SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 16, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

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________	663	CAF 19 01022	Mtr of CALVIN L. W., III

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

1143
CA 20-00270
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

NASIR MUZAID OMAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL MOORE, II, NU-ERA HOME IMPROVEMENT,
DEFENDANTS,
AND SADEQ AHMED, ALSO KNOWN AS SADEQ AHMED
ALSHAMARI, DEFENDANT-RESPONDENT.

VANDETTE PENBERTHY LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered November 18, 2019. The judgment adjudged that plaintiff "shall recover nothing from defendant" Sadeq Ahmed, also known as Sadeq Ahmed Alshamari.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion for summary judgment is denied and the third cause of action is reinstated.

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, breach of contract, negligence, and unjust enrichment arising from the unsatisfactory performance of construction work on his residence. Defendant Nu-Era Home Improvement (Nu-Era) and Sadeq Ahmed, also known as Sadeq Ahmed Alshamari (defendant), filed a pre-answer motion to dismiss the amended complaint against them in its entirety, and Supreme Court issued an order that, inter alia, denied the motion to dismiss insofar as it sought dismissal of the breach of contract, negligence, and unjust enrichment causes of action. This Court, on a prior appeal, modified that order by granting those parts of the motion seeking to dismiss against Nu-Era and defendant the first and second causes of action, alleging breach of contract and negligence, respectively, and affirmed the order insofar as it denied that part of the motion seeking to dismiss the third cause of action, alleging unjust enrichment against defendant (*Omar v Moore*, 171 AD3d 1533, 1533-1534 [4th Dept 2019]). After discovery, plaintiff discontinued the action against defendant Michael Moore, II, and defendant moved for summary judgment dismissing the third cause of action, i.e., the sole remaining cause of action. The court, inter alia, granted that motion, and plaintiff now appeals.

We agree with plaintiff that the court erred in granting defendant's motion. It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks omitted]), "and every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *see Palumbo v Bristol-Myers Squibb Co.*, 158 AD3d 1182, 1183-1184 [4th Dept 2018]). "The moving party's '[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez*, 68 NY2d at 324).

Here, we conclude that defendant failed to meet his initial burden on his motion. A cause of action for unjust enrichment requires a showing that the defendant was enriched at the expense of the plaintiff and that it would be inequitable for the defendant to retain the benefit provided by the plaintiff (*see Canandaigua Emergency Squad, Inc. v Rochester Area Health Maintenance Org., Inc.*, 108 AD3d 1181, 1183 [4th Dept 2013]). Defendant, in support of his motion, submitted, inter alia, Moore's responses to a notice to admit. Therein, Moore admitted, inter alia, that he received from plaintiff a total of $40,000, that defendant did not accept any of that money, and that the written contract that Moore entered into with plaintiff covered the subject matter underlying the third cause of action. Even assuming, arguendo, that the notice to admit did not improperly seek to "compel[ ] admission of fundamental and material issues or ultimate facts that [could] only be resolved after a full trial" (*Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6, 6 [1st Dept 2000]; *see 126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc.*, 121 AD3d 651, 654 [2d Dept 2014]; *see also* CPLR 3123), those responses did not, in light of defendant's other submissions on his motion, eliminate all triable issues of fact with regard to the third cause of action (*see generally Steven Mueller Motors, Inc. v Hickey*, 134 AD3d 1467, 1467-1468 [4th Dept 2015]). Defendant's other submissions included plaintiff's deposition testimony, wherein plaintiff testified that defendant "insist[ed]" on completing the renovations at plaintiff's residence, and that plaintiff paid defendant for the work to be performed. Plaintiff also testified that defendant promised plaintiff that he would finish the work on plaintiff's house after either defendant or his workers caused damage to the residence by leaving a door open. Thus, plaintiff's deposition testimony raises triable issues of fact whether defendant accepted money from plaintiff for work to be performed at plaintiff's residence and whether defendant performed the work (*see generally Britton v Diprima*, 71 AD3d 1560, 1561 [4th Dept 2010]).

Contrary to defendant's assertion, he did not meet his initial

burden on his motion through his reliance on our determination on the prior appeal regarding the existence of a written contract between plaintiff and Moore (*see Omar*, 171 AD3d at 1533-1534). Although the existence of a written contract generally precludes recovery in quasi contract for events arising out of that subject matter (*see Ahlers v Ecovation, Inc.*, 151 AD3d 1920, 1921 [4th Dept 2017]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), this Court did not address in our prior decision the validity of the contract or its applicability to the subject dispute between plaintiff and defendant (*see Omar*, 171 AD3d at 1533-1534). Moreover, in that regard, plaintiff's deposition testimony raises a question of fact whether defendant procured the contract between plaintiff and Moore by fraud. Specifically, plaintiff testified that he had a verbal agreement with defendant for the work to be completed at his residence, that plaintiff was not able to read English, and that plaintiff relied on defendant's translation of written documents from English to Arabic. Inasmuch as there is a bona fide dispute as to the application of the contract in question and whether the existing contract was procured by fraud (*see Hayward Baker, Inc. v C.O. Falter Constr. Corp.*, 104 AD3d 1253, 1255 [4th Dept 2013]), the existence of the contract between plaintiff and Moore does not prevent plaintiff from proceeding against defendant upon a theory of recovery in quasi contract (*see Gordon v Oster*, 36 AD3d 525, 525 [1st Dept 2007]), and plaintiff was not required to elect his remedy (*see Fisher v A.W. Miller Tech. Sales*, 306 AD2d 829, 831-832 [4th Dept 2003]).

In any event, plaintiff raised a triable issue of fact in opposition to defendant's motion sufficient to defeat summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff's submissions, which included defendant's deposition testimony and the affidavits of three witnesses, established, inter alia, that defendant and Moore worked together and had a construction company, Nu-Era, that defendant and Moore went to plaintiff's residence together several times to look at the work to be performed, and that defendant met with plaintiff at defendant's office. Thus, the evidence submitted by plaintiff in opposition to defendant's motion raises triable issues of fact whether defendant aided Moore in procuring plaintiff's signature on the contract and whether defendant obtained money from plaintiff for work to be performed at his residence.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

1187
CA 19-02271
PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

CHERYL HUMBOLT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTIN K. PARMETER, N.P., INDIVIDUALLY,
AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF
SYRACUSE ORTHOPEDIC SPECIALISTS, P.C.,
ET AL., DEFENDANTS,
DENISE LOUGEE, P.A., INDIVIDUALLY, AND AS
AN OFFICER, AGENT AND/OR EMPLOYEE OF ST.
JOSEPH'S MEDICAL, P.C., DOING BUSINESS AS ST.
JOSEPH'S PHYSICIANS, JULIE KING, M.D.,
INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR
EMPLOYEE OF ST. JOSEPH'S MEDICAL, P.C., DOING
BUSINESS AS ST. JOSEPH'S PHYSICIANS, AND ST.
JOSEPH'S MEDICAL, P.C., DOING BUSINESS AS ST.
JOSEPH'S PHYSICIANS, BY AND THROUGH ITS
OFFICERS, AGENTS AND/OR EMPLOYEES,
DEFENDANTS-APPELLANTS.

MAGUIRE CARDONA, P.C., ALBANY (MOLLY C. CASEY OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

BOTTAR LEONE, PLLC, SYRACUSE, POWERS & SANTOLA, LLP, ALBANY (MICHAEL
J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 19, 2019. The order denied the motion for summary judgment of defendants Denise Lougee, P.A., individually, and as an officer, agent and/or employee of St. Joseph's Medical, P.C., doing business as St. Joseph's Physicians; Julie King, M.D., individually, and as an officer, agent and/or employee of St. Joseph's Medical, P.C., doing business as St. Joseph's Physicians; and St. Joseph's Medical, P.C., doing business as St. Joseph's Physicians, by and through its officers, agents and/or employees.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint is dismissed against defendants Denise Lougee, P.A., individually, and as an officer, agent and/or employee of St. Joseph's Medical, P.C., doing business as St. Joseph's Physicians, Julie King, M.D., individually, and as an officer, agent and/or employee of St. Joseph's Medical, P.C., doing business as St. Joseph's Physicians, and St. Joseph's Medical, P.C., doing business as St. Joseph's Physicians, by and

through its officers, agents and/or employees.

Memorandum: Plaintiff commenced this medical malpractice action against multiple defendants, alleging, inter alia, that she sustained injuries, including paraplegia, caused by negligence in the care and treatment rendered by, among others, defendant Syracuse Orthopedic Specialists, P.C., by and through its officers, agents, and/or employees (SOS), defendant Kristin K. Parmeter, N.P., individually and as an agent and/or employee of SOS, defendant St. Joseph's Medical, P.C., doing business as St. Joseph's Medical Physicians, by and through its officers, agents and/or employees (St. Joseph's), defendant Denise Lougee, P.A., individually, and as an officer, agent and/or employee of St. Joseph's, and defendant Julie King, M.D., individually and as an officer, agent and/or employee of St. Joseph's. Of relevance to this appeal, plaintiff alleged that if Lougee and King had made an appropriate referral to an orthopedic specialist and monitored her condition after the referral was made, plaintiff would have received necessary surgery before she became paralyzed. Lougee, King and St. Joseph's (collectively, defendants) appeal from an order denying their motion for summary judgment dismissing the complaint against them.

Prior to the events leading to this appeal, plaintiff suffered from scoliosis and underwent multiple spinal surgeries, including a fusion and the insertion of "Harrington rods" to stabilize her spine. Beginning in 2015, King was plaintiff's primary care physician. King was aided by Lougee, a physician assistant, and both were employed by St. Joseph's. King and Lougee monitored plaintiff's various chronic ailments, which included back pain and chronic obstructive pulmonary disease (COPD) and, prior to October 2016, plaintiff was also receiving treatment for her chronic back pain from SOS and from a non-party pain management specialist. On October 3, 2016, plaintiff was evaluated by Lougee for, inter alia, complaints of increasing back pain. Lougee informed plaintiff that St. Joseph's would coordinate a referral to an orthopedist. Lougee ordered an updated X ray of plaintiff's back and completed a referral form for an orthopedist. The priority of the referral was described as "routine," and the nature of plaintiff's pain was described as "chronic." Plaintiff's X ray, which was taken later that day but after the referral was sent to the orthopedist, revealed that the Harrington rods in her spine were broken. Upon receiving the radiology report, Lougee discussed the results with King and then contacted the employee of St. Joseph's who was responsible for making referrals to upgrade plaintiff's referral to SOS from routine to "stat," and to forward the imaging results to SOS. Defendants booked an appointment for plaintiff at SOS that same week, and a nurse employed by St. Joseph's contacted plaintiff to advise her of the X ray results and that her appointment at SOS was scheduled for October 7. Plaintiff did not attend the October 7 appointment at SOS, and it was rescheduled to October 17.

On October 17, plaintiff saw Parmeter, a nurse practitioner at SOS who, inter alia, performed a physical examination and reviewed and discussed with plaintiff the X ray showing the broken Harrington rods.

Parmeter was unsure whether plaintiff's increasing back pain was a result of the broken Harrington rods or simply a byproduct of plaintiff's "extensive lumbar surgery in the past." Parmeter determined that plaintiff appeared to be "neurologically stable" at the appointment and that her condition was not emergent. SOS ordered additional diagnostic testing. Plaintiff was seen at SOS once more, on November 8, before she collapsed on November 20 and suffered, inter alia, paraplegia.

Plaintiff continued to see King between October 3 and November 11, 2016, and King was aware that plaintiff was being evaluated and treated by SOS for the issues with the Harrington rods. On October 28, King saw plaintiff for complaints of back pain and shortness of breath, which King believed were symptoms of plaintiff's chronic back pain and COPD because plaintiff had been experiencing the current episode of shortness of breath for two months. King saw plaintiff again on November 7, and plaintiff complained of shortness of breath and coughing, which King believed was related to plaintiff's COPD. King saw plaintiff for a follow-up visit on November 11 to ensure that plaintiff's condition was improving, and during that visit plaintiff made no reference to back pain.

We agree with defendants that Supreme Court erred in denying their motion. Defendants met their initial burden of establishing that the alleged departures from good and accepted medical practice were not the proximate cause of plaintiff's injuries (*see Dziwulski v Tollini-Reichert*, 181 AD3d 1165, 1165 [4th Dept 2020], *lv denied* 37 NY3d 901 [2021]; *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendants submitted the affidavit of their medical expert, who concluded that defendants' alleged departures did not cause or contribute to plaintiff's injuries. The expert's affidavit was "detailed, specific and factual in nature" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]), and " 'address[ed] each of the specific factual claims of negligence raised in . . . plaintiff's bill of particulars' " (*Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see Dziwulski*, 181 AD3d at 1166).

The affidavit of plaintiff's medical expert failed to raise a triable issue of fact in opposition inasmuch as the conclusory opinion of plaintiff's expert that defendants' "multiple deviations from the standard of care were a substantial contributing factor in causing [plaintiff's injuries]" is insufficient to raise an issue of fact concerning proximate cause (*see Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2d Dept 2006]; *see generally Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]). It is undisputed that treatment of a condition arising out of an issue with plaintiff's spinal hardware is outside the scope of defendants' practice and that referral to an orthopedic specialist at SOS was appropriate, and plaintiff's expert failed to identify what treatments or interventions were necessary, how defendants' monitoring of SOS would have necessarily resulted in those treatments or interventions being performed by the specialist, and whether the timing of any such interventions would have prevented

plaintiff’s injuries. To the extent that our dissenting colleague suggests that plaintiff’s failure to attend her appointment at SOS on October 7 evidences a failure on the part of defendants to inform her that the Harrington rods in her spine were broken, we reject that suggestion. Plaintiff’s deposition testimony demonstrates that her memory was fleeting, and her ability to recall dates and events was poor. Indeed, plaintiff was also unable to remember the names of her physicians and admitted that her memory was no longer what it used to be.

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent because, in my view, the affidavit of plaintiff’s expert raised triable issues of material fact with respect to the alleged deviation from the applicable standard of care by defendant Denise Lougee, P.A., individually, and as an officer, agent and/or employee of St. Joseph’s Medical, P.C., doing business as St. Joseph’s Physicians, defendant Julie King, M.D., individually, and as an officer, agent and/or employee of St. Joseph’s Medical, P.C., doing business as St. Joseph’s Physicians, and defendant St. Joseph’s Medical, P.C., doing business as St. Joseph’s Physicians, by and through its officers, agents and/or employees (St. Joseph’s) (collectively, defendants), as well as with respect to proximate cause, and I would vote to affirm the order denying defendants’ motion for summary judgment (*see generally Wick v O’Neil*, 173 AD3d 1659, 1660 [4th Dept 2019]). Specifically, assuming arguendo, that defendants met their initial burden on the motion with respect to both deviation from the applicable standard of care and proximate cause, I agree with Supreme Court that plaintiff’s expert raised triable issues of material fact whether defendants timely and appropriately communicated with plaintiff and her orthopedic specialist about the emergent significance of the broken Harrington rods located in her lower thoracic spine. Further, plaintiff’s expert raised triable issues of material fact whether defendants deviated from the standard of care by failing to properly recognize the significance of plaintiff’s severe shortness of breath and the relationship between that condition and her broken Harrington rods. Plaintiff’s expert also raised triable issues of fact whether those alleged deviations from the standard of care were a proximate cause of plaintiff’s injuries.

On September 9, 2016, plaintiff presented to defendants without any complaint of back pain. An X ray had been ordered three days earlier by a different medical provider, which did not reveal any new findings with respect to plaintiff’s spine. On September 26, 2016, plaintiff saw Lougee, a physician’s assistant, and reported a “new problem” with her back that had started three days earlier when she “twisted wrong.” This was Lougee’s first examination of plaintiff, after which she noted plaintiff’s “chronic” back pain, and referred plaintiff to defendant Syracuse Orthopedic Specialists, P.C., sued by and through its officers, agents and/or employees (SOS), which plaintiff was already seeing for pain management.

A week later, on October 3, 2016, plaintiff reported to Lougee that she was experiencing “acute or chronic” back pain that had

started two weeks earlier when she "was twisting and felt a 'pop.' " Lougee's notes from that visit state, inter alia, that this was a "new problem" and that, although the "problem occurs constantly," it had waxed and waned since onset. As the majority notes, Lougee ordered an X ray of plaintiff's spine, which was performed the same day and revealed that plaintiff had broken Harrington rods in her lower thoracic spine. A prior X ray from September 2016 had shown that the rods were intact at that time. Thus, the broken Harrington rods were clearly a new problem, not a chronic condition. Lougee testified that she directed St. Joseph's referral specialist to upgrade plaintiff's referral to SOS from routine to "stat" after reviewing the updated X ray that showed broken Harrington rods. It is undisputed, however, that St. Joseph's referral contained no such direction; instead it merely described the referral's priority as "[r]outine" and stated that it was for "chronic" back pain.

Lougee stated in an affidavit that she also instructed a nurse to inform plaintiff about the broken Harrington rods, but plaintiff denied being so informed. On defendants' motion, we must accept as true any evidence submitted by the movant that favors the opposing party, i.e., plaintiff's deposition testimony (*see Sopkovich v Smith*, 164 AD3d 1598, 1601 [4th Dept 2018]; *Bunk v Blue Cross & Blue Shield of Utica-Watertown*, 244 AD2d 862, 862 [4th Dept 1997]). The majority's assertion that plaintiff suffered from a faulty memory on this point is ultimately an issue for a jury to resolve (*see generally* PJI 1:8), and not a reason to reject our obligation to accept her testimony as true on summary judgment. In any event, I note that plaintiff's testimony denying having been told about the broken Harrington rods also is consistent with statements in her medical records. The records state that plaintiff elected to reschedule her appointment with SOS so she could instead see a gastroenterologist, and that, on October 17, 2016, when plaintiff finally saw a nurse practitioner who worked for SOS, namely defendant Kristin K. Parmeter, N.P., sued individually and as an officer, agent and/or employee of SOS, there was no mention of the broken Harrington rods.

After her appointment with Parmeter, plaintiff saw King on October 28, 2016. Before the visit with King, St. Joseph's requested and received a copy of Parmeter's notes. In her treatment notes for the October 28 visit, King noted that plaintiff complained of severe aching back pain that had been worsening since onset. She also noted that plaintiff, who had a preexisting condition of chronic obstructive pulmonary disease (COPD), had recently started experiencing shortness of breath. Despite knowing about plaintiff's broken Harrington rods, King made no reference to them in her treatment notes. King also was aware that Parmeter did not discuss the broken rods with plaintiff. On November 7 and 11, 2016, plaintiff again visited King and complained about her continued shortness of breath, which King attributed to COPD. Once again, King's notes from the November visits make no mention of the broken Harrington rods.

In my view, the affidavit from plaintiff's expert raises triable issues of material fact on the issues of deviation from the standard

of care and proximate cause. Specifically, plaintiff's expert opined that Lougee departed from the applicable standard of care because she failed to ensure that plaintiff was advised of the broken Harrington rods and failed to treat that condition as emergent. Plaintiff's expert also opined that Lougee departed from the standard of care because she failed to properly communicate the urgency of plaintiff's spinal condition to Parmeter and SOS. With respect to King, plaintiff's expert opined that, at the time King treated plaintiff for severe shortness of breath in October 2016, Parmeter and SOS had not treated the emergent condition of the broken Harrington rods. Thus, plaintiff's expert concluded that defendants deviated from the applicable standard of care by failing to monitor plaintiff's emergent condition during her three visits with King over a 16-day period in late October and early November 2016, and by failing to communicate with Parmeter and SOS about the failure to provide timely treatment for an emergent condition. In my view, the conflicting opinions of the parties' experts about defendants' alleged deviations from the standard of care result in "a classic battle of the experts that is properly left to a jury for resolution" (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]; *see Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018]; *see generally Schultz v Excelsior Orthopaedics, LLP* [appeal No. 2], 129 AD3d 1606, 1607 [4th Dept 2015]).

Additionally, I conclude that the court properly determined that plaintiff's expert raised triable questions of material fact on the issue of proximate cause—i.e., whether the alleged deviations from the standard of care were a substantial factor in diminishing plaintiff's chance of a better outcome. In particular, the court properly determined that there remained questions of material fact whether defendants' deviations caused the "broken rods to persist without appropriate treatment from October 3rd through November 20, 2016," which in turn caused "plaintiff to experience a period of spinal hypermobility [due to] the broken rods that[,] had [they] been timely diagnosed[,] would have been surgically corrected before compression caused permanent damage to [plaintiff's] spinal cord."

"Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]; *see Farnham v MIC Wholesale Ltd.*, 176 AD3d 1605, 1607 [4th Dept 2019]). It is equally well settled that "there may be more than one proximate cause of an injury" (*Mazella v Beals*, 27 NY3d 694, 706 [2016] [internal quotation marks omitted]). Thus, any negligence of Parmeter that may have been a proximate cause of plaintiff's worsened condition makes no difference to the issue of whether defendants' alleged deviations also were a proximate cause of that condition (*see id.*).

Defendants do not contend, nor could they contend under the circumstances here, that the alleged omissions by SOS were

" 'extraordinary . . . not foreseeable . . . or far removed from' " defendants' own alleged omissions to act as an intervening cause breaking the chain of causation between their alleged omissions and those of SOS (*id.*). Regardless, plaintiff's burden at trial would be "to show that defendant[s'] conduct was a substantial causative factor in the sequence of events that led to [plaintiff's] injury . . . [and] [t]hat showing need not be made with absolute certitude nor exclude every other possible cause of injury" (*Wright-Perkins v Lyon*, 188 AD3d 1604, 1605 [4th Dept 2020] [internal quotation marks omitted]; *see Koester v State of New York*, 90 AD2d 357, 361 [4th Dept 1982]). Simply put, in opposition to defendants' motion, plaintiff has at least raised a triable question of material fact whether she will meet that standard at trial. This is not one of the "rare cases" where proximate cause can be determined as a matter of law (*Hain*, 28 NY3d at 530).

Further guiding my analysis is our precedent in medical malpractice cases involving omission theories—i.e., cases with allegations that the defendants were negligent because they failed to perform an action (*see Wild v Catholic Health Sys.*, 85 AD3d 1715, 1717 [4th Dept 2011], *affd* 21 NY3d 951 [2013]), which is clearly present here. In medical malpractice cases alleging deviations from the standard of care based on omissions that also raise the issue of proximate cause—as is the case here—we have adopted a "loss of chance" theory of causation (*id.*; *see Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]; *Wolf v Persaud*, 130 AD3d 1523, 1524-1525 [4th Dept 2015]; *see generally* 1B NY PJI3d 2:150 at 47, 82-86 [2021]).

In such cases, where a "plaintiff alleges that the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby 'diminished [the patient's] chance of a better outcome' " (*Clune*, 142 AD3d at 1331; *see Wolf*, 130 AD3d at 1525). In those instances, a "plaintiff must present evidence from which a rational jury could infer that there was a 'substantial possibility' that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care . . . However, [a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the [patient's] chance of a better outcome . . . , as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the [patient's] chance of a better outcome" (*Clune*, 142 AD3d at 1331-1332 [internal quotation marks omitted]).

The record in *Clune* shows that the sole testimony of the plaintiff's expert regarding causation was that the chance of the plaintiff's decedent's survival would increase "the earlier in time or the closer in time that you catch a [medical problem] and are able to treat a [medical problem]." Based on that record, this Court determined that the testimony of the plaintiff's expert provided a rational basis upon which a jury could have found that the negligence

of certain defendants was the proximate cause of the decedent's death (*Clune*, 142 AD3d at 1332). Here, as noted above, plaintiff's expert stated in an affidavit that "[d]efendants' multiple deviations from the standard of care were a substantial contributing factor in causing . . . plaintiff to experience a period of spinal hypermobility caused by the broken Harrington rods that, had it been timely diagnosed, would have been surgically corrected before compression caused permanent damage to her spinal cord." Thus, when compared to the expert's testimony in *Clune*, it is inconsistent to say that the opinion of plaintiff's expert here was conclusory. Indeed, the expert's testimony here is significantly more detailed with respect to what defendants could have done sooner than the expert in *Clune*—i.e., earlier surgical correction that would not only have improved the chance of a better outcome, but could have been performed before the paralyzing compression occurred.

