeking, inter alia, all of the records of the Genesee County Sheriff's Office related to this incident, contending that defendant had no personal recollection of the event. County Court denied the motion, but

directed the People to provide defendant with information regarding potential witnesses to the incident. Contrary to defendant's contention, we conclude that the court appropriately balanced defendant's constitutional rights with the County's interest in maintaining the confidentiality of its records (*see People v Gissendanner*, 48 NY2d 543, 549-551 [1979]; *People v Jones*, 193 AD3d 1410, 1413 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *cf. People v Kozlowski*, 11 NY3d 223, 241-243 [2008], *rearg denied* 11 NY3d 904, 905 [2009], *cert denied* 556 US 1282 [2009]). Contrary to defendant's further contention, we decline to apply the new discovery rules that became effective in 2020 retroactively to this case (*see* CPL 245.10 [1] [a]; 245.20; *People v Austen*, 197 AD3d 861, 863-865 [4th Dept 2021, Smith, J., concurring], *lv denied* 37 NY3d 1095 [2021]; *but see People v DeMilio*, 66 Misc 3d 759, 762-763 [Dutchess County Ct 2020]).

Finally, defendant contends that reversal is required because the court, in its final instructions to the jury, improperly shifted the burden of proof to defendant when it instructed the jury that it "must decide if the required intent *can't* be inferred beyond a reasonable doubt" (emphasis added). As defendant correctly concedes, he did not object to the charge as given and, as a result, we conclude that defendant's contention is not preserved for our review (*see People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]; *People v Brown*, 166 AD3d 1582, 1583 [4th Dept 2018], *lv denied* 32 NY3d 1170 [2019]). In any event, the contention lacks merit. The one misstatement by the court was almost immediately corrected by the court. In addition, the court emphasized that the People had the burden of proving defendant guilty beyond a reasonable doubt. Moreover, in supplemental instructions, the court provided the correct charge. We thus conclude that "the court's charge, when viewed as a whole, adequately conveyed the correct standard for evaluating the proof at trial to the jury and did not improperly shift the burden of proof to the defendant" (*People v Phillips*, 136 AD2d 930, 931 [4th Dept 1988], *lv denied* 71 NY2d 972 [1988]; *see People v Williams*, 301 AD2d 794, 796 [3d Dept 2003]; *see generally People v Medina*, 18 NY3d 98, 104 [2011]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

323

KA 15-01421

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD R. WHITE, ALSO KNOWN AS PROPHET,
DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

HOWARD R. WHITE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 14, 2015. The appeal was held by this Court by order entered March 19, 2021, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (192 AD3d 1539 [4th Dept 2021]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to Supreme Court to conduct a suppression hearing, and we rejected defendant's remaining contentions (*People v White*, 192 AD3d 1539 [4th Dept 2021]). Upon remittal, after a hearing the court determined that the detention of defendant by the police in a patrol car and the securing of defendant's cell phone was lawful, and the court therefore refused to suppress evidence arising from defendant's detention. We affirm. Contrary to defendant's sole contention in his pro se supplemental brief on resubmission, the hearing record does not support the conclusion that the testifying officers had "lacked present recollection" of the events (*People v Grover*, 78 AD2d 590, 590 [4th Dept 1980]). Defendant raises no further contentions with respect to the court's refusal to suppress evidence following the hearing and has thus abandoned any such contentions (*see People v Blair*, 129 AD3d 1514, 1515 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015], *reconsideration denied* 26 NY3d 1038 [2015]).

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

327

KA 20-00244

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDUARDO VAZQUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered October 2, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). The conviction stems from an incident in which defendant shot and killed the victim following an altercation that occurred outside of defendant's Syracuse home. We affirm.

