SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 7, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

594

KA 21-01275

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

PATRICK A. HILL, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Jefferson County Court (David A. Renzi, J.), entered August 25, 2021. The order granted the motion of defendant to dismiss the superseding indictment.

It is hereby ORDERED that the order so appealed from is reversed on the law, the motion is denied, the superseding indictment is reinstated, and the matter is remitted to Jefferson County Court for further proceedings on the superseding indictment.

Memorandum: The People appeal from an order that granted defendant's motion to dismiss the superseding indictment on speedy trial grounds. By indictment issued in March 2019, a grand jury charged defendant with a series of crimes, and on March 28, 2019, the People announced readiness thereon. The People, with leave of County Court, obtained a superseding indictment by presenting the matter to another grand jury in September 2019, and they announced readiness with respect to the superseding indictment on October 26, 2019. The People announced readiness on several additional occasions and the matter was placed on the trial calendar on several dates, although it was not the first case scheduled to be tried on any of those dates. The matter was then scheduled for trial on August 9, 2021, as the fourth case to be tried. In the week before that date, all three preceding cases were settled by pleas of guilty. Although at a pretrial conference on July 28, 2021 the People had again indicated that they were ready for trial, at a pretrial calendar call on August 4, 2021 the trial prosecutor indicated that, with the approval of the District Attorney, she had not contacted the witnesses for this trial because they expected the three preceding matters to be tried, and they did not wish to put the child victims through the emotional trauma of preparing for trial. The trial prosecutor further indicated that they had not subpoenaed or interviewed those witnesses on any of the earlier dates when the matter was scheduled for trial. Finally,

the trial prosecutor stated that "we feel it is unfair for [the teenage victims] to be thrown into a jury trial with four days notice."

The court struck the matter from the trial calendar and indicated that it would entertain a speedy trial motion. Defendant moved the next day to dismiss the superseding indictment on statutory and constitutional speedy trial grounds. The court granted the motion and dismissed the superseding indictment on statutory speedy trial grounds. We reverse.

Initially, we note that defendant did not contend in his motion that any of the time prior to his arraignment on the superseding indictment should be chargeable to the People. Therefore, he failed to preserve any challenge to the People's readiness prior to October 26, 2019 (*see People v Pellis*, 159 AD3d 1347, 1348 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]). In any event, the court did not conclude that any time prior to that point was chargeable to the People.

Next, we note that the Governor's COVID-19 executive orders tolled the speedy trial time limits applicable to criminal proceedings from March 20, 2020 until October 4, 2020 (*see People v Pagan*, 75 Misc 3d 11, 12 [App Term, 2d Dept, 2d, 11th and 13th Jud Dists 2022]). Thus, that time period is properly excluded from the time chargeable to the People.

Contrary to the People's contention, the exclusion in CPL 30.30 (4) (g) for "exceptional circumstances" does not apply. As we have previously stated, an "analysis of cases where 'exceptional circumstances' have been found reveals two common factors: (1) that the delay was due to circumstances beyond the control of the District Attorney's office; and (2) that it prevented the prosecution from being ready for trial" (*People v LaBounty*, 104 AD2d 202, 204 [4th Dept 1984]; *see generally People v Barnett*, 158 AD3d 1279, 1280-1281 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]). Here, the determination not to prepare the victims to testify at trial was solely within the control of the District Attorney's Office. Thus, the time after August 4, 2021, when the People indicated that they were not prepared to try the case, is chargeable to them.

Nevertheless, with respect to the time between October 26, 2019 and August 4, 2021, the court concluded that the People's statements of readiness during that period were illusory because they had not subpoenaed their witnesses for the earlier trial dates. That was error.

"The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for exclusion' " (*Barnett*, 158 AD3d at 1280, quoting *People v Cortes*, 80 NY2d 201, 208 [1992]). There are two elements to readiness for trial, i.e., (1)

" 'a statement of readiness by the prosecutor in open court, . . . or a written notice of readiness' "; and (2) "the People must in fact be ready to proceed at the time they declare readiness" (*People v Chavis*, 91 NY2d 500, 505 [1998]; *see People v Kendzia*, 64 NY2d 331, 337 [1985]), thus "[a] statement of readiness at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]). Where, as here, the People declare readiness but then withdraw that declaration, the defendant "bears the ultimate burden of demonstrating, based on the People's proffered reasons and other relevant circumstances, that the prior statement of readiness was illusory" (*People v Brown*, 28 NY3d 392, 400 [2016]).

