SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS IN ATTORNEY DISCIPLINARY MATTERS

SEPTEMBER 27, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED SEPTEMBER 27, 2024

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_____	555	KA 23 00270	PEOPLE V IONA E. WHITE
_____	556	KA 22 01957	PEOPLE V JOSEPH P. HEVERLY
_____	559	KAH 24 00317	CRAIG M. CORDES, ESQ. V TOBIAS SHELLEY
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

383

KA 22-01944

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN BRIGHTMAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), entered November 18, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender.

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

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant, who relocated to New York having been previously convicted of a sex offense in Ohio, appeals from an order insofar as it designated him a sexually violent offender. Defendant contends, in pertinent part, that imposition of the sexually violent offender designation pursuant to the second disjunctive clause of Correction Law § 168-a (3) (b), as applied to him, violates his constitutional right to substantive due process. We agree.

Defendant was convicted in Ohio, upon his plea of guilty, of the felony offense of importuning (Ohio Rev Code Ann § 2907.07 [B]; [former (F) (3)]). The underlying conviction arose from defendant's conduct of soliciting via a telecommunications device another individual who was 13 years of age or older but less than 16 years of age to engage in sexual conduct with him when he was 23 years old (*see* § 2907.07 [B]; [former (F) (3)]). Defendant was sentenced to, inter alia, a local jail term and a period of postrelease supervision, and he was required to register as a sex offender in Ohio.

Defendant moved to New York several years later and, upon receiving notification thereof, the Board of Examiners of Sex Offenders (Board) determined that defendant was required to register as a sex offender in New York (*see* Correction Law § 168-k [2]). Based

on its review of defendant's records, including information relating to his Ohio conviction, the Board submitted to County Court a risk assessment instrument (RAI), case summary, and sex offender designation form. The Board assessed 25 points on the RAI, which rendered defendant a presumptive level one risk, and the Board did not recommend an upward departure from that risk level. The Board also did not recommend that defendant be designated a sexually violent offender under section 168-a (3) (b).

The People subsequently notified defendant and the court that they disagreed with the Board's recommendation that defendant not receive a designation as a sexually violent offender. The People contended in particular that defendant should be designated a sexually violent offender pursuant to the second disjunctive clause of Correction Law § 168-a (3) (b), which defines a "sexually violent offense" as a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Inasmuch as defendant was convicted of a felony in Ohio that required registration as a sex offender in that jurisdiction (*see* Ohio Rev Code Ann §§ 2950.01 [A] [1]; 2950.04 [A] [1] [a]), the People asserted that defendant should be designated a sexually violent offender in New York.

Defendant thereafter filed a motion challenging the constitutionality of Correction Law § 168-a (3) (b) on certain grounds, including that the provision violates principles of substantive due process—both facially and as applied to him—under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (US Const, 14th Amend, § 1). Defendant contended, in relevant part, that the second disjunctive clause of section 168-a (3) (b)—defining a sexually violent offense to include *any* conviction of an out-of-state felony for which sex offender registration is required in the state of conviction—is not rationally related to any legitimate governmental purpose and indeed "misleads the public, and places an unwarranted lifetime stigma on those persons whose underlying offenses are not of a violent nature." The People asserted in response that applying the sexually violent offender designation to any out-of-state offender with a registrable felony conviction is rationally related to the legitimate state interest of "protecting vulnerable populations (including the public at large) from potential harm by sex offenders." During the subsequent SORA hearing, the court held that it would adhere to its ruling in an earlier case that the challenges to the constitutionality of Correction Law § 168-a (3) (b) were without merit. Defendant now contends on appeal that the court erred in designating him a sexually violent offender because the second disjunctive clause of Correction Law § 168-a (3) (b), as applied to a "non-violent registrant[ ]" such as him, violates his substantive due process rights by impinging on his liberty interest to be free of an improper sex offender designation.

Defendant has "a 'constitutionally-protected liberty interest' for purposes of substantive due process 'in not being required to register under an incorrect label' " (*People v Brown*, 41 NY3d 279, 285 [2023], quoting *People v Knox*, 12 NY3d 60, 66 [2009], *cert denied* 558

US 1011 [2009]; *see People v David W.*, 95 NY2d 130, 137 [2000]). Nonetheless, inasmuch as that interest is "not fundamental in the constitutional sense," defendant's substantive due process challenge to his designation as a sexually violent offender pursuant to the second disjunctive clause of Correction Law § 168-a (3) (b) is "subject to deferential rational basis review" (*Brown*, 41 NY3d at 285; *see Knox*, 12 NY3d at 67). "The rational basis test is not a demanding one" (*Knox*, 12 NY3d at 69; *see Myers v Schneiderman*, 30 NY3d 1, 15 [2017], *rearg denied* 30 NY3d 1009 [2017]); "rather, it is 'the most relaxed and tolerant form of judicial scrutiny' " (*Myers*, 30 NY3d at 15, quoting *Dallas v Stanglin*, 490 US 19, 26 [1989]). That test "involves a 'strong presumption' that the challenged legislation is valid, and 'a party contending otherwise bears the heavy burden of showing that a statute is so unrelated to the achievement of any combination of legitimate purposes as to be irrational' " (*id.*, quoting *Knox*, 12 NY3d at 69). Ultimately, "[a] challenged statute will survive rational basis review so long as it is 'rationally related to any conceivable legitimate State purpose' . . . [and] 'courts may even hypothesize the Legislature's motivation or possible legitimate purpose' " (*id.*; *see Brown*, 41 NY3d at 285). "[A]n as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case" (*People v Stuart*, 100 NY2d 412, 421 [2003]).

Here, we conclude that defendant met his burden of showing that there is no rational basis to designate him a sexually violent offender under the second disjunctive clause of Correction Law § 168-a (3) (b), i.e., solely on the basis that he has an out-of-state felony conviction that required registration as a sex offender in that jurisdiction. The record establishes that the underlying out-of-state felony offense of importuning, which arose from defendant's conduct of soliciting via a telecommunication device another individual who was 13 years of age or older but less than 16 years of age to engage in sexual conduct with him when he was 23 years old (Ohio Rev Code Ann § 2907.07 [B]; [former (F) (3)]), was nonviolent in nature. Indeed, the offense of importuning under Ohio law appears comparable to the New York felony of disseminating indecent material to minors in the first degree, which relevantly prohibits a person from describing or depicting sexual conduct in words or images via a computer communication system in order to importune, invite, or induce a minor to engage in sexual conduct with that person (*see* Penal Law § 235.22 [2]). SORA classifies a violation of Penal Law § 235.22 as a "sex offense" rather than a "sexually violent offense" (Correction Law § 168-a [2] [a] [ii]; [3]). Additionally, the Board and the People each declined to request that points be assessed on the RAI under risk factor 1 for use of violence, the court did not assess any points under that risk factor, and neither the case summary nor the other submissions in the record contain any allegation that defendant's conduct involved violence. Consequently, even assuming that both the elements of the crime of conviction *and* defendant's underlying conduct are relevant to the inquiry (*compare People v Malloy*, 228 AD3d 1284, 1291 [4th Dept 2024 plurality], *with id.* at 1296-1298 [Whalen, P.J., and DelConte, J., dissenting]), we conclude that defendant established that he is an "individual[ ] . . . for whom the [sexually violent]

offender designation 'is unmerited' " (*Brown*, 41 NY3d at 289, quoting *Knox*, 12 NY3d at 69) because the out-of-state conviction was "not sexual[ly violent] in nature and his conduct provides no basis to predict risk of future sexual[ly violent] harm" (*id.* at 290).

We further agree with defendant that, contrary to the People's assertions, labeling defendant as a sexually violent offender is not rationally related to any legitimate governmental interest. Although, as the People contend, the government has a legitimate interest in protecting vulnerable populations, and in some instances the public at large, from the potential harm posed by sex offenders (*see* L 1995, ch 192, § 1; *People v Alemany*, 13 NY3d 424, 430 [2009]; *People v Mingo*, 12 NY3d 563, 574 [2009]), that generalized purpose, which is not focused on the particular distinction in designation between sex offenders and sexually violent offenders at issue here, "is already served by requiring defendant to register in New York as a sex offender" (*Malloy*, 228 AD3d at 1288). "[T]he animating notification purpose of SORA presupposes that the information available to the public as a consequence of a SORA registration is accurate" (*id.* at 1289). Where, as here, a nonviolent sex offender is designated a sexually violent offender merely because of an out-of-state conviction that required out-of-state registration, "the public is not accurately informed of the true risk posed by the offender" (*id.*). For the reasons set forth in the plurality memorandum in *Malloy*, we also reject the People's contention that applying the sexually violent offender designation to defendant—as an offender with an out-of-state felony conviction for which sex offender registration is required in the state of conviction—is rationally justified by administrative concerns in obtaining complete information from other jurisdictions (*see id.*).

In sum, we conclude that, as applied to him, the designation of defendant as a sexually violent offender pursuant to the second disjunctive clause of Correction Law § 168-a (3) (b) "unconstitutionally impacts defendant's liberty interest in a criminal designation that rationally fits his conduct and public safety risk" (*Brown*, 41 NY3d at 290). We therefore reverse the order insofar as appealed from and vacate the sexually violent offender designation. We have considered defendant's remaining constitutional challenges to the designation and conclude that they are without merit.

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

one risk and designating him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.).

Inasmuch as defendant presents both a facial and an as-applied challenge, the first task here is to decide whether the challenged statute is unconstitutional as applied to defendant (*see generally People v Stuart*, 100 NY2d 412, 422 [2003]). "As the term implies, an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant *under the facts of the case*" (*id.* at 421 [emphasis added]). To that end, as noted in the dissent in *People v Malloy* (228 AD3d 1284, 1295 [4th Dept 2024] [Whalen, P.J., and DelConte, J., dissenting]), under relevant Court of Appeals precedent, a statute requiring a defendant to register as a sex offender based on a conviction for a specified offense is not constitutionally invalid simply because that statute may encompass defendants whose criminal conduct was not sexual in nature "as that term is commonly understood" (*People v Knox*, 12 NY3d 60, 65 [2009], *cert denied* 558 US 1011 [2009]; *see People v Brown*, 41 NY3d 279, 289 [2023]). Indeed, the Court acknowledged in *People v Brown* that "the Legislature may cast a wide net by 'employ[ing] overinclusive terms' to include within SORA's reach those who commit a non-sexual crime but nonetheless present a future risk of sexual harm" (*Brown*, 41 NY3d at 289; *see Knox*, 12 NY3d at 69). Nonetheless, the *Brown* Court specifically recognized the existence of a judicial remedy for constitutional harm caused by the application of an overbroad SORA designation statute where there is an affirmative showing in the record that the defendant, although technically falling within the statutory definition of "sex offender," is nonetheless one "for whom the sex offender designation 'is unmerited' " (*Brown*, 41 NY3d at 289, quoting *Knox*, 12 NY3d at 69). I see no reason to depart from the logic of *Brown* in the present case.

Contrary to the conclusion of the majority, I do not believe that defendant met his burden of establishing that his designation as a sexually violent offender was unmerited and that the People's reliance on the foreign registration clause in Correction Law § 168-a (3) (b) was therefore unconstitutional as applied to him. Specifically, defendant did not argue before the SORA court that his predicate Ohio conviction did not include the essential elements of an enumerated sexually violent offense in New York (*see* Correction Law § 168-a [3] [a]). Instead, defendant presented to the SORA court, without distinguishing between a facial and an as-applied constitutional challenge, the same generalized argument that was presented by the defendant in *Malloy*, namely, that "[t]here is no logical rationale in defining all registerable out-of-state sex offenses as 'violent.' " Defendant repeats his generalized argument on appeal without further explication. Defendant's failure to make a *factual* argument that his foreign conviction involved no conduct defined as sexually violent under New York law or that his "conduct provides no basis to predict risk of future sexual[ly violent] harm" requires the rejection of his as-applied challenge (*Brown*, 41 NY3d at 290; *see generally Stuart*, 100 NY2d at 421).

Further, inasmuch as I previously concluded that the as-applied challenge to the foreign registration clause in Correction Law § 168-a (3) (b) raised by the defendant in *Malloy* lacks merit (*see Malloy*, 228 AD3d at 1296-1299 [Whalen, P.J., and DelConte, J., dissenting]), "the facial validity of the statute is confirmed" (*Stuart*, 100 NY2d at 422). Finally, I conclude that defendant's remaining constitutional challenge based on the Privileges and Immunities Clause lacks merit and, as such, I would affirm.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

555

KA 23-00270

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IONA E. WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered September 19, 2022. The judgment convicted defendant, upon her 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: In appeal No. 1, defendant appeals from a judgment convicting her, upon her plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and, in appeal No. 2, she appeals from a judgment convicting her, upon her plea of guilty, of criminal possession of a controlled substance in the third degree (§ 220.16 [1]) under a separate indictment. Defendant contends in each appeal that her waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. We agree with defendant that her waivers of the right to appeal are invalid. Both written waivers used overbroad language that " 'mischaracterized the nature of the right[s] that defendant was being asked to cede, portraying the waiver[s] as an absolute bar to defendant taking an appeal' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v St. Denis*, 207 AD3d 1084, 1084 [4th Dept 2022]), and the oral colloquies did not cure those defects (*see Thomas*, 34 NY3d at 566; *People v Fernandez*, 218 AD3d 1257, 1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *People v Rumph*, 207 AD3d 1209, 1210 [4th Dept 2022],

lv denied 39 NY3d 1075 [2023]). Nevertheless, we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

556

KA 22-01957

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH P. HEVERLY, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. The judgment convicted defendant upon a jury verdict of tampering with physical evidence and criminal possession of a controlled substance in the seventh 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 seventh degree (Penal Law § 220.03) and tampering with physical evidence (§ 215.40 [2]), defendant contends that he was deprived of effective assistance of counsel because his trial attorney failed to pursue suppression of tangible property seized from him during a traffic stop. Although defense counsel sought such relief in an omnibus motion and County Court granted a *Mapp* hearing to determine the admissibility of the evidence in question, no *Mapp* hearing was ever held. It appears that defense counsel abandoned the issue of suppression of physical evidence after filing the motion, and drugs seized from defendant as a result of the traffic stop were admitted at trial against him. According to defendant, there was no legitimate or strategic reason for defense counsel to abandon the suppression issue and this single error by defense counsel deprived defendant of effective assistance of counsel. We reject that contention.