In *Stradtman v Cavaretta* ([appeal No. 2] 179 AD3d 1468, 1471 [4th Dept 2020]), we likewise determined that the expert opinion relied upon by the plaintiff was neither speculative nor conclusory because "it was supported by ample evidence that, if defendants had performed an exploratory laparotomy of the entire bowel, they would have discovered that resection of the dying bowel was medically necessary, and, furthermore, that resection of decedent's dying bowel would have saved her life" (*id.*). A similar point can be made here. Plaintiff's expert opined, based in part on his review of plaintiff's medical records, that had defendants properly informed plaintiff and SOS of the urgent nature of plaintiff's condition, and monitored that condition and care based on the information available to them, plaintiff would not have suffered such severe compression of her spine, which resulted in paralysis of her lower body.

The dissent in *Stradtman* rejected the opinion of the plaintiff's expert as "conclusory," observing that "the expert failed to opine how a full abdominal exploration would have prevented the clinical deterioration of plaintiff's decedent or prevented her ultimate death" (*id.* at 1472 [Peradotto, J., dissenting]). In support of that conclusion on proximate cause, the dissent in *Stradtman* cites the exact same three cases relied upon by defendants here (*Poblocki v Todoro*, 49 AD3d 1239, 1240 [4th Dept 2008]; *Sawczyn v Red Roof Inns, Inc.*, 15 AD3d 851, 852 [4th Dept 2005], *lv denied* 5 NY3d 710 [2005]; *Koeppel v Park*, 228 AD2d 288, 290 [1st Dept 1996]). I am therefore compelled to respectfully observe that, by adopting defendants' contentions regarding proximate cause, the majority's analysis here is contrary to the conclusion of *Stradtman*, and deviates from our precedent on the "loss of chance" theory of causation we have adopted in cases premised on omission theories of negligence.

As the trial Justice in *Clune*, it was my view that the testimony of the plaintiff's expert was insufficient as a matter of law on the issue of causation. I also have written about the concern that a loss of chance concept reduces a plaintiff's burden of proof on the element of proximate cause (*see* John M. Curran, *"Loss of Chance" Doctrine in Medical Malpractice Cases*, 87 NY St BJ 31 [Nov/Dec 2015])—a concern

that I note is not universally shared (*see* Alan W. Clark, *Lost Chance as a Substantial Factor In Causing Injury: Part 2*, NYLJ, Oct. 22, 2020 at 4, col 4; Thomas A. Moore & Matthew Gaier, *Revisiting New York Case Law On Loss of Chance: Part 1*, NYLJ, Apr. 4, 2017 at 3, col 1; Thomas A. Moore & Matthew Gaier, *Revisiting New York Case Law On Loss of Chance: Part 2*, NYLJ, June 6, 2017 at 3, col 1). Nevertheless, it is beyond question that this Court has adopted a "loss of chance" approach to causation in medical malpractice actions, at least with respect to omission theories.

Based on our precedent applying the "loss of chance" approach, I conclude that we should remain true to those decisions unless we are directed otherwise. Thus, I respectfully submit that plaintiff has raised triable questions of material fact on the issue of proximate cause, an issue that the Court of Appeals has held "[t]ypically . . . is one to be made by the factfinder" (*Hain*, 28 NY3d at 529).

Entered: July 16, 2021 Mark W. Bennett
Clerk of the Court

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

1206
CA 20-00171
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF NATIONAL LAWYERS GUILD,
BUFFALO CHAPTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY SHERIFF'S OFFICE,
RESPONDENT-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR RESPONDENT-APPELLANT.

NICHOLAS RAMIREZ, CIVIL LIBERTIES AND TRANSPARENCY CLINIC, UNIVERSITY AT BUFFALO SCHOOL OF LAW, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Mark A. Montour, J.), entered January 13, 2020 in a proceeding pursuant to CPLR article 78. The judgment, among other things, directed respondent to disclose certain documents to petitioner.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the amended petition insofar as it seeks disclosure of the documents having pages Bates stamped 005-008, 010-013, 014-018, 020-026, 028-029, 046-048, 052-061, 066, 071-084, 121, 140-142, and 183, the documents having pages Bates stamped 009, 019, and 027 except to the extent that those documents include emails sent on December 12, 2017 at 10:38 a.m. and 10:59 a.m., and the documents having pages Bates stamped 102-105 and 294-297 except to the extent that those documents include emails sent on August 24, 2014 at 6:27 a.m., 6:33 a.m., 8:20 a.m., and 8:37 a.m., and directing that prior to disclosure all portions of the email appearing after the entry of statistical information corresponding to the year 2016 are redacted from the documents having pages Bates stamped 305-306 and that the identifying information of private citizens is redacted from the documents having pages Bates stamped 102-105, 294-297, and 352-353, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking disclosure of various documents pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6). After conducting an in camera review, Supreme Court entered a judgment directing the disclosure of several documents, and respondent now appeals from that judgment.

"All government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]). Under that statute, an agency may deny access to records or portions thereof that, inter alia, are "inter-agency or intra-agency materials" that are not (i) "statistical or factual tabulations or data"; (ii) "instructions to staff that affect the public"; (iii) "final agency policy or determinations"; or (iv) "external audits, including but not limited to audits performed by the comptroller and the federal government" (Public Officers Law § 87 [2] [g] [i-iv]). The agency bears the burden of establishing that a document is exempt from disclosure (*see Gould*, 89 NY2d at 275; *Matter of Rome Sentinel Co. v City of Rome*, 174 AD2d 1005, 1006 [4th Dept 1991]).

Upon conducting an in camera review of the subject documents, we agree with respondent that the court erred in ordering the disclosure, pursuant to Public Officers Law § 87 (2) (g), of the documents with pages Bates stamped 005-008, 010-013, 014-018, 020-026, 028-029, 046-048, 052-061, 066, 071-084, 121, 140-142, and 183; the documents with pages Bates stamped 009, 019, and 027 except to the extent that those documents include emails sent on December 12, 2017 at 10:38 a.m. and 10:59 a.m.; and the documents with pages Bates stamped 102-105 and 294-297 except to the extent that those documents include emails sent on August 24, 2014 at 6:27 a.m., 6:33 a.m., 8:20 a.m., and 8:37 a.m. (*see generally Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 487 [2005]; *Gould*, 89 NY2d at 277; *Matter of Spring v County of Monroe*, 141 AD3d 1151, 1152 [4th Dept 2016]). In addition, although the court properly ordered disclosure of the documents with pages Bates stamped 305-306, we conclude that all portions of the email appearing after the entry of statistical information corresponding to the year 2016 should be redacted. We further conclude that the documents with pages Bates stamped 102-105, 294-297, and 352-353 should be redacted to exclude the identifying information of private citizens (*see generally* Public Officers Law § 87 [2] [b]). Contrary to respondent's contention, we conclude that the court properly ordered disclosure of the remaining documents and portions of documents submitted for our review on the ground that respondent failed to establish that Public Officers Law § 87 (2) (g) exempted them from disclosure.

Lastly, we decline to award petitioner additional attorney fees beyond those previously agreed upon by the parties.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

1207
CA 20-00024
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

CHRISTY L. ARMENTA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AARON M. PRESTON, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

CAMPBELL & ASSOCIATES, EDEN (JASON M. TELAAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JENNIFER S. ADAMS, WILLIAMSVILLE (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), entered December 26, 2019. The order granted the motion of defendant Aaron M. Preston to dismiss the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a motor vehicle accident. We conclude that Supreme Court erred in granting the motion of Aaron M. Preston (defendant) seeking to dismiss the complaint against him pursuant to CPLR 3211 (a) (5) based upon a release executed by plaintiff. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release . . . If the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]). Although, in general, "[a] release 'should never be converted into a starting point for . . . litigation . . . [,]' [a] release may be invalidated . . . for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' " (*id.*, quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]).

Here, defendant met his initial burden of establishing that he had been released from the claims against him by submitting the executed release in support of his motion, and thus the burden shifted to plaintiff " 'to show that there has been fraud, duress or some other fact which will be sufficient to void the release' " (*id.*,

quoting *Fleming v Ponziani*, 24 NY2d 105, 111 [1969]). "In assessing a motion to dismiss on the ground that an action may not be maintained because of a release (*see* CPLR 3211 [a] [5]), the allegations in the complaint 'are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in [the plaintiff's] favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light' " (*Fimbel v Vasquez*, 163 AD3d 1120, 1121 [3d Dept 2018]; *see Sacchetti-Virga v Bonilla*, 158 AD3d 783, 784 [2d Dept 2018]).

"A plaintiff seeking to invalidate a release due to fraudulent inducement must 'establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276). We agree with plaintiff that the allegations in her affidavit in opposition to the motion are sufficient to establish the elements of fraud in the inducement (*see e.g. Cain-Henry v Shot*, 194 AD3d 1465, 1466-1467 [4th Dept 2021]; *Fimbel*, 163 AD3d at 1122; *Powell v Adler*, 128 AD3d 1039, 1041 [2d Dept 2015]). We therefore reverse the order, deny the motion, and reinstate the complaint against defendant.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

20
CA 18-02033
PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF CHARLIE MIXON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GREGORY G. WICKETT, CHIEF OF POLICE,
DEPARTMENT OF POLICE, TOWN OF HAMBURG,
RESPONDENT-RESPONDENT.

CHARLIE MIXON, PETITIONER-APPELLANT PRO SE.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (DAVID S. WHITTEMORE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 19, 2018 in a CPLR article 78 proceeding. The judgment granted the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondent to comply with petitioner's request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) relating to evidence collected in a criminal action that resulted in petitioner's conviction of arson and murder charges. Specifically, in a letter, petitioner made a single request of respondent, i.e., for respondent to submit certain cotton swabs stored in evidence box number seven for forensic testing pursuant to Executive Law § 838-a (1) (d). Petitioner now appeals from a judgment granting respondent's motion seeking dismissal of the petition pursuant to CPLR 3211 (a) (1) and 7804 (f). We affirm.

To the extent that petitioner's contentions on appeal relate to the cotton swabs stored in evidence box number seven, we reject petitioner's contentions. In order to meet his burden on his motion, respondent was required to provide documentary evidence that "utterly refute[d] [petitioner's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Matter of Nassau Community Coll. Fedn. of Teachers, Local 3150 v Nassau Community Coll.*, 127 AD3d 865, 866-867 [2d Dept 2015]). Here, in support of his motion, respondent established that Executive Law § 838-a deals with sexual

offense evidence kits, whereas the only cotton swabs in evidence box number seven had been used to collect a "grease-like substance [found] on the washer/dryer" in the home of the victims, and thus no sexual offense evidence existed in petitioner's criminal case. Because respondent was "under no obligation to furnish [materials that he did] not possess" (*Matter of Rivette v District Attorney of Rensselaer County*, 272 AD2d 648, 649 [3d Dept 2000]; *see generally Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388 [2006]), the evidence submitted by respondent "utterly refute[d] [petitioner's] factual allegations" with respect to the cotton swabs in evidence box number seven, thereby "conclusively establishing a defense as a matter of law" thereto (*Goshen*, 98 NY2d at 326; *see generally Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]).

To the extent that petitioner's contentions on appeal relate to allegations in the petition concerning swabs allegedly taken at the autopsy of one of the victims, petitioner's contentions are not properly before us. Inasmuch as petitioner's FOIL request to respondent did not include autopsy swabs, he failed to exhaust his administrative remedies concerning that purported evidence, and we "have no discretionary power to reach" petitioner's contentions concerning it (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]; *see Matter of Di Pietro v State Ins. Fund*, 206 AD2d 211, 214-215 [4th Dept 1994]; *see generally* Public Officers Law § 89 [4] [b]). Finally, we conclude that "[p]etitioner's [*Brady*] contentions were not raised in the petition and are thus not properly before us" (*Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]; *see Matter of Pennington v Clark*, 307 AD2d 756, 758 [4th Dept 2003]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

23
CA 20-00683
PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

IRENE SHEETS AND JAMES E. SHEETS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ALAINA MARIE KILBURY AND JEFFEREY J. KILBURY,
DEFENDANTS-RESPONDENTS.

MICHAEL P. STACY, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered October 22, 2019. The judgment, among other things, granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the significant limitation of use, permanent consequential limitation of use and significant disfigurement categories of serious injury within the meaning of Insurance Law § 5102 (d) and granting that part of the cross motion for partial summary judgment on the issue of negligence, and as modified the judgment is affirmed without costs.

Memorandum: Irene Sheets (plaintiff) and her husband, James E. Sheets (collectively, plaintiffs), commenced this action seeking to recover damages for injuries plaintiff allegedly sustained when the vehicle that she was operating was rear-ended by a vehicle driven by Alaina Marie Kilbury (defendant) and owned by Jefferey J. Kilbury (collectively, defendants). Plaintiffs appeal from a judgment that, inter alia, granted defendants' motion for summary judgment dismissing the complaint. We agree with plaintiffs that Supreme Court erred in granting defendants' motion to the extent that the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury within the meaning of the significant limitation of use, permanent consequential limitation of use, and significant disfigurement categories of serious injury (*see* Insurance Law § 5102 [d]), and we therefore modify the judgment accordingly. We note that plaintiffs have abandoned their claims with respect to the 90/180-day and permanent loss of use categories of serious injury (*see Ciesinski*

v Town of Aurora, 202 AD2d 984, 984 [4th Dept 1994]).

Defendants failed to meet their initial burden on their motion of establishing that plaintiff did not sustain a serious injury as a result of the motor vehicle accident. On their motion, defendants contended that the alleged injuries sustained in the accident were preexisting and were not causally related to the accident (*see Schreiber v Krehbiel*, 64 AD3d 1244, 1245 [4th Dept 2009]). Defendants submitted the affirmed report of a physician who conducted an examination of plaintiff on behalf of defendants and opined that plaintiff's injuries were degenerative in nature and predated the accident in question. Defendants' physician, however, did not review plaintiff's medical imaging study from prior to the accident in question (*cf. Roger v Soos*, 175 AD3d 937, 938 [4th Dept 2019]), and did not address the possibility that plaintiff's condition was aggravated or exacerbated by the accident (*see Karounos v Doulalas*, 153 AD3d 1166, 1167 [1st Dept 2017]). In addition, the physician did not indicate that plaintiff had any complaints of cervical pain or limited range of motion in her cervical spine prior to the subject accident (*cf. Boroszko v Zylinski*, 140 AD3d 1742, 1744 [4th Dept 2016]; *see also Endres v Shelba D. Johnson Trucking, Inc.*, 60 AD3d 1481, 1482-1483 [4th Dept 2009]). Thus, defendants " 'failed to submit evidence establishing as a matter of law that the injuries were entirely [preexisting] . . . and were not exacerbated by the accident in question' " (*Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]). In light of defendants' failure to meet their initial burden on the motion, there is no need for us to consider the sufficiency of plaintiffs' opposition thereto (*see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]).

We also agree with plaintiffs that the court should have granted that part of their cross motion for partial summary judgment on the issue of negligence, and we therefore further modify the judgment accordingly. Plaintiffs met their initial burden on their cross motion by establishing that the vehicle plaintiff was operating was rear-ended by the vehicle operated by defendant while plaintiff's vehicle was stopped in traffic, which presented a prima face case of negligence on the part of defendant (*see Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790 [4th Dept 2000]). In opposition, defendants failed to submit the requisite nonnegligent explanation for the collision (*see Rodriguez v First Student, Inc.*, 163 AD3d 1425, 1427 [4th Dept 2018]). Under the circumstances of this case, the "[e]vidence that plaintiff's lead vehicle was forced to stop suddenly in heavy traffic" does not constitute a nonnegligent explanation for the collision inasmuch as "it can easily be anticipated that cars up ahead will make frequent stops in [heavy] traffic" (*Ruzycki v Baker*, 301 AD2d 48, 50 [4th Dept 2002] [internal quotation marks omitted]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

30

KA 17-02231

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN HUDDLESTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 28, 2017. The judgment convicted defendant upon a jury verdict of burglary in the first degree, assault in the second degree, criminal possession of a weapon in the third degree, aggravated criminal contempt 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 following a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [3]) and assault in the second degree (§ 120.05 [2]), arising out of an incident in which he stabbed his wife (victim). We affirm.

Defendant contends that the evidence is not legally sufficient to support the conviction of burglary in the first degree because the People failed to establish that defendant entered or remained in the dwelling unlawfully. We reject that contention. There was ample evidence from which a jury could find beyond a reasonable doubt that defendant unlawfully entered the dwelling through a bedroom window (*see People v Reed*, 22 NY3d 530, 534 [2014], *rearg denied* 23 NY3d 1009 [2014]). Viewing the evidence in light of the elements of burglary in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although the victim, testifying for the defense, stated that she invited defendant into the dwelling, the jury "was entitled to discredit the exculpatory testimony" and credit the contrary testimony of other eyewitnesses (*People v Twillie*, 155 AD3d 1686, 1687 [4th Dept

2017], *lv denied* 30 NY3d 1120 [2018]; *see People v Robinson*, 142 AD3d 1302, 1304 [4th Dept 2016], *lv denied* 28 NY3d 1126 [2016]; *People v Morrison*, 48 AD3d 1044, 1045 [4th Dept 2008], *lv denied* 10 NY3d 867 [2008]).

Defendant also contends that the evidence is not legally sufficient to support the conviction of assault in the second degree because the People failed to establish that the victim sustained a physical injury. We reject that contention. Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Whether the 'substantial pain' necessary to establish an assault charge has been proved is generally a question for the trier of fact" (*People v Rojas*, 61 NY2d 726, 727 [1984]). Here, although the victim gave no testimony concerning the degree of pain she felt, the People presented the testimony of the victim's treating physician regarding the painful nature of the injuries. The People also presented photographic evidence depicting the stab wounds and the blood at the scene of the assault. Viewing that evidence in the light most favorable to the People, we conclude that there is a "valid line of reasoning and permissible inferences" to support the jury's conclusion that the victim experienced substantial pain (*People v Williams*, 84 NY2d 925, 926 [1994]). Additionally, viewing the evidence in light of the elements of the crime of assault in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence with respect to physical injury (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*id.*).

We reject defendant's further contention that County Court erred in denying his *Batson* challenge with respect to the prosecutor's exercise of a peremptory strike on a prospective juror. The prosecutor explained that he challenged the prospective juror because, among other things, the prospective juror was not forthcoming about his mother's criminal history. Although defendant contends that the prospective juror was in fact forthcoming, "[t]he court was in the best position to evaluate the demeanor of the prospective juror, the prosecutor, and defense counsel" (*People v Herrod*, 174 AD3d 1322, 1324 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019]). "The court's determination whether a proffered race-neutral reason for striking a prospective juror is pretextual is accorded great deference on appeal" (*People v Norman*, 183 AD3d 1240, 1241 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]; *see People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]), and we see no reason to disturb that determination here. Defendant failed to preserve for our review his remaining contentions that the prosecutor's explanations were pretextual (*see People v Cole*, 179 AD3d 1505, 1506 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]; *People v Simmons*, 119 AD3d 1343, 1343 [4th

Dept 2014], *lv denied* 24 NY3d 964 [2014], *reconsideration denied* 24 NY3d 1088 [2014]; *People v Holloway*, 71 AD3d 1486, 1486-1487 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010]). In any event, those contentions lack merit.

Contrary to defendant's further contention, the court properly denied defendant's motion to dismiss the indictment on speedy trial grounds (*see* CPL 30.30). Although the People acquired new DNA evidence from the victim after they stated their readiness for trial, the People could have proceeded to trial without the DNA evidence by presenting the physical evidence and the testimony of eyewitnesses, and thus we conclude that the People's statement of readiness was not illusory (*see People v Hewitt*, 144 AD3d 1607, 1607-1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Watkins*, 17 AD3d 1083, 1083 [4th Dept 2005], *lv denied* 5 NY3d 771 [2005]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

37
CA 19-02309
PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

MICHAEL J. TARSEL AND SUZANNE M. TARSEL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES J. TROMBINO, DEFENDANT-APPELLANT.

PULLANO & FARROW, ROCHESTER (LANGSTON D. MCFADDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 10, 2019. The judgment, among other things, permanently enjoined defendant from interfering with plaintiffs' right to maintain and make repairs of their easement.

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

Memorandum: Plaintiffs have an easement over a private road and strip of land owned by defendant, which provides access to their driveway and property. The condition of the strip of land deteriorated over time, and plaintiffs approached defendant about paving the strip to improve vehicular access to their driveway. Defendant raised concerns that paving the strip would, inter alia, cause water to drain onto his property, and the parties were unable to reach an agreement. Despite the lack of an agreement, plaintiffs went ahead and had the strip paved anyway. In response, defendant had the new asphalt removed the day after it was installed.

Plaintiffs thereafter commenced this action seeking, inter alia, money damages and a permanent injunction restraining defendant from interfering with future maintenance and repair of the easement. Following a bench trial, Supreme Court, inter alia, determined that the paving of the easement was necessary to facilitate plaintiffs' use of the easement for its intended purposes and enjoined defendant from interfering with plaintiffs' right to repair and maintain the easement. Defendant appeals, and we affirm.

We reject defendant's contention that the verdict is against the weight of the evidence. "[T]he decision of the fact-finding court

should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Livingston v State of New York*, 129 AD3d 1660, 1660 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]). Based on our review of the record, we conclude that a fair interpretation of the evidence supports the court's determination that plaintiffs' right of ingress and egress over the easement to their driveway had been impaired, that plaintiffs had the right to reasonably repair the easement by paving the 200-square-foot portion of the easement area, that defendant interfered with plaintiffs' exercise of that right, and that paving the easement would not create any new or additional burdens on defendant's property (*see Lopez v Adams*, 69 AD3d 1162, 1163-1164 [3d Dept 2010]; *Ickes v Buist*, 68 AD3d 823, 824 [2d Dept 2009]; *Bilello v Pacella*, 223 AD2d 522, 522 [2d Dept 1996]; *cf. Boice v Hirschbihl*, 128 AD3d 1215, 1217-1218 [3d Dept 2015]). In our view, the court struck the proper balance between plaintiffs' need to remediate the easement and the burden that such remediation would impose on defendant (*see Lopez*, 69 AD3d at 1164; *see generally Tarsel v Trombino*, 167 AD3d 1462, 1463 [4th Dept 2018]).

We also reject defendant's contention that the court accorded too much weight to the testimony of plaintiffs' expert. The court's assessment of conflicting expert testimony at trial is entitled to deference and will not be disturbed where, as here, it is supported by the record (*see Matter of State of New York v Connor*, 134 AD3d 1577, 1577-1578 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]; *Kirkpatrick v Timber Log Homes*, 190 AD2d 1072, 1072 [4th Dept 1993]; *see generally Doviak v Finkelstein & Partners, LLP*, 137 AD3d 843, 847 [2d Dept 2016]).

Defendant contends that the court abused its discretion to the extent that it precluded his expert from observing the trial testimony of plaintiffs' expert. We reject that contention inasmuch as defendant was provided with pretrial disclosure of that expert's calculations and did not otherwise demonstrate how he was prejudiced by the court's ruling (*see generally People v Todd*, 306 AD2d 504, 504 [2d Dept 2003], *lv denied* 1 NY3d 581 [2003]; *People v Leggett*, 55 AD2d 990, 991 [3d Dept 1977]; Jerome Prince, Richardson on Evidence § 6-203 [Farrell 11th ed 1995]).