We conclude that the court erred in determining that defendant met that burden. Prior to August 4, 2021, no adjournment was caused by the People's failure to have their witnesses ready for trial. Rather, the matter was adjourned on those occasions due to other, older matters proceeding to trial before this case was reached. "The People are not required to contact their witnesses on every adjourned date . . . , nor do they have to be able to produce their witnesses instantaneously in order for a statement of readiness to be valid" (*People v Camillo*, 279 AD2d 326, 326 [1st Dept 2001]; *see People v Robinson*, 171 AD2d 475, 476-478 [1st Dept 1991], *lv denied* 78 NY2d 973 [1991]). To the contrary, " '[p]ostreadiness delay may be charge[able] to the People when the delay is attributable to their inaction and directly implicates their ability to proceed to trial' " (*People v Fulmer*, 87 AD3d 1385, 1385 [4th Dept 2011], *lv denied* 18 NY3d 994 [2012], quoting *People v Carter*, 91 NY2d 795, 799 [1998]; *see People v Pratt*, 186 AD3d 1055, 1057 [4th Dept 2020], *lv denied* 36 NY3d 975 [2020]). Here, although the time after the People withdrew their statement of readiness was properly charged to them, there was no prior delay attributable to the People's inaction. Consequently, the prior statements of readiness were not illusory (*see generally People v Rice*, 172 AD3d 1616, 1618-1619 [3d Dept 2019]).

Finally, we admonish the prosecutor that she must obey an order of the court to have a case ready for trial. Regardless of the prosecutor's feelings concerning the order scheduling the trial for August 9, 2021 or its possible impact on the witnesses, it was a valid order of the court, and with certain exceptions that are not relevant here, "a court order must be obeyed" (*People v Williamson*, 136 AD2d 497, 497 [1st Dept 1988]; *see generally Matter of Balter v Regan*, 63 NY2d 630, 631 [1984], *cert denied* 469 US 934 [1984]).

All concur except NEMOYER, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent because, in my view, County Court properly determined that the People's statement of readiness was illusory and thus the order dismissing the superseding indictment should be affirmed. Delay is attributable to the People "when the delay is attributable to their inaction and directly implicates their ability to proceed to trial" (*People v Carter*, 91 NY2d 795, 799 [1998]). Here, the People were admittedly unable to proceed to trial due to their own failure to fully prepare their

witnesses, and thus the People's own inaction rendered them unready when the trial was ultimately scheduled. Although I agree with the majority that the People are not required to contact their witnesses on every adjourned date and do not have to be able to produce their witnesses instantaneously in order for a statement of readiness to be valid (*see People v Camillo*, 279 AD2d 326, 326 [1st Dept 2001]), this is not a case where a previously ready witness later became unavailable or could not be located for reasons beyond the People's control. Instead, on the day they declared that they were ready for trial, the People knew they had not fully prepared their witnesses, they did not remedy that deficiency before thereafter declaring that they were unready, and, according to the People, they lacked the time or ability to satisfactorily prepare their witnesses once the trial was scheduled. Under these circumstances, although the People were not required to constantly contact their witnesses so as to keep the witnesses ready for trial, here the People, by their choice, never fully prepared their witnesses for trial and thus, by their own admission, were never actually ready to proceed on any day before declaring that they were unready.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

598

CA 21-01451

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

MAIN STREET AMERICA ASSURANCE COMPANY, PHILLIP J. GEIGER D/B/A XL CONSTRUCTION SERVICES, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MERCHANTS MUTUAL INSURANCE COMPANY, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER 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, Monroe County (Ann Marie Taddeo, J.), entered April 22, 2021 in a declaratory judgment action. The judgment, insofar as appealed from, granted the motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that defendant Merchants Mutual Insurance Company is obligated to provide a defense to plaintiff Phillip J. Geiger d/b/a XL Construction Services, LLC, in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff Main Street America Assurance Company and its insured, plaintiff Phillip J. Geiger d/b/a XL Construction Services, LLC (XL Construction), commenced this action seeking, inter alia, a declaration that defendant Merchants Mutual Insurance Company (defendant) is obligated to provide a defense and indemnification for XL Construction, as an additional insured, in an underlying personal injury action. Defendant appeals from a judgment that granted plaintiffs' motion for partial summary judgment seeking a declaration that defendant has a duty to defend XL Construction in the underlying action.