"It is well settled that even a single error or failure to make an argument may amount to ineffective assistance of counsel, despite otherwise competent representation, where that error is sufficiently egregious and prejudicial" (*People v Bovee*, 221 AD3d 1549, 1550 [4th Dept 2023], *lv denied* 41 NY3d 982 [2024]; *see People v McGee*, 20 NY3d 513, 518 [2013]), and "[t]he failure to move for suppression may seriously compromise a defendant's right to a fair trial such that it

may . . . qualify as ineffective representation" (*People v Rossborough*, 122 AD3d 1244, 1245 [4th Dept 2014]).

While "[t]here can be no denial of effective assistance of trial counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]), "the standard to be applied is whether defense counsel failed to file [or pursue] a 'colorable' motion and, if so, whether [defense] counsel had a strategic or legitimate reason for failing to do so" (*People v Carver*, 124 AD3d 1276, 1279 [4th Dept 2015], *affd* 27 NY3d 418 [2016], quoting *People v Garcia*, 75 NY2d 973, 974 [1990]; *cf. McGee*, 20 NY3d at 518; *People v Brunner*, 16 NY3d 820, 821 [2011]). "Although neither the Court of Appeals nor the Appellate Division has defined colorable in this context, the term is elsewhere defined as appearing to be true, valid, or right . . . Federal courts have described a colorable claim as one that has a fair probability or a likelihood, but not a certitude, of success on the merits" (*Carver*, 124 AD3d at 1279).

Here, we conclude that defendant has failed to establish that he was likely to prevail on any motion seeking suppression of physical evidence and that defense counsel's single alleged error in abandoning the omnibus motion to that extent was therefore not so egregious as to deprive defendant of meaningful representation. The evidence at defendant's *Huntley* hearing established that he consented to a search of his person upon exiting the vehicle in which he was a passenger. With respect to defendant's abandoned request for suppression of the physical evidence obtained by the police as a result of that search, the question becomes whether the officer exceeded the scope of defendant's consent when he pulled defendant's underwear away from his body, revealing baggies of controlled substances near defendant's genitals. Inasmuch as the *Huntley* hearing was solely focused on the admission of defendant's statements, none of the witnesses testified regarding the scope of defendant's consent for the search of his person. While we cannot consider trial testimony or trial evidence on review of an actual suppression ruling (*see People v Gonzalez*, 55 NY2d 720, 721-722 [1981], *rearg denied* 55 NY2d 1038 [1982], *cert denied* 456 US 1010 [1982]; *see also People v Carmona*, 82 NY2d 603, 610 n 2 [1993]; *People v Kabir*, 148 AD3d 1802, 1803 [4th Dept 2017]), we consider it to determine whether defendant had a colorable motion to suppress physical evidence to support his claim of ineffective assistance of counsel (*see People v Rivera*, 71 NY2d 705, 709 [1988]).

At trial, the arresting officer testified that defendant was flailing around in the passenger seat at the time of the stop and, upon the officer's approach, he observed defendant with his hands in the genital area of his pants. The officer also reiterated his hearing testimony that defendant consented to a search of his person. At the time defendant exited the vehicle, the button and zipper to his pants was open. After conducting his "normal search," the officer removed the waistband of defendant's underwear from his stomach and observed the contraband.

Defendant testified at trial that he placed the contraband in his pants and that, after he heard the driver inform the police officers that she saw defendant "stuff[ ] something" in his pants, he got "pissed off" and opened his pants. Despite defendant's contention that he consented to only a pat search of his clothing, we conclude that the officer's search of his underwear did not exceed the scope of defendant's consent.

" 'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?' " (*People v Gomez*, 5 NY3d 416, 419 [2005], quoting *Florida v Jimeno*, 500 US 248, 251 [1991]; *see People v Hall*, 35 AD3d 1171, 1171 [4th Dept 2006], *lv denied* 8 NY3d 923 [2007]). Here, defendant's conduct in voluntarily unbuttoning and unzipping his own pants established that the scope of his consent included a search of the inside of his clothing (*see People v Meredith*, 49 NY2d 1038, 1039 [1980]; *People v Facen*, 117 AD3d 1463, 1464 [4th Dept 2014], *lv denied* 23 NY3d 1020 [2014]; *cf. People v Crespo*, 29 Misc 3d 1203[A], 2010 NY Slip Op 51680[U], *5 [Sup Ct, NY County 2010]), especially considering that defendant knew when he consented to the search that the officer suspected that defendant had hid something down his pants. We therefore conclude that defendant failed to establish a likelihood of success on the merits of a motion to suppress the evidence seized from his underwear and, as a result, failed to establish that he was denied effective assistance of counsel (*see generally Caban*, 5 NY3d at 152). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that he was denied a fair trial by evidentiary errors and prosecutorial misconduct. Even assuming, arguendo, that there were evidentiary errors, those errors related solely to the charge for which defendant was acquitted and, as a result, we deem any such errors harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Liberatore*, 167 AD2d 425, 426 [2d Dept 1990], *lv denied* 78 NY2d 956 [1991]).

With respect to the alleged instances of prosecutorial misconduct, defendant failed to object to the challenged actions of the prosecutor and, as a result, his challenges to those statements are not preserved for our review (*see People v Santiago*, 195 AD3d 1460, 1461 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]; *People v Boyd* [appeal No. 2], 184 AD3d 1151, 1154 [4th Dept 2020]). We decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We note that the uniform sentence and commitment form contains an inaccurate citation to Penal Law § 215.40 (5) rather than the correct citation, Penal Law § 215.40 (2). The uniform sentence and commitment form must therefore be amended to correct that clerical error (*see People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31

NY3d 1117 [2018]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

559

KAH 24-00317

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CRAIG M. CORDES, ESQ., ON BEHALF OF CARL NEWTON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOBIAS SHELLEY, SHERIFF OF ONONDAGA COUNTY,
RESPONDENT-RESPONDENT.

CRAIG M. CORDES, SYRACUSE, FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 8, 2024, in a habeas corpus proceeding. The judgment dismissed the petition and remanded Carl Newton to custody.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, the petition is granted, and the matter is remitted to Onondaga County Court, for further proceedings in accordance with the following memorandum: Petitioner appeals from a judgment of Supreme Court (Neri, J.) that, inter alia, dismissed his petition for a writ of habeas corpus seeking the immediate release of Carl Newton from custody.

Newton, while awaiting trial on an indictment charging him with, inter alia, murder in the second degree and attempted murder in the second degree, posted bail and was released from custody. A joint trial of Newton and his codefendant commenced in County Court (Limpert, J.) (bail-setting court), but ended in a mistrial after an individual described as being a supporter of Newton reportedly approached attorneys involved in the trial as they were leaving the courthouse and made statements voicing displeasure that certain prospective jurors had been removed from the panel. The bail-setting court conducted a bail revocation hearing.

In its oral decision, the bail-setting court first noted that CPL 530.60 (1) authorizes a court to revoke bail for good cause shown. The bail-setting court stated that Newton had "disrupted the trial, [and] appears to the [c]ourt to be involved in a potential scheme to choose jurors that could be tampered with," and that "as a result of his conduct [the court] had to dismiss the entire jury panel and relieve his attorneys resulting in the [c]ourt having no choice but to declare a mistrial." The bail-setting court then cited CPL 530.60

(2), which, inter alia, authorizes a court to revoke bail when the court has found, by clear and convincing evidence, that the defendant, after being charged with a felony, committed a felony while at liberty (*see* CPL 530.60 [2] [b] [iv]). The bail-setting court found "clear and convincing evidence that a prima facie case could be made that the conduct of [Newton] could be charged as a felony" and revoked Newton's bail.

Where, as here, a defendant is initially charged with a felony, released on bail, and subsequently accused of committing an additional felony, the securing order may be modified by means of either CPL 530.60 (1) or (2) (*see generally People ex rel. Rankin v Brann*, 41 NY3d 436, 442-443 [2024]).

"Under subdivision (1), a court may hold a summary hearing and consider the relevant factors to assess defendant's risk of flight and how the alleged additional crimes, now considered along with the factors underlying the initial determination, have changed the court's assessment of the 'kind and degree of control or restriction that is necessary to secure the principal's return to court' " (*Rankin*, 41 NY3d at 443, quoting CPL 510.30 [1]). Here, "the record does not sufficiently demonstrate that the [bail-setting court's determination was] based on factors informing [ ] defendant's likelihood of returning to court" and we therefore conclude that the determination is "presumed to rest upon" CPL 530.60 (2), not upon CPL 530.60 (1) (*id.* at 445). Indeed, the bail-setting court expressly stated that it found by "clear and convincing evidence that . . . [Newton] could be charged [with] a felony," thereby invoking subdivision (2) (b) (iv).

Thus, the dispositive issue is whether the bail-setting court's determination that Newton had "committed a felony while at liberty" (CPL 530.60 [2] [b] [iv]) was supported by clear and convincing evidence. Notably, the bail-setting court did not specify what felony Newton could have been charged with. In stating its rationale for declaring a mistrial, the bail-setting court mentioned "jury tampering," but tampering with a juror, whether charged in the first or second degree, is a misdemeanor (*see* Penal Law §§ 215.23, 215.25) and cannot serve as a valid basis for bail revocation under CPL 530.60 (2) (b) (iv). Therefore, we conclude that the bail-setting court's determination was not supported by clear and convincing evidence and that Supreme Court erred in dismissing the petition for a writ of habeas corpus.

We reverse the judgment, reinstate the petition, grant the petition, and remit the matter to the bail-setting court for further proceedings.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

560

KA 23-00510

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IONA E. WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered September 19, 2022. The judgment convicted defendant, upon her 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.

Same memorandum as in *People v White* ([appeal No. 1] — AD3d — [Sept. 27, 2024] [4th Dept 2024]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

562

CAF 23-01668

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

IN THE MATTER OF KARLIL WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JULIE GRAU, RESPONDENT-RESPONDENT.

IN THE MATTER OF JULIE GRAU,
PETITIONER-RESPONDENT,

V

KARLIL WILLIAMS, RESPONDENT-APPELLANT.

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

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Lewis County (Daniel R. King, J.), entered August 21, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole legal custody and primary residency of the subject child to respondent-petitioner.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, petitioner-respondent father appeals from an order that, inter alia, modified the parties' prior order of custody and parenting time by awarding sole legal custody and primary residency of the subject child to respondent-petitioner mother.

The father contends that the mother did not adequately plead a change in circumstances in her petition for modification of the prior order. That contention, raised for the first time on appeal, is not properly before this Court (*see Matter of Sierak v Staring*, 124 AD3d 1397, 1398 [4th Dept 2015]). In any event, the mother adequately pleaded a change in circumstances by alleging that the father "repeatedly and consistently neglected to exercise his right to full

[parenting time]" (*Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]) and that he was unable to communicate effectively with her (*see Matter of Spiewak v Ackerman*, 88 AD3d 1191, 1192 [3d Dept 2011]; *see generally Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]).

We reject the father's contention that Family Court erred in granting sole legal custody and primary residency to the mother, thereby significantly reducing his parenting time. Here, "the evidence at the hearing established that the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances" (*Matter of Capobianco v Capobianco*, 162 AD3d 1570, 1570 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]; *see Matter of Mattice v Palmisano*, 159 AD3d 1407, 1408 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]). We conclude that there is a sound and substantial basis in the record for the court's determination that an award of sole legal custody and primary residency to the mother with parenting time to the father was in the child's best interests, and we therefore decline to disturb that determination (*see generally Matter of Russell v Russell*, 173 AD3d 1607, 1609 [4th Dept 2019]; *Matter of Thayer v Ennis*, 292 AD2d 824, 825 [4th Dept 2002]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

563

CA 23-01297

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

IN THE MATTER OF THE ESTATE OF DAVID C. PETERS, DECEASED.

TONAWANDA INDIAN BAPTIST CHURCH, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

COREEN THOMPSON, ADMINISTRATOR C.T.A. OF THE ESTATE OF DAVID C. PETERS, DECEASED, RESPONDENT-RESPONDENT.

HODGSON RUSS LLP, ROCHESTER (CATHERINE GRANTIER COOLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICES OF JOHN P. BARTOLOMEI, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a decree (denominated order) of the Surrogate's Court, Genesee County (Melissa Lightcap Cianfrini, S.), entered April 21, 2023. The decree, inter alia, dismissed the petition.

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

Memorandum: Petitioner, Tonawanda Indian Baptist Church (Church), commenced this proceeding pursuant to SCPA 1420 (1) seeking construction of certain provisions of the last will and testament (will) of David C. Peters (decedent). Respondent, Coreen Thompson, Administrator C.T.A. of the estate of decedent (Coreen), opposed the petition. At the time of his death, decedent was the owner and operator of the Arrowhawk Smoke and Gas Shop (Arrowhawk). In his will, decedent devised the assets of Arrowhawk to his daughter Coreen and his brother, Thomas Peters (Thomas), "which assets shall be used by them in the continuing operating business pursuant to the separate Business Management Agreement" (Management Agreement). The will further provided that, in the event that Coreen and Thomas "do not agree and become party to the Management Agreement, their share (one or both) shall pass" pursuant to clause Sixth C. of the will. That clause provided, in relevant part, that "[i]n the event that the parties cannot agree on the ongoing business management pursuant to the [Management] Agreement, the underlying assets shall be sold to a qualified buyer (Native American) and the proceeds shall pass to the [Church]." In its petition, the Church sought a construction of the will to find that the contingent bequest to the Church had vested inasmuch as Coreen and Thomas had not reached an agreement regarding

the ongoing operation of Arrowhawk.

Coreen moved to dismiss the petition. That motion was denied by Surrogate's Court (Mohun, A.S.). The Surrogate found a latent ambiguity in the will and determined to hold a hearing at which he would receive evidence and hear arguments for and against the construction of the will as urged by the Church. The parties, however, thereafter agreed that a hearing was not necessary and consented to submit the issue for determination on papers only. Surrogate's Court (Cianfrini, S.) thereafter issued a decree that, inter alia, denied the relief sought by the Church. The Church appeals.

Initially, the Church contends that the doctrine of the law of the case precluded the Surrogate from reversing the prior finding that the will contained a latent ambiguity. Even assuming, arguendo, that the Surrogate was bound by the law of the case doctrine, "this Court is not bound by the doctrine of law of the case, and may make its own determination" (*Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 219 AD3d 1157, 1158-1159 [4th Dept 2024]; *see William Metrose Ltd. Bldr./Dev. v Waste Mgt. of N.Y., LLC*, 225 AD3d 1223, 1224 [4th Dept 2024]; *Matter of Panella* [appeal No. 2], 218 AD3d 1198, 1203 [4th Dept 2023]).