Contrary to defendant's further contention, the comments and conduct of the court during trial, while at times invasive, did not demonstrate that the court was biased against defendant (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]). Recognizing that "[t]he trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*id.* [internal quotation marks omitted]; *see Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189, 189 [1st Dept 2005], *lv dismissed* 5 NY3d 820 [2005]; *Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1st Dept 1995]), we conclude that the court did not

abuse its discretion in directing a witness to answer questions or in expediting and clarifying the testimony of defendant's expert engineer (*see Rivera v Time Warner Cable of N.Y. City*, 228 AD2d 661, 661 [2d Dept 1996]). We nonetheless take this opportunity to remind the court that it must strictly avoid taking on "either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]; *see Matter of Wright v Perry*, 169 AD3d 910, 913 [2d Dept 2019], *lv denied* 33 NY3d 906 [2019]).

To the extent defendant contends that he was prejudiced by the court's alleged ex parte communication with one of the plaintiffs during a recess, we conclude that his challenge is unpreserved (*see Matter of Diaz v Kleinknecht Elec.*, 123 AD3d 1304, 1306 [3d Dept 2014]; *see generally* 22 NYCRR 100.3 [b] [6]). In any event, because the alleged ex parte communication related to neither the substance of that plaintiff's testimony nor the court's determination, we conclude that defendant suffered no prejudice as a result of the court's action (*see Matter of Tamika B. v Pamela C.*, 187 AD3d 1332, 1334 [3d Dept 2020]).

Finally, defendant's contention that the court erred in staying its determination of plaintiffs' request for attorneys' fees and punitive damages is not properly before us because it is not part of the judgment on appeal (*see generally* CPLR 5515 [1]; *Matter of National Fuel Gas Distrib. Corp. v City of Jamestown*, 108 AD3d 1045, 1046 [4th Dept 2013]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

40
CA 20-00749
PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF THE APPLICATION UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW BY KEY BANK, ALSO
KNOWN AS 3920 MAIN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, RESPONDENT-RESPONDENT.

COUNTY OF ERIE, INTERVENOR-RESPONDENT,
AND AMHERST CENTRAL SCHOOL DISTRICT, INTERVENOR.

WOLFGANG & WEINMANN, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR
PETITIONER-APPELLANT.

JOANNE A. SCHULTZ, TOWN ATTORNEY, WILLIAMSVILLE, FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered November 27, 2019 in proceedings pursuant to RPTL article 7. The order, among other things, dismissed the petitions challenging tax assessments for tax years 2010-2011, 2012-2013, 2013-2014, and 2014-2015.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part, reinstating the petitions challenging the assessments for tax years 2010-2011, 2013-2014, and 2014-2015, and granting the cross motion, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced these proceedings pursuant to RPTL article 7, seeking, as relevant on appeal, to challenge the tax assessments on a commercial property located in the Town of Amherst for the tax years 2010-2011, 2013-2014, and 2014-2015. The matter proceeded to trial before a Referee, who issued a report recommending that the petitions be dismissed. Respondent and intervenors joined in a motion seeking an order confirming the Referee’s report and directing entry of a judgment in their favor, and petitioner cross-moved to modify the Referee’s report and have Supreme Court make a judicial determination based on the transcript and evidence submitted. The court granted the motion, denied the cross motion, and dismissed the petitions, concluding that petitioner failed to meet its threshold burden of providing substantial evidence to rebut the presumption of validity attached to the assessments.

"In an RPTL article 7 proceeding, a rebuttable presumption of validity attaches to the valuation of property made by the taxing authority," and "a petitioner challenging the accuracy of a tax valuation has the initial burden to rebut the presumption by introducing substantial evidence that the property was overvalued" (*Matter of Roth v City of Syracuse*, 21 NY3d 411, 417 [2013]; *see Matter of Buscaglia v Assessor, Town of Hamburg*, 162 AD3d 1709, 1710 [4th Dept 2018]). "[T]he 'substantial evidence' standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation. The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 188 [1998]). That burden is lower than "proof by 'a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt' " (*id.*, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]), and a taxpayer most often attempts to meet it by submitting a " 'detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser' " (*Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 175 [2014], quoting *Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes*, 92 NY2d 192, 196 [1998]). An appraisal "should be disregarded[, however,] when a party violates [22 NYCRR] 202.59 (g) (2) by failing to adequately 'set forth the facts, figures and calculations supporting the appraiser's conclusions' " (*id.* at 176; *see Pritchard v Ontario County Indus. Dev. Agency*, 248 AD2d 974, 974 [4th Dept 1998], *lv denied* 92 NY2d 803 [1998]).

Here, the court erred in concluding that petitioner failed to present substantial evidence of overvaluation and thus failed to rebut the presumption of validity. Petitioner's appraiser presented a detailed analysis of the property "utilizing two recognized and accepted methodologies—the sales comparison approach and the capitalization of income approach," and he supplied "documentation and calculations to support the underlying methodologies and the ultimate valuation" (*Matter of United Parcel Serv. v Assessor of Town of Colonie*, 42 AD3d 835, 838 [3d Dept 2007]; *see Matter of Home Depot U.S.A. Inc. v Assessor of the Town of Queensbury*, 129 AD3d 1427, 1428 [3d Dept 2015], *lv denied* 26 NY3d 915 [2016]; 22 NYCRR 202.59 [g] [2]). Although some aspects of his valuation methodology were disputed, that fact "goes to the weight to be accorded the appraisal[]" rather than to the threshold issue whether petitioner produced substantial evidence to rebut the presumption (*Matter of Techniplex III v Town and Vil. of E. Rochester*, 125 AD3d 1412, 1413 [4th Dept 2015] [internal quotation marks omitted]; *see FMC Corp.*, 92 NY2d at 188; *Matter of OCG L.P. v Board of Assessment Review of Town of Owego*, 79 AD3d 1224, 1226 [3d Dept 2010]). Thus, we modify the order by denying the motion with respect to the petitions challenging the assessments for tax years 2010-2011, 2013-2014, and 2014-2015, reinstating those petitions, and granting the cross motion, and we remit the matter to Supreme Court to " 'weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the

evidence that [the] property has been overvalued’ ” (*Buscaglia*, 162 AD3d at 1711, quoting *FMC Corp.*, 92 NY2d at 188).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

42
CA 20-00733
PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

KELLY DEPCZYNSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOM SCHUSTER AND SCHUSTER CONSTRUCTION, LLC,
DEFENDANTS-APPELLANTS.

DAVID W. POLAK ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT E. WEIG, LANCASTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered December 16, 2019. The order, among other things, granted plaintiff's motion for summary judgment and denied defendants' cross motion for summary judgment.

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

Memorandum: Plaintiff commenced this action alleging that defendants breached the parties' contract for, inter alia, removal and replacement of plaintiff's front porch by failing to replace an existing porch foundation footer (footer) with one that was set at a depth of 42 inches below grade as required by the New York State Building Code (building code). Plaintiff alleged that she could not move forward with any other aspect of the project until the foundation was removed and reinstalled at a depth complying with the building code. During the course of litigation, the parties entered into a stipulation and settlement agreement pursuant to which they would excavate the area adjacent to the front porch to ascertain whether the footer was placed at the appropriate depth "from grade." All parties were present at the excavation, and all maintained that the excavation revealed that the stipulation and settlement agreement should be enforced in their favor. Defendants now appeal from an order that, inter alia, granted plaintiff's motion for summary judgment enforcing the stipulation and settlement agreement in her favor and denied defendants' cross motion insofar as it sought enforcement of the stipulation and settlement agreement in their favor. We affirm.

We conclude that Supreme Court properly determined that plaintiff met her initial burden on her motion by submitting the affidavits of four experts who personally observed and measured the excavated footer and determined that it was less than 42 inches in depth (*see generally*

Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). All four experts, one of whom was the code enforcement officer tasked with approving the project, opined that the footer was not placed at a depth that complied with the building code, thereby establishing that the stipulation and settlement agreement should be enforced in plaintiff's favor.

We further conclude that defendants failed to raise an issue of fact sufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition to the motion, defendants submitted, inter alia, an affidavit from an expert—a retired town code enforcement official—who opined, based on his review of photographs of the excavated footer, that the footer had been placed at a depth of more than 42 inches and therefore complied with the building code. That affidavit was insufficient to raise a triable issue of fact with respect to the depth of the footer. Although an expert may typically base his or her conclusions on a review of photographs without personally conducting a physical inspection (*see Pereira v Quogue Field Club of Quogue, Long Is.*, 71 AD3d 1104, 1106 [2d Dept 2010]), that rule does not apply where an expert bases precise *measurements* solely on photographs without actually measuring the object in question (*see Davidson v Sachem Cent. School Dist.*, 300 AD2d 276, 277 [2d Dept 2002]). In that situation, "there are too many variables for the expert to determine exact measurements of [the footer] from the photographs" (*id.*). Thus, because it is undisputed that defendants' expert did not personally observe or measure the depth of the footer, we conclude that the court properly determined that defendants did not raise an issue of fact in opposition to the motion.

In light of our determination that the court properly granted plaintiff's motion for summary judgment, defendants' contention that the court erred in denying their cross motion insofar as it sought summary judgment enforcing the stipulation and settlement agreement in their favor is without merit.

Plaintiff's contention that the court should have granted that part of her motion seeking to impose sanctions on defendants under 22 NYCRR 130-1.1 is not properly before us because plaintiff did not cross-appeal from the order insofar as it implicitly denied her request for that relief (*see generally* CPLR 5515 [1]; *Matter of McGraw v Town Bd. of Town of Villenova*, 186 AD3d 1014, 1016 [4th Dept 2020]; *Webber v Webber*, 145 AD3d 1499, 1503 [4th Dept 2016], *lv denied* 29 NY3d 915 [2017]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 17-00042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY PERKINS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered July 20, 2016. The judgment convicted defendant upon a jury verdict of rape in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the third degree (Penal Law § 130.25 [2]) and endangering the welfare of a child (§ 260.10 [1]). We affirm.

Contrary to defendant's contention, County Court properly denied his motion to preclude identification testimony without holding either a *Wade* or a *Rodriguez* hearing. Initially, we conclude that the court did not err in refusing to hold a *Wade* hearing. "[A] court may summarily deny a *Wade* hearing (and hence no CPL 710.30 notice would be required) where the court concludes that, as a matter of law, the identifying, civilian witness knew the 'defendant so well that no amount of police suggestiveness could possibly taint the identification' " (*People v Boyer*, 6 NY3d 427, 432 [2006]). Here, the court did not err in determining that the witness in question, i.e., the complainant, who had dated defendant for approximately two months during which time she turned 15 years old, was so familiar with defendant that there was "little or no risk that police suggestion could lead to a misidentification" (*People v Carter*, 57 AD3d 1017, 1017 [3d Dept 2008], *lv denied* 12 NY3d 781 [2009] [internal quotation marks omitted]; *see People v Rodriguez*, 79 NY2d 445, 449 [1992]; *People v Hines*, 132 AD3d 1385, 1386-1387 [4th Dept 2015], *lv denied* 26 NY3d 1109 [2016]).

With respect to whether the court should have held a *Rodriguez* hearing, we note that, in general, a trial court must hold an evidentiary hearing before making the determination that defendant is so well known to a witness that " 'suggestiveness' is not a concern" (*People v Gissendanner*, 48 NY2d 543, 552 [1979]; *see Rodriguez*, 79 NY2d at 453). Here, however, testimony from the first trial, which ended in a mistrial, established that there was "a mutual relationship" between defendant and the witness (*Rodriguez*, 79 NY2d at 453). Indeed, such testimony established that the two had engaged in sexual relations on several occasions, that the witness had introduced defendant to her mother, and that a police officer had observed the witness sitting and talking with defendant on a prior occasion. As a result, the court was not required to hold a *Rodriguez* hearing before making the determination that no *Wade* hearing was warranted (*see id.*; *People v Carmona*, 185 AD3d 600, 602 [2d Dept 2020]; *see also People v Bennett*, 292 AD2d 626, 626 [2d Dept 2002], *lv denied* 98 NY2d 729 [2002]).

We reject defendant's further contention that he was deprived of effective assistance of counsel because a nonlawyer participated in his trial. Where, as here, there was active participation by a licensed attorney throughout a defendant's trial, "a conviction should not be reversed in the absence of a showing of prejudice" arising from the participation of a nonlawyer (*People v Jacobs*, 6 NY3d 188, 190 [2005]). Inasmuch as defendant has not established any prejudice from the minor participation by the nonlawyer—a law school graduate who had passed the bar examination, was awaiting admission to the bar, and was working on the case pursuant to a limited practice order issued by this Court—we conclude that the nonlawyer's participation does not warrant reversal (*see generally id.* at 190-191).

Defendant next contends that certain evidence was admitted in violation of *People v Molineux* (168 NY 264 [1901]), i.e., testimony by the complainant that she and defendant used crack cocaine together, and testimony by a police investigator regarding defendant's statement that he had engaged in sex with numerous women. Contrary to defendant's contention, the testimony regarding drug use was not *Molineux* evidence, and thus its admission does not violate that exclusionary rule, "inasmuch as the evidence at issue related directly to a crime charged herein, i.e.," endangering the welfare of a child (*People v Figueroa*, 15 AD3d 914, 915 [4th Dept 2005]; *see generally People v Hymes*, 174 AD3d 1295, 1296 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Frumusa*, 29 NY3d 364, 370 [2017], *rearg denied* 29 NY3d 1110 [2017]). In addition, the evidence that defendant told a police investigator that he had engaged in sex with "so many women" was also not *Molineux* evidence. "*Molineux* analysis is limited to the introduction of a prior uncharged crime or a prior bad act. It should not be used to evaluate a prior consensual sexual act between adults" (*People v Brewer*, 28 NY3d 271, 276 [2016]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). It is well settled that

"[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]). Contrary to defendant's contention, the complainant's trial testimony "was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]), and we see no basis for disturbing the jury's credibility determinations in this case (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the trial evidence rendered count three of the indictment, i.e., the rape count of which he was convicted, duplicitous. Even assuming, arguendo, that defendant's request to the court to charge the jury with respect to the specific date of each offense charged in the indictment was sufficient to preserve for our review his contention (*cf. People v Rivera*, 257 AD2d 425, 425 [1st Dept 1999], *lv denied* 93 NY2d 901 [1999]), we reject it. Although the complainant described several incidents of sexual contact with defendant, she was "quite specific in describing the . . . distinct occasion[]" charged in the indictment with respect to count three, and thus "it was not 'nearly impossible to determine the particular act upon which the jury reached its verdict' as to [that] count[]" (*People v Tomlinson*, 53 AD3d 798, 799 [3d Dept 2008], *lv denied* 11 NY3d 835 [2008]; *see People v Spencer*, 119 AD3d 1411, 1412-1413 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]).

Defendant also contends that he was deprived of a fair trial based on several instances of prosecutorial misconduct. Contrary to defendant's contention, we conclude that "the prosecutor [did not] vouch for the credibility of the People's witnesses. Faced with defense counsel's focused attack on their credibility, the prosecutor was clearly entitled to respond by arguing that the witnesses had, in fact, been credible . . . An argument by counsel that his [or her] witnesses have testified truthfully is not vouching for their credibility" (*People v Overlee*, 236 AD2d 133, 144 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *see People v Roman*, 85 AD3d 1630, 1632 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]). Additionally, after the court sustained defendant's objections to the prosecutor's comments about the complainant's state of mind, defendant failed to request curative instructions or move for a mistrial. Consequently, defendant failed to preserve for our review his contention that he was deprived of a fair trial by those comments (*see People v Logan*, 178 AD3d 1386, 1388 [4th Dept 2019], *lv denied* 35 NY3d 1028 [2020]; *see generally People v Heide*, 84 NY2d 943, 944 [1994]). In any event, we conclude that all of the prosecutor's challenged comments on summation "were 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Easley*, 124 AD3d 1284, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015]; *see People v Doty*, 161 AD3d 1511, 1513 [4th Dept 2018], *lv denied* 31 NY3d 1147 [2018]; *People v Lewis*, 154 AD3d 1329, 1331 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). Furthermore, we reject defendant's contention that he was deprived of a fair trial because the prosecutor twice used the term

"the victim" during voir dire. The use of the word victim was "so minimal in the context of the trial as a whole that we perceive no possibility that the presumption of innocence was undermined or that defendant was deprived of a fair trial" (*People v Horton*, 181 AD3d 986, 990 n 1 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 20-01130
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODNEY NEVINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 8, 2019. The judgment convicted defendant upon a nonjury verdict of criminal possession of a controlled substance in the third degree, criminally using drug paraphernalia in the second degree (two counts) and obstructing governmental administration 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 following a nonjury trial of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. We reject those contentions.

Although defendant contends that the People failed to establish to a moral certainty that he possessed the drugs and drug paraphernalia found in a vehicle parked outside of his residence, it is well settled that, even though the trier of fact is "bound to consider the evidence in light of the statutory 'moral certainty' standard, the function of an appellate court reviewing the [sufficiency of the evidence] is limited to assessing whether the inference of wrongful intent logically flowed from the proven facts and whether any valid line of reasoning could lead a rational trier of fact, viewing the evidence in the light most favorable to the People, to conclude that the defendant committed the charged crime" (*People v Norman*, 85 NY2d 609, 620 [1995]; *see People v Chadick*, 162 AD3d 1662, 1663 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018]).

"Where, as here, there is no evidence that defendant actually

possessed the [drugs and drug paraphernalia], the People must establish that defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007] [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573-574 [1992]; *People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]). We conclude that there is a valid line of reasoning and permissible inferences to support County Court's conclusion that defendant had constructive possession of the drugs and paraphernalia found in the vehicle (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The keys to the vehicle were found next to defendant, who was alone in his residence. He admitted that the keys on the key chain were his "car keys," and his personal documents were found inside the vehicle in proximity to the contraband, which was in plain view (*see People v Velez*, 78 AD3d 1522, 1522 [4th Dept 2010]; *Mattison*, 41 AD3d at 1225; *cf. People v Hunt*, 185 AD3d 1531, 1532-1533 [4th Dept 2020]).

We further conclude, after viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We note that the certificate of conviction incorrectly reflects that defendant was sentenced to five years of postrelease supervision, and it must therefore be amended to reflect that he was sentenced to three years of postrelease supervision (*see People v Tumolo*, 149 AD3d 1544, 1544 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Smoke*, 43 AD3d 1332, 1333 [4th Dept 2007], *lv denied* 9 NY3d 1039 [2008]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

100
KA 20-00073
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD BAEK, DEFENDANT-APPELLANT.

EMILY E. STOUFER-QUINN, NUNDA, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered October 17, 2019. The judgment convicted defendant upon a jury verdict of rape in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Allegany County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him following a jury trial of rape in the third degree (Penal Law § 130.25 [3]), defendant contends, inter alia, that the indictment, as amplified by the bill of particulars, is facially duplicitous and, further, that the indictment was rendered duplicitous by the testimony at trial. Inasmuch as defendant did not object to the trial testimony in question that rendered the indictment duplicitous, his latter contention is not preserved for our review (*see People v Allen*, 24 NY3d 441, 448-449 [2014]). Although defendant did preserve his contention concerning facial duplicity by seeking dismissal of the indictment on that ground in the pretrial omnibus motion (*see People v Kalabakas*, 183 AD3d 1133, 1135 [3d Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *cf. People v Box*, 145 AD3d 1510, 1512-1513 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017]), we are unable to address that contention because County Court failed to rule on that part of defendant's omnibus motion (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 197-198 [2011]).

The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, *or not ruled upon*, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999] [emphasis added]; *see People v Watkins*, 179 AD3d 1467, 1468 [4th Dept 2020]), "and thus the court's failure to rule on the motion cannot be deemed a denial thereof" (*Watkins*, 179 AD3d at 1468; *see People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020]). We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on that part of defendant's omnibus motion.

Defendant's contention that his conviction is not supported by legally sufficient evidence is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]; *see also People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

104
CA 20-00494
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

SHAUN BRENNAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VLADYSLAV DEMYDYUK, LIA DEMYDYUK AND LIA DEMYDYUK, DOING BUSINESS AS DDT TRANSPORT, DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN TROP, ROCHESTER, BARTH SULLIVAN BEHR, LLP, BUFFALO (PHILIP C. BARTH, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS VLADYSLAV DEMYDYUK AND LIA DEMYDYUK.

HURWITZ & FINE P.C., BUFFALO (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-APPELLANT LIA DEMYDYUK, DOING BUSINESS AS DDT TRANSPORT.

FARACI LANGE, LLP, ROCHESTER (LESLEY E. NIEBEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered February 13, 2020. The order, insofar as appealed from, granted in part the motion of plaintiff to compel discovery.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and those parts of the motion with respect to defendants’ cell phone records and records for food and beverage purchases are denied.

Memorandum: Plaintiff commenced this negligence action seeking to recover damages for injuries he allegedly sustained when defendant Vladyslav Demydyuk, while operating a pickup truck that was registered to defendant Lia Demydyuk (collectively, Demydyuks) and doing so in the scope of his employment with the permission of defendant Lia Demydyuk, doing business as DDT Transport (DDT), collided with a vehicle being operated by plaintiff. The Demydyuks and DDT each appeal from an order insofar as it granted plaintiff’s motion to compel discovery in part by ordering that defendants produce all cell phone records during a specified period and an authorization to obtain such records, and by further ordering that defendants produce any and all receipts, billing records, credit card receipts and business records for food and beverages purchased on the date of the collision and an authorization to obtain such records. Defendants contend that Supreme Court erred in granting those parts of plaintiff’s motion with respect to the cell phone records and records for food and beverage

purchases because plaintiff failed to show that the requested records were material and necessary to his prosecution of the action. We agree, and we therefore reverse the order insofar as appealed from.

"Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " (*Forman v Henkin*, 30 NY3d 656, 661 [2018]). The words " 'material and necessary' " are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Forman*, 30 NY3d at 661). "A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant—regardless of whether discovery is sought from another party . . . or a nonparty" (*Forman*, 30 NY3d at 661).

In this case, plaintiff repeatedly asserted in his discovery requests and motion papers that the requested records were relevant to proving that Vladyslav was the operator of the pickup truck involved in the collision. However, " '[t]he issues framed by the pleadings determine the scope of discovery in a particular action' " (*Kern v City of Rochester*, 261 AD2d 904, 905 [4th Dept 1999]) and, here, there was no dispute regarding the identity of the operator of the pickup truck inasmuch as the Demydyuks had already admitted in their answer that Vladyslav was driving the pickup truck at the time of the accident (*cf. Mendives v Curcio*, 174 AD3d 796, 797 [2d Dept 2019]). Given the prior admission establishing that Vladyslav was the operator of the pickup truck, plaintiff "failed to meet the threshold for disclosure by showing that [his] request for [defendants'] cell phone [records and records for food and beverage purchases] was reasonably calculated to yield information material and necessary to [his action]" (*Evans v Roman*, 172 AD3d 501, 502 [1st Dept 2019]; *see Long Is. Coll. Hosp. v Whalen*, 55 AD2d 792, 792-793 [3d Dept 1976]; *see also Brooklyn Bur. of Social Serv. & Children's Aid Socy. v Transamerica Ins. Co.*, 28 AD2d 841, 841 [1st Dept 1967]). We agree with defendants that the additional reason asserted by plaintiff in support of his motion was insufficient to meet his threshold burden (*see generally Forman*, 30 NY3d at 661).