Defendant Timothy J. O'Connor (O'Connor) commenced the underlying

action against, inter alia, XL Construction pursuant to Labor Law §§ 200, 240 (1), and 241 (6), seeking damages for injuries he sustained during the course of his work as a self-employed drywall finishing subcontractor on a construction project. XL Construction had subcontracted that drywall work to O'Connor and, as part of a written indemnification and insurance agreement between those two parties, O'Connor was obligated to obtain insurance for the benefit of XL Construction. O'Connor was insured by defendant under a policy containing an additional insureds endorsement that, as relevant here, provided coverage to a party where required by a written agreement, but "only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by . . . [O'Connor's] acts or omissions."

Contrary to defendant's contention, Supreme Court properly granted the motion. "[T]he duty to defend is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotation marks omitted]). Defendant is correct that the endorsement language utilized here only "applies to injury proximately caused by the named insured" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 317 [2017]). Nonetheless, there may be more than one proximate cause of an injury (*see Leon-Rodriguez v Roman Catholic Church of Sts. Cyril & Methodius*, 192 AD3d 883, 885 [2d Dept 2021]; *see generally Farnham v MIC Wholesale Ltd.*, 176 AD3d 1605, 1607 [4th Dept 2019]) and here the complaint in the underlying action, submitted in support of the motion, suggests a reasonable possibility that O'Connor's own negligence was a proximate cause of his injuries (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010]; *Automobile Ins. Co. of Hartford*, 7 NY3d at 137). We conclude that "[t]he fact that the . . . complaint in the underlying action alleged [Labor Law violations] on the part of [XL Construction], and not [negligence by O'Connor himself], is of no consequence inasmuch as the allegations in the . . . complaint '[brought] the claim potentially within the protection purchased' and triggered [defendant's] duty to defend [XL Construction] as an additional insured" (*ZRAJ Olean, LLC v Erie Ins. Co. of N.Y.*, 134 AD3d 1557, 1561 [4th Dept 2015], *lv denied* 29 NY3d 915 [2017]; *see Regal Constr. Corp.*, 15 NY3d at 37).

Defendant further contends that its duty to defend was not triggered because "it may be concluded, as a matter of law, that there is no possible factual or legal basis upon which [it] might eventually be held to be obligated to indemnify [XL Construction] under any provision of the insurance policy" (*Bruckner Realty, LLC v County Oil Co., Inc.*, 40 AD3d 898, 900 [2d Dept 2007]; *see Dumblewski v ITT Hartford Ins. Group*, 213 AD2d 823, 824 [3d Dept 1995]). Defendant raised that contention for the first time on appeal in its reply brief, and thus that argument is not properly before us (*see Ford v Annucci*, 189 AD3d 2070, 2071 [4th Dept 2020]). In any event, it is without merit. Here, XL Construction "might eventually be held" (*Bruckner*, 40 AD3d at 900) partially or wholly liable for O'Connor's bodily injuries if they were proximately caused *in part* by O'Connor's

acts or omissions (*see generally St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290 [2003]; *Siragusa v State of New York*, 117 AD2d 986, 986-987 [4th Dept 1986], *lv denied* 68 NY2d 602 [1986]).

Although the court properly granted the motion, it failed to declare the rights of the parties in connection with the duty to defend (*see Marine Buffalo Assoc. v Town of Amherst Indus. Dev. Agency*, 5 AD3d 1014, 1015 [4th Dept 2004]). We therefore modify the judgment accordingly. In light of our determination, the parties' remaining contentions are academic.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

652

KA 21-00849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACCAI SAVERY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTIN N. MCDERMOTT 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 (Matthew J. Doran, J.), rendered August 23, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree (two counts) and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Following a fatal shooting, Syracuse Police Department detectives interviewed defendant, and he indicated, among other things, that he and the decedent were members of a gang, had committed numerous robberies together, and had robbed a drug dealer from Yonkers on the day of the killing. Defendant told the detectives that the man from Yonkers must have shot the decedent after the robbery. On appeal, defendant contends that County Court erred in admitting in evidence the parts of that interview in which defendant made statements concerning his membership in a gang and his participation in prior robberies with the decedent. We reject defendant's contention.