We reject defendant's contention that the verdict is against the weight of the evidence with respect to the justification defense (*see People v Johnson*, 103 AD3d 1226, 1226-1227 [4th Dept 2013], *lv denied* 21 NY3d 944 [2013]; *see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]). "When a defense of justification is raised, 'the People must prove beyond a reasonable doubt that [the] defendant's conduct was not justified' " (*People v Umali*, 10 NY3d 417, 425 [2008], *rearg denied* 11 NY3d 744 [2008], *cert denied* 556 US 1110 [2009]; *see* Penal Law §§ 25.00 [1]; 35.00; *People v Marchant*, 152 AD3d 1243, 1245 [4th Dept 2017]). Specifically, in this case, "the People were required to prove either that defendant lacked a subjective belief that [his] use of deadly physical force was necessary to protect [himself] against [the victim's] imminent use of deadly physical force, or that a reasonable person in the same situation would not have perceived that deadly force was necessary" (*Marchant*, 152 AD3d at 1245 [internal quotation marks omitted]; *see* Penal Law § 35.15 [1], [2] [a]; *Umali*, 10 NY3d at 425).

Here, a different result would not have been unreasonable based on the evidence presented (*see generally Danielson*, 9 NY3d at 348). Nevertheless, viewing the evidence in light of the jury instructions concerning the elements of the crime and the defense of justification (*see id.* at 349), we conclude that, upon " 'weigh[ing] the relative probative force of [the] conflicting testimony and the relative strength of [the] conflicting inferences that may be drawn from the testimony,' " the verdict is not against the weight of the evidence (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Perkins*, 160 AD3d 1455, 1456 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]). Defendant's testimony that, contrary to the account established by the People's witnesses, the victim arrived at defendant's Syracuse home while carrying a handgun and threatening to kill defendant and his family merely "presented a credibility issue for the [jury] to resolve" (*Perkins*, 160 AD3d at 1456 [internal quotation marks omitted]; *see People v Alls*, 195 AD2d 952, 953 [4th Dept 1993], *lv denied* 82 NY2d 890 [1993]), and the jury, "as the finder of fact, 'was entitled to discredit the testimony of defendant' that the victim was the initial aggressor" (*People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). We note that defendant's testimony that the victim was about to shoot him was contradicted by other evidence in the record (*see People v Di Bella*, 277 AD2d 699, 700-701 [3d Dept 2000], *lv denied* 96 NY2d 758 [2001]), and "the testimony of the People's witnesses was not incredible as a matter of law, i.e., it was not impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]). Ultimately, " 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]; *see Contreras*, 154 AD3d at 1321).

Defendant did not object to Supreme Court's charge to the jury on the justification defense and therefore failed to preserve for review his contention that the charge was insufficient because the jury was not instructed that a justification defense could also include a defense of third parties and because the court did not relate the law on justification to the facts of this particular case (*see People v Cruz*, 175 AD3d 1060, 1061 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Heatley*, 116 AD3d 23, 25-26 [4th Dept 2014], *appeal dismissed* 25 NY3d 933 [2015]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's next contention, the court properly refused to suppress statements that he made to a police officer during an interview that occurred after his warrantless arrest at a North Carolina residence on the ground that the arresting officers entered that home without consent in violation of *Payton v New York* (445 US