Plaintiff nonetheless contends, as an alternative ground for affirmance, that there is a different reason supporting disclosure that was not included in his discovery requests or motion papers in the record on appeal, i.e., the requested records are potentially relevant to identifying witnesses who could testify about Vladyslav's physical condition on the night of the accident and to determining whether Vladyslav was intoxicated or impaired. On the record before us, which does not include any memoranda of law despite our repeated and longstanding advisements that such memoranda may properly be included in the record on appeal for the limited purpose of determining preservation (*see Town of W. Seneca v Kideney Architects,*

P.C., 187 AD3d 1509, 1510 [4th Dept 2020]; *Byrd v Roneker*, 90 AD3d 1648, 1649 [4th Dept 2011]; *Brown v Smith*, 85 AD3d 1648, 1649 [4th Dept 2011]; *Matter of Lloyd v Town of Greece Zoning Bd. of Appeals* [appeal No. 1], 292 AD2d 818, 818-819 [4th Dept 2002], *lv dismissed in part and denied in part* 98 NY2d 691 [2002], *rearg denied* 98 NY2d 765 [2002]), we conclude that plaintiff's contention is not properly before us inasmuch as it is raised for the first time on appeal (*see Canandaigua Natl. Bank & Trust Co. v Acquest S. Park, LLC*, 178 AD3d 1374, 1375-1376 [4th Dept 2019]; *Breau v Burdick*, 166 AD3d 1545, 1549 [4th Dept 2018]; *Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]).

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

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

111
CA 20-00807
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

SCOTT BULLOCK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE ANGRY GOAT PUB, INC., DOING BUSINESS AS
ANGRY GOAT PUB, DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (JESSICA E. TARIQ OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRENNA BOYCE PLLC, ROCHESTER (DAVID C. SIELING OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered February 26, 2020. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from a six-inch platform in a pub owned by defendant. In his complaint, as amplified by his bill of particulars, plaintiff alleged, inter alia, that defendant was negligent in failing to properly construct and inspect the platform and in failing to warn him adequately of the hazardous condition presented by the platform. Defendant moved for summary judgment dismissing the complaint on the grounds that plaintiff had failed to identify the cause of his fall, and that, even if plaintiff had identified a cause, the step was an open and obvious condition, and thus plaintiff's own inattention was the sole proximate cause of the accident. Defendant appeals from an order denying the motion, and we affirm.

Contrary to defendant's contention, the bill of particulars and the video recording of the incident sufficiently identify the cause or causes of plaintiff's fall, and thus a factfinder will be able to reach a verdict based on logical inferences to be drawn from the evidence, and not on speculation (*see Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]; *see also Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1488 [4th Dept 2014]; *see generally Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]). Thus, defendant "failed to establish as a matter of law that the cause of plaintiff's fall was speculative" (*Dixon*, 118 AD3d at 1488).

Contrary to defendant's further contention, it failed to establish as a matter of law that the platform constituted an open and obvious hazard, and thus that it had no duty to warn plaintiff of the danger of falling (*see Schneider v Corporate Place, LLC*, 149 AD3d 1503, 1504 [4th Dept 2017]; *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533-1534 [4th Dept 2012]; *see also Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1043 [4th Dept 2013]). Defendant also failed to establish as a matter of law that the step was not inherently hazardous, that the height differential was trivial as a matter of law, or that the height differential was not a proximate cause of the fall (*see Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219-1220 [4th Dept 2003]). Consequently, we reject defendant's contention that plaintiff was, as a matter of law, the sole proximate cause of the fall (*see id.*). Defendant's contention that plaintiff fell because he failed to look down is a matter of comparative negligence that does not negate defendant's duty to keep the premises in a safe condition (*see id.*; *see also Schneider*, 149 AD3d at 1505). Additionally, although defendant submitted evidence that the platform at issue is in compliance with the applicable building code, such compliance " 'does not necessarily preclude a jury from finding that the . . . [raised platform] was part of or contributed to any inherently dangerous condition existing in the area of [plaintiff's] fall' " (*Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032 [4th Dept 2004]; *see Belsinger*, 108 AD3d at 1042; *Hayes*, 100 AD3d at 1532). In light of defendant's failure to meet its initial burden on the motion, we do not consider the sufficiency of plaintiff's opposing papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

112
CA 19-02310
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

JEFFREY T.C., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF S.C., A MINOR AND DANIELLA M. S.-C., INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF S.C., A MINOR, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

GRAND ISLAND CENTRAL SCHOOL DISTRICT, TOWN OF GRAND ISLAND AND WILLIAM KAEGEBEIN ELEMENTARY, DEFENDANTS-APPELLANTS.

BAXTER SMITH & SHAPIRO, WEST SENECA (BRYAN R. FORBES OF COUNSEL), FOR DEFENDANTS-APPELLANTS GRAND ISLAND CENTRAL SCHOOL DISTRICT AND WILLIAM KAEGEBEIN ELEMENTARY.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANT-APPELLANT TOWN OF GRAND ISLAND.

DOLCE PANEPINTO, P.C., BUFFALO (JOHN B. LICATA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 22, 2019. The order, insofar as appealed from, denied the motions of defendants to dismiss the complaint with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motions insofar as they sought dismissal of the complaint and dismissing the complaint without prejudice, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this negligence action seeking to recover damages for injuries sustained by their child, who was then a second-grade student, during recess. Defendants appeal from an order that, insofar as appealed from, denied their motions seeking dismissal of the complaint with prejudice on the ground that plaintiffs failed to fulfill a condition precedent to suit by refusing to produce the child for a demanded examination pursuant to General Municipal Law § 50-h.

"As General Municipal Law § 50-h (5) makes clear on its face, compliance with a municipality's demand for a section 50-h examination

is a condition precedent to commencing an action against that municipality" (*Colon v Martin*, 35 NY3d 75, 79 [2020]). "A claimant's failure to comply with such a demand generally warrants dismissal of the action" (*id.*, citing *Davidson v Bronx Mun. Hosp.*, 64 NY2d 59, 62 [1984]). "Requiring claimants to comply with section 50-h before commencing an action augments the statute's purpose, which 'is to afford the [municipality] an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement' " (*id.* at 79-80). " 'The failure to submit to . . . an examination [pursuant to section 50-h], however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity' " (*Legal Servs. for the Elderly, Disabled, or Disadvantaged of W. N.Y., Inc. v County of Erie*, 125 AD3d 1321, 1322 [4th Dept 2015]; *see McDaniel v City of Buffalo*, 291 AD2d 826, 826 [4th Dept 2002]).

Here, "[b]y refusing to produce for an examination under General Municipal Law § 50-h the minor child on whose behalf they are suing, plaintiffs failed to comply with a condition precedent to commencing the action . . . Nor did they demonstrate exceptional circumstances so as to excuse their noncompliance" (*Simon v Bellmore-Merrick Cent. High Sch. Dist.*, 133 AD3d 557, 558 [1st Dept 2015]; *see C.B. v Park Ave. Pub. Sch.*, 172 AD3d 980, 982 [2d Dept 2019]; *Matter of Brian VV. v Chenango Forks Cent. School Dist.*, 299 AD2d 803, 803-804 [3d Dept 2002]). We therefore agree with defendants that Supreme Court erred in denying their motions insofar as they sought dismissal of the complaint (*see Simon*, 133 AD3d at 558; *McDaniel*, 291 AD2d at 826). We nevertheless conclude that, contrary to defendants' contention, the complaint should be dismissed without prejudice (*see Kowalski v County of Erie*, 170 AD2d 950, 950 [4th Dept 1991], *lv denied* 78 NY2d 851 [1991]). In light of our determination, we do not address defendants' remaining contention.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 18-01852

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOVON MCGLOUN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered March 5, 2018. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Although the notice of appeal incorrectly states that defendant is appealing from a "plea and sentencing," we exercise our discretion to treat the appeal as taken from the judgment founded upon the jury verdict (*see* CPL 460.10 [6]; *People v Boldt*, 185 AD3d 1551, 1552 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020]). We now affirm.

Defendant abandoned his pretrial request for a new attorney by thereafter "repeatedly stat[ing] . . . that he was ready to proceed to trial with [existing] counsel" (*People v Avent*, 178 AD3d 1403, 1404 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *see People v Scott*, 172 AD3d 543, 544 [1st Dept 2019], *lv denied* 34 NY3d 954 [2019]). Defendant's present contention that County Court erred in denying his pretrial request for a new attorney is therefore waived (*see People v Jones*, 79 AD3d 1665, 1665 [4th Dept 2010]; *People v Cobb*, 72 AD3d 1565, 1567 [4th Dept 2010], *lv denied* 15 NY3d 803 [2010]; *People v Hernandez*, 62 AD3d 401, 401 [1st Dept 2009], *lv denied* 13 NY3d 797 [2009]). We reject defendant's further contention that the court erred in denying his request for a new attorney at sentencing (*see People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]; *People v Johnson*, 292 AD2d 871, 871 [4th Dept 2002], *lv denied* 98 NY2d 652

[2002]).

To the extent reviewable on direct appeal, defendant's ineffective assistance of counsel claim is without merit (*see People v Linder*, 170 AD3d 1555, 1559-1560 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *People v Vargas*, 72 AD3d 1114, 1119-1120 [3d Dept 2010], *lv denied* 15 NY3d 758 [2010]). Defendant's remaining contentions are unpreserved for appellate review, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Lathrop*, 171 AD3d 1473, 1475 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]; *People v Shannon*, 269 AD2d 839, 839 [4th Dept 2000]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

131
CA 20-00793
PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PAUL BUMBOLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FAXTON ST. LUKE'S HEALTHCARE, ALSO KNOWN AS
MOHAWK VALLEY HEALTH SYSTEM, ET AL., DEFENDANTS,
AND EMERGENCY PHYSICIAN SERVICES OF NEW YORK, P.C.,
DEFENDANT-APPELLANT.

PHELAN, PHELAN & DANEK, LLP, ALBANY (TIMOTHY S. BRENNAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF MICHAEL S. ALLEN, ROCHESTER (MICHAEL S. ALLEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered August 9, 2019. The order, insofar as appealed from, denied the motion of defendant Emergency Physician Services of New York, P.C., to dismiss the complaint against it.

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

Memorandum: Plaintiff commenced this negligence and medical malpractice action seeking compensatory damages arising from the psychiatric treatment he received from a doctor working for Emergency Physician Services of New York, P.C. (defendant) and from other medical providers. Plaintiff alleged that, while in the grip of mental illness, he was apprehended and arrested by the police for threatening and assaulting members of his family and for abusing and killing a dog. Plaintiff was brought to a hospital pursuant to Mental Hygiene Law § 9.41. Plaintiff alleged that the doctor working for defendant and the other medical providers participated in his care and, by their acts and omissions including failing to perform a proper work-up, caused plaintiff to be wrongly discharged from the hospital on the same day he was admitted. Plaintiff further alleged that, although the police had requested that they be notified of plaintiff's impending release prior to his discharge, they were not so notified. Shortly after his release, plaintiff killed the three members of his family whom he had previously threatened. Subsequently, with the urging of both plaintiff and the District Attorney, a criminal court accepted plaintiff's plea of not responsible by reason of mental disease or defect. Plaintiff was then remanded to a state psychiatric institution.

Plaintiff alleged in his complaint that defendant committed medical malpractice by, among other things, failing to perform a proper psychiatric exam; failing to diagnose and treat his ongoing psychiatric condition, acute mental illness, and violent propensities; and discharging him without notifying the police. Plaintiff further alleged that defendant's negligence was a substantial cause in his killing of his family members inasmuch as defendant failed to retain and treat him and failed to notify the police prior to his discharge, and that his commission of violence against his family members was predictable and foreseeable. Plaintiff sought compensatory damages for, inter alia, the mental and psychological damage and burden of having killed his family members, his loss of freedom, and the stigma of psychiatric admission.

Defendant moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (7) on the ground that plaintiff failed to state a legally cognizable cause of action because, pursuant to the doctrine set forth in *Riggs v Palmer* (115 NY 506 [1889]) and its progeny, including *Barker v Kallash* (63 NY2d 19 [1984]), plaintiff was barred from taking advantage of his own wrong and founding a claim on his own iniquity. Supreme Court denied the motion, and we now affirm.

"On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), '[w]e accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). With respect to the ground for dismissal asserted here, "as a matter of public policy, . . . where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a *serious* violation of the law and the injuries for which the plaintiff seeks recovery are the *direct* result of that violation" (*Manning v Brown*, 91 NY2d 116, 120 [1997]; *see Barker*, 63 NY2d at 24-29). The rule derives from the maxim that "[n]o one shall be permitted to profit by his [or her] own fraud, or to take advantage of his [or her] own wrong, or to found any claim upon his [or her] own iniquity, or to acquire property by his [or her] own crime" (*Riggs*, 115 NY at 511; *see Alami v Volkswagen of Am.*, 97 NY2d 281, 286 [2002]; *Manning*, 91 NY2d at 120; *Barker*, 63 NY2d at 25; *Carr v Hoy*, 2 NY2d 185, 187 [1957]). In cases in which the doctrine applies, "recovery is precluded 'at the very threshold of the plaintiff's application for judicial relief' " (*Alami*, 97 NY2d at 285, quoting *Barker*, 63 NY2d at 26). Notably, the Court of Appeals has applied the doctrine with caution to avoid overextending it inasmuch as the rule "embodies a narrow application of public policy imperatives under limited circumstances" (*Alami*, 97 NY2d at 288).

Defendant contends that, despite plaintiff's plea in the criminal action of not responsible by reason of mental disease or defect, the doctrine applies to bar plaintiff's action under the circumstances of this case. We reject that contention. As relevant here, a criminal defendant may enter a plea of not responsible by reason of mental disease or defect with both the permission of the court and the

consent of the People (*see* CPL 220.15 [1]). As part of the process for such a plea, the prosecutor must state, among other things, that the People are "satisfied that the affirmative defense of lack of criminal responsibility by reason of mental disease or defect would be proven by the defendant at a trial by a preponderance of the evidence" (*id.*), and the court must make the same finding before accepting the plea (*see* CPL 220.15 [5] [b]). The affirmative defense of lack of criminal responsibility for proscribed conduct "means that at the time of such conduct, as a result of mental disease or defect, [the defendant] lacked substantial capacity to know or appreciate either . . . [t]he nature and consequences of such conduct[] or . . . [t]hat such conduct was wrong" (Penal Law § 40.15; *see also* CPL 220.15 [3] [f]).

Here, accepting the facts as alleged in the complaint as true, we conclude that the criminal court's acceptance of plaintiff's plea of not responsible by reason of mental disease or defect demonstrates that, at the time of his conduct constituting a serious violation of the law, plaintiff lacked substantial capacity to know or appreciate either the nature and consequences of his conduct or that such conduct was wrong (*see* Penal Law § 40.15; CPL 220.15). Thus, unlike cases applying the rule to preclude recovery, the record here establishes that plaintiff's illegal conduct was not knowing, willful, intentional, or otherwise sufficiently culpable to warrant application of the rule (*cf. Manning*, 91 NY2d at 119; *Barker*, 63 NY2d at 27; *Riggs*, 115 NY at 508-509, 512; *Matter of Wells*, 76 Misc 2d 458, 458-462 [Sur Ct, Nassau County 1973]). Although defendant correctly notes that the doctrine may be applied in cases even where the wrongdoer is not, or cannot be, held criminally responsible, the application of the doctrine still involves evaluation of the wrongdoer's culpability to determine whether he or she should be relieved of the consequences of the apparently criminal conduct (*see Manning*, 91 NY2d at 120-121; *Barker*, 63 NY2d at 27 and n 3). Where, as here, the record establishes that the wrongdoer is not responsible by reason of mental disease or defect, we conclude that the subject doctrine does not apply to bar the wrongdoer's action (*see Matter of Bobula*, 19 NY2d 818, 819 [1967], *revg* 25 AD2d 241 [4th Dept 1966], *revg* 45 Misc 2d 745 [Sur Ct, Erie County 1965]; *Matter of Fitzsimmons*, 64 Misc 2d 622, 623-624 [Sur Ct, Erie County 1970]; *Matter of Wirth*, 59 Misc 2d 300, 300-303 [Sur Ct, Erie County 1969]; *cf. Matter of Demesyeux*, 42 Misc 3d 730, 731-739 [Sur Ct, Nassau County 2013]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

133
CA 20-00303

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

LLOYD CUYLER, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTINE SEPCIC, DEFENDANT-RESPONDENT.

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

HAGELIN SPENCER LLC, BUFFALO (LAURA B. GARDINER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 14, 2020. The order and judgment granted the motion of defendant for summary judgment, dismissed the complaint and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for the injuries he allegedly sustained in a motor vehicle accident. Supreme Court thereafter denied plaintiff's cross motion for partial summary judgment on the issue of serious injury and granted defendant's motion for summary judgment dismissing the complaint on that same issue (*see generally* Insurance Law § 5102 [d]). Plaintiff appeals.

We reject plaintiff's contention that the court erred in denying his cross motion (*see Brown v Ng*, 163 AD3d 1464, 1465 [4th Dept 2018]). We agree with plaintiff, however, that the court erred in granting defendant's motion (*see Cook v Peterson*, 137 AD3d 1594, 1596-1598 [4th Dept 2016]). We therefore modify the order and judgment accordingly.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

177
CA 20-00781
PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF ALBERT WILLIAMS,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 4, 2020 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the denial of his application for release to parole supervision after a hearing in September 2018. The Attorney General has advised this Court that, subsequent to that denial, petitioner reappeared before the Board of Parole in September 2020 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; *Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner’s contention, this matter does not fall within the exception to the mootness doctrine (*see Colon*, 177 AD3d at 1394; *Matter of Soule v Stanford*, 155 AD3d 1552, 1552-1553 [4th Dept 2017], *lv denied* 30 NY3d 912 [2018]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

221
CA 20-00082
PRESENT: SMITH, J.P., NEMOYER, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

AMBROSIA ROSADO, AS ADMINISTRATRIX OF THE ESTATE
OF CRISTINA ROSARIO, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROSA COPLON JEWISH HOME AND INFIRMARY, ROSA
COPLON JEWISH HOME AND INFIRMARY, INC., MENORAH
CAMPUS ADULT HOME, INC., MENORAH CAMPUS, INC.,
THE HARRY AND JEANETTE WEINBERG CAMPUS AND
WEINBERG CAMPUS, DEFENDANTS-RESPONDENTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 3, 2020. The order granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the first and second causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as administratrix of the estate of her mother (decedent), commenced this action seeking damages for, inter alia, decedent's personal injuries and wrongful death. Decedent was a resident of a long-term health care facility owned and operated by defendants. Decedent sustained a broken hip as a result of an unwitnessed fall from her bed, and she ultimately died several weeks later. In the complaint, as amplified by the bill of particulars, plaintiff alleged, among other things, that decedent's injuries and death were caused by defendants' negligent failure to prevent decedent's fall. Following discovery, defendants moved for summary judgment dismissing the complaint on, inter alia, the grounds that they met the requisite standard of medical and nursing home care and that their conduct was not the proximate cause of decedent's injuries and death. Supreme Court granted the motion and dismissed the complaint, and plaintiff now appeals.

Even assuming arguendo that defendants met their initial burden

of demonstrating their entitlement to judgment as a matter of law on each of the causes of action in the complaint (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), we conclude that plaintiff raised a triable issue of fact with respect to the causes of action based on allegations of negligence. Plaintiff submitted an expert affidavit from a physician with extensive experience in the treatment of geriatric patients and who is familiar with the standards of care applicable for skilled nursing facilities, including those in New York as they existed during the relevant time period (*see generally Pichardo v St. Barnabas Nursing Home, Inc.*, 134 AD3d 421, 424 [1st Dept 2015]). The expert opined that, based on decedent's history of over 30 falls while at defendants' facility, decedent was a "high fall risk." Plaintiff's expert set forth the interventions that defendants failed to implement to reduce decedent's known and documented risk of falling. Moreover, he opined that, in this case, defendants failed to meet the relevant standard of care because they failed to use bed restraints, which were appropriate and would have prevented decedent's fall, and failed to use side rails, alarms and motion detectors, which also would have prevented decedent's fall. Thus, his affidavit raises a question of fact whether defendants were negligent by failing to implement available precautions to protect decedent from a foreseeable risk of falling (*see D'Elia v Menorah Home & Hosp. for the Aged & Infirm*, 51 AD3d 848, 852 [2d Dept 2008]), and whether that negligence was a proximate cause of decedent's fall (*see generally Kadyszewski v Ellis Hosp. Assn.*, 192 AD2d 765, 766-767 [3d Dept 1993]).

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

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

234
KA 18-02414
PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUILLE O. MANNERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered October 10, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). We affirm.

Defendant contends that the verdict is against the weight of the evidence on the "intent to sell" element of criminal possession of a controlled substance in the third degree and the "sell" element of criminal sale of a controlled substance in the third degree. We reject that contention. In conducting our weight of the evidence review, we "assess[ ] the evidence in light of the elements of the crime[s] as charged to the jury" (*People v Johnson*, 10 NY3d 875, 878 [2008]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Here, County Court correctly defined "sell" as "to sell, exchange, give or dispose of to another" and "intent to sell" as the "conscious objective or purpose . . . to sell" (*see* Penal Law §§ 15.05 [1]; 220.00 [1]). Applying those definitions to defendant's undisputed sale of crack cocaine to a cooperating buyer in exchange for approximately $100 in cash and a portion of the drugs, we conclude that an acquittal on either charge would have been unreasonable (*see generally Danielson*, 9 NY3d at 348-349). Contrary to defendant's assertion, the verdict cannot be against the weight of the evidence on the agency defense because that defense was not submitted to the jury (*see People v*

Mahon, 160 AD3d 563, 563 [1st Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *see also People v Bell*, 191 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]). Defendant's reliance on *People v Cruz* (176 AD3d 852 [2d Dept 2019]) is unavailing because the trial court gave an agency instruction in that case (*see id.* at 857).

We reject defendant's further contention that the court erred in refusing to submit the agency defense to the jury. Given the Court of Appeals' "language in [*People v*] *Lam Lek Chong* [45 NY2d 64 (1978)] as well as common sense," it is well established that " 'the defense of agency is not intended to protect a person who arranges a drug transaction for the purpose of earning the equivalent of a finder's fee or broker's commission, in contrast to a person who performs a "favor," possibly rewarded by a tip or incidental benefit' " (*People v Rose*, 58 AD3d 544, 545 [1st Dept 2009], *lv denied* 12 NY3d 859 [2009]; *see People v Roche*, 45 NY2d 78, 83 [1978], *cert denied* 439 US 958 [1978]; *People v Elvy*, 277 AD2d 80, 80 [1st Dept 2000], *lv denied* 96 NY2d 783 [2001]). Here, as noted above, it is undisputed that defendant sold crack cocaine to a cooperating buyer in exchange for approximately $100 in cash and a portion of the drugs. Moreover, it was defendant himself who insisted on keeping a portion of the drugs, and it was defendant himself who decided how much of the drugs he would be keeping. Unlike the "tip" scenario contemplated by the Court of Appeals in *Lam Lek Chong*, this is not a case in which the buyer, grateful for the seller's gratis assistance in procuring illegal drugs, generously decided to share the drugs with the seller as a token of appreciation. The roles were reversed in this case; instead of accepting a token gift at the buyer's behest, the seller—defendant—decided on his own initiative to take a cut of the drugs for himself. Thus, defendant was not entitled to an agency instruction because there is no reasonable interpretation of the evidence, even when viewed in the light most favorable to him, under which he acted "*solely* to accommodate the buyer" (*People v Feldman*, 50 NY2d 500, 503 [1980] [emphasis added]; *see Roche*, 45 NY2d at 83; *Rose*, 58 AD3d at 544-545; *People v Hunt*, 50 AD3d 1246, 1248 [3d Dept 2008], *lv denied* 11 NY3d 789 [2008]).