Contrary to the Church's further contention, it is not entitled to the relief sought in its petition. "[I]n construing a will, the intention of the testator must be [the] 'absolute guide' " (*Matter of Bieley*, 91 NY2d 520, 525 [1998]; *see Matter of Carmer*, 71 NY2d 781, 785 [1988]; *Matter of Bonanno*, 151 AD3d 718, 719 [2d Dept 2017]). In ascertaining decedent's intent, " 'a sympathetic reading of the will as an entirety' is required" (*Carmer*, 71 NY2d at 785, quoting *Matter of Fabbri*, 2 NY2d 236, 240 [1957]). "[T]he best indicator of the testator's intent is found in the clear and unambiguous language of the will itself and, thus, where no ambiguity exists, [e]xtrinsic evidence is inadmissible to vary the terms of a will" (*Matter of Scale*, 38 AD3d 983, 985 [3d Dept 2007] [internal quotation marks omitted]; *see Estate of Anderson v Bernstein*, 184 AD3d 429, 429 [1st Dept 2020], *lv denied* 36 NY3d 910 [2021]). "If, on the other hand, a provision of the will is ambiguous, extrinsic evidence is properly considered in discerning the testator's true intent" (*Matter of McCabe*, 269 AD2d 727, 729 [3d Dept 2000]; *see Matter of Schermerhorn*, 31 NY2d 739, 741 [1972]).

Here, it is clear from the terms of the will that it was decedent's intent to give the assets of Arrowhawk to Coreen and Thomas, to be used by them in the continued operation of the business. Shortly after decedent's death, Coreen and Thomas each signed an "Adherence Agreement" in which they agreed to adhere to and be bound by the Management Agreement. By entering into the adherence agreements, Coreen and Thomas agreed on the ongoing business management of Arrowhawk pursuant to the Management Agreement; their rights to the assets of Arrowhawk then vested, and the Church's contingent interest was extinguished. The Surrogate thus properly denied the construction of the will sought by the Church (*see*

generally Matter of Lynch, 113 AD3d 616, 618 [2d Dept 2014]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

565

CA 23-00957

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

BL DOE 7, PLAINTIFF-RESPONDENT,

V ORDER

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

FERRARA FIORENZA PC, EAST SYRACUSE (RYAN L. MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), AND O'BRIEN & FORD, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, inter alia, denied in part the motion of defendant Rochester City School District for summary judgment dismissing the complaint against it.

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

568

CA 24-00283

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

SHAWN BROTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, ET AL., DEFENDANTS,
AND STEVEN WILLIAMS, INDIVIDUALLY AND IN
HIS CAPACITY AS INVESTIGATIVE CONSULTANT
TO ONONDAGA COUNTY BOARD OF ETHICS,
DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (GARY J. LAVINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered February 8, 2024. The order denied the motion of defendant Steven Williams to disqualify counsel for plaintiff.

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

Memorandum: Steven Williams (defendant), individually and in his capacity as investigative consultant to Onondaga County Board of Ethics, appeals from an order denying his motion to disqualify plaintiff's attorneys from further representation of plaintiff in this action. Defendant sought to disqualify plaintiff's attorneys on the ground that they were interested witnesses whose testimony would be necessary and relevant to the action. We conclude that defendant failed to meet his "burden of making 'a clear showing that disqualification is warranted' " (*Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]; *see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445 [1987]), and Supreme Court thus did not abuse its discretion in denying the motion (*see generally HoganWillig, PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1372-1373 [4th Dept 2022]).

We have considered defendant's remaining contention and conclude

that it does not warrant modification or reversal of the order.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

571

KA 21-01517

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARELD BAILEY, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered September 20, 2021. 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, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Rowell*, 224 AD3d 1335, 1335 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]; *see also People v Gilbert*, 228 AD3d 1341, 1341 [4th Dept 2024]; *People v Hawkins*, 224 AD3d 1219, 1219 [4th Dept 2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

572

KA 22-00441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN MCKNIGHT, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered March 8, 2022. The judgment convicted defendant upon his plea of guilty of attempted 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 his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]), defendant contends that his waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Dumas*, 227 AD3d 1509, 1509 [4th Dept 2024]; *People v Gilbert*, 225 AD3d 1274, 1274-1275 [4th Dept 2024]) or otherwise does not encompass his challenge to the severity of the sentence (*see People v Loomis*, 227 AD3d 1461, 1461 [4th Dept 2024]; *People v Tennant*, 217 AD3d 1564, 1564 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

574

KA 18-01292

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEL J. FORSYTHE, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (JESSICA P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered February 6, 2018. The judgment convicted defendant, upon a nonjury verdict, of attempted 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 appeals from a judgment convicting him, following a nonjury trial, of one count of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant and three other men pursued the victim, and one of the other men attempted to punch the victim, before defendant produced a semiautomatic pistol and fired three or four shots, striking the victim in the left arm. The encounter was captured on several surveillance videos.

Defendant contends that the evidence is legally insufficient to establish that he intended to kill the victim. We reject that contention. "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] [internal quotation marks omitted]), and, here, according to the evidence at trial, defendant pursued the victim—who was retreating—for several minutes before defendant produced a firearm and fired three or four shots at close range (*see generally People v Holmes*, 129 AD3d 1692, 1694 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]).

After 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

from which a rational [finder of fact] could have found' " that defendant intended to kill the victim (*People v Danielson*, 9 NY3d 342, 349 [2007]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*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]).

We likewise reject defendant's contention that defense counsel was ineffective for failing to request that the lesser included offense of attempted assault in the second degree be charged. To prevail on a claim of ineffective assistance of counsel, defendant has the burden to show that he was " 'deprived of a fair trial by less than meaningful representation' " (*People v Mendoza*, 33 NY3d 414, 418 [2019]; *see People v Caban*, 5 NY3d 143, 152 [2005]). "As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 712-713 [1998]). Here, defendant failed to meet his burden of establishing that defense counsel's failure to request the lesser included charge was " 'other than an acceptable all-or-nothing defense strategy' " to be acquitted of the top count (*People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *see People v McFadden*, 161 AD3d 1570, 1571 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]).

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

575

KA 22-01635

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM L. HUFNAGLE, DEFENDANT-APPELLANT.

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

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Karen M. Brandt Brown, J.), rendered May 3, 2022. The judgment convicted defendant, after a nonjury trial, of sexual abuse in the first degree (two 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, after a nonjury trial, of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]) and one count of endangering the welfare of a child (§ 260.10 [1]). 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 Evans*, 206 AD3d 1613, 1614 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *see People v Barnett*, 221 AD3d 1421, 1422 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]). 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' " (*Evans*, 206 AD3d at 1614; *see generally People v Smith*, 6 NY3d 827, 828 [2006], *cert denied* 548 US 905 [2006]). Inasmuch as defendant's mental competency was established by a CPL article 730 examination, there is "no reason to doubt his capacity to waive a jury trial" (*People v Sanchez*, 201 AD3d 599, 600 [1st Dept 2022], *lv denied* 38 NY3d 1009 [2022]; *see People v Campos*, 93 AD3d 581, 582-583 [1st Dept 2012], *lv denied* 19 NY3d 971 [2012]).

Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People*

v Delamota, 18 NY3d 107, 113 [2011]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The sworn testimony of the minor victim that defendant inappropriately touched her vagina is legally sufficient to support the conviction of sexual abuse in the first degree (*see* Penal Law § 130.65 [3]; *People v Russell*, 50 AD3d 1569, 1569 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]; *see also People v Scerbo*, 74 AD3d 1730, 1731-1732 [4th Dept 2010], *lv denied* 15 NY3d 757 [2010]), and "[b]ecause the evidence . . . [is] legally sufficient with respect to [defendant's] conviction of sexual abuse, it necessarily also [is] legally sufficient with respect to the conviction of endangering the welfare of a child" (*Scerbo*, 74 AD3d at 1732; *see generally* § 260.10 [1]).

Furthermore, 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 the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Kouao*, 177 AD3d 1335, 1335 [4th Dept 2019], *lv denied* 34 NY3d 1160 [2020] [internal quotation marks omitted]; *see People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we see no basis to reject County Court's credibility and weight determinations here (*see People v McMillian*, 158 AD3d 1059, 1061 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Beauharnois*, 64 AD3d 996, 998-999 [3d Dept 2009], *lv denied* 13 NY3d 834 [2009]).

Defendant also contends that he was denied effective assistance of counsel. " 'To prevail on his claim, defendant must demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to pursue colorable claims' " (*People v Wills*, 224 AD3d 1329, 1330 [4th Dept 2024], *lv denied* 41 NY3d 1005 [2024]), and " '[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success' " (*id.* at 1331). Defendant's mental competency had been previously established by a CPL article 730 examination, and thus defense counsel was not ineffective in failing to request a second examination, which would have had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]); nor was defense counsel ineffective in failing to pursue a defense of mental disease or defect, which was not supported by the record (*see People v Hurlbert*, 81 AD3d 1430, 1430-1431 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). Defendant's argument that defense counsel was ineffective in failing to request an adjournment to allow him time to prepare, or obtain an expert to prepare, a sentencing memorandum lacks merit because defendant has not shown that defense counsel "could have articulated some [additional] basis for leniency" (*People v Adams*, 247 AD2d 819, 819 [4th Dept 1998], *lv denied* 91 NY2d 1004 [1998]) or that "[an expert opinion] was available, that it would have assisted the

[court] in its determination [and] that [defendant] was prejudiced by its absence" (*People v Englert*, 130 AD3d 1532, 1533 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015], 26 NY3d 1144 [2016] [internal quotation marks omitted]). Defendant's argument that defense counsel should have requested an adjournment to ensure that defendant's participation in the proceedings—including, inter alia, his decision to forgo a plea and his waiver of a jury trial—were knowing and voluntary " 'implicates his relationship with his trial attorney and is to be proved, if at all, by facts outside the trial record in a proceeding maintainable under CPL 440.10' " (*People v Magnano*, 158 AD2d 979, 979 [4th Dept 1990], *affd* 77 NY2d 941 [1991]; *see People v Dallas*, 119 AD3d 1362, 1364 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]).

Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

579

CAF 23-00508

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

IN THE MATTER OF ASPEN RIDALL,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

BRYANT JONES, RESPONDENT-PETITIONER-RESPONDENT.

CARA A. WALDMAN, FAIRPORT, FOR PETITIONER-RESPONDENT-APPELLANT.

MEGAN E. O'LEARY, ROCHESTER, FOR RESPONDENT-PETITIONER-RESPONDENT.

TYSON BLUE, MACEDON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered March 16, 2023, in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner primary physical placement of the subject children.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that, among other things, denied her petition for modification of the parties' custody order and granted in part the cross-petition of respondent-petitioner father, awarding him primary physical custody of the subject children. We affirm.

Initially, we note that the parties do not dispute that there is a sufficient change in circumstances to warrant an inquiry into whether modification of the existing custody arrangement would be in the children's best interests (*see generally Matter of Clark v Clark*, 199 AD3d 1455, 1455 [4th Dept 2021]; *Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]). Contrary to the mother's contention, Family Court did not err in awarding primary physical custody of the subject children to the father. It is well settled that " 'a court's determination regarding custody . . . , based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019]). Here, we perceive no basis to disturb the court's credibility assessment and factual findings, and we conclude

that its custody determination is supported by a sound and substantial basis in the record (*see Matter of Doner v Flora*, 229 AD3d 1158, 1158 [4th Dept 2024]).

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

580

CAF 22-01976

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

IN THE MATTER OF EVA'LYN F.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNDSEY M., AND EVAN F., RESPONDENTS-APPELLANTS.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT LYNDSEY M.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT EVAN F.

LISA A. BOWMAN, PINEHURST, NORTH CAROLINA, FOR PETITIONER-RESPONDENT.

CYNTHIA B. BRENNAN, AUBURN, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered November 10, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order that, inter alia, determined that they had abandoned the subject child and terminated their parental rights with respect to that child. We affirm.

The mother and the father each contend that they were denied procedural due process because Family Court failed to advise them, in both the instant proceeding and the underlying Family Court Act article 10 derivative neglect proceeding, of their rights pursuant to, inter alia, Family Court Act § 1033-b (1) (b) and (d). Contrary to the contentions of the mother and the father, the court's failure to strictly comply with the notice requirements set forth in Family Court Act article 10 does not require reversal here inasmuch as the mother and the father—who were each served with both the petition in the derivative neglect proceeding and the petition in this proceeding and who were represented at all times by appointed counsel—"suffered no prejudice as [a] result" of any failure by the court (*Matter of Stephanie A.*, 224 AD2d 1027, 1028 [4th Dept 1996], *lv denied* 88 NY2d 814 [1996]; *see Matter of Julia R.*, 52 AD3d 1310, 1311 [4th Dept

2008], *lv denied* 11 NY3d 709 [2008]; *Matter of Shawndalaya II.*, 31 AD3d 823, 825 [3d Dept 2006], *lv denied* 7 NY3d 714 [2006]).

We also reject the mother's contention that petitioner failed to establish that it made reasonable efforts to reunite her with the subject child or that she intended to forgo her parental rights during the period in which she had no contact with the child or petitioner. "In the abandonment context, 'the court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in' " Social Services Law § 384-b (5) (a) (*Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003], quoting § 384-b [5] [b]; *see Matter of Najuan W. [Stephon W.]*, 184 AD3d 1111, 1112 [4th Dept 2020]). "For the purposes of [that] section, a child is 'abandoned' by [their] parent if such parent evinces an intent to [forgo their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency" (§ 384-b [5] [a]). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (*id.*), and the burden shifts to the parent "to establish that circumstances existed that prevented [the parent's] contact with the child or agency or that the agency discouraged such contact" (*Najuan W.*, 184 AD3d at 1112; *see Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785 [4th Dept 2017]). Here, petitioner established that the mother failed to maintain contact for the statutory period, and the mother "failed to demonstrate that 'there were circumstances rendering contact with the child or [petitioner] infeasible, or that [she] was discouraged from doing so by [petitioner]' " (*Matter of Armani W. [Adifah W.]*, 167 AD3d 1569, 1570 [4th Dept 2018]; *see Matter of Annette B.*, 4 NY3d 509, 514 [2005], *rearg denied* 5 NY3d 783 [2005]).

We have reviewed the remaining contentions of the mother and the father and conclude that they lack merit.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

581

CAF 23-00913

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

IN THE MATTER OF MARSONA B. DAVIS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ARCIDES DIEGUEZ CASTILLO, RESPONDENT-APPELLANT.

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

THE LEGAL AID SOCIETY OF ROCHESTER, ROCHESTER (HANNAH M. NEZEZON OF COUNSEL), FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Tanya Conley, R.), entered January 31, 2023, in a proceeding pursuant to Family Court Act article 8. The order, inter alia, directed respondent to stay away from petitioner until January 30, 2025.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued after a fact-finding hearing and upon a related decision made after the hearing that found that he committed family offenses against petitioner. We affirm.