573 [1980]). " 'Where a person with ostensible authority consents to police presence on the premises, either explicitly or tacitly, the right to be secure against warrantless arrests in private premises as expressed in *Payton v New York* (445 US 573 [1980]) is not violated' " (*People v Bunce*, 141 AD3d 536, 537 [2d Dept 2016], *lv denied* 28 NY3d 969 [2016]). Inasmuch as consent may be established by conduct (*see People v Huff*, 133 AD3d 1223, 1223 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *People v Sinzheimer*, 15 AD3d 732, 734 [3d Dept 2005], *lv denied* 5 NY3d 794 [2005]), we conclude that the conduct of defendant's stepson "in stepping aside from the door to admit the officers is enough to establish consent" (*People v Davis*, 120 AD2d 606, 607 [2d Dept 1986], *lv denied* 68 NY2d 769 [1986]; *see People v Xochimitl*, 147 AD3d 793, 794 [2d Dept 2017], *affd* 32 NY3d 1026 [2018]; *People v Sigl*, 107 AD3d 1585, 1586-1587 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]). Additionally, the testimony of police officers during the suppression hearing established that the stepson gestured to indicate that defendant was inside the home, and that the stepson did not otherwise object or offer resistance when the officers followed him inside (*see People v Satornino*, 153 AD2d 595, 595 [2d Dept 1989]; *People v Long*, 124 AD2d 1016, 1017 [4th Dept 1986]). Although the stepson testified at the suppression hearing that he did not consent to the officers' entry into the North Carolina home, "the credibility determinations of the suppression court[, which rejected that testimony,] are entitled to great deference on appeal and will not be disturbed [inasmuch as they are not] clearly unsupported by the record" (*People v Howard*, 129 AD3d 1469, 1470 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015], *reconsideration denied* 26 NY3d 1089 [2015] [internal quotation marks omitted]; *see People v Daniels*, 147 AD3d 1392, 1392-1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *People v Johnson*, 138 AD3d 1454, 1454 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]).

Defendant's remaining contention regarding the statements that he made during his postarrest interview with the police is unpreserved for our review (*see People v Graham*, 174 AD3d 1486, 1488 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Shire*, 77 AD3d 1358, 1359 [4th Dept 2010], *lv denied* 15 NY3d 955 [2010]; *see generally* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

343

CA 21-00625

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

IN THE MATTER OF THE APPLICATION OF M.B.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SUICIDE PREVENTION AND CRISIS SERVICES, INC.,
ET AL., RESPONDENTS,
AND NEW YORK STATE OFFICE OF MENTAL HEALTH,
RESPONDENT-APPELLANT.

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

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a supplemental order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 7, 2021. The supplemental order, insofar as appealed from, granted the petition to seal records from respondent New York State Office of Mental Health, with certain limitations.

It is hereby ORDERED that the supplemental order insofar as appealed from is unanimously reversed on the law without costs and the petition against respondent New York State Office of Mental Health is dismissed in its entirety.

Memorandum: Petitioner, who has been committed to psychiatric facilities on multiple occasions for paranoid schizophrenia and bipolar disorder with psychotic features, commenced this proceeding to seal his psychiatric records under Mental Hygiene Law § 33.14 (a) (1) (b). To prevail in such a proceeding, the petitioner is obligated, among other things, to prove "by competent medical evidence that he [or she] is not currently suffering from a mental illness" and that "the interests of . . . society would best be served by sealing [his or her] records" (*id.*). Supreme Court granted the petition in relevant part and directed respondent-appellant (State) to, inter alia, seal petitioner's psychiatric records. The State appeals, and we now reverse.

As the State correctly contends, petitioner failed to establish either the mental illness prong or the societal interests prong of Mental Hygiene Law § 33.14 (a) (1) (b). The psychiatrist's affirmation upon which petitioner relies to establish the mental

illness prong is entitled to no weight because the psychiatrist failed to review petitioner's psychiatric records and offered a conclusion that was entirely at odds with petitioner's longstanding and well-documented history of severe, incapacitating mental illness. Indeed, the psychiatrist simply accepted at face value petitioner's self-serving and counterfactual claim that he never actually suffered from any mental illness and that all of his diagnoses and hospitalizations were his mother's fault. Moreover, petitioner is seeking to seal his psychiatric records in order to join the military or become a police officer—callings that offer advanced weapons training and the privilege of using lethal force in defense of civil society. The interests of society are not "best" served by removing a barrier to petitioner's ability to join the military or police (*id.*). Indeed, it would be inimical to society's best interests to facilitate the induction of petitioner into the security services of the United States (*see e.g. People v Westchester County S.P.C.C.*, 173 AD2d 687, 688 [2d Dept 1991], *lv dismissed* 78 NY2d 1041 [1991], *lv dismissed* 79 NY2d 819 [1991], *rearg denied* 79 NY2d 914 [1992]).