Finally, we note that both the certificate of conviction and the uniform sentence and commitment form incorrectly indicate that defendant was sentenced as a second felony offender, and they must be amended to reflect defendant's sentencing as a second felony drug offender previously convicted of—a violent felony (*see People v Martinez*, 166 AD3d 1558, 1560 [4th Dept 2018]). The foregoing documents must also be amended to reflect the court's assessment of the required fees and surcharges (*see People v Cutaia*, 167 AD3d 1534, 1536 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

310
CA 19-01606
PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

RICHARD VIRKLER, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

V.S. VIRKLER & SON, INC., JOSEPH VIRKLER AND
ALEX VIRKLER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ASSAF & SIEGAL PLLC, ALBANY (MICHAEL D. ASSAF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Lewis County (James P. McClusky, J.), entered July 19, 2019. The judgment, inter alia, granted in part the motion of defendants for partial summary judgment.

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

Memorandum: In 2007, Richard Virkler (plaintiff), a former shareholder of defendant V.S. Virkler & Son, Inc. (Company), transferred his shares of the Company pursuant to a series of documents that included a stock redemption agreement (contract) and a promissory note, which was secured by a mortgage on the Company's property (collectively, transfer documents). Plaintiff's nephew, defendant Joseph Virkler, then became the majority owner of the Company. The transfer documents all indicate that the Company paid plaintiff $1 million at the time of transfer of his stock, and the Company also promised to pay plaintiff an additional $1.8 million over 25 years at an annual interest rate of seven percent. In 2018, plaintiff's attorney sent Joseph a letter (demand letter) accusing defendants of being in default of certain provisions of the contract and stating that plaintiff was accelerating the balance due under the transfer documents. After attempts to resolve the matter failed, plaintiff and another shareholder commenced this action seeking, among other relief, to foreclose on the mortgage. Defendants moved, inter alia, for partial summary judgment on the issue whether they may exercise their right of redemption under the mortgage and declaring that they must pay only the amount then due on the note to exercise that right. Plaintiff cross-moved for, inter alia, the appointment of

a receiver to run the Company or, in the alternative, for a declaration that defendants owed to plaintiff the amount then due on the note, together with all future interest payments, if Supreme Court ordered redemption. Plaintiff appeals, in appeal No. 1, from a judgment that, among other things, granted in part the motion by directing that defendants may exercise their right of redemption and effectively declaring that defendants must pay only the amount then due on the note to exercise that right and that denied the cross motion.

After that motion and cross motion were decided, plaintiff moved for "partial summary judgment on liability for breach of contract," and defendants cross-moved for, inter alia, partial summary judgment dismissing the first and third causes of action. In appeal No. 2, plaintiff appeals from an order denying the motion and granting the cross motion with respect to the first and third causes of action.

In appeal No. 1, plaintiff contends that the court erred in fixing the amount that defendants must pay to exercise their right of redemption. Specifically, plaintiff contends that, pursuant to the transfer documents, he is entitled to the remaining amount due on the note, including all interest payments that he would have received if defendants paid the note over the full 25-year term. He contends that the mortgage specifically provides for those payments and that the transfer documents give him the right to refuse to accept prepayment of the amount due. Because he refused to accept payment unless he received all future payments, including the unaccrued interest, he contends that the court was required to permit defendants to exercise their right of redemption only upon payment of that amount. We reject those contentions, and thus we affirm the judgment in appeal No. 1.

With respect to plaintiff's latter contention, we conclude that plaintiff improperly conflates defendants' right of redemption with plaintiff's right to withhold consent to prepayment of the note. It is well settled that "[t]he filing of the summons and complaint seeking the entire unpaid balance of principal in the . . . foreclosure action constituted a valid election by . . . plaintiff to accelerate the maturity of the debt" (*Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018]; *see U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018]). Further, as noted, prior to filing the complaint, plaintiff's attorney sent the demand letter to Joseph stating that plaintiff "hereby declares the entire remaining balance of the Debt due and owing immediately." "New York courts have observed . . . that the acceleration of a mortgage debt may occur by means other than the commencement of a foreclosure action, such as through an unequivocal acceleration notice transmitted to the borrower" (*Freedom Mtg. Corp. v Engel*, 37 NY3d 1, 25 [2021], *rearg denied* 37 NY3d 926 [2021]). Inasmuch as the demand letter from plaintiff constituted such an unequivocal notice, that letter also accelerated the debt. Thus, we conclude that defendants were not seeking to prepay the amount due under the note, rather plaintiff accelerated the remaining amount due by instituting a foreclosure action and sending the demand letter.

We also reject plaintiff’s contention that he is entitled to the remaining amount due on the note, including all unaccrued interest payments. It is well settled that, once a foreclosure proceeding is commenced, “[a] mortgagor or other owner of the equity of redemption of a property subject to a judgment of foreclosure and sale may redeem the mortgage at any time prior to the foreclosure sale” (*Norwest Mtge., Inc. v Brown*, 35 AD3d 682, 683 [2d Dept 2006]; *see NYCTL 1998-2 Trust v Chinese Am. Trading Co., Inc.*, 189 AD3d 1437, 1440 [2d Dept 2020]). “An unconditional tender of the full amount due is all that is required” to exercise the right of redemption (*NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573, 579 [2009], *cert denied* 561 US 1006 [2010]). Thus, defendants’ tender of payment of the entire mortgage principal and the accrued interest was all that was required “in response to [plaintiff’s] acceleration of the debt upon default [and, as noted,] did not constitute a ‘prepayment’ of the debt within the meaning of the prepayment clause set forth in the mortgage” (*Matter of D.I.S. LLC v Sagos*, 38 AD3d 543, 544 [2d Dept 2007]). Inasmuch as “the accelerated payment here is the result of plaintiff[-]mortgagee[] having elected to bring this foreclosure action, [he] may not exact a prepayment penalty” (*3C Assoc. v IC & LP Realty Co.*, 137 AD2d 439, 439 [1st Dept 1988]; *see Kilpatrick v Germania Life Ins. Co.*, 183 NY 163, 168 [1905]).

Plaintiff’s further contention in appeal No. 1, i.e., that the mortgage provides for the payment of unaccrued interest in the event of any prepayment, including by way of redemption in a foreclosure, is belied by the documents upon which he relies (*cf. SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986, 987 [2d Dept 2006]; *3C Assoc.*, 137 AD2d at 439).

Contrary to plaintiff’s contention in appeal No. 2, the court properly denied his motion for “partial summary judgment on liability for breach of contract” and granted defendants’ cross motion for partial summary judgment dismissing the first and third causes of action. The debt reflected in the note and contract and secured by the mortgage was satisfied by defendants’ payment of the full amount due under the transfer documents and, once “the mortgagor pays in full the person entitled to enforce the note, the note is discharged and the mortgage that secures it is extinguished” (*Weiss v Phillips*, 157 AD3d 1, 8 [1st Dept 2017]; *see Reale v Tsoukas*, 146 AD3d 833, 835 [2d Dept 2017]; *see generally FGB Realty Advisors v Parisi*, 265 AD2d 297, 298 [2d Dept 1995]). The first and third causes of action arose from alleged breaches of the transfer documents, including the mortgage and note, which could not be enforced after the amounts due under those documents were satisfied by payment of the amount directed by the judgment in appeal No. 1.

We have considered plaintiff’s remaining contention and conclude that it lacks merit.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

311
CA 20-00759
PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

RICHARD VIRKLER, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V — MEMORANDUM AND ORDER

V.S. VIRKLER & SON, INC., JOSEPH VIRKLER AND
ALEX VIRKLER, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ASSAF & SIEGAL PLLC, ALBANY (MICHAEL D. ASSAF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered January 24, 2020. The order, among other things, denied the motion of plaintiff Richard Virkler for partial summary judgment.

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

Same memorandum as in *Virkler v V.S. Virkler & Son, Inc.* ([appeal No. 1] — AD3d — [July 16, 2021] [4th Dept 2021]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

334
CA 20-00663
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

LAURIE ANN SMITH, INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE OF THOMAS J.
BLANCKE, SR., DECEASED,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125901.)

THE COCHRAN FIRM, NEW YORK CITY (NORMAN A. OLCH OF COUNSEL), FOR
CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Richard E. Sise, J.), entered October 28, 2019. The order, among other things, granted the cross motion of defendant to dismiss claimant’s second and third causes of action.

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

Memorandum: Claimant, Laurie Ann Smith, individually and as administratrix of the estate of Thomas J. Blancke, Sr. (decedent), commenced this negligence and wrongful death action seeking damages after her husband, an inmate at Five Points Correctional Facility, was killed by his cellmate. Claimant appeals from an order that, inter alia, granted defendant’s cross motion to dismiss as untimely the second and third causes of action, for personal injuries caused by negligence and negligent supervision, hiring and training. We affirm.

We reject claimant’s contention that the Court of Claims erred in granting the cross motion. “The State of New York is sovereign and has consented to be sued only in strict accordance with the requirements of the Court of Claims Act” (*Matter of Geneva Foundry Litig.*, 173 AD3d 1812, 1813 [4th Dept 2019]). Pursuant to Court of Claims Act § 10 (3), “[a] claim to recover damages for . . . personal injuries caused by the negligence or unintentional tort of an officer or employee of the state while acting as such officer or employee, shall be filed and served upon the attorney general within ninety days after the accrual of such claim, unless the claimant shall within such time serve upon the attorney general a written notice of intention to

file a claim therefor, in which event the claim shall be filed and served upon the attorney general within two years after the accrual of such claim." It is well settled that the " '[f]ailure to comply with either the filing or service provisions of the Court of Claims Act results in a lack of subject matter jurisdiction requiring dismissal of the claim' " (*Hatzfeld v State of New York*, 104 AD3d 1165, 1166 [4th Dept 2013]; *see Ivy v State of New York*, 27 AD3d 1190, 1191 [4th Dept 2006]; *Baggett v State of New York*, 124 AD2d 969, 969 [4th Dept 1986]).

Here, the claim accrued on December 14, 2013, and therefore claimant had until March 14, 2014 to file and serve on the Attorney General the claim or to serve on the Attorney General a written notice of intention to file a claim (*see* Court of Claims Act § 10 [3]). Claimant, however, did not serve the Attorney General with written notice of intention to file a claim until February 2, 2015, and the claim was subsequently served on April 8, 2015. We reject claimant's contention that a notice of claim served on the Attorney General on March 3, 2014 in connection with a prior claim filed by decedent's mother should be treated as timely notice of intention to file the subject claim. By voluntarily withdrawing the notice of claim dated March 3, 2014, the attorney for decedent's mother discontinued the 2014 claim by decedent's mother, rendering it a nullity (*see generally Harris v Ward Greenberg Heller & Reidy LLP*, 151 AD3d 1808, 1810 [4th Dept 2017]).

We also reject claimant's contention that defendant waived its affirmative defenses regarding the timeliness of service of the claim or notice of claim by failing to satisfy the pleading requirement set forth in Court of Claims Act § 11 (c). Pursuant to section 11 (c), "[a]ny objection or defense based upon failure to comply with . . . the time limitations contained in section ten of this act . . . is waived unless raised, with particularity, either by a motion to dismiss made before service of the responsive pleading is required or in the responsive pleading." Here, we conclude that defendant raised its affirmative defense with sufficient particularity inasmuch as, in its answer, defendant unequivocally asserted that the claim and the notice of intention to file a claim were untimely (*see Scalise v State of New York*, 210 AD2d 916, 917 [4th Dept 1994]).

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

Entered: July 16, 2021 Mark W. Bennett
Clerk of the Court

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

341
KA 18-02098
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

NEGUS J. DESOUZA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered August 14, 2018. The judgment convicted defendant, upon a jury verdict, of attempted assault in the first degree, attempted robbery in the first degree and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), attempted robbery in the first degree (§§ 110.00, 160.15 [4]), and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]). We affirm.

Defendant contends that his sentence is illegal because County Court violated Penal Law § 70.25 (2) by imposing consecutive sentences on the counts charging attempted assault in the first degree and attempted robbery in the first degree. We reject that contention. Pursuant to Penal Law § 70.25 (2), "[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently." Thus, "[i]t is well settled that 'sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other' " (*People v Jackson*, 56 AD3d 1295, 1296 [4th Dept 2008], quoting *People v Laureano*, 87 NY2d 640, 643 [1996]; *see* § 70.25 [2]; *People v Wright*, 19 NY3d 359, 363 [2012]). The People have the burden of establishing the legality of consecutive sentences (*see People v Brahney*, 29 NY3d 10, 13-14 [2017],

rearg denied 29 NY3d 1046 [2017]; *People v Tripp*, 177 AD3d 1409, 1410 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]), and "once the People offer evidence of the existence of a separate and distinct act, the trial court has discretion to order consecutive sentences" (*People v Couser*, 28 NY3d 368, 377 [2016]).

Here, the court lawfully imposed consecutive sentences because the evidence establishes that, although both crimes were committed against the same victim during the course of one continuous transaction, the acts constituting the attempted robbery were separate and distinct from the acts constituting the attempted assault (*see generally People v Rodriguez*, 25 NY3d 238, 244-245 [2015]; *People v McKnight*, 16 NY3d 43, 49 [2010]; *People v Samms*, 83 AD3d 1099, 1100 [2d Dept 2011], *lv denied* 17 NY3d 809 [2011]). The attempted robbery was completed when defendant pointed a rifle at the victim and demanded his money (*see* Penal Law §§ 110.00, 160.15 [4]), and the attempted assault was committed when defendant formed a new intent to cause serious physical injury to another person and performed the separate and distinct act of repeatedly firing the rifle at the victim (*see* §§ 110.00, 120.10 [1]; *People v Hayes*, 84 AD3d 463, 464 [1st Dept 2011], *lv denied* 17 NY3d 817 [2011]; *People v Murray*, 299 AD2d 225, 225-226 [1st Dept 2002], *lv denied* 99 NY2d 631 [2003]; *see generally Couser*, 28 NY3d at 377).

The sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

343
KA 20-01475
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER L. SERRANO, ALSO KNOWN AS JENNIFER SERRANO, ALSO KNOWN AS JENNIFER LYNN BUMPUS SERRANO, DEFENDANT-APPELLANT.

LOTEMPIO & BROWN, P.C., BUFFALO (JACK M. SANCHEZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered August 19, 2019. The judgment convicted defendant upon a jury verdict of vehicular manslaughter in the second degree, leaving the scene of an incident resulting in death without reporting, driving while intoxicated and aggravated unlicensed operation of a motor vehicle in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, vehicular manslaughter in the second degree (Penal Law § 125.12 [1]) and leaving the scene of an incident resulting in death without reporting (Vehicle and Traffic Law § 600 [2] [a], [c] [ii]). Defendant failed to preserve for our review her challenge to the legal sufficiency of the evidence supporting the conviction of leaving the scene of an incident resulting in death without reporting inasmuch as she moved for a trial order of dismissal on grounds different from those raised on appeal (*see People v Scott*, 61 AD3d 1348, 1349 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that the verdict is against the weight of the evidence. Regarding the count of leaving the scene of an incident resulting in death without reporting, defendant acknowledges that the evidence at trial established that she was operating a motor vehicle that struck and killed the victim, and that

she did not report the incident to the police. Defendant nevertheless contends that the verdict is against the weight of the evidence with respect to that count because she did not "know[ ] or have cause to know that personal injury has been caused to another person," so as to trigger her responsibility to report the incident (Vehicle and Traffic Law § 600 [2] [a]). On the night of the incident, defendant was driving on a narrow, unlit road with a passenger in her vehicle. The passenger testified at trial that she and defendant had been drinking alcohol since that afternoon, and that defendant had consumed a minimum of 16 alcoholic beverages, and possibly significantly more, over the course of the day. Defendant drove past a group of pedestrians walking on the opposite side of the road, then realized she was on the wrong road and turned the vehicle around. Shortly after defendant turned around, the passenger looked up and saw significant damage to the vehicle's windshield and passenger side mirror. The passenger testified that she did not see or hear an impact, but that she had been concentrating on her phone and there was loud music playing in the vehicle. The passenger asked defendant, "what happened? What did you hit?" Defendant did not respond to the questions, instead stating that they needed to get to the friend's house where they intended to stay the night. The victim's friends testified at trial that they did not witness the impact, but that the victim had run ahead of the group shortly before the collision and that they heard a loud noise soon after the victim ran ahead.

The victim's body was found the following morning in a cornfield alongside the collision site. The evidence at trial established that the victim's head struck the lower corner of defendant's windshield on the passenger side and that the victim was standing when he was struck. The People also presented the testimony of expert witnesses that, although the road was unlit and the victim was dressed in a dark shirt, the victim would nevertheless have been visible from a reasonable distance for defendant to avoid a collision. The experts' testimony was consistent with testimony from the victim's friends, who said that most of the cars passing them seemed to see them from a distance and give them a wide berth. Inasmuch as the passenger testified that she was not aware that the vehicle struck a person until the following day and the evidence from the crash data reporter on defendant's vehicle did not record any driving abnormalities such as heavy braking or a significant change in velocity that would be indicative of an impact, we agree with defendant that a different verdict would not have been unreasonable (*see generally People v Danielson*, 9 NY3d 342, 348 [2007]). Nevertheless, viewing the evidence in light of the elements of leaving the scene of an incident resulting in death without reporting as charged to the jury (*id.* at 349), we conclude that, upon weighing the " 'relative strength of conflicting inferences that may be drawn from the testimony,' " the jury did not fail to give the evidence the weight it should be accorded (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

With respect to the count of vehicular manslaughter in the second degree, defendant concedes that she consumed alcohol and that her vehicle struck and killed the victim, but she contends that the

verdict is against the weight of the evidence because the People failed to establish that she was intoxicated or impaired or that as a result of such intoxication or impairment she operated her vehicle in a manner that caused the victim's death (*see* Penal Law § 125.12 [1]). We reject that contention. The People established that defendant was intoxicated by presenting the testimony of a sheriff's deputy who, shortly after the collision, arrested defendant for an unrelated traffic incident. The sheriff's deputy testified that he could smell alcohol on defendant's breath, her speech was slurred, and her eyes were bloodshot and glassy, and the jury was shown a 27-minute recording from the deputy's body camera, which depicted defendant failing several field sobriety tests and refusing to take a breath test (*see People v Gonzalez*, 90 AD3d 1668, 1669 [4th Dept 2011]; *People v Curkendall*, 12 AD3d 710, 713 [3d Dept 2004], *lv denied* 4 NY3d 743 [2004]; *People v Kraft*, 278 AD2d 591, 591-592 [3d Dept 2000], *lv denied* 96 NY2d 864 [2001]). With respect to causation, under Penal Law § 125.12, "once it is established that the defendant was unlawfully [intoxicated] while operating the vehicle, there [is] a rebuttable presumption that, as a result of such [intoxication], [the defendant] operated the motor vehicle . . . in a manner that caused such death" (*People v Drouin*, 115 AD3d 1153, 1154-1155 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014] [internal quotation marks and emphasis omitted]; *see* § 125.12; *People v Mojica*, 62 AD3d 100, 108-109 [2d Dept 2009], *lv denied* 12 NY3d 856 [2009]). That statutory presumption was properly applied in this case (*see People v Davis*, 112 AD3d 959, 961 [2d Dept 2013], *lv denied* 22 NY3d 1155 [2014]). Furthermore, although the victim was also intoxicated at the time that he was struck by defendant's vehicle, a defendant may be held criminally responsible for a homicide, even if his or her conduct was not the sole cause of death, as long as the defendant's actions were a "sufficiently direct cause" of death by "set[ting] in motion" the events that resulted in the death (*People v DaCosta*, 6 NY3d 181, 184 [2006] [internal quotation marks omitted]; *see Davis*, 112 AD3d at 960-961). Viewing the evidence in light of the elements of vehicular manslaughter in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), and giving deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see Bleakley*, 69 NY2d at 495), we conclude that the verdict with respect to that crime is not against the weight of the evidence.

We reject defendant's contention that County Court erred in allowing the rebuttal testimony of two expert witnesses regarding the victim's location when he was struck by defendant's vehicle. The rebuttal testimony was properly admitted in evidence because it was offered to contradict the testimony of defendant's expert that the victim was in the driving lane when he was struck, and the location of the victim was not an affirmative fact that the People were required to prove (*see People v Harris*, 57 NY2d 335, 345 [1982], *cert denied* 460 US 1047 [1983]; *People v Clabeaux*, 277 AD2d 988, 988 [4th Dept 2000], *lv denied* 96 NY2d 781 [2001]). Moreover, even assuming, arguendo, that the testimony was "not technically of a rebuttal nature," we nevertheless conclude that the court did not abuse its discretion in allowing that testimony pursuant to CPL 260.30 (7)

(*Harris*, 57 NY2d at 345; *see People v O'Connor*, 21 AD3d 1364, 1366 [4th Dept 2005], *lv denied* 6 NY3d 757 [2005]).

Defendant's contentions that prosecutorial misconduct warrants reversal because the prosecutor improperly called a town justice as an expert witness and the prosecutor lacked a good faith basis for his cross-examination of the defense's expert are unpreserved for our review (*see* CPL 470.05 [2]; *see generally People v Haynes*, 35 AD3d 1212, 1213 [4th Dept 2006], *lv denied* 8 NY3d 946 [2007]). In any event, those contentions are without merit inasmuch as "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Kerce*, 140 AD3d 1659, 1660 [4th Dept 2016], *lv denied* 28 NY3d 1028 [2016] [internal quotation marks omitted]).

The People correctly concede that, during summation, the prosecutor improperly inferred that the defense expert had lied and mischaracterized the expert's testimony regarding his membership in certain professional organizations. Although we conclude that reversal is not warranted on those grounds, we nevertheless take this opportunity to admonish the prosecutors and remind them that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Huntsman*, 96 AD3d 1387, 1388 [4th Dept 2012], *lv denied* 20 NY3d 1099 [2013], quoting *People v Santorelli*, 95 NY2d 412, 421 [2000]). We have reviewed defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

357
CA 20-01011
PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

LESLIE J. FINEBERG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHIRLEY A. ANAIN, M.D., DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (MICHAEL J. ROACH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FREID & KLAWON, WILLIAMSVILLE (ASHLEY C. GLOSSER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 3, 2020. The order denied in part defendant's motion seeking summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she allegedly sustained as a result of surgery performed by defendant. Immediately after the surgery, plaintiff experienced pain, numbness and tingling in her left leg, and she was subsequently diagnosed with a permanent nerve injury. Defendant now appeals from an order denying in part her motion for summary judgment dismissing the complaint. We affirm.

Defendant contends that Supreme Court erred in denying that part of her motion seeking summary judgment dismissing the cause of action for lack of informed consent. We reject that contention. It is well settled that, in order to prevail in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must establish that " '(1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment' " (*Thompson v Hall*, 191 AD3d 1265, 1266 [4th Dept 2021], quoting *Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; *see* Public Health Law § 2805-d [1], [3]). Here, in the complaint plaintiff alleges that, prior to the surgery, defendant failed to advise her of the possible risks and dangers, including the possibility of permanent injury, and that plaintiff would not have consented to the surgery if defendant had advised her of the possible risks and dangers. Defendant therefore was required to establish on

her motion that, prior to the procedure, she had advised plaintiff of the reasonably foreseeable risks of the proposed procedure (*see Tirado v Koritz*, 156 AD3d 1342, 1344 [4th Dept 2017]; *Gray v Williams*, 108 AD3d 1085, 1086 [4th Dept 2013]). We conclude that defendant failed to meet that burden.