"A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Washington v Davis*, 207 AD3d 1078, 1079 [4th Dept 2022], *lv denied* 39 NY3d 902 [2022] [internal quotation marks omitted]; *see* Family Ct Act § 832). Here, we agree with respondent that Family Court did not specify the subsections of the criminal statutes upon which it based its findings that respondent had committed the family offenses of harassment in the second degree and disorderly conduct. However, upon exercising our independent review power (*see Matter of Tara N. P.-T. v Emma P.-T.*, 204 AD3d 1414, 1415 [4th Dept 2022]; *Matter of Telles v Dewind*, 140 AD3d 1701, 1701 [4th Dept 2016]), we conclude, contrary to respondent's contention, that the record is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offenses of harassment in the second degree under Penal Law § 240.26 (1) and disorderly conduct under section 240.20 (1) (*see Tara*

N. P.-T., 204 AD3d at 1415; *Telles*, 140 AD3d at 1701-1702). The determination of whether a family offense was committed is a factual issue to be resolved by the court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed where, as here, it is supported by the record (*see Washington*, 207 AD3d at 1079).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

582

CA 23-01169

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

IN THE MATTER OF BLOSSOM V., A PATIENT ADMITTED TO ST. JOSEPH'S HOSPITAL HEALTH CENTER, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

NARAYANA REDDY, M.D., MEDICAL DIRECTOR, ST. JOSEPH'S HOSPITAL HEALTH CENTER, PSYCHIATRIC INPATIENT UNIT, PETITIONER-RESPONDENT.

(APPEAL NO. 1.)

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT W. CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered June 22, 2023, in a proceeding pursuant to Mental Hygiene Law article 9. The order, inter alia, granted the application of petitioner for temporary authorization of treatment of respondent over objection.

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

Memorandum: In appeal No. 1, respondent appeals from an order granting, inter alia, petitioner's application for an order temporarily authorizing petitioner to administer medication to respondent over her objection until July 20, 2023. In appeal No. 2, respondent appeals from an order denying her motion seeking to have the proceedings in this Mental Hygiene Law article 9 matter conducted in person, rather than virtually.

We dismiss both appeals as moot. It is well settled that "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *see Matter of Buffalo Teachers Fedn., Inc. [Board of Educ. of the Buffalo Pub. Schs.]*, 179 AD3d 1553, 1554 [4th Dept 2020]). Here, the order in appeal No. 1 expired by its own terms on July 20, 2023. Thus, adjudication of the merits with respect to that appeal will not "result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see Matter of Upstate*

Univ. Hosp. v Bryant W., 224 AD3d 1340, 1341 [4th Dept 2024]). Similarly, both appeal No. 1 and appeal No. 2 must be dismissed as moot in light of respondent's discharge from involuntary hospitalization by petitioner (*see Matter of Talbot V. [Kingsboro Psychiatric Ctr.]*, 192 AD3d 1123, 1124 [2d Dept 2021], *affd* 38 NY3d 1128 [2022]; *Matter of Dill v Michael P.*, 217 AD3d 1431, 1431 [4th Dept 2023]). In short, these appeals are moot inasmuch as "[r]espondent is no longer aggrieved by [either] order because she is no longer subject to the forcible administration of . . . drugs" by petitioner (*Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]).

Contrary to respondent's contention in both appeals, we conclude that the exception to the mootness doctrine does not apply (*see id.*; *see generally Hearst Corp.*, 50 NY2d at 714-715).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

583

CA 23-01736

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

IN THE MATTER OF BLOSSOM V., A PATIENT ADMITTED TO ST. JOSEPH'S HOSPITAL HEALTH CENTER, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

NARAYANA REDDY, M.D., MEDICAL DIRECTOR, ST. JOSEPH'S HOSPITAL HEALTH CENTER, PSYCHIATRIC INPATIENT UNIT, PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ROBERT W. CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 27, 2023, in a proceeding pursuant to Mental Hygiene Law article 9. The order denied the motion of respondent for in-person hearings.

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

Same memorandum as in *Matter of Blossom V. (Reddy)* ([appeal No. 1] — AD3d — [Sept. 27, 2024] [4th Dept 2024]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

585

CA 23-00890

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

PATRICK CAPPOLA, AS PROPOSED EXECUTOR OF
THE ESTATE OF ROSE CAPPOLA, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TENNYSON COURT, TENNYSON COURT, LLC, SALEM
BUFFALO, LLC, AND JAMES T. HANDS,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered May 9, 2023. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint and granted plaintiff's cross-motion to amend the complaint to substitute Mark Cappola and Patrick Cappola, as the executors of the estate of Rose Cappola, as plaintiffs.

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

Memorandum: This action for, inter alia, wrongful death and violations of Public Health Law §§ 2801-d and 2803-c was commenced by plaintiff as "Proposed Executor" of the estate of Rose Cappola (decedent). Defendants appeal from an order that, insofar as appealed from, denied in part their motion to dismiss the complaint and granted plaintiff's cross-motion to substitute the executors of decedent's estate as the named plaintiffs. We reverse.

An action for wrongful death may be maintained by "[t]he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees" (EPTL 5-4.1 [1]). Similarly, an action for injury to a person or property "may be brought . . . by the personal representative of the decedent" (EPTL 11-3.2 [b]). As relevant here, "personal representative" is defined in EPTL 1-2.13 as "a person who has received letters to

administer the estate of a decedent."

Here, as a "[p]roposed" executor who had not obtained letters to administer decedent's estate, plaintiff was not a personal representative within the meaning of the Estates, Powers and Trusts Law at the time the action was commenced and thus did not have standing to commence an action on behalf of decedent's estate (*see Freeland v Erie County*, 122 AD3d 1348, 1349-1350 [4th Dept 2014]; *Yates v Genesee County Hospice Found.*, 278 AD2d 928, 928 [4th Dept 2000], *lv denied* 96 NY2d 714 [2001]; *see generally Carrick v Central Gen. Hosp.*, 51 NY2d 242, 252-253 [1980]). Thus, we agree with defendants that Supreme Court erred in granting plaintiff's cross-motion to substitute as plaintiffs the executors of decedent's estate inasmuch as "[s]ubstitution . . . is not an available mechanism for replacing a party . . . who had no right to sue with one who has such a right" (*Matter of C & M Plastics [Collins]*, 168 AD2d 160, 162 [3d Dept 1991]; *see generally National Fin. Co. v Uh*, 279 AD2d 374, 375 [1st Dept 2001]).

We further agree with defendants that the court erred in denying that part of their motion seeking to dismiss the complaint on the ground that the action was brought by a party without standing (*see Freeland*, 122 AD3d at 1349-1450). We therefore grant the motion in its entirety and dismiss the complaint without prejudice to recommence the action pursuant to CPLR 205 (a) (*see Carrick*, 51 NY2d at 252-253; *Yates*, 278 AD2d at 928-929).

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

Entered: September 27, 2024 Ann Dillon Flynn
Clerk of the Court

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

586

CA 24-00098

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

PATRICK CAPPOLA, AS PROPOSED EXECUTOR OF
THE ESTATE OF ROSE CAPPOLA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

TENNYSON COURT, TENNYSON COURT, LLC, SALEM
BUFFALO, LLC, AND JAMES T. HANDS,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered May 9, 2023. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint and granted plaintiff's cross-motion to amend the complaint to substitute Mark Cappola and Patrick Cappola, as the executors of the estate of Rose Cappola, as plaintiffs.

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

587

CA 24-00229

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

CATHERINE TAMBINI, CLAIMANT-APPELLANT.

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 135464.)

HELD & HINES, LLP, BROOKLYN (PHILIP M. HINES OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered August 2, 2023. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimant commenced this action seeking damages for injuries she sustained when she slipped and fell on a snow-covered walkway to the medical building at Albion Correctional Facility, where she was incarcerated. Defendant moved for summary judgment dismissing the claim on the ground that it did not have a duty to clear the walkway because there was a storm in progress at the time of claimant's accident, submitting, inter alia, claimant's deposition testimony that it was snowing at the time of her accident and an expert affidavit from a meteorologist opining that the weather conditions at that time were "snowy" and "stormy" and the snow on the ground was "fresh." The Court of Claims granted the motion pursuant to the storm in progress doctrine. Claimant appeals, and we now affirm.

Defendant met its initial burden of establishing as a matter of law "that a storm was in progress at the time of the accident and, thus, that it 'had no duty to remove the snow [or] ice until a reasonable time ha[d] elapsed after cessation of the storm' " (*Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541 [4th Dept 2015]; *see Valentine v State of New York*, 197 Misc 972, 975 [Ct Cl 1950], *affd* 277 App Div 1069 [3d Dept 1950]; *see generally Battaglia v MDC Concourse Ctr., LLC*, 34 NY3d 1164, 1165-1166 [2020]). In opposition, claimant failed to raise a triable issue of fact " 'whether the accident was caused by a slippery condition at the location where

[she] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition' " (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [4th Dept 2014]). Specifically, the record is devoid of competent evidence that there was preexisting snow or ice on the walkway to the medical building, and claimant's attorney's statement in his opposing affirmation that there may have been an underlying layer of ice on the walkway from precipitation three days before the accident was "based on mere speculation and thus . . . insufficient to raise an issue of fact" (*Hanifan v COR Dev. Co., LLC*, 144 AD3d 1569, 1570 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]).

We have reviewed claimant's remaining contention and conclude that it is without merit.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

588

CA 23-01650

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

IN THE MATTER OF WILLIAM SHRUBSALL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered September 12, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 amended petition seeking to annul the determination of the Board of Parole (Board) denying his request for release to parole supervision. We affirm.

Petitioner contends that the Board failed to measure his rehabilitation under current legislative mandates because it did not use a risk and needs assessment instrument tailored to his programming. Petitioner failed to preserve that contention for our review inasmuch as he did not raise it in his administrative appeal or in the amended petition (*see Matter of Krupa v Stanford*, 145 AD3d 1656, 1656 [4th Dept 2016]). Petitioner further contends that the illegibility of the signatures of the Board members who decided his administrative appeal renders it impossible to determine whether the Board violated Executive Law § 259-i (4) (a), which prohibits Board members who participated in the parole determination from participating in the administrative appeal. Petitioner similarly failed to preserve that contention for our review inasmuch as he did not raise it in his amended petition (*see Matter of Ruggiero v Coombe*, 219 AD2d 844, 844 [4th Dept 1995]; *see also Matter of Allen v Evans*, 82 AD3d 1427, 1428 [3d Dept 2011]). We have no discretionary

authority to review petitioner's unpreserved contentions in this CPLR article 78 proceeding (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Krupa*, 145 AD3d at 1656).

Finally, to the extent that petitioner contends otherwise, we conclude upon our review of the record that the Board properly considered the requisite factors and adequately set forth its reasons to deny petitioner's application for release and "that there was no showing of irrationality bordering on impropriety" (*Krupa*, 145 AD3d at 1656-1657 [internal quotation marks omitted]; *see Matter of Milling v Berbary*, 31 AD3d 1202, 1203 [4th Dept 2006], *lv denied* 7 NY3d 808 [2006], *rearg denied* 7 NY3d 922 [2006]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

589

CA 23-01329

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

KEITH BALLARD AND DAWN BALLARD,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

300 EASTERN BLVD. CANANDAIGUA LLC,
DEFENDANT-RESPONDENT.

COLIN J. LAREAUX, UTICA, FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered June 29, 2023. The order, insofar as appealed from, denied the motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Keith Ballard (plaintiff) when he fell to the ground while working on the roof of a building being constructed on defendant's property. Plaintiff and his coworkers were installing plywood sheets to form the base layer of the roof when plaintiff stepped on an unsecured plywood sheet, causing him to fall into the hole created by the shifting plywood. At the time of the accident, plaintiff was not wearing a harness or any other similar type of safety device. Plaintiffs asserted causes of action for, inter alia, violations of Labor Law §§ 240 (1) and 241 (6). Plaintiffs appeal from an order insofar as it denied those parts of their motion seeking partial summary judgment on the Labor Law §§ 240 (1) and 241 (6) causes of action. We affirm.

We reject plaintiffs' contention that Supreme Court erred in denying the motion with respect to the Labor Law § 240 (1) cause of action. Plaintiffs met their initial burden on the motion by establishing that defendant's failure to provide any fall protection was a proximate cause of the accident (*see Lagares v Carrier Term. Servs., Inc.*, 177 AD3d 1394, 1395 [4th Dept 2019]; *see generally Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], *rearg denied* 25 NY3d 1195 [2015]). Specifically, plaintiffs relied on the affidavits of plaintiff and a fellow worker who stated that plaintiff fell after he stepped on the unsecured piece of plywood and that

defendant did not supply any of the workers, including plaintiff, with a harness or other safety device that would have prevented the fall.

We conclude, however, that, in opposition, defendant raised a triable issue of fact whether plaintiff's own negligence was the sole proximate cause of his injuries due to his choice not "to use available, safe and appropriate equipment"—i.e., a harness—at the time of the accident (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015] [internal quotation marks omitted]; *see generally Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]). Specifically, defendant submitted, inter alia, deposition testimony from the owner of plaintiff's employer, who testified that he had seen plaintiff wearing a harness while working on the roof the day before the accident and that he had previously told plaintiff to wear a harness while working at that height. The owner testified that the harnesses were "definitely" present at the worksite on the day of the accident because they had been present the day before. Indeed, it is undisputed that equipment brought to the worksite at the beginning of the work week would remain there the entire week. The owner also testified that the absence of a harness caused the accident based on his observation of tie-off equipment located on the roof of the building that would have stopped plaintiff from falling had he been wearing a harness attached to such a device. In short, there are issues of fact whether plaintiff was the sole proximate cause of the accident because, viewed in the light most favorable to defendant as the nonmovant (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), the owner's testimony suggested that plaintiff chose not to use a harness for no good reason, despite knowing that harnesses were available at the worksite and that he was expected to use one, and that plaintiff's choice not to use a harness caused him to fall (*see generally Biaca-Neto*, 34 NY3d at 1167-1168; *Thomas v North Country Family Health Ctr., Inc.*, 208 AD3d 962, 963-965 [4th Dept 2022]). Although plaintiffs contend that the owner's testimony does not raise an issue of fact because it is based on speculation without factual support, we reject that contention inasmuch as the owner's assertions were based on his personal observations of the worksite the day before the accident (*see Hann v S&J Morrell, Inc.*, 207 AD3d 1118, 1121 [4th Dept 2022]).