We have considered and rejected petitioner's jurisdictional challenges to our power to entertain this appeal.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

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

349

KA 21-00293

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHALA WILLIAMS, DEFENDANT-APPELLANT.

JOHN R. LEWIS, SLEEPY HOLLOW, FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department from an order of the Onondaga County Court (Stephen J. Dougherty, J.), dated January 25, 2021. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was previously convicted after a jury trial of one count each of murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [2]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). He appealed, and this Court affirmed (*People v Williams* [appeal No. 1], 175 AD3d 980 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]). Together with the appeal of his judgment of conviction, defendant also appealed from an order of County Court that denied without a hearing his motion pursuant to CPL 440.10 to vacate the judgment of conviction on the ground of ineffective assistance of counsel. This Court reversed that order and remitted the matter to County Court for a hearing on the motion (*People v Williams* [appeal No. 2], 175 AD3d 980, 982 [4th Dept 2019]). After a hearing, the court again denied the motion, and a Justice of this Court granted defendant leave to appeal. We agree with defendant that the court erred in denying the motion, and we therefore reverse the order, grant the motion, vacate the judgment of conviction, and grant defendant a new trial.

"To prevail on his claim that he was denied effective assistance of counsel, defendant must demonstrate that his attorney failed to provide meaningful representation" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v*

Baldi, 54 NY2d 137, 147 [1981]). A defendant claiming ineffective representation "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019] [internal quotation marks omitted]). "It is well settled that '[t]he failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel' " (*People v Borcyk*, 184 AD3d 1183, 1184 [4th Dept 2020]; *see People v Pottinger*, 156 AD3d 1379, 1380 [4th Dept 2017]).

This case arises from an incident in which a male victim and a female victim were shot with bullets matching a .38 caliber firearm through a closed window of the male victim's residence, killing the male victim. The shooting took place several hours after defendant had attended a gathering at the residence, during which defendant and the male victim had a physical altercation. Defendant was arrested and, during pretrial incarceration, he heard from a fellow inmate that the shootings had been committed by a third party who wanted to rob the residence, and that a witness had been present. Although defendant informed his trial counsel that the witness who had been present during the shootings was able to provide potentially exculpatory information, trial counsel never interviewed the witness.

The witness, who testified at the CPL article 440 hearing against the advice of his counsel, stated that, on the night of the shooting, he and a third party committed a string of crimes, including an armed robbery of another residence with a .22 caliber firearm. The witness explained that he and the third party then retrieved a second firearm, a .38 caliber handgun, and proceeded to the male victim's residence to undertake another robbery. He further testified that, while he and the third party were standing outside the male victim's residence, someone inside turned on a light and spooked the third party, who then fired shots into the residence from the backyard through a closed window. The witness was unequivocal that defendant was not present during the shooting and did not fire the shots. The witness added that he was not related to or particularly friendly with defendant, and acknowledged that he might incur legal penalties as a result of his testimony.

At the CPL article 440 hearing, the People called trial counsel and the hired defense investigator. The investigator testified that, although defendant requested that he interview the witness, the investigator did not think it was necessary because the witness's version of events was not credible due to various inconsistencies, including, inter alia, the difference in caliber of gun used in the shooting and that used in other incidents in which the witness was involved. Similarly, trial counsel testified that she did not follow up with the witness because his version of events did not comport with accounts from other witnesses the defense might have called at trial. We conclude, however, that those putative discrepancies were either resolved by the witness's testimony at the CPL article 440 hearing, immaterial, or related to minor differences in terminology.