Here, in support of her motion defendant submitted her own affidavit, her deposition testimony, and her certified office records for plaintiff, all of which included statements that, prior to the surgery, defendant discussed the consent forms with plaintiff, she explained the known risks associated with the particular surgery, and that plaintiff signed a preoperative consent form "confirming that she understood the risks of the procedure and consent[ing] to the surgery." Nevertheless, the preoperative consent form that was included in defendant's office records for plaintiff is neither signed nor initialed by plaintiff. Although a signed consent form "is not necessarily required where the [defendant] providing the treatment in a medical malpractice action submits testimonial evidence that the [defendant] obtained the patient's verbal consent to perform the procedure" (*Hope A.L. v Unity Hosp. of Rochester*, 173 AD3d 1713, 1715 [4th Dept 2019]), defendant stated in her affidavit, testified at her deposition, and noted in her office record for plaintiff that she had obtained plaintiff's written consent. Thus, in light of the discrepancy between the documentary evidence and defendant's statements in her affidavit and deposition testimony, defendant's own submissions in support of the motion raise a triable issue of fact whether she obtained plaintiff's informed consent (*cf. Gray*, 108 AD3d at 1086; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Moreover, even if defendant's submissions are sufficient to meet her initial burden on the motion, we conclude that plaintiff raised questions of fact by submitting her deposition testimony that she did not sign a consent form and that she was not informed that permanent nerve damage was a possible risk of her surgery. Plaintiff's testimony, which is consistent with the unsigned consent form that was submitted by defendant in support of the motion, is sufficient to raise a triable issue of fact (*see Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 2029-2030 [3d Dept 2020]; *see generally Gray*, 108 AD3d at 1087).

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

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

377
CA 20-00684
PRESENT: CENTRA, J.P., PERADOTTO, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

LISA PEEVEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

UNITY HEALTH SYSTEM AND ROCHESTER REGIONAL
HEALTH SYSTEM, DEFENDANTS-RESPONDENTS.

FARACI LANGE, LLP, ROCHESTER (STEPHEN G. SCHWARZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (James J. Piampiano, J.), entered May 19, 2020. The judgment decreed that defendants were not negligent and that no damages would be awarded to plaintiff.

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

Memorandum: Plaintiff commenced this medical malpractice action alleging, in relevant part, that defendants were vicariously liable for the purported negligence of a doctor employed at defendants' hospital during the performance of laparoscopic surgery to treat plaintiff's ruptured ectopic pregnancy. Plaintiff appeals from a judgment entered upon a jury verdict finding that the doctor did not depart from the standard of care. Plaintiff's appeal brings up for review both that part of an order denying her pretrial motion for partial summary judgment on the issue of liability and the order denying her posttrial motion to set aside the verdict (*see* CPLR 5501 [a] [1], [2]). We affirm.

We reject plaintiff's contention that Supreme Court (Rosenbaum, J.) erred in denying her pretrial motion for partial summary judgment on the issue of liability. Although plaintiff met her initial burden of establishing entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Cianfrocco v St. Luke's Mem. Hosp. Ctr.*, 265 AD2d 849, 850 [4th Dept 1999]), defendants raised a triable issue of fact whether the doctor departed from the accepted standard of medical care by submitting, inter alia, the affirmation of their expert obstetrician/gynecologist (*see Cranker v Infantino*, 229 AD2d 908, 908-909 [4th Dept 1996]). Defendants' expert opined, in contrast to the opinion of plaintiff's

expert, that the vascular injury sustained by plaintiff during the procedure was a known and accepted complication associated with that type of laparoscopic surgery, which could occur in the absence of negligence, and that the doctor's performance of the surgery adhered to the accepted standard of medical care (*see Matos v Schwartz*, 104 AD3d 650, 651-652 [2d Dept 2013]). Contrary to plaintiff's contention, we conclude that the opinions of defendants' expert were not conclusory, unfounded, or speculative (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Wilk v James*, 107 AD3d 1480, 1485 [4th Dept 2013]). Where, as here, the nonmovants' expert affirmation squarely opposes the affidavit of the moving party's expert, the result is a classic battle of the experts that is properly left to a jury for resolution (*see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

We also reject plaintiff's contention that the court (Piampiano, J.) erred in denying her motion during trial for a directed verdict pursuant to CPLR 4401 and her posttrial motion insofar as it sought judgment notwithstanding the verdict pursuant to CPLR 4404 (a). Initially, we note that plaintiff failed to preserve for our review her contention that the court erred in admitting the expert testimony of defendants' general surgeon based on the purported lack of evidentiary foundation for that testimony (*see generally Horton v Smith*, 51 NY2d 798, 799 [1980]; *Taylor-Gove v St. Joseph's Hosp. Health Ctr.*, 242 AD2d 879, 880 [4th Dept 1997], *lv denied* 91 NY2d 805 [1998]). Contrary to plaintiff's contention, upon our review of the conflicting factual and expert evidence presented by the parties at trial, we conclude that there was a rational process by which the jury could base a finding in defendants' favor (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *Wolfe v St. Clare's Hosp. of Schenectady*, 57 AD3d 1124, 1126 [3d Dept 2008]), i.e., that the doctor did not depart from the standard of care.

Contrary to plaintiff's further contention, we conclude that the court properly denied her posttrial motion pursuant to CPLR 4404 (a) insofar as it sought to set aside the verdict as against the weight of the evidence. It is well settled that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]), and that is not the case here.

Finally, plaintiff contends that she is entitled to a new trial on the ground that defendants' attorney improperly argued before the jury during summation a theory regarding how the vascular injury occurred that was unsupported by the record. Plaintiff failed to object to the allegedly improper argument of defendants' attorney on summation, and thus plaintiff's contention is not preserved for our review (*see Dailey v Keith*, 306 AD2d 815, 816 [4th Dept 2003], *affd* 1 NY3d 586 [2004]). In any event, we conclude that any impropriety by defendants' attorney during summation was " 'not so flagrant or excessive that a new trial is warranted' " (*Dombrowski v Moore*, 299 AD2d 949, 951 [4th Dept 2002];

see Winiarski v Harris [appeal No. 2], 78 AD3d 1556, 1558 [4th Dept 2010]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

380
CA 20-01030
PRESENT: CENTRA, J.P., PERADOTTO, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

CARLY KNASZAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HAMBURG CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (ANASTASIA M. MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

CARL W. MORGAN, P.C., HAMBURG (CARL W. MORGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered June 3, 2020. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained as a result of defendant's alleged negligent supervision following an incident in which plaintiff was sexually assaulted by another student while they were alone in a classroom. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint.

It is well established that "[s]chools are under a duty to adequately supervise the students in their charge[,] and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49; *see Brandy B.*, 15 NY3d at 302). "Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*Mirand*, 84 NY2d at 49). Thus, "an injury caused by the impulsive,

unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*id.*). "Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B.*, 15 NY3d at 302, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Here, defendant met its initial burden on the motion by establishing that the "sexual assault against [plaintiff by the student] was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated" (*id.*), and plaintiff failed to raise a triable issue of fact (*see id.* at 303; *see generally Alvarez*, 68 NY2d at 324). Defendant's submissions, including plaintiff's testimony, established the undisputed fact that plaintiff and the student did not know each other and did not have any prior interactions before the sexual assault (*see Francis v Mount Vernon Bd. of Educ.*, 164 AD3d 873, 875 [2d Dept 2018], *lv denied* 32 NY3d 913 [2019]; *Jake F. v Plainview-Old Bethpage Cent. School Dist.*, 94 AD3d 804, 805 [2d Dept 2012]). Although the student had an extensive and troubling disciplinary history that resulted in several detentions and suspensions, such history did not contain any infractions for physically aggressive conduct directed at other people, sexually inappropriate behavior, or threats of physical or sexual violence (*see Emmanuel B. v City of New York*, 131 AD3d 831, 832 [1st Dept 2015]; *Jennifer R. v City of Syracuse*, 43 AD3d 1326, 1327 [4th Dept 2007]; *Murnyack v Rebon*, 21 AD3d 1406, 1406-1407 [4th Dept 2005]; *see also Brandy B.*, 15 NY3d at 302).

Contrary to the court's determination, while the student's history involved attendance issues, insubordination toward school staff, inappropriate verbal outbursts, being under the influence of drugs or alcohol, possession and sale of drugs, and academic problems, that history did not raise a triable issue of fact whether defendant had sufficiently specific knowledge or notice of the injury-causing conduct inasmuch as it was not similar to the student's physically and sexually aggressive behavior that injured plaintiff (*see McBride v City of New York*, 160 AD3d 414, 414 [1st Dept 2018]; *Taylor v Dunkirk City School Dist.*, 12 AD3d 1114, 1115 [4th Dept 2004]; *Sanzo v Solvay Union Free School Dist.*, 299 AD2d 878, 878 [4th Dept 2002]; *Morman v Ossining Union Free School Dist.*, 297 AD2d 788, 789 [2d Dept 2002]). "More significantly, [the student's] prior history did not include *any* sexually aggressive behavior" (*Brandy B.*, 15 NY3d at 302). We also agree with defendant that the court impermissibly drew an unsubstantiated and speculative inference that the student's disclosure to a school social worker about being a victim of sexual abuse during his childhood, coupled with his substance abuse, should have provided defendant with notice of the student's propensity to commit sexual assault (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

In sum, "without evidence of any prior conduct similar to the unanticipated injury-causing act, this claim for negligent supervision must fail" (*Brandy B.*, 15 NY3d at 302).

All concur except BANNISTER, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would affirm. I agree with the majority that "schools have a duty to adequately supervise their students, and 'will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' " (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]). A school is "obligated to exercise such care of their students 'as a parent of ordinary prudence would observe in comparable circumstances' " (*David v County of Suffolk*, 1 NY3d 525, 526 [2003], quoting *Mirand*, 84 NY2d at 49). Where the complaint alleges negligent supervision in the context of injuries caused by another student's intentional acts, the plaintiff generally must demonstrate that the school knew or should have known of the individual's propensity to engage in such conduct, such that the individual's acts could be anticipated or were foreseeable (*see Mirand*, 84 NY2d at 49).

Here, in my view, defendant failed to meet its initial burden on the motion of establishing that it had no actual or constructive notice of the offending student's propensity to engage in the misconduct alleged (*see Charles D.J. v City of Buffalo*, 185 AD3d 1488, 1489 [4th Dept 2020]). In support of the motion, defendant submitted the offending student's disciplinary record and deposition testimony of teachers and administrators describing the offending student as "troubled," a "behavior concern," "vengeful," "angry," "a problem," and "disrespectful." Among the behaviors identified in the record, including criminal misconduct, the offending student had used, sold and bought drugs on school property and also had anger issues and created disturbances, which often occurred when he was under the influence. As a condition to returning to in-person school after a lengthy suspension, the offending student was required to comply with certain conditions, including counseling. Defendant's submissions on the motion demonstrate, however, that defendant never ensured that the offending student complied with those conditions before reportedly allowing him to return to school. The disciplinary record further demonstrates that the offending student was under the influence of drugs or alcohol at the time he allegedly committed the misconduct against plaintiff. Thus, in my view, defendant's own submissions raise questions of fact whether it had notice of the offending student's prior bad behavior and the propensity to engage in misconduct particularly when he was under the influence of drugs or alcohol on school grounds. Defendant therefore failed to establish as a matter of law that the misconduct at issue here was "sudden, spontaneous," unanticipated or unforeseeable (*Mirand*, 84 NY2d at 49).

Unlike the majority, I do not believe that prior case law on this issue compels a different result. For instance, in *Brandy B.*, a case relied on heavily by the majority and defendant, the Court of Appeals held that the alleged sexual assault of the student in that case "was an unforeseeable act that, without sufficiently specific knowledge or

notice, could not have been reasonably anticipated by the school district" (15 NY3d at 303). In that case, the Court not only considered the fact that the offending student had no prior sexually aggressive behavior, but it also considered the fact that while the offending student had behavioral issues, the student had not displayed any behavior issues for more than two years prior to the incident giving rise to the lawsuit (*id.* at 302). Here, there was no evidence that the offending student's angry and troubling behavior, including the abuse of drugs or alcohol, had ever ceased in his time at defendant's school. Indeed, defendant classified the incident at issue in the disciplinary report as one arising out of the offending student's drug abuse, a behavior that was well-documented and continuous throughout his school tenure. Thus, I conclude that here, a "jury needed little more than its own common experience to conclude" that defendant had sufficient notice of a dangerous situation and could have reasonably anticipated the misconduct in this case (*Mirand*, 84 NY2d at 51).

Therefore, in my view, Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

428
KA 19-00214
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIJAH CURTIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered November 13, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, criminal possession of a controlled substance in the seventh degree and criminal possession of marihuana in the fifth 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, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). The People correctly concede that defendant did not validly waive his right to appeal (*see People v Clark*, 178 AD3d 1409, 1410 [4th Dept 2019], *lv denied* 34 NY3d 1157 [2020]; *People v Coats*, 158 AD3d 1296, 1297 [4th Dept 2018], *lv denied* 31 NY3d 1080 [2018]). Contrary to defendant’s contention, however, the sentence is not unduly harsh or severe. We are nevertheless “compelled to emphasize once again” that, contrary to the assertion in the People’s brief, a criminal defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court in order to obtain a sentence reduction under CPL 470.15 (6) (b) (*People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]; *see People v Thomas*, 194 AD3d 1405, 1406 [4th Dept 2021]; *People v Kibler*, 187 AD3d 1569, 1570 [4th Dept 2020]). Finally, both the certificate of conviction and the uniform sentence and commitment form must be corrected to reflect County Court’s imposition of a three-year, not a two-year, period of

postrelease supervision on count one.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

429
KA 19-00113
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER A. KINGDOLLAR, ALSO KNOWN AS ROGER KINGDOLLAR, ALSO KNOWN AS ROGER A. KINGDOLLAR, III, ALSO KNOWN AS ROGER ATWELL KINGDOLLAR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered November 14, 2018. The judgment convicted defendant upon a plea of guilty of attempted promoting an obscene sexual performance by a child.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted promoting an obscene sexual performance by a child (Penal Law §§ 110.00, 263.10). In appeal No. 2, defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*) based on his conviction in appeal No. 1. We affirm in both appeals.

With respect to appeal No. 1, defendant contends that his waiver of the right to appeal is invalid and does not encompass his challenge to County Court's refusal to grant him youthful offender status or his challenge to the severity of the sentence. Initially, contrary to defendant's contention, the Court of Appeals has rejected the assertion that waivers of the right to appeal should be invalid per se (*see People v Thomas*, 34 NY3d 545, 557-558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 8-9 [1989]; *People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude his challenge to the youthful offender determination (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020];

People v McClellan, 49 AD3d 1201, 1202 [4th Dept 2008]), we conclude that the court did not abuse its discretion in declining to adjudicate defendant a youthful offender (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see also People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). Further, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him such status (*see Simpson*, 182 AD3d at 1047; *Lewis*, 128 AD3d at 1400-1401; *cf. Keith B.J.*, 158 AD3d at 1161). We also conclude that the sentence is not unduly harsh or severe.

With respect to appeal No. 2, defendant contends that he was denied effective assistance of counsel at the SORA classification proceeding. We reject that contention. Defendant's contention that his attorney should have challenged the assessment of points under risk factor 11—pertaining to his history of drug abuse—is without merit. "It is well established that '[a] defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success' " (*People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, the record establishes that there was no colorable basis for challenging the points assessed under risk factor 11 because defendant admitted that he had used marihuana daily for years (*see People v Palmer*, 20 NY3d 373, 377-378 [2013]; *People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019]; *People v Merkley*, 125 AD3d 1479, 1479 [4th Dept 2015]).

With respect to defendant's further contention that defense counsel was ineffective in failing to seek a downward departure from defendant's presumptive risk level, we conclude that there are no " 'mitigating factors warranting a downward departure from his risk level' " (*Greenfield*, 126 AD3d at 1489; *see People v Allport*, 145 AD3d 1545, 1546 [4th Dept 2016]). Thus, contrary to defendant's contention, defense counsel "could have reasonably concluded that there was nothing to litigate at the hearing" (*People v Reid*, 59 AD3d 158, 159 [1st Dept 2009], *lv denied* 12 NY3d 708 [2009]; *see Allport*, 145 AD3d at 1546).

Entered: July 16, 2021 Mark W. Bennett
Clerk of the Court

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

430
KA 19-00451
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER A. KINGDOLLAR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), entered February 4, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Same memorandum as in *People v Kingdollar* ([appeal No. 1] — AD3d — [July 16, 2021] [4th Dept 2021]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

433
KA 18-02390
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY GREEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 2, 2018. The judgment convicted defendant upon a jury verdict of arson in the third degree (four 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 four counts of arson in the third degree (Penal Law § 150.10). We reject defendant's contention that Supreme Court erred in refusing to suppress statements that he made during police-monitored conversations with defendant's relatives (informants). Although we agree with defendant that the informants were acting as agents of the police when they spoke with him, the informants " 'did not make a threat that would create a substantial risk that defendant might falsely incriminate himself' " (*People v Bradberry*, 131 AD3d 800, 802 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015]; *see People v Mitchell*, 170 AD3d 1522, 1522-1523 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]) and, considering the totality of the circumstances, we agree with the court's further determination that defendant's statements to the informants were voluntarily made (*see generally People v Huff*, 133 AD3d 1223, 1225 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *People v Alexander*, 51 AD3d 1380, 1381 [4th Dept 2008], *lv denied* 11 NY3d 733 [2008]).

We also reject defendant's contention that the court erred in refusing to suppress the statements that he made to a police investigator. Contrary to his contention, we agree with the court that no *Miranda* warnings were necessary before he spoke to the investigator because defendant was not in custody (*see People v Baez*, 175 AD3d 982, 983 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019];

People v Leta, 151 AD3d 1761, 1762 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]). Indeed, the record supports the court's conclusions, including that defendant went home after the interview terminated and that he made the statement at issue spontaneously as he was leaving the police station. With respect to defendant's contention that the statement was involuntary because a police investigator told defendant that the police would be looking for him, we conclude that defendant failed to make the requisite showing that the investigator engaged in "deception [that] was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession" (*People v Morris*, 173 AD3d 1797, 1798 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019] [internal quotation marks omitted]), and we further conclude that the statements to the investigator were voluntarily made (*cf. People v Anderson*, 42 NY2d 35, 39 [1977]). Defendant failed to preserve for our review his contention that the court should have suppressed those statements as the fruit of an unlawful stop of a vehicle in which he was a passenger (*see People v Watkins*, 151 AD3d 1913, 1913 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]; *see generally People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the issue does not require preservation (*see e.g. People v Miranda*, 27 NY3d 931, 932-933 [2016]; *People v Graham*, 25 NY3d 994, 996-997 [2015]).

We also reject defendant's further contention that he was deprived of effective assistance of counsel due to his attorney's failure to move to suppress defendant's statements on the ground that they were the fruit of the allegedly unlawful vehicle stop. The record before us does not establish that defense counsel had any basis upon which to challenge the stop of the vehicle, and it is well settled that "[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" (*People v Francis*, 63 AD3d 1644, 1644 [4th Dept 2009], *lv denied* 13 NY3d 835 [2009] [internal quotation marks omitted]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). To the extent that defendant's contention involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL 440.10 (*see People v Carey*, 162 AD3d 1476, 1478 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]). Defendant's remaining allegations of ineffective assistance of counsel lack merit. Viewing defense counsel's representation in its totality and as of the time of the representation, including defendant's acquittal on the four counts charged in the indictment, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's contention that the court erred in concluding that the identification procedure was not unduly suggestive. To the contrary, we conclude that "the fact that a witness viewed the photo array while [other people were] in the room did not taint the witness's identification of defendant's photograph

in the photo array" (*People v Rodriguez*, 17 AD3d 1127, 1129 [4th Dept 2005], *lv denied* 5 NY3d 768 [2005]). The evidence from the suppression hearing demonstrates that the juvenile witness's father and the father's attorney were present but did not participate in the identification procedure or influence the identification of defendant by the juvenile (*see People v Vanvleet*, 140 AD3d 1633, 1634 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016]; *Rodriguez*, 17 AD3d at 1129; *see also People v Libbett*, 289 AD2d 961, 961-962 [4th Dept 2001], *lv denied* 97 NY2d 730 [2002]).

Defendant's contention that the court erred in its *Molineux* ruling with respect to the evidence of an uncharged crime is not preserved for our review because defendant did not challenge that evidence in his opposition to the People's application to introduce *Molineux* evidence or otherwise object to the admission thereof (*see People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]). We further conclude that "[d]efendant's contention that the court erred in allowing a witness to testify that he had allegedly committed uncharged crimes outside the scope of the *Molineux* ruling is not properly before us inasmuch as defendant did not object at the time of that testimony" (*People v Williams*, 101 AD3d 1730, 1732 [4th Dept 2012], *lv denied* 21 NY3d 1021 [2013]; *see People v Bastian*, 83 AD3d 1468, 1469 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]). Defendant also failed to preserve his contentions concerning alleged instances of prosecutorial misconduct during summation (*see People v Boyd* [appeal No. 2], 184 AD3d 1151, 1154 [4th Dept 2020]; *see also People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]), and an alleged *Brady* violation (*see People v Bloom*, 149 AD3d 1462, 1463 [4th Dept 2017], *lv denied* 30 NY3d 947 [2017]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

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

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

435
KA 18-00688
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALEEM K. MUHAMMED, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRITTNEY N. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered December 12, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). On appeal, defendant argues that Supreme Court erred in refusing to suppress a gun recovered from his coat pocket during the initial 40 seconds of a traffic stop. We affirm.

At the outset, defendant correctly concedes that the initial traffic stop was lawful based on the driver's traffic infractions and suspended license (*see People v Robinson*, 97 NY2d 341, 350 [2001]; *People v Jarrett*, 157 AD3d 534, 534 [1st Dept 2018], *lv denied* 31 NY3d 1014 [2018]). Defendant also correctly concedes that the police properly directed him to exit the vehicle (*see People v Garcia*, 20 NY3d 317, 321 [2012]). Defendant further correctly concedes that, at the inception of the traffic stop, a recent tip from his parole officer supplied the police with founded suspicion that he was in possession of a gun; defendant therefore acknowledges that the police were authorized to conduct a level two common-law inquiry at the inception of the traffic stop.

Defendant asserts, however, that the gun was not actually discovered until the police had already effectuated a level three detention of his person by grabbing his arms after he exited the vehicle. That purported level three detention was impermissible,

according to defendant, because the police lacked any reasonable suspicion of criminality at its inception. Thus, defendant reasons, the court erred in refusing to suppress the gun discovered during the ostensibly impermissible level three detention. We reject defendant's contention for the following reasons.