With respect to the Labor Law § 241 (6) cause of action, even assuming, arguendo, that plaintiffs met their initial burden on the motion (*see generally Misicki v Caradonna*, 12 NY3d 511, 515 [2009]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 504-505 [1993]), we conclude, for the reasons stated above, that the court properly denied the motion with regard to that cause of action inasmuch as there are triable issues of fact with respect to whether plaintiff was the sole proximate cause of the accident (*see Garcia v Emerick Gross Real Estate, L.P.*, 196 AD3d 676, 678 [2d Dept 2021]; *Arnold v Barry S.*

Barone Constr. Corp., 46 AD3d 1390, 1390-1391 [4th Dept 2007], *lv denied* 10 NY3d 707 [2008]; *see generally Fazekas*, 132 AD3d at 1403).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

591

CA 23-01673

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

IN THE MATTER OF ARBITRATION BETWEEN WAYNE SPENCE, AS PRESIDENT OF THE NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO AND MICHELLE LAFRAMBOISE, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK, JOHN B. KING, JR., AS CHANCELLOR OF STATE UNIVERSITY OF NEW YORK, BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK, DR. MERRYL H. TISCH, AS CHAIR OF BOARD OF TRUSTEES OF STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK UPSTATE MEDICAL UNIVERSITY, AND MANTOSH DEWAN, AS PRESIDENT OF STATE UNIVERSITY OF NEW YORK UPSTATE MEDICAL UNIVERSITY, RESPONDENTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

EDWARD J. GREENE, JR., ALBANY, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered August 22, 2023, in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, granted the petition, vacated an arbitration award, directed reinstatement of petitioner Michelle Laframboise and amendment of her employment record, and remitted the matter to arbitration to address the matters of back pay, statutory interest, and restoration of accruals.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is denied, the application is granted, the arbitration award is confirmed, and the second and third ordering paragraphs are vacated.

Memorandum: In this CPLR article 75 proceeding to vacate an arbitration award, respondents appeal from an order insofar as it granted the petition seeking to vacate the arbitration award, effectively denied respondents' application to confirm the award, and reinstated with back pay and benefits petitioner Michelle Laframboise (petitioner), a former registered nurse employed by defendant State University of New York Upstate Medical University (SUNY Upstate).

In 2021, consistent with respondents' then-existing obligation

under 10 NYCRR 2.61 (repealed by NY St Reg, Oct. 4, 2023 at 22) to ensure that certain personnel be fully vaccinated against COVID-19, respondents directed petitioner to receive her first dose of the COVID-19 vaccine by a date certain and informed her that upon her failure to do so, she would be suspended without pay and that SUNY Upstate would seek to terminate her employment. Petitioner did not receive her first dose of the vaccine by the required deadline, and thus, SUNY Upstate suspended her without pay and issued a Notice of Discipline in accordance with Article 33 of the collective bargaining agreement (CBA) with petitioner's union. Petitioner filed a disciplinary grievance and demanded arbitration.

Following arbitration, and one day after the parties filed their written closing statements, Supreme Court (Neri, J.) issued a decision in a different matter, which declared 10 NYCRR 2.61 null and void (*Medical Professionals for Informed Consent v Bassett*, 78 Misc 3d 482, 489-491 [Sup Ct, Onondaga County 2023] [*MPIC*]). The parties advised the arbitrator of that decision; however, the arbitrator concluded that his jurisdiction was "limited to interpreting and applying the provisions of the [CBA]" and thus, the import of the *MPIC* decision was beyond his jurisdiction to consider or apply to the facts.

In the arbitration award, the arbitrator concluded that respondents met their burden of establishing misconduct and that the misconduct prevented petitioner from performing her job duties. Thus, the arbitrator concluded that respondents had probable cause to suspend petitioner and just cause to issue the Notice of Discipline and terminate her employment.

Thereafter, petitioners commenced this CPLR article 75 proceeding to vacate the arbitration award and, in their answer, respondents sought an order confirming the award (application). Following oral argument, Supreme Court (Neri, J.) in this matter concluded that the arbitrator's award violated public policy and was totally irrational, insofar as it ignored the *MPIC* decision that 10 NYCRR 2.61 was null and void. Thus, the court granted the petition, effectively denied the application, vacated the arbitration award, ordered that petitioner be reinstated and that her employment record be amended, and remitted the matter to arbitration to address the matters of back pay, statutory interest, and restoration of accruals. We reverse the order insofar as appealed from.

A court's authority to vacate an arbitrator's award is limited to the grounds set forth in CPLR 7511 (b), which permits vacatur of an award where the arbitrator, as relevant here, "exceed[s] [their] power" (CPLR 7511 [b] [1] [iii]) by issuing an " 'award [that] violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010], quoting *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]).

Where, as here, the parties agree to submit their dispute to an arbitrator pursuant to a collective bargaining agreement, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). "The party seeking to vacate an arbitration award thus bears a heavy burden to establish that the arbitrator exceeded their power" (*Matter of Buffalo Teachers' Fedn. [Board of Educ. of Buffalo City Sch. Dist.]*, 227 AD3d 1435, 1436 [4th Dept 2024]).

We agree with respondents that the court erred in vacating the award on the ground that it was against public policy because petitioners failed to meet their heavy burden to establish that the award in this employer-employee dispute violated public policy (*see Matter of Rochester City School Dist. [Rochester Assn. of Paraprofessionals]*, 34 AD3d 1351, 1351-1352 [4th Dept 2006], *lv denied* 8 NY3d 807 [2007]; *see generally Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1984], *rearg denied* 62 NY2d 803 [1984]).

We further agree with respondents that the court erred in vacating the award on the ground that it was irrational. " 'An award is irrational if there is no proof whatever to justify the award' " (*Buffalo Teachers' Fedn.*, 227 AD3d at 1437). Where, however, "an arbitrator 'offer[s] even a barely colorable justification for the outcome reached,' the arbitration award must be upheld" (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]; *see Wien & Malkin LLP*, 6 NY3d at 479). Here, inasmuch as it was undisputed that SUNY Upstate directed petitioner to receive the vaccine by a date certain, that it apprised her that her continued employment was dependent upon her compliance, and that petitioner refused to be vaccinated by the required date, the court erred in concluding that the arbitrator's award was irrational.

Entered: September 27, 2024 Ann Dillon Flynn
Clerk of the Court

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

592.1

KA 19-01174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered May 23, 2019. The appeal was held by this Court by order entered March 15, 2024, decision was reserved and the matter was remitted to Erie County Court for further proceedings (225 AD3d 1202 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We previously concluded, with respect to defendant's suppression motion, that County Court "erroneously concluded that the patrol lieutenant engaged in only a level one intrusion when he directed defendant to step out of the vehicle" (*People v Taylor*, 225 AD3d 1202, 1203 [4th Dept 2024]). We therefore held the case and remitted the matter to County Court to determine, based on the evidence presented at the suppression hearing, whether the patrol lieutenant had reasonable suspicion to direct defendant to exit his vehicle (*id.*). Upon remittal, the court concluded that the patrol lieutenant lacked reasonable suspicion and granted that part of defendant's omnibus motion seeking to suppress physical evidence. Because that determination results in the suppression of all evidence supporting the crime charged, the indictment against defendant must be dismissed (*see People v Stock*, 57 AD3d 1424, 1425 [4th Dept 2008]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

592

CA 23-00928

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

MARIA FERNANDA ASTIZ, PH.D., STEVEN MADDOX, PH.D., MATTHEW MITCHELL, PH.D., AND KATHRYN F. WILLIAMS, PH.D., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CANISIUS COLLEGE, DEFENDANT-RESPONDENT.

J. MORGAN LEVY FIRM, PLLC, FAIRPORT (J. MORGAN LEVY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CULLEN AND DYKMAN LLP, UNIONDALE (JENNIFER A. MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

GLADSTEIN REIF & MEGINNISS LLP, NEW YORK CITY (KENT Y. HIROZAWA OF COUNSEL), AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, WASHINGTON, D.C., FOR AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered May 1, 2023. The order granted the motion of defendant for summary judgment, dismissed the amended complaint and denied the motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs appeal from an order that, inter alia, granted defendant's motion for summary judgment dismissing the amended complaint. We affirm.

Contrary to plaintiffs' contention, a CPLR article 78 proceeding was the proper vehicle for challenging defendant's determination terminating their tenured faculty positions as part of a strategic restructuring plan implemented in response to alleged financially exigent circumstances. It is well settled that courts have "a 'restricted role' in dealing with and reviewing controversies involving colleges and universities" because "administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and [such] institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters" (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *see Gertler v Goodgold*, 107 AD2d 481, 485 [1st Dept 1985], *affd for the*

reasons stated 66 NY2d 946 [1985]; *Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413 [1980]). Thus, "the proper vehicle for challenging [a college's] compliance with procedures set forth in an employee handbook" (*Holm v Ithaca Coll.*, 256 AD2d 986, 988 [3d Dept 1998], *lv denied* 93 NY2d 804 [1999]) and for determining "a professor's benefits and privileges of . . . academic tenure" (*Matter of Hansbrough v College of St. Rose*, 209 AD3d 1168, 1170 [3d Dept 2022]), is "a CPLR article 78 proceeding . . . , not a plenary action" (*Maas*, 94 NY2d at 92). That plaintiffs seek compensatory damages is of no moment because the demand for damages is "incidental to [their] success in invalidating the administrative determination" (*Doe v State Univ. of N.Y., Binghamton Univ.*, 201 AD3d 1075, 1077 [3d Dept 2022]; *see Bango v Gouverneur Volunteer Rescue Squad, Inc.*, 101 AD3d 1556, 1557 [3d Dept 2012]).

"Although courts generally possess the authority to convert a plenary action to a CPLR article 78 proceeding if jurisdiction of the parties has been obtained, conversion is not appropriate where the claims are barred by the four-month statute of limitations governing CPLR article 78 proceedings" (*Doe v State Univ. of N.Y., Binghamton Univ.*, 201 AD3d 1075, 1077 [3d Dept 2022]). Inasmuch as plaintiffs did not commence this action until more than four months after their cause of action accrued, the claims are time-barred (*see* CPLR 217; *Mitchell v New York Univ. ["NYU"]*, 129 AD3d 542, 543 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015]; *Diehl v St. John Fisher College*, 278 AD2d 816, 816-817 [4th Dept 2000], *lv denied* 96 NY2d 707 [2001]).

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

594

KA 21-00207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYSHAWN PARKER, DEFENDANT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, 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 Monroe County Court (Christopher S. Ciaccio, J.), dated October 1, 2020. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL article 440.

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

596

KA 23-01557

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

BRIAN SCOTT LORENZO AND JAMES PUGH,
DEFENDANTS-RESPONDENTS.

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

EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP, NEW YORK CITY (ILANN M. MAAZEL OF COUNSEL), AND ZMO LAW PLLC, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered August 23, 2023. The order granted the motions of defendants insofar as they sought to vacate judgments of conviction and order a new trial.

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

Memorandum: Following a joint trial in 1994, defendants, Brian Scott Lorenzo and James Pugh, were convicted of murder in the second degree (Penal Law § 125.25 [3]) and burglary in the first degree (§ 140.30 [2]), and Lorenzo was also convicted of an additional count of murder in the second degree (§ 125.25 [1]). The People now appeal from an order granting defendants' motions pursuant to CPL 440.10 (1) (g), (g-1), and (h) to vacate the judgments on the grounds of newly discovered evidence and a *Brady* violation. We affirm.

Defendants' convictions stemmed from the murder of a woman in her home the afternoon of February 17, 1993. The victim was stabbed multiple times and strangled to death with a necktie. The evidence against defendants at the joint trial consisted of testimony from friends and acquaintances who testified that defendants admitted their involvement in the crime, and the testimony of the victim's husband that a 1921 Morgan S silver dollar recovered from Lorenzo belonged to him. At the hearing upon defendants' motions to vacate, evidence was introduced that forensic DNA testing conducted after the conviction of defendants excluded them as contributors to any DNA found on various items inside the victim's residence, including the knife used to stab the victim, the handcuffs used to bind her, the necktie used to strangle her, her clothing, and her fingernail scrapings. There was also testimony that the prosecutor did not turn over to the defense

his handwritten note stating that the father of the victim's husband was unable to identify the recovered silver dollar as the one he had given to his son. Although not a ground for Supreme Court's granting of the motions, we also note that there was considerable evidence at the hearing that the lead investigator had pressured many witnesses to incriminate and testify against defendants.

It is well settled that on a motion to vacate a judgment of conviction based on newly discovered evidence, "the movant must establish, inter alia, that there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and[ ] (6) which does not merely impeach or contradict the record evidence" (*People v White*, 125 AD3d 1372, 1373 [4th Dept 2015] [internal quotation marks omitted]). Where forensic DNA testing has been performed since entry of the judgment, vacatur is warranted where the court determines "that there exists a reasonable probability that the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g-1] [2]). We conclude that the court did not abuse its discretion in determining that the newly discovered DNA evidence will probably change the result if a new trial is granted (*see White*, 125 AD3d at 1374) or that there existed a reasonable probability that the verdict would have been more favorable to defendants had the DNA evidence been admitted at trial (*see People v Robinson*, 214 AD3d 904, 906 [2d Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v Hicks*, 114 AD3d 599, 602 [1st Dept 2014]).

The People contend that the new DNA testing results were merely cumulative of the evidence at trial because defendants were never connected to the crime scene by any scientific evidence. We reject that contention. "[T]estimony is cumulative when it would not have contradicted *or* added to the existing testimony" (*People v Garcia*, 192 AD3d 1463, 1465 [4th Dept 2021] [internal quotation marks omitted]; *see People v Smith*, 33 NY3d 454, 461 [2019]). We conclude that the trial stipulation that the scrapings found beneath the victim's fingernails contained only her own blood is not the equivalent of evidence conclusively eliminating defendants as contributors to mixtures of DNA found on the knife and necktie used in the victim's murder, as well as numerous other items that were tested. Although we agree with the People that the DNA evidence does not conclusively exclude defendants as participants in the crime inasmuch as they may have worn gloves during the commission of the crime, the discovery of unidentified DNA on several items that were tested allows for the possibility that another unidentified person committed the crime and could raise reasonable doubt among the jury (*see White*, 125 AD3d at 1373-1374; *Hicks*, 114 AD3d at 602-603).