Under the circumstances of this case, we conclude that defendant

met his burden of establishing that defense counsel's failure to interview the potentially exculpatory witness constituted ineffective assistance of counsel, inasmuch as the record before us reflects "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013] [internal quotation marks omitted]; *see generally* CPL 440.30 [6]). The failure by defendant's trial counsel to interview the witness cannot be characterized as a legitimate strategic decision because, "without collecting that information, [defense] counsel could not make an informed decision as to whether the witness['s] evidence might be helpful at trial" (*People v Davis*, 193 AD3d 967, 971 [2d Dept 2021]; *see also People v Oliveras*, 21 NY3d 339, 348 [2013]). To the extent that the defense team deemed the witness not credible due to his criminal record or history, that alone "does not excuse trial counsel's failure to investigate since a witness's unsavory background[ ] does not render his or her testimony incredible as a matter of law" (*Davis*, 193 AD3d at 971 [internal quotation marks omitted]; *see People v Tankleff*, 49 AD3d 160, 181 [2d Dept 2007]). Further, we conclude that, "even if the witness['s] criminal record[] provided a strategic basis for choosing not to present [his] testimony, it does not provide an excuse for [defense] counsel's failure to investigate [him] as [a] possible witness[ ]" (*Davis*, 193 AD3d at 971; *see generally Oliveras*, 21 NY3d at 348). Moreover, the witness's testimony at the CPL article 440 hearing was wholly consistent with the theory pursued by trial counsel, namely that defendant was not present at the shooting and that the crime was instead committed by an individual seeking to rob the victims' residence, and the proposed witness would have provided the only eyewitness testimony at trial as to the shooting.

We therefore agree with defendant that the record discloses no tactical reason for defense counsel's failure to interview the witness (*see Borcyk*, 184 AD3d at 1184; *see generally People v Dombrowski*, 94 AD3d 1416, 1417 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]), and that defense counsel's deficient conduct was "sufficiently egregious and prejudicial as to compromise [the] right to a fair trial" (*Caban*, 5 NY3d at 152; *see Borcyk*, 184 AD3d at 1187).

Entered: June 3, 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 19-00165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT L. THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered December 4, 2018. The judgment convicted defendant upon his plea of guilty of criminal mischief in the third degree and aggravated family offense.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal mischief in the third degree (Penal Law § 145.05 [2]) and aggravated family offense (§ 240.75 [1]). Defendant was sentenced to, inter alia, an indeterminate term of incarceration, restitution, and a collection surcharge. By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that he did not knowingly, voluntarily, and intelligently enter the plea (*see People v Brinson*, 130 AD3d 1493, 1493 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]). Furthermore, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). To the extent that defendant negated an essential element of a crime to which he pleaded guilty by initially denying any intent to damage property, we note that County Court immediately conducted the requisite further inquiry to ensure that defendant's guilty plea was knowing, intelligent, and voluntary (*see id.* at 666-668; *People v Stafford*, 195 AD3d 1466, 1466-1467 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]), and we conclude that "defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017] [internal quotation marks omitted]; *see People v Bonacci*, 119 AD3d 1348, 1349 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]).

We further conclude that the court's finding with respect to the amount of restitution is supported by the requisite preponderance of the evidence presented at the restitution hearing (*see* CPL 400.30 [4]). The court properly credited the victim's testimony concerning the cost to repair her car door and windshield, which was supported by an estimate and a receipt from credible repair shops (*see People v Grant*, 189 AD3d 2112, 2114 [4th Dept 2020], *lv denied* 37 NY3d 956 [2021]; *People v Davis*, 114 AD3d 1287, 1288 [4th Dept 2014]; *People v Francis L.M.*, 278 AD2d 919, 919-920 [4th Dept 2000], *lv denied* 97 NY2d 754 [2002]). Contrary to defendant's further contention, " '[c]onsideration of defendant's ability to pay was not required because restitution was ordered as part of a nonprobationary sentence that included a period of incarceration as a significant component' " (*People v Willis*, 105 AD3d 1397, 1397 [4th Dept 2013], *lv denied* 22 NY3d 960 [2013]; *see People v Knapp*, 132 AD3d 1290, 1290 [4th Dept 2015]; *see generally People v Henry*, 64 AD3d 804, 807 [3d Dept 2009], *lv denied* 13 NY3d 860 [2009]).