First, defendant was not subject to a level three detention at any point *before* the police saw the gun. It is well established that "minimal self-protective measure[s are] permissible in furtherance of the common-law right of inquiry, where sufficient concerns for [officer] safety are present" (*People v Butler*, 127 AD3d 623, 624 [1st Dept 2015] [internal quotation marks omitted]; *see People v Chin*, 192 AD2d 413, 413 [1st Dept 1993], *lv denied* 81 NY2d 1071 [1993]). As such, a level one or two encounter is not transformed into a level three detention whenever law enforcement briefly grabs the defendant in response to a sudden movement that made it "objectively reasonable, under all the circumstances, for the officer to be concerned that [the] defendant might be reaching for a weapon" (*People v Davis*, 106 AD3d 144, 151 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *see People v Wyatt*, 14 AD3d 441, 441-442 [1st Dept 2005], *lv denied* 4 NY3d 837 [2005]; *People v Campbell*, 293 AD2d 396, 396-397 [1st Dept 2002], *lv denied* 98 NY2d 695 [2002]; *Chin*, 192 AD2d at 413). Put simply, grabbing a suspect's arm after he or she reaches furtively or suspiciously for his or her pocket during a level two encounter is a "justified" and "minimal self-protective measure" (*Davis*, 106 AD3d at 151); such a protective action is "not a frisk" subject to level three scrutiny (*Wyatt*, 14 AD3d at 441-442 [internal quotation marks omitted]). Here, the parole officer's tip that defendant had a gun, combined with defendant's continuous clutching at his right side and evasive efforts to shield whatever he was clutching as he exited the vehicle, made it "objectively reasonable, under all the circumstances, for the officer[s] to be concerned that defendant might be reaching for a weapon" (*Davis*, 106 AD3d at 151). Thus, the officers' momentary actions in grabbing and attempting to secure defendant's arms to ensure that he did not draw a gun were a proper "minimal self-protective measure" that did not transform the indisputably permissible level two inquiry into a level three detention requiring reasonable suspicion (*id.*; *see Wyatt*, 14 AD3d at 441-442; *Campbell*, 293 AD2d at 396-397; *Chin*, 192 AD2d at 413).

Second, even had the police effectuated a level three detention simply by grabbing defendant's arms, any such level three detention would have been justified by the requisite reasonable suspicion of criminality. Specifically, given the combined effect of the parole officer's tip, defendant's continuous and unnatural clutching at his right side, defendant's evasive efforts to extricate himself from the scene by forcefully walking backwards upon exiting the vehicle, and defendant's status as a parolee, we conclude that the police had reasonable suspicion that defendant was armed at the moment they grabbed his arms (*see e.g. People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]; *People v White*, 113 AD3d 532, 533 [1st Dept 2014], *lv denied* 24 NY3d 1048 [2014]; *People v Nelson*, 67 AD3d 486, 487 [1st Dept

2009]; *see generally People v Huntley*, 43 NY2d 175, 181 [1977]). Defendant's contrary arguments improperly analyze each aspect of the encounter in isolation and without considering the totality of the circumstances confronting the officers during this fast-moving and compacted encounter (*see People v Stephens*, 47 AD3d 586, 588-589 [1st Dept 2008], *lv denied* 10 NY3d 940 [2008]).

The court thus properly refused to suppress the gun because the police did nothing improper to facilitate or cause its discovery.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

448
KA 18-02331
PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MANUEL BLANCO-ORTIZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered November 1, 2018. The judgment convicted defendant upon a plea of guilty of attempted sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking condition 35 as a condition of probation in its entirety and striking condition 34 as a condition of probation and replacing it with the following condition:

> "Probationer shall not use the internet to access pornographic material, shall not access or have an internet account for a commercial social networking website as defined by Penal Law § 65.10 (4-a) (b), and shall not communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of 18."

and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [4]). Defendant's contention that his waiver of the right to appeal is invalid is academic. Defendant's sole remaining contention on appeal is a challenge to the legality of certain conditions of his probation, and that contention survives even a valid waiver of the right to appeal (*see People v Castaneda*, 173 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019], *lv denied* 34 NY3d 1126 [2020]; *People v King*, 151 AD3d 1651, 1652 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]).

Regarding defendant's challenge to the conditions of probation,

we reject defendant's contention that condition 21 fails to serve the goals of probation as set forth in Penal Law § 65.10 (*see* § 65.10 [1], [2] [l]; *cf. Matter of Brandon W.*, 28 AD3d 783, 785 [2d Dept 2006], *lv denied* 7 NY3d 707 [2006]; *see generally People v Hakes*, 32 NY3d 624, 628 [2018]). We likewise reject defendant's contention that Supreme Court erred in imposing condition 31. To the extent that defendant contends that condition 31 allows his probation officer to "veto" defendant's ability to develop relationships with persons over 18 years of age, we conclude that the condition, by its terms, does not provide the probation officer with such authority. Instead, the condition requires defendant to "inform all persons with whom [he has] a significant relationship . . . of [his] sexual offending history" and requires defendant to consent to his probation officer contacting all such persons. To the extent that defendant otherwise contends that condition 31 is not reasonably related to the goals of probation, we conclude that, in light of the facts of the offense underlying defendant's conviction, the condition is appropriate and will assist in both defendant's rehabilitation and his ability to lead a law-abiding life (*see generally* § 65.10 [1], [2] [l]).

We also reject defendant's contention that condition 34 should be stricken to the extent that it prohibits him from maintaining an account on a social networking site. Under the circumstances of defendant's conviction, that was a mandatory condition of his probation (*see* Penal Law § 65.10 [4-a] [b]; *King*, 151 AD3d at 1653).

We agree with defendant, however, that the court erred in imposing the remainder of condition 34 and condition 35. In addition to prohibiting defendant from maintaining an account on a social networking site, condition 34 also prohibits defendant from purchasing, possessing, controlling, or having access to any computer or device with internet capabilities and from maintaining any "internet account," including email, without permission from his probation officer. Condition 35 prohibits defendant from owning, renting, or possessing a cell phone with picture taking capabilities or cameras or video recorders for capturing images. In light of defendant's lack of a prior criminal history and the lack of evidence in the record linking defendant's use of technology to the underlying offense, we conclude that those parts of condition 34 and the entirety of condition 35 do not relate to the goals of probation and thus are not enforceable on that ground (*see generally People v Mead*, 133 AD3d 1257, 1258 [4th Dept 2015]). We therefore modify the judgment by striking condition 35 as a condition of probation in its entirety and striking condition 34 as a condition of probation and replacing it with the following condition: "Probationer shall not use the internet to access pornographic material, shall not access or have an internet account for a commercial social networking website as defined by Penal Law § 65.10 (4-a) (b), and shall not communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of 18."

Entered: July 16, 2021 Mark W. Bennett
Clerk of the Court

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

453
KA 15-01988
PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OMARI S. MCGUIRE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered February 27, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, County Court did not err in denying his for-cause challenge to a prospective juror. None of the prospective juror's statements reflected that he had " 'a state of mind that [was] likely to preclude him . . . from rendering an impartial verdict based upon the evidence adduced at the trial,' " and nothing he said, placed in context, " 'cast serious doubt on [his] ability to render an impartial verdict' " (*People v Fowler-Graham*, 124 AD3d 1403, 1403 [4th Dept 2015], *lv denied* 25 NY3d 1072 [2015]; *see generally People v Dirschberger*, 185 AD3d 1224, 1227 [3d Dept 2020], *lv denied* 36 NY3d 1056 [2021]).

We likewise reject defendant's contention that the People committed a violation of their *Rosario* or *Brady* obligations by failing to disclose to defendant the testimony that two trial witnesses had given during a *Darden* hearing conducted prior to trial. The People's *Rosario* and *Brady* obligations are limited to materials under the People's possession or control (*see People v Santorelli*, 95 NY2d 412, 421 [2000]; *People v Kelly*, 88 NY2d 248, 251-252 [1996]). Here, it is undisputed that the People did not possess a copy of the transcript from the *Darden* hearing, and defendant thus contends that the People's obligations arose from their control over the transcript. The

transcript containing the witnesses' testimony, however, was generated and held by the court, an independent entity over which the People have no authority or control such that an obligation to disclose material held by it could arise (*see generally People v Howard*, 87 NY2d 940, 941 [1996]; *People v Washington*, 86 NY2d 189, 192 [1995]; *People v Fishman*, 72 NY2d 884, 886 [1988]; *People v Frank*, 107 AD2d 1057, 1057 [4th Dept 1985]).

Defendant correctly concedes that he failed to preserve for our review his contention that, during deliberations, the court erred in allowing the jury to review video exhibits in the courtroom, rather than the jury room. Contrary to defendant's contention, that alleged error is not one that falls within the "very narrow category of so-called 'mode of proceedings' errors" that are reviewable even in the absence of a timely objection (*People v Agramonte*, 87 NY2d 765, 770 [1996]; *see People v Hasan*, 165 AD3d 1606, 1607 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's identity as the perpetrator (*see generally People v Brown*, 92 AD3d 1216, 1217 [4th Dept 2012], *lv denied* 18 NY3d 992 [2012]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we 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]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

457

KA 19-00481

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH LOPEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 14, 2018. The judgment convicted defendant, upon a plea of guilty, of attempted course of sexual conduct against a child in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of attempted course of sexual conduct against a child in the first degree (Penal Law §§ 110.00, 130.75 [1] [a]). We affirm.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see generally People v Goins*, 191 AD3d 1399, 1399 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]), we reject defendant's contention that Supreme Court erred in refusing to suppress certain statements that defendant made to the police (*see People v Crane*, 87 AD3d 1386, 1387 [4th Dept 2011], *lv denied* 17 NY3d 952 [2011]).

We also reject defendant's contention that the court abused its discretion in refusing to grant him youthful offender status (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]). Additionally, having reviewed the applicable factors pertinent to a youthful offender adjudication (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him such status (*see Simpson*, 182 AD3d at 1047). Finally, the sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

508
CA 20-01490
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

ROME GAS, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FASTRAC PROPERTIES I, LLC, DEFENDANT-RESPONDENT.

CALLI, CALLI AND CULLY, UTICA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered April 24, 2020. The order granted the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking specific performance and monetary damages arising from defendant's alleged breach of a real estate purchase agreement (REPA). The REPA contained a liquidated damages provision, which stated in part: "In the event the Agreement is not closed due to the fault of the Seller [i.e., defendant], the money paid in escrow shall be returned to the Purchaser [i.e., plaintiff]. In such event neither party shall have any further claim against the other." Plaintiff now appeals from an order that granted defendant's motion for summary judgment limiting damages on the first cause of action to the amount paid in escrow pursuant to the liquidated damages provision, and dismissing the second and third causes of action in their entirety.

We reject plaintiff's contention that the liquidated damages provision is unconscionable and therefore unenforceable. A "determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]). Here, the REPA is not procedurally unconscionable given that it was "entered into by sophisticated entities as part of a normal commercial transaction, there is no evidence of deceptive or high-pressure tactics, [the] agreement contains [no] 'fine print,' and there was no disparity in bargaining power" (*Mazursky Group, Inc. v 953 Realty Corp.*, 166 AD3d 432, 433 [1st Dept 2018]). Contrary to plaintiff's assertion, the fact that it was not initially represented

by counsel does not make the REPA procedurally unconscionable (*see Gillman*, 73 NY2d at 11-12). We note in that regard that, even after plaintiff retained counsel and sought to amend various other provisions of the REPA, plaintiff never objected to the liquidated damages provision. Nor can it be said, "[c]onsidering the context, the purpose and the effect of the [liquidated damages] provision . . . , that [such provision] is substantively unconscionable" (*Nalezenec v Blue Cross of W. N.Y.*, 172 AD2d 1004, 1005 [4th Dept 1991]; *see Matter of Conifer Realty LLC [EnviroTech Servs., Inc.]*, 106 AD3d 1251, 1254 [3d Dept 2013]; *E. Lee Martin, Inc. v Saks & Co.*, 30 AD3d 1139, 1140 [1st Dept 2006]).

Contrary to plaintiff's further contention, the remedy of specific performance is barred by the "explicit language in the contract that the liquidated damages provision was to be the sole remedy" in the event of a breach (*Rubinstein v Rubinstein*, 23 NY2d 293, 298 [1968]; *see L.K. Sta. Group, LLC v Quantek Media, LLC*, 62 AD3d 487, 493 [1st Dept 2009]; *cf. Coizza v 164-50 Crossbay Realty Corp.*, 37 AD3d 640, 643 [2d Dept 2007]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

510
CA 20-00400
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

PATTI FITZGERALD, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN KULA, DEFENDANT-RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT.

TREVETT CRISTO P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered February 18, 2020. The order and judgment, among other things, awarded money damages to both parties.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the verdict is set aside and the matter is remitted to Supreme Court, Ontario County, for a new trial.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, assault and battery, and in his amended answer defendant asserted counterclaims for, inter alia, defamation. The matter proceeded to trial, and now plaintiff appeals and defendant cross-appeals from an order and judgment of Supreme Court that denied the parties' respective motions to set aside portions of the jury verdict and, upon the jury verdict, awarded damages both to plaintiff and to defendant. We reverse.

We agree with defendant on his cross appeal that the court erred in denying his request to poll the jury. "A party has an absolute right to poll the jury, and a court's denial of that right mandates reversal and a new trial" (*Holstein v Community Gen. Hosp. of Greater Syracuse*, 20 NY3d 892, 893 [2012]; *see Duffy v Vogel*, 12 NY3d 169, 175 [2009]; *Muth v J & T Metal Prods. Co.*, 74 AD2d 898, 898 [2d Dept 1980], *lv dismissed* 51 NY2d 703 [1980], *lv dismissed* 51 NY2d 745 [1980]; *see generally Matter of National Equip. Corp. v Ruiz*, 19 AD3d 5, 12-13 [1st Dept 2005]). We therefore reverse the order and judgment and remit the matter to Supreme Court for a new trial (*see Dore v Wyer*, 1 AD2d 973, 974 [2d Dept 1956]; *see generally Holstein*, 20 NY3d at 893). In light of our determination, we do not address the

remaining contentions of the parties.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

522
CAF 19-02339
PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF TORY ANNE BAKER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHAUN WILLIAM MACKEY, RESPONDENT-RESPONDENT.

IN THE MATTER OF SHAUN WILLIAM MACKEY,
PETITIONER-RESPONDENT,

V

TORY ANNE BAKER, RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered December 13, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the violation petition of respondent-petitioner Shaun William Mackey and adjudged that respondent-petitioner have sole legal custody and primary physical custody of the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, petitioner-respondent mother filed separate petitions alleging a violation of a prior order of custody and visitation and seeking modification of that order by awarding her primary residential custody of the parties' child. Respondent-petitioner father filed separate petitions alleging a violation of the prior order and seeking modification of that order by, among other things, awarding him sole legal custody. The mother appeals from an order that, inter alia, granted the father's violation petition and his modification petition insofar as it sought sole legal custody and that dismissed the mother's petitions. We affirm.

Initially, we note that the mother is not aggrieved by that part of the order in which Family Court concluded that she established a change in circumstances sufficient to warrant an examination of the

best interests of the child, and thus her contentions with respect thereto are not properly before us (*see Matter of Menard v Roberts*, 194 AD3d 1427, 1428 [4th Dept 2021]; *see generally* CPLR 5511; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]).

We reject the mother's further contention that the court erred in granting the father's modification petition insofar as it sought sole legal custody of the child and in dismissing her modification petition. It is well settled that "a court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011] [internal quotation marks omitted]), and such a determination " 'will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1393 [4th Dept 2016]; *see Williams v Williams*, 100 AD3d 1347, 1348 [4th Dept 2012]).

Finally, we reject the mother's contention that the court erred in dismissing her violation petition. To the contrary, we conclude that "the court properly determined that [the mother] failed to establish by clear and convincing evidence that the [father] willfully violated the terms of the custody order with respect to . . . visitation" (*Matter of Unczur v Welch*, 159 AD3d 1405, 1405 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *see Matter of Santoro v Guggi*, 191 AD3d 1249, 1251 [4th Dept 2021], *lv denied* 37 NY3d 902 [2021]; *cf. Matter of Moreno v Elliott*, 155 AD3d 1561, 1562 [4th Dept 2017], *lv dismissed in part and denied in part* 30 NY3d 1098 [2018]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

533
KA 14-00053
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

ANACIN L. HYMES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JEFFREY WICKS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 9, 2013. The appeal was held by this Court by order entered April 27, 2018, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (160 AD3d 1386 [4th Dept 2018]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, resisting arrest (Penal Law § 205.30). On a prior appeal, we noted that defendant made a motion for a trial order of dismissal, but that Supreme Court failed to issue a ruling on that part of the motion with respect to the resisting arrest charge. We therefore held the case, reserved decision and remitted the matter to Supreme Court for such a ruling (*People v Hymes*, 160 AD3d 1386, 1387-1388 [4th Dept 2018]). Upon remittal, the court denied that part of the motion.

We reject defendant's contention that the evidence is legally insufficient to support the conviction of resisting arrest (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, "[t]o support a conviction for resisting arrest, it is not necessary that the person be informed verbally that he [or she] is being arrested; it is sufficient that such knowledge be inferable from the facts and circumstances" (*People v Maturevitz*, 149 AD2d 908, 908 [4th Dept 1989]).

Here, the proof at trial established that a uniformed officer identified himself as a police officer and ordered defendant not to move. Defendant responded by fleeing, jumping over a fence, and

attempting to evade other officers he thereafter encountered. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that, under these circumstances, the evidence is legally sufficient to support the conviction of resisting arrest (*see People v Bell*, 265 AD2d 813, 814 [4th Dept 1999], *lv denied* 94 NY2d 916 [2000]; *People v Gray*, 189 AD2d 922, 922-923 [3d Dept 1993], *lv denied* 81 NY2d 886 [1993]; *Maturevitz*, 149 AD2d at 908-909). We addressed the other contentions raised by defendant in our prior decision and concluded that none required modification or reversal of the judgment (*see Hymes*, 160 AD3d at 1387-1388).

Entered: July 16, 2021 Mark W. Bennett
Clerk of the Court

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

546
CAF 20-00706
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF ARIEL PONTILLO,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

LANCE JOHNSON-KOSIOREK,
RESPONDENT-PETITIONER-RESPONDENT.

JENNIFER M. LORENZ, ESQ., ATTORNEY
FOR THE CHILD, APPELLANT.

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

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 31, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother and the Attorney for the Child (AFC) each appeal from an order that, in essence, dismissed the mother's petition seeking to suspend respondent-petitioner father's visitation and granted the father's cross petition seeking to modify a prior custody and visitation order by, among other things, awarding him sole custody of the subject child.

The mother contends on her appeal that Family Court erred in making its custody determination before the parties had completed psychological evaluations ordered by the court. We agree. "In custody disputes, the value of forensic evaluations of the parents and child[ ] has long been recognized" (*Ekstra v Ekstra*, 49 AD3d 594, 595 [2d Dept 2008]). The assistance of psychological experts in custody proceedings may be necessary where the child has exhibited emotional and behavior problems, there is sharply conflicting testimony regarding the conduct of the parties, or a party's mental health is at

issue (*see Markowitz v Markowitz*, 183 AD3d 710, 711 [2d Dept 2020]; *Ekstra*, 49 AD3d at 595; *Matter of Thompson v Thompson*, 267 AD2d 516, 519 [3d Dept 1999]; *Matter of Paul C. v Tracy C.*, 209 AD2d 955, 955 [4th Dept 1994]). The dispositive inquiry is whether there was sufficient testimony from the parties and other witnesses to enable the court to resolve the custody dispute without those evaluations (*see Matter of Nunnery v Nunnery*, 275 AD2d 986, 987 [4th Dept 2000]; *see also Ekstra*, 49 AD3d at 595).

The mother's mental and emotional health was the central issue contested in this proceeding, and we conclude that the court abused its discretion in making its determination and awarding the father sole custody of the child without first considering the results of the psychological evaluations that it ordered (*see Markowitz*, 183 AD3d at 711; *Ekstra*, 49 AD3d at 595-596; *Paul C.*, 209 AD2d at 955). Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information on the mother's emotional functioning, the impact her mental health issues had on her ability to parent the child, or the fitness of either parent. Thus, on this record, we cannot say that there was sufficient evidence for the court to resolve the custody dispute without considering the court-ordered psychological examinations of the parents (*see Ekstra*, 49 AD3d at 595-596; *cf. Nunnery*, 275 AD2d at 987). Consequently, we reverse the order, reinstate the mother's petition, and remit the matter to Family Court for completion of the court-ordered psychological evaluations and for a new hearing to determine whether modification of the parties' prior order of custody and visitation is in the child's best interests. Pending the court's determination upon remittal, the custody and visitation provisions in the order appealed from shall remain in effect.

The mother's further contention on her appeal that the court abused its discretion in failing to hold a *Lincoln* hearing is unpreserved for our review because she did not request such a hearing (*see Matter of Montalbano v Babcock*, 155 AD3d 1636, 1636-1637 [4th Dept 2017], *lv denied* 31 NY3d 912 [2018]). In any event, the court did not abuse its discretion in failing to hold a *Lincoln* hearing given the young age of the child and the fact that the child may have been inadvertently coached by the mother to repeat unfounded allegations (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1530-1531 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]; *Matter of Kakwaya v Twinamatsiko*, 159 AD3d 1590, 1591 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]).

In light of our determination, the mother's remaining contentions on her appeal and the AFC's contentions on her appeal are academic.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

549
CA 20-00579
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DOY S., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ELIZABETH S. FORTINO, ACTING DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Robert E. Antonacci, II, J.), entered April 21, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, directed the release and discharge of petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: Petitioner is a convicted sex offender who was civilly committed pursuant to Mental Hygiene Law § 10.07 (f) in 2018. One year later, petitioner petitioned for discharge pursuant to section 10.09. After conducting an annual review hearing pursuant to section 10.09 (d), Supreme Court, inter alia, determined that petitioner does not suffer from a mental abnormality as that term is defined in section 10.03 (i), granted the petition, and directed petitioner's unconditional discharge from the custody of the New York State Office of Mental Health. Respondent State of New York (State) now appeals.

We agree with the State that the court erred in determining that a combination of antisocial personality disorder (ASPD) with psychopathy or ASPD with narcissistic traits cannot constitute the basis for a finding of mental abnormality. At the annual review hearing, the State has the burden of establishing by clear and convincing evidence that the offender continues to suffer from a mental abnormality and that he or she remains a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). A mental abnormality is defined as a "congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or

her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). "Thus, not only must the State establish by clear and convincing evidence the existence of a predicate condition, disease or disorder, it must also link that condition, disease or disorder to a person's predisposition to commit conduct constituting a sex offense and to that person's serious difficulty in controlling such conduct" (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* 137 S Ct 579 [2016] [internal quotation marks omitted]; *see also* § 10.07 [d]). A diagnosis need not be limited to mental disorders listed in the Diagnostic and Statistical Manual of Mental Disorders (*see Matter of State of New York v Shannon S.*, 20 NY3d 99, 106 [2012], *cert denied* 568 US 1216 [2013]).

In *Matter of State of New York v Donald DD.* (24 NY3d 174, 189-191 [2014]), the Court of Appeals held that a diagnosis of ASPD, by itself, is insufficient to support a mental abnormality finding. Rather, it must be "accompanied by a diagnosis of any *other condition*, disease or disorder alleged to constitute a mental abnormality" (*id.* at 190 [emphasis added]).

The State's expert here diagnosed petitioner with ASPD with narcissistic features and the condition of psychopathy, and the expert testified that those diagnoses, together with petitioner's enduring hostility towards women, collectively constitute a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). She acknowledged that the scientific community has been debating for decades whether psychopathy is a distinct condition from ASPD, but she opined that they were indeed separate conditions. Petitioner's expert, on the other hand, diagnosed petitioner with ASPD but testified that petitioner had no other conditions in addition to that diagnosis that would render him a sex offender within the meaning of Mental Hygiene Law article 10. He further testified that psychopathy was simply an extreme variant of ASPD and should not be considered a condition separate from ASPD.