It is well settled that "evidence of uncharged crimes is inadmissible where its only relevance is to show defendant's bad character or criminal propensity" (*People v Agina*, 18 NY3d 600, 603 [2012]). Nevertheless, "[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Thus, the Court of Appeals has unequivocally stated that evidence of a defendant's prior bad acts, including "[e]vidence

regarding gang activity can be admitted to provide necessary background, or when it is inextricably interwoven with the charged crimes, or to explain the relationships of the individuals involved" (*People v Kims*, 24 NY3d 422, 438 [2014] [internal quotation marks omitted]; *see People v Bailey*, 32 NY3d 70, 83 [2018]).

Here, the court did not abuse its discretion in admitting the evidence concerning defendant's gang membership. We conclude that the evidence was inextricably interwoven with the narrative of events leading up to the shooting, and provided necessary background information to explain to the jury the relationship between defendant, the decedent, and the eyewitnesses to the crimes (*see Bailey*, 32 NY3d at 83; *People v Argueta*, 194 AD3d 857, 858 [2d Dept 2021], *lv denied* 37 NY3d 970 [2021]; *People v Jones*, 179 AD3d 948, 950 [2d Dept 2020], *lv denied* 35 NY3d 942 [2020], *reconsideration denied* 35 NY3d 1027 [2020]). In addition, we conclude that "the prejudicial effect of [the evidence] did not outweigh its probative value" (*Argueta*, 194 AD3d at 858; *see generally People v Alvino*, 71 NY2d 233, 241-242 [1987]). Moreover, the court alleviated any prejudice to defendant by providing an appropriate limiting instruction (*see Bailey*, 32 NY3d at 83-84; *People v Benjamin*, 203 AD3d 617, 617 [1st Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Haygood*, 201 AD3d 1363, 1364 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]).

Similarly, the court did not abuse its discretion in admitting evidence that defendant and the decedent had committed robberies together. That evidence was admissible "to complete the narrative of the events charged in the indictment . . . and [to] provide[] necessary background information" (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009] [internal quotation marks omitted]; *see People v Bullard-Daniel*, 203 AD3d 1630, 1632 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Resto*, 147 AD3d 1331, 1332-1333 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]).

Defendant also contends that the verdict is contrary to the weight of the evidence, based primarily upon his challenge to the credibility of the two eyewitnesses. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor' " (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Contrary to defendant's contention, the eyewitnesses' testimony was not incredible as a matter of law (*see People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]; *People v Johnson*, 153 AD3d 1606, 1607 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]). Although there were some inconsistencies in that testimony, it was not "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Caballero*, 199 AD3d 1468, 1471 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022], *reconsideration denied* 38 NY3d 949 [2022] [internal quotation marks omitted]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we

conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

668

CA 21-00841

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

SERGIO BROOKS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, AND CITY OF BUFFALO POLICE OFFICER JOHN DOE, DEFENDANTS-APPELLANTS.

CAVETTE A. CHAMBERS, ACTING CORPORATION COUNSEL, BUFFALO (DANIEL MUSCARELLA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 16, 2021. The order granted plaintiff's motion to amend his complaint.

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

Memorandum: Plaintiff commenced this personal injury action against the City of Buffalo (City) and then-unidentified City of Buffalo Police Officer John Doe (collectively, defendants), based on plaintiff's allegations that the officer injured him and violated his constitutional rights during an unlawful stop and frisk. After limited discovery, plaintiff moved to amend the complaint to add two named police officers and the City of Buffalo Police Commissioner (Commissioner) as defendants, and to add a cause of action based on 42 USC § 1983 against the Commissioner and the City. Defendants appeal from an order insofar as it granted the motion with respect to the Commissioner and the new cause of action. We affirm.

It is well settled that, "[a]lthough leave to amend a pleading should be freely granted (*see* CPLR 3025 [b]), it may be denied where the proposed amendment is palpably insufficient or patently devoid of merit" (*Matter of DeCarr v Zoning Bd. of Appeals for Town of Verona*, 154 AD3d 1311, 1314 [4th Dept 2017] [internal quotation marks omitted]; *see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; *Landco H & L, Inc. v 377 Main Realty, Inc.*, 203 AD3d 1601, 1602-1603 [4th Dept 2022]). Additionally, it is equally well settled that "the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Pink v Ricci*, 100 AD3d 1446, 1448 [4th Dept 2012] [internal quotation marks omitted]; *see Christian v Brookdale Senior Living Communities, Inc.*, 199 AD3d

1450, 1451 [4th Dept 2021]; *Duszynski v Allstate Ins. Co.*, 107 AD3d 1448, 1449 [4th Dept 2013]).