Finally, we reject defendant's contention that the court erred in imposing a collection surcharge of 10% of the amount of restitution. Penal Law § 60.27 (8) provides that a court must impose a surcharge of 5% of the amount of restitution, and may impose an additional surcharge of up to 5% "[u]pon the filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution or reparation in a particular case exceeds five percent of the entire amount of the payment or the amount actually collected" (*see People v Kirkland*, 105 AD3d 1337, 1338-1339 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]) and the requisite affidavit was filed here (*see People v Robinson*, 112 AD3d 1349, 1350 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014]).

Entered: June 3, 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 20-00789

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE LAWHORN, DEFENDANT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN 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 (Victoria M. Argento, J.), rendered June 17, 2020. The judgment convicted defendant upon a plea of guilty of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that he did not knowingly, voluntarily, and intelligently waive his right to be personally present at his plea and sentencing proceedings. Initially, we agree with defendant that those contentions are properly before us regardless of the validity of his waiver of the right to appeal (*see People v Perkins*, 162 AD3d 1641, 1642 [4th Dept 2018]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]).

Under the circumstances of this case, we reject defendant's contention that he did not validly waive his right to be personally present at the plea proceeding. Generally, a defendant must be personally present at the plea proceeding and may not appear electronically (*see* CPL 182.20, 182.30 [1]; 220.50 [1]). At the time of defendant's plea proceeding, however, the Governor, in response to the COVID-19 pandemic, had suspended the applicable prohibition on electronic court appearances for plea proceedings and permitted a defendant to consent to an electronic appearance (*see* Executive Order [A. Cuomo] No. 202.1 [9 NYCRR 8.202.1]; Executive Order [A. Cuomo] No. 202.28 [9 NYCRR 8.202.28]). The record demonstrates that defendant consented to the use of an electronic appearance for his plea proceeding inasmuch as he was aware of the pandemic and was given an opportunity by the court to adjourn the plea proceeding until an

in-person proceeding could take place, but nonetheless declined that opportunity and expressed his desire to move the case forward during the electronic plea appearance.

We also reject defendant's contention that he did not waive his right to be personally present at the sentencing proceeding. "[D]efendants have a 'fundamental right to be present at sentencing' in the absence of a waiver" of that right (*People v Estremera*, 30 NY3d 268, 272 [2017]; *see People v Rossborough*, 27 NY3d 485, 488 [2016]). Here, the record establishes that defendant informed the court that he consented to appear electronically for sentencing and also signed a written waiver of his in-person appearance (*see generally Rossborough*, 27 NY3d at 488-489).

We have considered defendant's remaining challenge to the validity of his guilty plea, and we conclude that it is without merit.

Entered: June 3, 2022

Ann Dillon Flynn
Clerk of the Court

MOTION NO. (688/06) KA 04-00773. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V ANTONIO TYES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ. (Filed June 3, 2022.)

MOTION NO. (1076/18) KA 14-01339. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALAN FICK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND WINSLOW, JJ. (Filed June 3, 2022.)

MOTION NO. (998/19) KA 17-02096. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAURA RIDEOUT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND WINSLOW, JJ. (Filed June 3, 2022.)

MOTION NO. (607/21) KA 19-00168. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL J. WILSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ. (Filed June 3, 2022.)

MOTION NO. (215/22) CA 21-00109. -- ESTATE OF MARK D. PIERCE, DECEASED, BY AND THROUGH DEBORAH PIERCE, AS EXECUTRIX, AND DEBORAH PIERCE, INDIVIDUALLY, PLAINTIFF-RESPONDENT, V THOMAS MADEJSKI, M.D., JOSEPH MISITI, M.D., DALE W. SPONAUGLE, M.D., RADIOLOGY SOLUTIONS ASSOCIATES, PLLC, DEFENDANTS-

APPELLANTS, ET AL., DEFENDANTS. -- Motions to withdraw appeals granted and the appeals are dismissed, with costs payable to plaintiffs-respondents. PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ. (Filed June 3, 2022.)

MOTION NO. (251/22) CA 21-01023. -- JULIO LICINIO, M.D., PHD, MBA, MS, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, JJ. (Filed June 3, 2022.)