The court determined that a diagnosis of psychopathy or psychopathic features is still only a diagnosis of ASPD alone and thus, under *Donald DD.* (24 NY3d at 190), could not constitute an "other condition" to provide a basis for a finding of a mental abnormality. We agree with the State that, in so holding, the court did not resolve the conflict between the experts regarding ASPD and psychopathy by weighing their testimony but rather made a determination that, generally speaking and without regard to petitioner's specific case, a finding of ASPD and psychopathy can *never* provide a basis for a finding of mental abnormality. Contrary to the court's apparent conclusion, "the Court of Appeals in *Donald DD.* did not state that diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality" (*Matter of State of New York v Jerome A.*, 137 AD3d 557, 558 [1st Dept 2016]). When supported by expert testimony, a diagnosis of ASPD and psychopathy is legally sufficient to provide a basis for a finding of mental abnormality (*see Matter of State of New York v Francisco R.*, 191 AD3d 989, 991 [2d Dept 2021]; *Matter of State of New York v*

Marcello A., 180 AD3d 786, 787-790 [2d Dept 2020], *appeal dismissed* 36 NY3d 940 [2020]; *Matter of Suggs v State of New York*, 142 AD3d 1283, 1284 [4th Dept 2016]; *Jerome A.*, 137 AD3d at 558; *see also Dennis K.*, 27 NY3d at 750-752; *Matter of State of New York v Williams*, 139 AD3d 1375, 1378 [4th Dept 2016], *lv denied* 28 NY3d 910 [2016], *cert denied* 137 S Ct 2276 [2017]). Inasmuch as there was conflicting expert opinion on the matter, the court should have weighed the testimony of the experts in rendering its determination whether petitioner suffers from a mental abnormality (*see generally Shannon S.*, 20 NY3d at 107), which it did not do.

The court further determined that the diagnosis of ASPD with narcissistic features could not support a finding of a mental abnormality because the diagnosis of "with [n]arcissistic [f]eatures" was subsumed into the diagnosis of ASPD. We agree with the State that the court erred in so holding because its determination was not based on the expert testimony before it. Rather, the court substituted its own psychological judgment for that of the parties' experts, which was improper (*see Scalisi v Oberlander*, 96 AD3d 106, 122 [1st Dept 2012]; *see generally Donald DD.*, 24 NY3d at 190; *Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340 [4th Dept 2020]).

Contrary to the State's contention, however, in light of the conflicting expert testimony, there is not uncontroverted evidence that petitioner has a mental abnormality. We therefore reverse the order and remit the matter to the Supreme Court for a new hearing on whether petitioner continues to suffer from a mental abnormality and remains a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). We also direct that the new hearing in this matter be conducted before a different judge.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

550
CA 20-00585
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DOY S., PETITIONER-RESPONDENT,

V ORDER

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

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

ELIZABETH S. FORTINO, ACTING DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Robert E. Antonacci, II, J.), dated April 24, 2020 in a proceeding pursuant to Mental Hygiene Law article 10. The amended order amended a prior order by extending the period of a stay.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

560
KA 17-01491
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD BRADLEY, DEFENDANT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered July 18, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). Defendant contends that he is entitled to vacatur of the plea because, contrary to the alleged promise of County Court, he was not eligible for immediate enrollment in the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program following his combined plea and sentencing proceeding. Even assuming, arguendo, that preservation was not required under the circumstances of this case (*see generally People v Williams*, 27 NY3d 212, 219-225 [2016]; *People v Balkum*, 169 AD3d 1358, 1359 [4th Dept 2019], *lv denied* 33 NY3d 974 [2019]), we conclude that defendant's contention lacks merit. Here, the record establishes that the court made no promise with respect to defendant's immediate participation in the CASAT program (*see People v Wrobel*, 57 AD3d 1499, 1500 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009]; *People v Martin*, 55 AD3d 1304, 1304 [4th Dept 2008], *lv denied* 11 NY3d 899 [2008]; *People v McKoy*, 52 AD3d 1246, 1247 [4th Dept 2008], *lv denied* 11 NY3d 833 [2008]). Instead, the court fulfilled the promise it did make by issuing an order—which was provided by defense counsel to the court for signature—directing defendant's enrollment in that program, but only on the condition that defendant satisfied the statutory eligibility criteria for participation in such program (*see* Penal Law § 60.04 [6]; *see generally McKoy*, 52 AD3d at 1247). To the extent that defendant claims that he entered the plea under the mistaken

belief that he was eligible for immediate participation in the CASAT program, we note that where, as here, "a sentencing court keeps the promise[] it made at the time it accepted a plea of guilty, a defendant should not be permitted to withdraw his [or her] plea on the sole ground that he [or she] misinterpreted the agreement. Compliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580 [1976]; *see People v Lorraine*, 138 AD3d 1494, 1495 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]; *People v Guillory*, 81 AD3d 1394, 1395 [4th Dept 2011], *lv denied* 16 NY3d 895 [2011]).

Defendant also contends that his plea was not voluntarily entered because the court failed to inform him of the eligibility criteria for the CASAT program, which defendant characterizes as a direct consequence of the plea. Even assuming, arguendo, that defendant was not required to preserve that contention under the circumstances of this case (*see generally Williams*, 27 NY3d at 219-225), we nonetheless conclude that it lacks merit. "It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" (*People v Jones*, 118 AD3d 1360, 1361 [4th Dept 2014]; *see People v Harnett*, 16 NY3d 200, 205 [2011]; *People v Catu*, 4 NY3d 242, 244 [2005]). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" (*Harnett*, 16 NY3d at 205). Here, we conclude that any restrictions on defendant's eligibility for participation in the CASAT program constituted a collateral consequence of the plea, and thus the court's failure to discuss the eligibility criteria does not warrant vacatur of the plea (*see People v Colt*, 39 AD3d 770, 770 [2d Dept 2007]). Contrary to defendant's related contention, we further conclude on the record before us that defendant failed to "show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed" (*People v Gravino*, 14 NY3d 546, 559 [2010]; *see Harnett*, 16 NY3d at 207-208).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]; *see Martin*, 55 AD3d at 1305). Insofar as

defendant contends that defense counsel misinformed him about his eligibility for the CASAT program, his contention "involves matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440" (*Wrobel*, 57 AD3d at 1500; *see People v Moran*, 57 AD3d 1010, 1010 [2d Dept 2008], *lv denied* 12 NY3d 918 [2009]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, we note that the combined plea and sentencing proceeding and the sentence reflect defendant's status as a second felony drug offender (Penal Law § 70.70 [1] [b]), and the record thus confirms that the court merely misstated during sentencing that defendant was a second felony offender rather than a second felony drug offender (*see Seymore*, 188 AD3d at 1770; *People v Feliciano*, 108 AD3d 880, 881 n 1 [3d Dept 2013], *lv denied* 22 NY3d 1040 [2013]). Inasmuch as the certificate of conviction incorrectly reflects that defendant was sentenced as a second felony offender, it must be amended to reflect that he was sentenced as a second felony drug offender (*see People v Easley*, 124 AD3d 1284, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

562
KA 18-01874
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL REYES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered May 16, 2018. The judgment convicted defendant, upon a plea of guilty, of burglary in the third degree and criminal mischief in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20) and criminal mischief in the fourth degree (§ 145.00 [1]), defendant contends that his waiver of the right to appeal is unenforceable and that his felony conviction should be reduced to a misdemeanor because County Court abused its discretion in refusing to allow him to continue participating in the judicial diversion program following an arrest on new felony charges. Even assuming, arguendo, that defendant's waiver of the right to appeal is unenforceable (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we perceive no abuse of discretion by the court (*see People v Secore*, 102 AD3d 1059, 1060 [3d Dept 2013], *lv denied* 21 NY3d 1019 [2013]). In any event, under these circumstances, there is no legal basis for us to reduce the felony conviction to a misdemeanor, as defendant requests.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

575

KA 18-02437

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. TORNABENE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered September 11, 2018. The judgment revoked defendant’s sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant pleaded guilty to attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [a]) and, pursuant to the plea agreement, County Court sentenced him to a five-year term of probation. Shortly after being placed on probation, defendant violated the terms and conditions of probation and entered an admission in return for a promise from the court to sentence him to no more than two years in prison plus three years of postrelease supervision (PRS) and the court imposed that sentence.

Defendant now contends that his waiver of the right to appeal is invalid and that the period of PRS is unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is unenforceable (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we perceive no basis in the record to exercise our power to modify the period of PRS as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

590

KA 15-01823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. BREWER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 22, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 20 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant's conviction stems from his participation in a murder along with two other codefendants. At trial, a witness testified that defendant pointed a gun at the victim and shot him. In defendant's written statement to the police, he admitted that he agreed to kill the victim for one of the codefendants in exchange for a sum of money, that he retrieved his gun from his house and drove from Elmira to Rochester with the codefendants to execute the plan, that he waited with the codefendants for the victim to arrive at a house, and that when the victim arrived, he pointed the gun at him and threatened to "shoot him in the brain." Defendant further stated, however, that he "couldn't pull the trigger" even though a codefendant was telling him to "shoot him, shoot him." That codefendant then "snatched" the gun out of defendant's hand, said "F^{xxx} it I'll do it," and shot the victim multiple times. Defendant was previously convicted of criminal possession of a weapon in the second degree stemming from this incident, which conviction we affirmed (*People v Brewer*, 118 AD3d 1407 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). He was also convicted, after a separate trial, of murder in the second degree stemming from this incident, but we reversed that conviction and

remitted for a new trial on that count of the indictment based on our determination that Supreme Court (Egan, J.) erred in charging the jury with the affirmative defense of renunciation over the objection of defense counsel (*People v Brewer*, 118 AD3d 1409 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

In this appeal, we reject defendant's contention that the People were judicially estopped from proceeding on a theory of accomplice liability inasmuch as "the People neither argued for nor prevailed upon a contrary position in a prior proceeding" (*People v Adam*, 126 AD3d 1169, 1170 [3d Dept 2015], *lv denied* 25 NY3d 911 [2015]). Defendant relies upon statements made by the prosecutor when opposing defendant's request to dismiss the count of intentional murder in the indictment based upon an executed cooperation agreement, the court's denial of which we upheld on the prior appeal from the murder conviction (*Brewer*, 118 AD3d at 1409-1411). Specifically, the prosecutor had indicated that defendant's statement to the police, on its own, would not give the prosecutor a legal basis to charge him with intentional murder under any theory of liability, but that, after obtaining a statement from a witness who said that defendant shot the victim, the prosecutor voided the cooperation agreement on the ground that defendant had provided false information. Thus, the People did not argue or prevail upon a contrary position in the earlier proceeding because the issue whether defendant's statement, if accepted as true, would support a charge of murder on a theory of accomplice liability was irrelevant to the issue before the court and this Court, which was whether the prosecutor had a good faith belief that defendant failed to provide truthful information (*id.* at 1411).

We reject defendant's contention that the court (Affronti, J.) erred in instructing the jury on both principal and accomplice liability. It is well settled that "there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]; *see People v Mateo*, 2 NY3d 383, 406 [2004], *cert denied* 542 US 946 [2004]; *People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]). Thus, the court properly instructed the jurors that, while their verdict needed to be unanimous, they did not need to be unanimous on whether defendant committed the crime personally or by acting in concert with another or others (*see Mateo*, 2 NY3d at 406; CJI2d[NY] Accessorial Liability n 7). Contrary to defendant's contention, the court's instruction was not contrary to *Ramos v Louisiana* (— US —, —, 140 S Ct 1390, 1395-1397 [2020]) inasmuch as, unlike *Ramos*, defendant here was convicted upon a unanimous verdict.

We reject defendant's contention that the evidence is legally insufficient to establish his liability as an accessory. "Accessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Pizarro*, 151 AD3d 1678, 1681 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017] [internal quotation marks omitted]; *see* Penal Law § 20.00). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the factfinder could have

reasonably concluded that defendant and the codefendants "jointly planned, prepared for and committed the murder of the victim" (*People v Glanda*, 5 AD3d 945, 949 [3d Dept 2004], *lv denied* 3 NY3d 640 [2004], *reconsideration denied* 3 NY3d 674 [2004], *cert denied* 543 US 1093 [2005]; *see People v Williams*, 179 AD3d 1502, 1502-1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *People v Morris*, 229 AD2d 451, 451 [2d Dept 1996], *lv denied* 88 NY2d 990 [1996]; *see generally People v Cabey*, 85 NY2d 417, 421-422 [1995]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that the court erred in denying his request to admit in evidence the results of his polygraph examination (*see People v Shedrick*, 66 NY2d 1015, 1018 [1985], *rearg denied* 67 NY2d 758 [1986]; *People v Weber*, 40 AD3d 1267, 1267 [3d Dept 2007], *lv denied* 9 NY3d 927 [2007]; *see also People v DeLorenzo*, 45 AD3d 1402, 1402-1403 [4th Dept 2007], *lv denied* 10 NY3d 763 [2008]). We also reject defendant's further contention that his absence from a pretrial appearance denied him his right to be present at a material stage of the criminal proceeding. At the proceeding, the court, the prosecutor, and defense counsel discussed only questions of law regarding the admissibility of defendant's polygraph examination results and the judicial estoppel issue, and thus defendant's presence was not required (*see People v Velasco*, 77 NY2d 469, 472 [1991]; *People v Butler*, 96 AD3d 1367, 1368 [4th Dept 2012], *lv denied* 20 NY3d 931 [2012]; *see generally People v Chisolm*, 85 NY2d 945, 947 [1995]). The facts regarding those issues were uncontested and, contrary to defendant's contention, did not implicate his "peculiar factual knowledge" (*People v Fabricio*, 3 NY3d 402, 406 [2004]).

We agree with defendant, however, that the sentence imposed, an indeterminate term of incarceration of 25 years to life, is unduly harsh and severe. Under the circumstances of this case, including that defendant was 18 years old at the time of the incident, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of incarceration of 20 years to life (*see generally* CPL 470.15 [6] [b]), with the sentence remaining concurrent to the sentence previously imposed on the count of criminal possession of a weapon in the second degree.

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

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

598

KA 17-01698

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

JARRON A. BALL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered May 22, 2017. The judgment convicted defendant upon a plea of guilty of disseminating indecent material to minors in the first degree and sexual misconduct.

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 disseminating indecent material to minors in the first degree (Penal Law § 235.22) and sexual misconduct (§ 130.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

646
CA 20-01089
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF ANTHONY ROMANO,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered August 12, 2020 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the Parole Board's determination denying his request for release to parole supervision. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in February 2021 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; *Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see Matter of Porter v Annucci*, 148 AD3d 1779, 1779 [4th Dept 2017]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: July 16, 2021 Mark W. Bennett
Clerk of the Court

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

652

KA 19-00806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC SMITH, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 14, 2019. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

655
KA 18-01288
PRESENT: CENTRA, J.P., CARNI, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE E. DESJARDINS, DEFENDANT-APPELLANT.

ROBERT GALLAMORE, OSWEGO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Oswego County (James W. McCarthy, J.), rendered February 23, 2018. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child in the second degree, rape in the second degree and sexual abuse in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress statements made to the Child Protective Services caseworker is granted, and the matter is remitted to Supreme Court, Oswego County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]), rape in the second degree (§ 130.30 [1]), and sexual abuse in the third degree (§ 130.55) stemming from incidents that were investigated by both the Oswego County Sheriff’s Office and Child Protective Services (CPS). As an initial matter, defendant’s purported waiver of the right to appeal is invalid inasmuch as Supreme Court’s colloquy did not sufficiently apprise defendant of the scope of the waiver or that certain rights would survive the waiver (*see People v Esquilin*, 192 AD3d 1481, 1481 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *see also People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and the written waiver of the right to appeal executed by defendant did not cure the deficient colloquy (*see People v Davis*, 188 AD3d 1731, 1732 [4th Dept 2020]; *People v Harlee*, 187 AD3d 1586, 1587 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]).

With respect to the merits, defendant contends that the CPS caseworker who interviewed him while he was in custody was acting as an agent of the police when she interviewed him and that the court

thus erred in refusing to suppress the statements he made to her outside the presence of his counsel after his right to counsel had undisputedly attached (*see People v Velasquez*, 68 NY2d 533, 537 [1986]). Although social workers are not automatically considered agents of the police, they may be so considered under certain circumstances (*see People v Rodriguez*, 135 AD3d 1181, 1184-1185 [3d Dept 2016], *lv denied* 28 NY3d 936 [2016]). In determining whether there is an agency relationship, the existence of a joint task force involving CPS and law enforcement agencies is not itself dispositive (*see People v Wilcox*, 192 AD3d 1540, 1541 [4th Dept 2021], *lv denied* 37 NY3d 961 [2021]). Rather, it is the "degree of investigatory cooperation" between the two agencies that should be considered (*People v Rodas*, 145 AD3d 1452, 1453 [4th Dept 2016]; *see People v Wilhelm*, 34 AD3d 40, 48 [3d Dept 2006]; *People v Greene*, 306 AD2d 639, 640-641 [3d Dept 2003], *lv denied* 100 NY2d 594 [2003]).

Here, the CPS caseworker testified at the *Huntley* hearing that, at the time she interviewed defendant, she was aware that defendant was being held on criminal charges and that he was represented by counsel. She further testified that she worked on a multidisciplinary task force composed of social services and law enforcement agencies, through which she received training on interviewing individuals accused of committing sexual offenses. Additionally, in keeping with task force protocol directing her to report to law enforcement any inculpatory statements made during CPS interviews, the CPS caseworker called the investigating officer immediately following the interview with defendant and promptly went to his office to report defendant's statements. Under the circumstances of this case as reflected at the hearing, although the police did not specifically direct the CPS caseworker to conduct the interview on a specific date or time or accompany her to the interview (*cf. Wilcox*, 192 AD3d at 1541; *Rodriguez*, 135 AD3d at 1185), we conclude that the CPS caseworker here had a "cooperative working arrangement" with police such that she was acting as an agent of the police when she interviewed defendant and relayed his incriminatory statements (*Wilhelm*, 34 AD3d at 48 [internal quotation marks omitted]; *see Rodas*, 145 AD3d at 1453; *Greene*, 306 AD2d at 640-641). The statements were thus obtained in violation of defendant's right to counsel, and the court erred in refusing to suppress them (*see Rodas*, 145 AD3d at 1454; *Wilhelm*, 34 AD3d at 49-50). Further, because defendant's statements to the CPS caseworker were the only statements in which he admitted to having sexual contact with the victim, we cannot say that there is "no reasonable possibility that the error contributed to the plea" (*People v Clanton*, 151 AD3d 1576, 1579 [4th Dept 2017] [internal quotation marks omitted]; *see generally People v Wells*, 21 NY3d 716, 718-720 [2013]). We therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress the statements made to the CPS caseworker, and remit the matter to Supreme Court for further proceedings on the indictment (*see Wells*, 21 NY3d at 720; *People v Holz*, 184 AD3d 1156, 1157 [4th Dept 2020]). In light of our

determination, we do not address defendant’s remaining contentions.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

657
KA 18-02272
PRESENT: CENTRA, J.P., CARNI, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

VINCENT ALIOTTA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered September 27, 2018. The judgment convicted defendant upon his plea of guilty of attempted 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 attempted robbery in the third degree (Penal Law §§ 110.00, 160.05). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the amount of the fine imposed as part of his sentence (*see generally People v Goins*, 191 AD3d 1399, 1399 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]), we nevertheless conclude that defendant's challenge lacks merit.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

658

KA 20-01461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD JONES, DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Thomas J. Miller, J.), dated August 28, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points against him under risk factor 3. We reject that contention. The People provided the requisite clear and convincing evidence to support the assessment of 30 points for risk factor 3, properly relying on the case summary to substantiate the number of victims (*see People v Martinez*, 192 AD3d 1663, 1663 [4th Dept 2021]; *People v Mangan*, 174 AD3d 1337, 1338 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]). According to the case summary, defendant and two other adult males gave three minor females alcohol and illegal drugs, engaged in sexual conduct with them, recorded portions of the sexual acts, and then posted the recordings on the Internet. Although defendant pleaded guilty to only one count of criminal sexual act in the third degree, "the court is not limited to consideration of the charges to which the defendant pleaded guilty" (*People v Dubeau*, 174 AD3d 748, 749 [2d Dept 2019], *lv dismissed* 34 NY3d 1150 [2020]; *see People v Menjivar*, 121 AD3d 660, 661 [2d Dept 2014], *lv denied* 24 NY3d 915 [2015]; *People v Gardiner*, 92 AD3d 1228, 1229 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]). Moreover, although defendant denies that he had sexual contact with more than one victim, risk factor 3 does not "require actual, physical, sexual contact between the offender and victim" (*People v DeDona*, 102 AD3d 58, 63 [2d Dept 2012]; *see People v Izzo*, 26 NY3d 999, 1002 [2015]).

Finally, contrary to defendant's further contention, we conclude that the court did not err in denying defendant's request for a

downward departure from his presumptive risk level inasmuch as defendant "failed to establish by a preponderance of the evidence any ground for a downward departure" (*People v Cathy*, 134 AD3d 1579, 1579-1580 [4th Dept 2015] [internal quotation marks omitted]; *see People v Martinez-Guzman*, 109 AD3d 462, 462-463 [2d Dept 2013], *lv denied* 22 NY3d 854 [2013]). Moreover, even assuming, arguendo, that defendant established facts that might warrant a downward departure from his presumptive risk level, upon examining all of the relevant circumstances, we conclude that the court properly "exercised its discretion in denying defendant's application for a downward departure" (*Martinez-Guzman*, 109 AD3d at 463).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

661

KA 18-02408

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWAN LAPORTE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 1, 2018. The judgment convicted defendant, upon his plea of guilty, of petit larceny.

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 petit larceny (Penal Law § 155.25). We affirm. Even assuming, arguendo, that defendant did not validly waive his right to appeal, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

662
CAF 20-00896
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF LAHNI E. THOMAS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GEOFFREY D. THOMAS, RESPONDENT-RESPONDENT.

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-RESPONDENT.

JOAN D. MERRY, HORNELL, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered July 7, 2020 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner mother appeals from an order that dismissed her petition seeking to modify a prior order of custody and visitation. We reject the mother's contention that Family Court abused its discretion in dismissing the petition without conducting a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417 [4th Dept 2003] [internal quotation marks omitted]; *see Matter of Gworek v Gworek* [appeal No. 1], 158 AD3d 1304, 1304 [4th Dept 2018]). Here, we conclude that the mother failed to "make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Di Fiore*, 2 AD3d at 1417-1418 [internal quotation marks omitted]; *see Matter of Williams v Reid*, 187 AD3d 1593, 1594 [4th Dept 2020]).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court

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

663
CAF 19-01022
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF CALVIN L.W., III

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DOMINIQUE H., RESPONDENT-APPELLANT.

DOMINIQUE H., RESPONDENT-APPELLANT PRO SE.

DAVID J. HAYLETT, JR., LOCKPORT, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (Kathleen Wojtaszek-Gariano, J.), entered April 15, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Niagara County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother contends that Family Court erred in allowing the mother's attorney to withdraw as counsel and in proceeding with the hearing in the mother's absence. We agree. " 'An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective' " (*Matter of Gonzalez v Bebee*, 177 AD3d 1274, 1275 [4th Dept 2019]; *see* CPLR 321 [b] [2]). Because there is no indication in the record that the mother's attorney informed her that he was seeking to withdraw as counsel, the court should not have relieved him as counsel (*see Gonzalez*, 177 AD3d at 1275; *Matter of Menghi v Trotta-Menghi*, 162 AD3d 771, 772 [2d Dept 2018]; *cf. Matter of Patience T. [Christopher T.]*, 173 AD3d 1761, 1762 [4th Dept 2019]). Although, generally, no appeal lies from an order entered on default (*see* CPLR 5511; *Menghi*, 162 AD3d at 772), here, the absence of evidence that the mother was put on notice of her attorney's motion to withdraw renders the finding of default improper, and thus the mother's appeal is not precluded (*see Gonzalez*, 177 AD3d at 1275; *Menghi*, 162 AD3d at 772). We therefore reverse the order and remit the matter to Family Court for the assignment of new counsel and a new

hearing (*see Gonzalez*, 177 AD3d at 1275).

Entered: July 16, 2021

Mark W. Bennett
Clerk of the Court