The proposed amended complaint alleges, insofar as relevant here, a violation of 42 USC § 1983, which "impose[s] liability . . . for conduct which subjects, or causes to be subjected the complainant to a deprivation of a right secured by the Constitution and laws" (*Rizzo v Goode*, 423 US 362, 370-371 [1976] [internal quotation marks omitted]). "[A] plaintiff may prevail on a cause of action to recover damages pursuant to 42 USC § 1983 against a municipality where the plaintiff proves the existence of (1) an official policy or custom [on the part of a municipal defendant] that (2) caused the claimant to be subjected to (3) a denial of a constitutional right . . . For a cause of action pursuant to 42 USC § 1983 to lie against a municipality, the action that is alleged to be unconstitutional must implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . , or have occurred pursuant to a practice so permanent and well settled as to constitute a custom or usage with the force of law" (*Bassett v City of Rye*, 104 AD3d 889, 890-891 [2d Dept 2013] [internal quotation marks and brackets omitted]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 762 [2016]; *Pendleton v City of New York*, 44 AD3d 733, 736-737 [2d Dept 2007]). The proposed amended complaint alleges the existence of an extraconstitutional municipal "stop and frisk" policy, that the police officers unlawfully searched and allegedly injured plaintiff pursuant to that policy, and that the Commissioner unofficially authorized or exhibited deliberate indifference to that policy and determined that the actions that violated plaintiff's rights were appropriate. Therefore, we conclude that the proposed amended complaint states a cause of action under 42 USC § 1983 against the City (*see Smith v City of New York*, 170 AD3d 499, 500 [1st Dept 2019]; *see generally Matusick v Erie County Water Auth.*, 757 F3d 31, 62-63 [2d Cir 2014]) and against the Commissioner (*see generally Hafer v Melo*, 502 US 21, 25-31 [1991]). Consequently, defendants failed to show that the proposed amended complaint was palpably insufficient or patently without merit and thus Supreme Court did not abuse its discretion in granting the motion.

It is well settled that contentions that are raised for the first time in a reply brief are not properly before us (*see Northwoods, L.L.C. v Hale*, 201 AD3d 1357, 1358 [4th Dept 2022]; *Scheer v Elam Sand & Gravel Corp.*, 177 AD3d 1290, 1292 [4th Dept 2019]; *Turner v Canale*, 15 AD3d 960, 961 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]). Consequently, we do not consider defendants' contentions that the motion should have been denied because the officers had reasonable suspicion to conduct a pat-down search of plaintiff to ensure officer safety, and that the allegations in the proposed amended complaint exceeded those in plaintiff's citizen complaint to the Buffalo Police Department. Finally, we have reviewed defendants' remaining

contentions and conclude that they are without merit.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

673

KA 21-00703

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHANCE J. BARNWELL-MCCLARY, ALSO KNOWN AS CHANCE BARNWELL-MCCLARY, ALSO KNOWN AS CHANCE JEMIL BARNWELL-MCCLARY, ALSO KNOWN AS CHANCE B. MCCLARY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered February 8, 2021. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [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 was not knowingly, voluntarily and intelligently entered" (*People v Plantiko*, 163 AD3d 1471, 1471 [4th Dept 2018]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), especially considering that defendant has already been released to parole supervision (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

678

KA 21-01232

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLINT T. SHIRLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered July 8, 2021. The judgment convicted defendant upon a nonjury verdict of, inter alia, aggravated driving while intoxicated, driving while intoxicated, endangering the welfare of a child (two counts), and "refusal to submit to a field screening device."

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

Memorandum: Defendant was convicted following a nonjury trial of, inter alia, one count of aggravated driving while intoxicated (DWI) as a class E felony (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i] [B]), one count of DWI as a misdemeanor (§ 1192 [3]), two counts of endangering the welfare of a child (Penal Law § 260.10 [1]), and one count of "refusal to submit to a field screening device" (Vehicle and Traffic Law § 1194 [1] [b]).