With respect to the *Brady* claim, defendants were required to show "that (1) the evidence is favorable to [them] because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v McGhee*, 36 NY3d 1063, 1064-1065 [2021] [internal quotation marks omitted]). Where, as here, the

defense did not specifically request the information, "the test of materiality is whether there is a reasonable probability that had it been disclosed to the defense, the result would have been different" (*People v Garrett*, 23 NY3d 878, 891 [2014], *rearg denied* 25 NY3d 1215 [2015] [internal quotation marks omitted]; *see People v Ulett*, 33 NY3d 512, 519 [2019]). We conclude that the court did not abuse its discretion in granting the motions on this ground (*see generally People v Samandarov*, 13 NY3d 433, 436 [2009]). The People concede that the information that the father of the victim's husband was unable to identify the coin constituted *Brady* material, and contrary to their contention, defendants met their burden of establishing that the information was not turned over to them. We reject the People's further contention that there was no reasonable probability that disclosing the evidence would have changed the verdict (*see generally People v Negron*, 26 NY3d 262, 270 [2015]). The testimony of the victim's husband that the coin recovered from Lorenzo belonged to him was a key piece of evidence at trial (*see People v Lorenzo*, 224 AD2d 924, 924 [4th Dept 1996], *lv denied* 88 NY2d 967 [1996]), as the People concede. Defendants established that " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict' " (*Ulett*, 33 NY3d at 520).

We have considered the People's remaining contentions and conclude that they are without merit.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

599

KA 19-01127

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAALIQUE J. MILORD, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 (Thomas E. Moran, J.), rendered August 20, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Washington*, 220 AD3d 1231, 1232 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023]).

Defendant contends that the court erred in refusing to suppress the handgun that he discarded while being pursued by the police, and the holster recovered from the parked vehicle in which defendant was observed sitting in the driver's seat prior to his flight, during an incident in September 2017. The evidence adduced at the suppression hearing established, inter alia, that a patrol officer observed the vehicle parked, with large puffs of smoke coming from it, in an area known for marihuana sales. Contrary to defendant's contention, based on the patrol officer's initial observations of the vehicle and of defendant sitting in the driver's seat, the officer had an objective, credible reason to approach the vehicle and, therefore, did not act improperly, in the first instance, in stopping his patrol vehicle and approaching the parked vehicle to request information (*see People v*

De Bour, 40 NY2d 210, 223 [1976]; *People v Jennings*, 129 AD3d 1103, 1104 [2d Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *see also People v Dixon*, 203 AD3d 1726, 1726-1727 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]).

We also conclude that, contrary to defendant's contention, the patrol officer who initially approached defendant, as well as another police officer who was present, acted properly in pursuing defendant after he exited the parked vehicle and fled. "Police pursuit of an individual significantly impede[s] the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Lobley*, 31 AD3d 1161, 1163 [4th Dept 2006] [internal quotation marks omitted]; *see People v Holmes*, 81 NY2d 1056, 1057-1058 [1993]). "Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, [may] provide the predicate necessary to justify pursuit" (*Holmes*, 81 NY2d at 1058). Here, the patrol officer who initially approached defendant testified that, after exiting his vehicle, he smelled a strong odor of burnt marihuana, and that he was familiar with the odor of burnt marihuana based on his training and experience. That evidence, along with the evidence of defendant's flight and the patrol officer's knowledge that the area was known for marihuana sales, established that, at the time of the encounter, the officers had reasonable suspicion to pursue defendant (*see People v Wright*, 210 AD3d 1486, 1490 [4th Dept 2022]; *People v Hough*, 151 AD3d 1591, 1592 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *see generally Holmes*, 81 NY2d at 1058).

We have considered defendant's remaining contentions concerning the court's suppression ruling and conclude that they do not warrant reversal or modification of the judgment.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

602

CAF 23-01120

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

IN THE MATTER OF LILLYANA M.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RONDELL M., RESPONDENT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

AMY L. HALLENBECK, GLOVERSVILLE, FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered June 23, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of abandonment. We affirm.

Social Services Law § 384-b (5) (a) provides that "a child is 'abandoned' by [their] parent if such parent evinces an intent to forego [their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." A petition for termination of parental rights on the ground of abandonment may be granted when the parent engages in such behavior "for the period of six months immediately prior to the date on which the petition is filed" (§ 384-b [4] [b]). "In the absence of evidence to the contrary, [the parent's] ability to visit and communicate shall be presumed" (§ 384-b [5] [a]). Here, the evidence at the hearing established that, during the relevant six-month period, the father did not visit with the child, send her cards or gifts, pay any support for her, or communicate with the child's caretakers. The father's sporadic and insubstantial contact with petitioner's caseworkers, which we note was initiated almost entirely by the caseworkers rather than the father, did not preclude the

finding of abandonment (*see Matter of Tonasia K.*, 49 AD3d 1247, 1248 [4th Dept 2008]).

We reject the father's contention that petitioner failed to establish abandonment because it discouraged him from having a relationship with the child by not accommodating his request to visit the child in Onondaga County, where he lived, instead of Oswego County, where the child lived; by not suggesting to him that he send the child letters, cards, or gifts; and by never requesting that he pay child support. "In the abandonment context, '[a] court shall not require a showing of diligent efforts, if any, by an authorized agency to encourage the parent to perform the acts specified in [Social Services Law § 384-b (5) (a)]' " (*Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003], quoting Social Services Law § 384-b [5] [b]; *see Matter of Lundyn S. [Al-Rahim S.]*, 128 AD3d 1406, 1407 [4th Dept 2015]). Rather, it was the father's burden, which he failed to meet, "to show that there were circumstances rendering contact with the child or agency infeasible, or that he was discouraged from doing so by the agency" (*Matter of Regina A.*, 43 AD3d 725, 725 [1st Dept 2007]; *see Matter of Najuan W. [Stephon W.]*, 184 AD3d 1111, 1112 [4th Dept 2020]; *Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469, 1470 [4th Dept 2014]). Although the father indicated to a caseworker that he had a medical reason why he could not travel to Oswego County, the documentation he provided in support of that claim was over a year old, and the father was unable, when asked, to provide updated documentation. The evidence at the trial also established that the father was able to travel to Oswego County for court proceedings.

The father's contention that Family Court was biased against him and impermissibly acted as an advocate for petitioner is not preserved for our review (*see Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1319 [4th Dept 2024]; *Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Dominique M.*, 85 AD3d 1626, 1626 [4th Dept 2011], *lv denied* 17 NY3d 709 [2011]) and is without merit in any event. The fact that the court reserved decision on petitioner's motion to withdraw a prior petition for termination of the father's parental rights does not demonstrate bias (*see generally Melish*, 221 AD3d at 1561). Moreover, "a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial" so long as the court does not "take on the function or appearance of an advocate" (*Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169 [4th Dept 2005] [internal quotation marks omitted]). Here, the court questioned one witness, and the questioning was nonadversarial and served to clarify the witness's testimony (*see Dominique M.*, 85 AD3d at 1626; *Capodiferro v Capodiferro*, 77 AD3d 1449, 1450 [4th Dept 2010]).

We reject the father's contention that he was denied effective assistance of counsel. "It is axiomatic that, because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (*Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140 [4th Dept 2014], *lv denied* 22 NY3d 866 [2014] [internal quotation marks omitted]). Here, we

conclude that "the record, viewed in totality, reveals that the father received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; *see Matter of Mirah J.P. [Marquis P.]*, 213 AD3d 1219, 1220 [4th Dept 2023]; *Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1165 [4th Dept 2020]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

612

CA 23-00899

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

VICKY L. WALTERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

BARCLAY DAMON LLP, BUFFALO (CHARLES J. ENGLERT, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered May 17, 2023. The order, insofar as appealed from, denied the motion of defendant City of Buffalo 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 that she sustained when she allegedly slipped on ice and fell on a sidewalk located adjacent to the school where she worked. The sidewalk was owned by defendant City of Buffalo (City). The City moved for summary judgment dismissing the complaint against it, and Supreme Court denied the City's motion. We affirm.

It is well settled that " '[w]here, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective [sidewalk] . . . condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies' " (*Runge v City of N. Tonawanda*, 217 AD3d 1405, 1405 [4th Dept 2023]; *see Horst v City of Syracuse*, 191 AD3d 1297, 1297-1298 [4th Dept 2021]).

Initially, we reject plaintiff's contention, raised as an alternative ground for affirmance, that the City's prior written notice statute is not applicable. Plaintiff contends that the sidewalk was constructed for the use of teachers, staff, students, and visitors of the school, and not the general public. Section 21-2 of the Charter of the City of Buffalo provides, in relevant part, that "[n]o civil action shall be maintained against the [C]ity for damage or injuries to person or property sustained in consequence of *any*

. . . sidewalk . . . being defective, out of repair, unsafe, dangerous or obstructed, or in consequence of the existence or accumulation of snow or ice upon *any* . . . sidewalk . . . , unless" prior written notice was given to the city clerk (emphasis added). The plain meaning of the statute is that prior written notice is required with respect to any sidewalk owned by the City, and the purpose for which the sidewalk was constructed is not relevant (*see generally Matter of Walt Disney Co. & Consol. Subsidiaries v Tax Appeals Trib. of the State of N.Y.*, — NY3d —, 2024 NY Slip Op 02127, *5 [2024]).

In support of its motion, the City established, and plaintiff does not dispute, that the City never received prior written notice of any defective condition. Thus, the burden shifted to plaintiff to raise a triable issue of fact on "the applicability of one of [the] two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Groninger v Village of Mamaroneck*, 17 NY3d 125, 129 [2011]; *Runge*, 217 AD3d at 1405).

Plaintiff relies on only the first exception, i.e., that the City created the defective condition. The City submitted in support of its motion evidence that the sidewalk was installed as part of a renovation project. In opposition to the motion, plaintiff submitted a Master Design and Construction Agreement (Construction Agreement) showing that the City, through its agent, the Joint Schools Construction Board (Construction Board), hired a contractor to replace the sidewalk. Plaintiff also submitted the affidavit of her expert engineer, who inspected the area where plaintiff fell and opined that the sidewalk was substantially in the same condition at the time of construction as it was at the time of his inspection. In his opinion, the sidewalk was defectively designed and constructed inasmuch as it was improperly graded, which allowed water to pool and ice to form.

We reject the City's contention that it was not a party to the Construction Agreement. The Construction Agreement explicitly stated that the Construction Board was the agent for the City. Thus, the City was a party to the Construction Agreement through its agent, the Construction Board, and contracted for the replacement of the sidewalk. We also reject the City's contention that it cannot be held liable for the allegedly defective design of the sidewalk because the contractor, and not the City, designed and constructed the sidewalk. Inasmuch as the City hired the contractor that allegedly created the defective condition, we conclude that plaintiff raised a triable issue of fact whether the affirmative negligence exception applies (*see Horst*, 191 AD3d at 1301; *Santelises v Town of Huntington*, 124 AD3d 863, 865-866 [2d Dept 2015]).

Entered: September 27, 2024 Ann Dillon Flynn
Clerk of the Court

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

620

KA 19-01387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 12, 2019. The judgment convicted defendant upon his plea of guilty of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in declining to adjudicate defendant a youthful offender, particularly in view of the circumstances of the offense (*see People v Graham*, 218 AD3d 1359, 1360 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). In addition, upon our review of the record, we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see id.*; *People v Mohawk*, 142 AD3d 1370, 1371 [4th Dept 2016]). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

622

KA 23-00986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE M. GAUSE, DEFENDANT-APPELLANT.

FELDMAN AND FELDMAN, MANHASSET (STEVEN A. FELDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered January 11, 2023. The judgment convicted defendant upon a jury verdict of robbery in the first degree, assault in the first degree and conspiracy in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [1]), assault in the first degree (§ 120.10 [1]), and conspiracy in the fourth degree (§ 105.10 [1]). Defendant contends that the evidence is legally insufficient because the testimony of her boyfriend and the victim was incredible, she was merely present when the crimes were committed and did not intend to assault or rob the victim, her boyfriend's testimony was not adequately corroborated, and she renounced her participation in the conspiracy. Defendant's contention is not preserved for our review inasmuch as her motion for a trial order of dismissal was not " 'specifically directed' at [those] alleged error[s]" (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Johnson*, 225 AD3d 1115, 1116 [4th Dept 2024]; *People v Colon*, 211 AD3d 1613, 1614 [4th Dept 2022], *lv denied* 39 NY3d 1141 [2023]). In any event, we conclude that defendant's contention is without merit.

First, the testimony of defendant's boyfriend and the victim was not incredible as a matter of law, that is, their testimony "was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Krista M.G.*, 228 AD3d 1300, 1302 [4th Dept 2024] [internal quotation marks omitted]; *see People v Rojas-*

Aponte, 224 AD3d 1264, 1265 [4th Dept 2024]). Second, this is not a case where the evidence established only defendant's mere presence at the scene of the crimes (*cf. People v Ramos*, 218 AD3d 1113, 1114-1115 [4th Dept 2023]; *see generally People v Cabey*, 85 NY2d 417, 421 [1995]). The victim testified that he exchanged text messages with defendant, asking whether she had any girlfriends "that wanted to catch a buzz and hang out." According to the victim's testimony, defendant indicated that she had a friend who would do that, and they arranged for defendant and her friend to pick up the victim. Meanwhile, according to the testimony of defendant's boyfriend, whom she had been dating for about a month prior, defendant said that the victim had propositioned her to have sex with him in exchange for drugs and that the victim had previously raped her, which enraged the boyfriend. The boyfriend testified that he, defendant, her friend, and a second man came up with a plan to kill the victim, and that the four drove out to a road where the boyfriend and the second man, both armed with knives, exited the vehicle. In addition, the testimony of the victim and the boyfriend established that defendant and her friend then picked up the victim and drove him to the same location where the boyfriend and the second man were waiting. The testimony further established that the boyfriend and the second man robbed and cut the victim before fleeing the scene. 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 to support the conclusion that defendant had "a shared intent, or 'community of purpose' with the principal[s]" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016]; *see Cabey*, 85 NY2d at 421), and that she "intentionally aided the principal[s] in bringing forth [the] result" (*People v Kaplan*, 76 NY2d 140, 146 [1990] [emphasis omitted]; *see People v Spencer*, 181 AD3d 1257, 1258 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]; *cf. People v Nelson*, 178 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020]).