Defendant contends that his arrest was unlawful because the police lacked probable cause to believe that he was intoxicated, and that County Court therefore erred in denying his request to suppress his post-arrest refusal to submit to a chemical test. We reject that contention. A New York State Trooper lawfully stopped defendant's vehicle for having an expired inspection sticker. While conversing with defendant, the Trooper noticed that defendant emitted an odor of alcohol and admitted that he may have consumed a beer. Defendant then refused to submit to an Alco-Sensor test and failed all three field sobriety tests he was asked to perform. "Although an Alco-Sensor test is not admissible as evidence of intoxication, breath screening devices have won acceptance as being sufficiently reliable to

establish probable cause for an arrest" (*People v Thomas*, 121 AD2d 73, 76 [4th Dept 1986], *affd* 70 NY2d 823 [1987]), and a refusal to submit to a breath screening device, such as the Alco-Sensor, can be considered in determining whether an arrest is lawful (*see People v Moskal*, 262 AD2d 986, 987 [4th Dept 1999]). We conclude from the totality of the circumstances that the Trooper had probable cause to believe that defendant was driving in violation of Vehicle and Traffic Law § 1192 (*see People v Lewis*, 147 AD3d 1481, 1481 [4th Dept 2017]; *People v Gibeau*, 55 AD3d 1303, 1304 [4th Dept 2008], *lv denied* 12 NY3d 758 [2009]).

We reject defendant's further contentions that the evidence is legally insufficient to establish that he was intoxicated and that the verdict with respect to the counts of DWI, aggravated DWI, and endangering the welfare of a child is against the weight of the evidence in that regard. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" from which the court could find that defendant was intoxicated when he operated his motor vehicle (*People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to the weight of the evidence, viewing the evidence in light of the elements of the crimes of DWI, aggravated DWI, and endangering the welfare of a child in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that his "refusal to submit to a [field screening device] did not establish a cognizable offense" (*People v Alim*, 204 AD3d 1418, 1419 [4th Dept 2022], *lv denied* 38 NY3d 1068 [2022] [internal quotation marks omitted]; *see People v Bembry*, 199 AD3d 1340, 1342 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]). We therefore modify the judgment by reversing that part convicting defendant of count seven of the indictment and dismissing that count.

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

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

684

CA 21-01467

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

PAULINE KINACH, AS EXECUTOR OF THE ESTATE OF
PAUL KINACH, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOPS MARKET, AND BATHCANPUL, LLC,
DEFENDANTS-RESPONDENTS.

RALPH W. FUSCO, UTICA, FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), dated September 30, 2021. The order denied plaintiff's motion in limine and plaintiff's request to disqualify defense counsel.

It is hereby ORDERED that said appeal from the order insofar as it denied those parts of the motion seeking to preclude defendant Bathcanpul, LLC from submitting the lease into evidence at trial and to preclude that defendant from asserting at trial that it was an out-of-possession landlord is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff appeals from an order that denied her motion in limine seeking to preclude defendant Bathcanpul, LLC (Bathcanpul) from introducing into evidence at trial a lease between Bathcanpul and defendant Tops Market and to preclude Bathcanpul from asserting that it was an out-of-possession landlord, and denied plaintiff's request to disqualify defense counsel due to an alleged conflict of interest caused by defense counsel's joint representation of defendants. At the outset, we dismiss the appeal from the order insofar as it denied those parts of the motion seeking to preclude the introduction of the lease and the assertion that Bathcanpul was an out-of-possession landlord. Generally, an order denying a motion in limine, even when " 'made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1285 [4th Dept 2015]; *see Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [4th Dept 2009]). The denial of those parts of plaintiff's motion "does not limit the scope of the issues to be tried and thus is not appealable on that ground" (*Angelicola v Patrick Heating of Mohawk Val., Inc.*, 77 AD3d 1322, 1323

[4th Dept 2010]).

With respect to that part of the order denying plaintiff's request to disqualify defense counsel, under the circumstances of this case, she waived her contention regarding the alleged conflict of interest (*see Matter of Peters*, 124 AD3d 1266, 1268 [4th Dept 2015]; *Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

697

KA 18-00449

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNA J. NARY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered November 16, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Contrary to defendant's contention, we conclude that the jury's rejection of the affirmative defense of extreme emotional disturbance is not against the weight of the evidence (*see People v Whittemore*, 185 AD3d 1528, 1529 [4th Dept 2020], *lv denied* 36 NY3d 977 [2020]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, the jury "was entitled to consider the conduct of defendant before and after the homicide[] and to reject [her] explanation for [her] conduct" (*People v Steen*, 107 AD3d 1608, 1608 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013] [internal quotation marks omitted]; *see generally People v Drake*, 216 AD2d 873, 873 [4th Dept 1995], *lv denied* 87 NY2d 900 [1995]).

Contrary to defendant's further contention, she was not denied effective assistance of counsel based on defense counsel's opening statement, his cross-examination of certain law enforcement witnesses regarding the defense of intoxication, his cross-examination of the victim's sister, and his determination to elicit from defendant testimony regarding post-arrest incidents while in jail. Those contentions amount to mere second-guessing of defense counsel's trial strategy and do not establish ineffectiveness (*see People v Moore*, 185 AD3d 1544, 1545 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]; *People v Adams*, 59 AD3d 928, 929 [4th Dept 2009], *lv denied* 12 NY3d 813

[2009]). We likewise reject defendant's contention that defense counsel was ineffective in failing to move for a mistrial without prejudice based on testimony given by the victim's sister. Defense counsel objected to that testimony, Supreme Court struck it, and defense counsel made an unsuccessful motion for a mistrial with prejudice. Defense counsel was not ineffective for failing to move instead for a mistrial without prejudice inasmuch as that motion also would have had "little to no chance of success" (*People v Briggs*, 124 AD3d 1320, 1321 [4th Dept 2015], *lv denied* 25 NY3d 1198 [2015]). Defendant's contention that defense counsel was ineffective in failing to seek pretrial suppression of certain evidence as the product of a warrantless search relies on matters that have not been included in the record on appeal and thus cannot be reviewed on direct appeal (*see People v Marcial*, 41 AD3d 1308, 1308-1309 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]; *see generally People v Lopez-Mendoza*, 33 NY3d 565, 573 [2019]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

698

KA 18-01098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS L. DAVID, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 26, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress two handguns found in the center console of the vehicle he had operated because the guns were recovered during an unlawful inventory search. We reject defendant's contention. " 'Following a lawful arrest of the driver of an automobile that must then be impounded, the police may conduct an inventory search of the vehicle' " (*People v Nichols*, 175 AD3d 1117, 1119 [4th Dept 2019], *lv denied* 34 NY3d 1018 [2019], quoting *People v Johnson*, 1 NY3d 252, 255 [2003]). Here, the suppression hearing testimony established that it is the policy of the Rochester Police Department to tow a vehicle and conduct an inventory search when, following a traffic stop, there is no licensed driver present. Defendant had no valid driver's license and he was the sole occupant of the vehicle. Thus, the police properly decided to tow it (*see People v Hayden-Larson*, 179 AD3d 1549, 1550 [4th Dept 2020], *lv denied* 35 NY3d 970 [2020]; *People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]). The record does not give rise to the inference that "the [corresponding] inventory search was a mere pretext to uncover incriminating evidence; rather, the testimony established that the [officer]'s 'intention for the search was to inventory the items in the vehicle' " prior to having it towed (*People v Morman*, 145 AD3d 1435, 1436 [4th Dept 2016], *lv denied* 29 NY3d 999

[2017], quoting *People v Padilla*, 21 NY3d 268, 273 [2013], *cert denied* 571 US 889 [2013]; *see People v Tardi*, 28 NY3d 1077, 1078-1079 [2016]). We therefore conclude that the inventory search was valid and the court properly refused to suppress the physical evidence recovered from the vehicle (*see Nichols*, 175 AD3d at 1119; *People v Huddleston*, 160 AD3d 1359, 1360-1361 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *Wilburn*, 50 AD3d at 1618).

Defendant failed to preserve for our review his further contention that he was denied a fair trial based upon the cumulative effect of improper remarks during the prosecutor's summation (*see generally People v Britt*, 34 NY3d 607, 616 [2019]; *People v Shire*, 77 AD3d 1358, 1359 [4th Dept 2010], *lv denied* 15 NY3d 955 [2010]). In any event, we conclude that none of the alleged improper remarks were so pervasive or egregious, individually or cumulatively, as to deprive defendant of a fair trial (*see People v Lundy*, 165 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

We do not address defendant's contention that reversal is required pursuant to *People v O'Rama* (78 NY2d 270 [1991]) inasmuch as defense counsel withdrew that contention at oral argument of this appeal. Finally, we have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