Third, it is well settled that "[a]ccomplice testimony must be corroborated by evidence 'tending to connect the defendant with the commission of [an] offense' " (*People v McCutcheon*, 219 AD3d 1698, 1699-1700 [4th Dept 2023], *lv denied* 40 NY3d 1040 [2023], quoting CPL 60.22 [1]). Here, the non-accomplice testimony, including the testimony of the victim, " 'ten[ded] to connect the defendant with the commission of the crime[s] in such a way as [could] reasonably satisfy the jury that the accomplice [was] telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see McCutcheon*, 219 AD3d at 1700). Fourth, "[t]he affirmative defense of renunciation requires a defendant to meet an initial burden of establishing, by a preponderance of the evidence . . . , that [the defendant] 'withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof' " (*People v Brewer*, 118 AD3d 1409, 1412 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014] [emphasis omitted], quoting Penal Law § 40.10 [1]). Here, there was testimony that defendant shouted to the boyfriend as he was struggling with the victim to stop and return to the car, but that did not constitute a renunciation inasmuch as there was no withdrawal from participation *prior* to the commission of the crimes (*see generally*

People v Sanford, 148 AD3d 1580, 1582 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *People v Stevens*, 65 AD3d 759, 762-763 [3d Dept 2009], *lv denied* 13 NY3d 839 [2009]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that County Court erred in instructing the jury with respect to accomplice testimony. The court instructed the jurors that they were to determine whether the boyfriend was an accomplice and, if so, that they would need to find that his testimony was corroborated by other evidence tending to connect defendant to the commission of the crimes. Defendant contends that the court should have charged the jury that the boyfriend was an accomplice as a matter of law. Defendant's contention, however, is not preserved for our review (*see People v Lipton*, 54 NY2d 340, 351 [1981]; *People v Ortiz*, 194 AD3d 1351, 1351 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]). In any event, as explained above, the boyfriend's testimony was sufficiently corroborated (*see People v Elder*, 108 AD3d 1117, 1117 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *People v Peoples*, 66 AD3d 1419, 1419 [4th Dept 2009], *lv denied* 14 NY3d 843 [2010]). Defendant also failed to preserve for our review her further contention that the court erred in allowing evidence of flight and failing to instruct the jury on the limited use of that evidence (*see People v Jones*, 213 AD3d 1279, 1279-1280 [4th Dept 2023], *lv denied* 39 NY3d 1155 [2023]; *People v Keating*, 183 AD3d 595, 597 [2d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Wilson*, 34 AD3d 1276, 1276 [4th Dept 2006], *lv denied* 8 NY3d 886 [2007]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the court properly denied her request for a missing witness instruction with respect to her friend and the second man who, as noted above, were present at the scene of the crimes. Defendant failed to meet her burden of establishing that the witnesses would naturally be expected to provide testimony favorable to the People (*see People v Hirji*, 185 AD3d 1053, 1054 [2d Dept 2020]; *People v Crowder*, 96 AD3d 515, 516 [1st Dept 2012]; *see generally People v Smith*, 33 NY3d 454, 458-459 [2019]). Indeed, as accomplices, their testimony "would have been presumptively suspect . . . or subject to impeachment detrimental to the People's case" (*People v Spagnuolo*, 173 AD3d 1832, 1833 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019] [internal quotation marks omitted]).

We reject defendant's contention that the court erred in denying, after a hearing, her application to be sentenced pursuant to Penal Law § 60.12 (*see generally Krista M.G.*, 228 AD3d at 1301-1302; *People v Vilella*, 213 AD3d 1282, 1283 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]). Defendant did not establish by a preponderance of the evidence that "substantial physical, sexual or psychological abuse

. . . was a significant contributing factor to [her] criminal behavior" (§ 60.12 [1]; *cf. People v Addimando*, 197 AD3d 106, 116-117 [2d Dept 2021]).

As defendant contends and the People correctly concede, however, the court erred in failing to "pronounce sentence on each count" of the conviction (CPL 380.20; *see People v Brady*, 195 AD3d 1545, 1546 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). Although the uniform sentence and commitment form states that defendant was sentenced on each count to concurrent terms of incarceration of five years with three years of postrelease supervision, the court in fact did not "impose a sentence for each count of which defendant was convicted" (*People v Bradley*, 52 AD3d 1261, 1262 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]; *see* CPL 380.20). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. In light of our determination, we do not address defendant's contention regarding the severity of the sentence.

We have examined defendant's remaining contentions and conclude that they do not warrant further modification or reversal of the judgment.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

625

KA 19-01388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered May 31, 2019. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree and robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and robbery in the first degree (§ 160.15 [4]), defendant contends that his sentence is unduly harsh and severe. As the People correctly concede, defendant did not validly waive his right to appeal because "[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 [County 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 *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Thornton*, 213 AD3d 1332, 1332 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]). Nevertheless, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note, however, that the certificate of disposition must be amended to correct a clerical error (*see People v Brown*, 221 AD3d 1565, 1566 [4th Dept 2023]; *People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2023]). The certificate of disposition erroneously states that defendant was sentenced to a determinate term of 25 years' imprisonment on count 4, robbery in the

first degree, and should be amended to correctly reflect that defendant was sentenced to a determinate term of five years' imprisonment on that count.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

626

CAF 22-01954

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

IN THE MATTER OF TYSHAWN P., JR.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TYSHAWN P., SR., RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

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

JESSICA L. WRIGHT, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered November 1, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect. We affirm.

Initially, we conclude that the father's contention that the petition against him must be dismissed on the ground that it was filed prematurely is unpreserved for our review. The father failed to move pursuant to CPLR 4401 for judgment as a matter of law on that ground at the close of evidence in the permanent neglect hearing held with respect to the petition against him (*see Matter of Zahrada S.M.R. [Wanda C.R.]*, 140 AD3d 969, 969-970 [2d Dept 2016]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). The father could not preserve his contention in that regard merely by joining the mother's motion to dismiss the petition in the separate permanent neglect hearing held with respect to a petition against the mother.

We also reject the father's contention that petitioner failed to establish that it exercised diligent efforts to encourage and strengthen the parent-child relationship while the father was incarcerated, as required by Social Services Law § 384-b (7) (a) (*see*

Matter of Hailey ZZ. [Ricky ZZ.], 19 NY3d 422, 429 [2012]; *Matter of Sheila G.*, 61 NY2d 368, 373, 380-381 [1984]). Where, as here, a parent is incarcerated during the relevant period of time, petitioner's duty to engage in diligent efforts to strengthen the parent-child relationship "may be satisfied by informing the parent of the child[']s well-being and progress, responding to the parent's inquiries, investigating relatives suggested by the parent as placement resources, and facilitating communication between the child[ ] and the parent" (*Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1694 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019] [internal quotation marks omitted]; *see* § 384-b [7] [f]). Here, we conclude that petitioner exercised diligent efforts inasmuch as its caseworker facilitated monthly in-person visits between the father and the child, repeatedly provided him with updates about the child, provided him with the opportunity to participate in service provider reviews, and investigated the relatives suggested by the father as potential placement resources.

We also conclude that, contrary to the father's contention, petitioner established that, despite its diligent efforts, the father failed substantially and continuously or repeatedly to plan appropriately for the future of the child (*see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776-1777 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). The record shows that the father's "failure . . . to provide any realistic and feasible alternative to having the child[ ] remain in foster care until [his] release from prison . . . supports a finding of permanent neglect" (*Matter of Davianna L. [David R.]*, 128 AD3d 1365, 1365 [4th Dept 2015], *lv denied* 25 NY3d 914 [2015] [internal quotation marks omitted]; *see Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1164 [4th Dept 2020]).

Finally, we conclude that the evidence supports Family Court's determination that termination of the father's parental rights is in the best interests of the child (*see Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). Among other things, the steps taken by the father to address the issues that led to the child's removal were "not sufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Zackery S. [Christa P.]*, 224 AD3d 1336, 1337 [4th Dept 2024], *lv denied* 41 NY3d 909 [2024]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

627

CAF 23-01697

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

IN THE MATTER OF ROBYN GEROW,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANNIAH SAMUEL, RESPONDENT-APPELLANT.

THE LAW OFFICES OF MATTHEW ALBERT, ESQ., DARIEN CENTER (MATTHEW ALBERT OF COUNSEL), FOR RESPONDENT-APPELLANT.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (DAVID A. SHAPIRO OF COUNSEL), FOR PETITIONER-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered May 22, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, granted custody of the subject child to petitioner, Robyn Gerow (grandmother). We reject the mother's contention that the grandmother failed to establish the existence of extraordinary circumstances. It is well settled that "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness, or other like extraordinary circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]; *see Matter of Wolfford v Stephens*, 145 AD3d 1569, 1569-1570 [4th Dept 2016]). "If extraordinary circumstances are established such that the nonparent has standing to seek custody, the court must make an award of custody based on the best interest of the child" (*Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]).

We agree with the mother that, in determining that extraordinary circumstances exist, Family Court erred in relying on the fact that the child had been in the custody of the grandmother for an extended period of time. The child was placed in the grandmother's custody only after an order of protection was issued against the mother regarding the child, and the mother thereafter petitioned to regain

custody (*see generally Matter of Dickson v Lascaris*, 53 NY2d 204, 209-210 [1981]; *Matter of Byler v Byler*, 207 AD3d 1072, 1074 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]). The court properly further held, however, that the "cumulative effect of all issues" (*Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142, 1144 [4th Dept 2023] [internal quotation marks omitted]; *see Byler*, 207 AD3d at 1074-1075; *Matter of Renee TT. v Britney UU.*, 133 AD3d 1101, 1103 [3d Dept 2015]) other than the extended disruption of custody established that extraordinary circumstances exist. The evidence established that the mother was an unfit and neglectful parent based on, inter alia, the mother's use of excessive corporal punishment; her disregard of court orders requiring supervision of her access and precluding contact between the child and her boyfriend, who murdered the child's father; her failure to recognize the child's need for counseling or to facilitate such counseling; her failure to take any interest in the child's education; and her conduct in allowing repeated exposure of the child to his father's murderer and in nurturing that relationship (*see generally Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585-1586 [4th Dept 2014]).

Contrary to the mother's further contention, the court properly determined that it was in the best interests of the child for custody to be granted to the grandmother (*see Matter of Matthews v Allen*, 214 AD3d 1431, 1433-1434 [4th Dept 2023]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

630

CA 23-01843

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

TRACY A. HENEGHAN AND BARRY O. HENEGHAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

CJW ELECTRIC, LLC, RAYMOND KOLLIDAS,
ROSANNA KOLLIDAS, ET AL., DEFENDANTS-RESPONDENTS,
AND KODIAK BUILDERS, INC., DEFENDANT-APPELLANT.

KODIAK BUILDERS, INC., THIRD-PARTY PLAINTIFF,

V

RAYMOND KOLLIDAS AND ROSANNA KOLLIDAS,
THIRD-PARTY DEFENDANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (NADIA R. BEKKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (DERICK R. WHITE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RAYMOND KOLLIDAS AND ROSANNA KOLLIDAS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 27, 2023. The order denied the motion of defendant-third-party plaintiff Kodiak Builders, Inc. for summary judgment dismissing the second amended complaint against it.

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

636

KA 20-01645

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NELSON E. FIGUEROA, JR., DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered November 24, 2020. The judgment convicted defendant upon a plea of guilty of predatory sexual assault against a child (two counts), sexual abuse in the first degree, and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the sentence awarding restitution and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of predatory sexual assault against a child (Penal Law former § 130.96), arising from defendant's repeated sexual abuse of his girlfriend's daughter (victim). Contrary to defendant's contention and the People's incorrect concession (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024]; *People v Morrison*, 179 AD3d 1454, 1455 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]), the record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see Edmonds*, 229 AD3d at 1276-1277; *People v Giles*, 219 AD3d 1706, 1706-1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). We note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally Thomas*, 34 NY3d at 567; *Edmonds*, 229 AD3d at 1277; *Giles*, 219 AD3d at 1706). Contrary to defendant's assertion, the court did not mischaracterize the appeal waiver as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; *see Edmonds*, 229 AD3d at 1277; *see also People v Wilson*, 217 AD3d 1561, 1562 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *People v*

Cromie, 187 AD3d 1659, 1659 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]). Instead, the court followed the model colloquy nearly verbatim, explaining that defendant retained the right to take an appeal, but that his conviction and sentence would, "as a practical matter," "be final" because he was giving up the right to appellate review of "most claims of error," including claims regarding the severity of the sentence but excluding the "limited claims" that survive an appeal waiver, such as those relating to the voluntariness of the plea, the validity of the appeal waiver, and the legality of the sentence (*see Thomas*, 34 NY3d at 567; *Edmonds*, 229 AD3d at 1277; *People v Jackson*, 198 AD3d 1317, 1318 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). Contrary to defendant's further assertion, the record establishes that defense counsel had already "take[n] a few minutes" to discuss with defendant the appeal waiver required to obtain the court's sentencing commitment; the record also establishes that, upon an inquiry by the court consistent with the model colloquy, defendant confirmed that he had discussed waiving his right to appeal with defense counsel (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally Thomas*, 34 NY3d at 560). Any deficiency by the court in ascertaining on the record defendant's understanding of the contents of the written waiver (*see Thomas*, 34 NY3d at 563, 566; *People v Bradshaw*, 18 NY3d 257, 266-267 [2011]; *People v Callahan*, 80 NY2d 273, 283 [1992]) is of no moment where, as here, the oral waiver was adequate (*see Lopez*, 6 NY3d at 257; *People v Witherow*, 203 AD3d 1595, 1595-1596 [4th Dept 2022]; *People v Thomas*, 178 AD3d 1461, 1461 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]; *People v Smith*, 164 AD3d 1621, 1621 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]).

In further seeking to invalidate the appeal waiver, defendant encourages us to apply the rule created by the Second Department that where, as here, the inclusion of the appeal waiver as part of a plea agreement is demanded by the court rather than the People, the appeal waiver is unenforceable if the court fails to sufficiently articulate the reasons for its demand (*see People v Sutton*, 184 AD3d 236, 244-245 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]). We have "not adopted the Second Department's requirement that the court articulate a reason for requiring a[n appeal] waiver in a . . . plea proceeding" (*People v Dilworth*, 189 AD3d 636, 637 [1st Dept 2020], *lv denied* 36 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 964 [2021]). In any event, the court here, unlike the court in *Sutton*, included the appeal waiver as a condition of the plea offer prior to accepting defendant's plea and articulated on the record that the appeal waiver was required in order for defendant to secure the benefit of the sentencing limitation promised by the court (*see id.*; *see also People v Guerrero*, 194 AD3d 1258, 1259 [3d Dept 2021], *lv denied* 37 NY3d 992 [2021]).

Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of the incarceration component of his sentence (*see Lopez*, 6 NY3d at 255-256; *Witherow*, 203 AD3d at 1596).

Next, defendant challenges the court's imposition of restitution on the ground that the girlfriend's request therefor was not based on

any actual out-of-pocket loss that qualifies as a valid basis for restitution. We note at the outset that defendant's challenge to the restitution component of his sentence survives his valid waiver of the right to appeal inasmuch as restitution was not included in the terms of the plea agreement (*see Witherow*, 203 AD3d at 1596; *People v McBean*, 192 AD3d 1706, 1707 [4th Dept 2021], *lv denied* 37 NY3d 958 [2021]; *People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]). We further note that defendant preserved his challenge for appellate review by objecting to the imposition of restitution on the same ground he now advances (*see People v Richardson*, 173 AD3d 1859, 1860-1861 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019], *reconsideration denied* 34 NY3d 1081 [2019]).

The girlfriend requested restitution for the unpaid balance of rent for the house she had shared with defendant and for a bill for garbage and recycling collection that was not yet due. The People argued that the girlfriend was entitled to restitution for those expenses because, according to the girlfriend's statements, defendant's offenses caused the victim emotional and psychological harm and caused the girlfriend stress that resulted in serious health issues and several hospitalizations, all of which rendered her unable to work, thereby ultimately resulting in financial hardship and her inability to pay the claimed household expenses. The court, over defense counsel's objection that the claimed expenses were not directly caused by defendant's offenses, imposed the requested restitution. That was error.

"Penal Law § 60.27 (1) addresses the related concepts of restitution and reparation, allowing a court to order a defendant to 'make restitution of the fruits of [their] offense or reparation for the actual out-of-pocket loss caused thereby' " (*People v Horne*, 97 NY2d 404, 410 [2002]; *see People v Connolly*, 27 NY3d 355, 359 [2016]; *Witherow*, 203 AD3d at 1596). Restitution and reparation may be required for expenses that "were not voluntarily incurred, but stem from legal obligations that are directly and causally related to the crime" (*People v Cruz*, 81 NY2d 996, 998 [1993]; *see People v Johnson*, 125 AD3d 1419, 1421 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]). Conversely, the statute "does not impose a duty on the defendant to pay for the costs associated [ ]with . . . expenses [that] are not directly caused by the defendant's crime" (*People v Case*, 214 AD3d 1379, 1381 [4th Dept 2023]).

Here, we conclude that the claimed expenses do not constitute "actual out-of-pocket loss caused" by defendant's offenses (Penal Law § 60.27 [1]) inasmuch as the girlfriend's unpaid rent and utility bill are costs "not directly caused by . . . defendant's crime[s]" (*Case*, 214 AD3d at 1381). Contrary to the People's assertion, the girlfriend's request did not constitute a claim for lost wages directly caused by defendant's offenses (*cf. People v Robinson*, 133

AD3d 1043, 1044 [3d Dept 2015], *lv denied* 27 NY3d 1154 [2016]). We therefore modify the judgment accordingly.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

641

KA 18-00222

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER WHITEHILL RIDEOUT, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK 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 (Thomas E. Moran, J.), rendered October 24, 2017. The judgment convicted defendant, upon a jury verdict, of tampering with physical evidence (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 two counts of tampering with physical evidence (Penal Law § 215.40 [2]). Contrary to defendant's contention, we conclude that the indictment and bill of particulars provided defendant with "fair notice of the accusations made against him, so that he [was] able to prepare a defense" (*People v Iannone*, 45 NY2d 589, 594 [1978]; *see People v Schulz*, 32 AD3d 1224, 1224 [4th Dept 2006]; *see generally People v Morris*, 61 NY2d 290, 293-296 [1984]). Contrary to defendant's further contention, we conclude that the circumstantial evidence, when viewed in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]), is legally sufficient to support the conviction (*see People v Neulander*, 221 AD3d 1412, 1412-1413 [4th Dept 2023], *lv denied* 41 NY3d 984 [2024]; *People v Maull*, 167 AD3d 1465, 1466 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

645

CA 23-01072

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

COHEN & LOMBARDO, P.C., PLAINTIFF-APPELLANT,

V ORDER

DANIEL R. CONNORS AND JAMES J. NASH,
DEFENDANTS-RESPONDENTS.

DANIEL R. CONNORS AND JAMES J. NASH,
PLAINTIFFS-RESPONDENTS,

V

ROCCO LUCENTE, II, KATHERINE J. BESTINE AND
TERRIE BENSON MURRAY, DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT AND DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered May 2, 2023. The order and judgment, inter alia, granted that part of the motion of defendants Daniel R. Connors and James J. Nash seeking summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 7 and 14, 2024,

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

652

KA 23-01311

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL F. SANTOS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered January 4, 2023. The judgment convicted defendant upon a plea of guilty of sexual abuse in the third degree and forcible touching.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his guilty plea of forcible touching (Penal Law § 130.52 [1]) and sexual abuse in the third degree (§ 130.55). In appeal No. 2, defendant appeals from a judgment convicting him upon his guilty plea of disseminating indecent material to a minor in the first degree (former § 235.22) and promoting a sexual performance by a child (§ 263.15). In each appeal, defendant contends that his global waiver of the right to appeal is unenforceable, and that his guilty plea should be vacated because it was not knowingly, intelligently, and voluntarily entered. In appeal No. 2, defendant further contends that his negotiated sentence is unduly harsh and severe. We affirm in both appeals.

Because defendant did not move to withdraw his pleas or to vacate either judgment of conviction, he failed to preserve for our review his challenges in both appeals to the voluntariness of his pleas (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Peter*, 141 AD3d 1115, 1116 [4th Dept 2016]). Contrary to defendant's contention in both appeals, his challenges do not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662 [1988]), inasmuch as he did not say anything during the plea colloquy that negated an element of a pleaded-to offense "or otherwise cast significant doubt

on his guilt or call[ed] into question the voluntariness of the plea[s]" (*People v Barrett*, 153 AD3d 1600, 1600 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]; *see Lopez*, 71 NY2d at 666).

We agree with defendant in both appeals that his global waiver of the right to appeal is unenforceable inasmuch as County Court's colloquy and the written waiver used overbroad language that mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McCracken*, 217 AD3d 1543, 1543-1544 [4th Dept 2023]; *People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]). Nevertheless, contrary to defendant's contention in appeal No. 2, we conclude that defendant's negotiated sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

657

KA 23-01682

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL F. SANTOS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered January 4, 2023. The judgment convicted defendant upon a plea of guilty of disseminating indecent material to a minor in the first degree and promoting a sexual performance by a child.

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

Same memorandum as in *People v Santos* ([appeal No. 1] — AD3d — [Sept. 27, 2024] [4th Dept 2024]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

659

CAF 24-00022

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

IN THE MATTER OF HARPER W., PRESLEY W. AND AYLA W.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HALEY W., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), dated December 11, 2023, in a proceeding pursuant to Family Court Act article 10. The order granted respondent a suspended judgment.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that imposed a suspended judgment with conditions, including, inter alia, that she submit to random drug screens immediately upon request. Initially, we note that the mother's appeal brings up for review the corrected order of fact-finding in which Family Court found that the mother neglected two of her children (*see Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258 [4th Dept 2012]).

Contrary to the mother's contention, petitioner met its burden of establishing by a preponderance of the evidence that the mother neglected the two children (*see* Family Ct Act § 1046 [b] [i]). "It is well established that a finding of neglect may be appropriate even when a child has not been actually impaired, in order to protect that child and prevent impairment . . . , and that [a] single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855-1856 [4th Dept 2010] [internal quotation marks omitted]). Here, the court properly found that the two children, ages three and five, were in imminent risk of harm when the mother left them unattended in an unlocked, running vehicle for at least 30 minutes while she went shopping (*see id.* at 1856; *Matter of Samuel D.-C.*, 40 AD3d 853, 854 [2d Dept 2007]).

Contrary to the mother's further contention, the court properly ordered, as a condition of the suspended judgment, that the mother submit to random drug screens immediately upon request (*see generally* Family Ct Act § 1053 [a]; 22 NYCRR 205.83 [a] [3]; *Matter of Anoushka G. [Cyntra M.]*, 132 AD3d 867, 868 [2d Dept 2015]).

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

664

CA 23-01933

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

COUNSEL FINANCIAL HOLDINGS LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SULLIVAN LAW, L.L.C., ROBERT C. SULLIVAN, BIANCA T. SULLIVAN, JOHN R. BONDON, PARROT PROPERTIES, INC., ROBBA PROPERTIES, L.L.C., AND SOUTH SIDE INVESTMENT COMPANY,
DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a corrected order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 9, 2023. The corrected order granted the motion of plaintiff seeking leave to reargue and, upon reargument, inter alia, reinstated a prior order.

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

Memorandum: Defendants appeal from a corrected order of Supreme Court (Chimes, J.) that, inter alia, granted plaintiff's motion for leave to reargue defendants' motion for leave to renew their opposition to plaintiff's CPLR 3213 motion for summary judgment in lieu of complaint and, upon reargument, reversed a 2023 order of Supreme Court (Walker, A.J. [2023 order]) and reinstated a 2021 order of Supreme Court (Walker, A.J. [2021 order]). The 2021 order had granted the CPLR 3213 motion, and the 2023 order had, inter alia, granted defendants' motion for leave to renew their opposition to the CPLR 3213 motion and, upon renewal, vacated the 2021 order and denied the CPLR 3213 motion. We affirm.

Defendants contend that Justice Chimes (hereinafter reargument motion court) had no authority to grant plaintiff's motion for leave to reargue because Acting Justice Walker had issued the original order. We reject that contention. CPLR 2221 (a) provides that a motion for leave to reargue "shall be made . . . to the judge who signed the order, unless [that judge] is for any reason unable to hear it." Here, at the time plaintiff's motion was heard by the reargument

motion court, Acting Justice Walker had retired and was "unable to hear it" (*id.*). Thus, the reargument motion court properly heard and decided plaintiff's motion (*see Mauro v Countrywide Home Loans, Inc.*, 116 AD3d 930, 932 [2d Dept 2014]).

Defendants further contend that plaintiff engaged in gamesmanship by serving its motion for leave to reargue after Acting Justice Walker notified the parties of the date of his impending retirement, and setting a return date for a date after his retirement, and that the reargument motion court improperly rewarded that tactic. We reject that contention. Although "[i]t is fundamental that a [j]udge may not review or overrule an order of another [j]udge of co-ordinate jurisdiction in the same action or proceeding," it is also well established that "the unavailability of a retired [j]udge may permit a new [j]udge to grant reargument in a proceeding" (*Matter of Wright v County of Monroe*, 45 AD2d 932, 932-933 [4th Dept 1974]), and here, as noted above, retired Acting Justice Walker was "unable to hear" the reargument motion (CPLR 2221 [a]). Moreover, plaintiff's motion for leave to reargue was timely served following entry of the 2023 order (*cf. Wright*, 45 AD2d at 933). We further note that defendants made no effort to move, by order to show cause or otherwise, to have Acting Justice Walker hear the motion during the month remaining before he retired (*see* Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C2214:11).

We likewise reject defendants' contention that the reargument motion court erred in granting plaintiff's motion for leave to reargue, and upon reargument, reversing the 2023 order, and reinstating the 2021 order. This Court's decision in *Counsel Fin. II LLC v Bortnick* ([appeal No. 2], 214 AD3d 1388 [4th Dept 2023]) did not change the law with respect to what constitutes an instrument for the payment of money only. Thus, it was error to grant defendants' motion for leave to renew their opposition to plaintiff's CPLR 3213 motion.

When this case previously was before us on appeal, in *Counsel Fin. Holdings LLC v Sullivan Law, L.L.C.* ([appeal No. 2], 208 AD3d 1028, 1029 [4th Dept 2022], *lv dismissed* 39 NY3d 1099 [2023] [hereinafter *Sullivan I*]), this Court rejected defendants' contention that the financial instruments, including a guaranty, were not "for the payment of money only" (CPLR 3213). Seven months later, in *Bortnick*, this Court concluded that the plaintiff's motion papers in that case demonstrated that "outside evidence beyond 'simple proof of nonpayment or a similar de minimis deviation from the face of the document[s]' [was] needed to determine the amount due" and denied the plaintiff's motion for summary judgment pursuant to CPLR 3213 (*Bortnick*, 214 AD3d at 1391, quoting *Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). We explained that "[t]he reduction of [the] defendant's liability by the amount of two contingency fees effectively represents a separate offset or credit agreement requiring outside proof beyond de minimis extrinsic evidence to establish the amount due" (*id.*). For that reason, the action in *Bortnick* was not "based upon an instrument for the payment of money only" (CPLR 3213).

After *Bortnick* was issued, defendants moved for leave to renew

their opposition to the CPLR 3213 motion, contending that, inasmuch as *Sullivan I* and *Bortnick* involved the same guaranty, *Bortnick* constituted a change in the law warranting vacatur of the 2021 order. We agree with the reargument motion court that *Bortnick* is distinguishable on the facts from *Sullivan I* and required a different result, even though the same guaranty was present in both cases. The only extrinsic evidence submitted by plaintiff in *Sullivan I* was a two-page line of credit statement, whereas, as described above, *Bortnick* involved substantially more extrinsic evidence submitted by the plaintiff, including "a separate offset or credit agreement" (*Bortnick*, 214 AD3d at 1391). Thus, *Bortnick* did not constitute a change in the law and we conclude that the 2023 order was properly reversed and the 2021 order properly reinstated (*see South Towns Surgical Assoc., P.C. v Steinig*, 165 AD3d 1630, 1631 [4th Dept 2018]; *Smith v City of Buffalo*, 122 AD3d 1419, 1420 [4th Dept 2014]; *see generally* CPLR 2221 [d] [2]).

We have reviewed defendants' remaining contention and conclude that it is without merit.

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00145

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

EMRES NEW YORK, LLC, PLAINTIFF-APPELLANT,

V ORDER

BROOKSTONE 8, LLC, DEFENDANT-RESPONDENT.

BROOKSTONE 8, LLC, THIRD-PARTY PLAINTIFF,

V

TEN-X, LLC, THIRD-PARTY DEFENDANT,
CBRE GROUP, INC., AND WILLIAM VONDERFECHT,
THIRD-PARTY DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING PLLC, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN, MOSKOWITZ & KALLEN, P.C., NEW YORK CITY (KENNETH L. MOSKOWITZ OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

JACOBOWITZ NEWMAN TVERSKY LLP, CEDARHURST (RACHEL WRUBEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered January 3, 2024. The order granted in part the motion of third-party defendants CBRE Group, Inc. and William Vonderfecht and granted in part the motion of plaintiff.

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00009

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

DUANE STANTON, PLAINTIFF-RESPONDENT,

V ORDER

CHRIS REINHART, DEFENDANT, AND
AUSTIN REINHART, DEFENDANT-APPELLANT.

CHARTWELL LAW, WHITE PLAINS (CARMEN A. NICOLAOU OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLS LAW OFFICES PLLC, DEWITT (CRAIG K. NICHOLS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Allison J. Nelson, A.J.), entered November 29, 2023. The order, insofar as appealed from, denied in part the motion of defendant Austin Reinhart for summary judgment.

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

Entered: September 27, 2024

Ann Dillon Flynn
Clerk of the Court