700

KA 20-00841

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAL YOUNG, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, LACKAWANNA, 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 (Kenneth F. Case, J.), rendered February 20, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the conviction is not supported by legally sufficient evidence of his intent. Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We initially note that, although defendant was charged as both a principal and an accessory, there is no dispute that defendant did not personally participate in the shooting that led to this prosecution and that defendant may therefore be held criminally liable for the conduct of the codefendant only as an accessory (*see generally People v Hawkins*, 192 AD3d 1637, 1638 [4th Dept 2021]). "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* § 20.00; *People v Williams*, 179 AD3d 1502, 1502 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]). "Whether an accessory shares the intent of a principal actor may be established by circumstantial evidence" (*People v Davis*, 177 AD3d 1323, 1324 [4th Dept 2019], *lv denied* 35 NY3d 969 [2020]). Here, the People introduced evidence at trial, including video recordings from numerous sources, from which the jury could reasonably have concluded that

defendant's vehicle, with defendant driving and the codefendant in the passenger seat, followed immediately behind the victim's vehicle until the victim's vehicle entered a gas station parking lot. The evidence would also permit the jury to reasonably conclude that defendant then drove his vehicle a short distance down the street next to the gas station and stopped, that the codefendant got out, walked to the victim's vehicle, and repeatedly shot the victim as he sat in the driver's seat of his vehicle, that the codefendant then ran directly to defendant's waiting vehicle and entered it, and that they drove away. The People also introduced evidence establishing that defendant and the codefendant frequently posted pictures of themselves together on social media before the incident, that they exchanged 39 telephone calls in the two weeks before the incident, and that they were recorded together at a mall immediately after the shooting. Defendant initially lied to the police about his whereabouts at the time of the incident, and when he was told at the time of his arrest that he was charged with murder and criminal possession of a weapon, he said "that gun charge ain't gonna stick. They never found that gun." We conclude that the totality of the evidence concerning defendant's behavior before, during, and after the incident is sufficient to establish that defendant intentionally aided the codefendant to possess the weapon used in the shooting (*see People v Johnson*, 94 AD3d 1408, 1409 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]; *see generally People v Allah*, 71 NY2d 830, 831-832 [1988]) and that the jury could have reasonably concluded that defendant and the codefendant shared "a common purpose and a collective objective" (*People v Cabey*, 85 NY2d 417, 422 [1995]; *cf. Hawkins*, 192 AD3d at 1638-1639).

We reject defendant's further contention that the evidence supporting his conviction of criminal possession of a weapon in the second degree is insufficient because the conviction is factually inconsistent with the part of the jury verdict acquitting him on a charge of murder in the second degree arising from the same incident. Factual inconsistency—"which can be attributed to mistake, confusion, compromise or mercy—does not provide a reviewing court with the power to overturn a verdict" (*People v Muhammad*, 17 NY3d 532, 545 [2011]; *see People v Abraham*, 22 NY3d 140, 146 [2013]; *see generally People v Nichols*, 163 AD3d 39, 44-47 [4th Dept 2018]).

Furthermore, viewing the evidence in light of the elements of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on that count is not against the weight of the evidence (*cf. Hawkins*, 192 AD3d at 1640; *see generally Bleakley*, 69 NY2d at 495).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

703

CAF 21-01494

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

IN THE MATTER OF TY'SHAWN B., ALSO KNOWN AS "BABY BOY" B.

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

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

CASSANDRA B., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TRENEEKA C. FIELDS OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered September 1, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, authorized the continued removal of the subject child from the custody of respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, granted petitioner's application to place the subject child in the temporary custody of the Commissioner of Social Services (*see* Family Ct Act § 1017 [2] [a] [iii]), where the child would remain in the care of his paternal uncle and the uncle's girlfriend. The child had previously been temporarily placed with those individuals (*see* § 1017 [2] [a] [ii]), who had since been certified as foster parents.

We conclude that the mother's appeal must be dismissed inasmuch as she is not an aggrieved party (*see* CPLR 5511). "[A] fundamental principle of our jurisprudence [is] that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal," and courts are thus forbidden from deciding "academic, hypothetical, moot, or otherwise abstract questions" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; *see Berger v Prospect Park Residence, LLC*, 166 AD3d 937, 938 [2d Dept 2018], *lv denied* 33 NY3d 910 [2019]). Courts generally do not have the power to decide matters "[w]hen a determination would have no practical effect on the parties" (*Berger*, 166 AD3d at 938; *see also*

Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 811 [2003], *cert denied* 540 US 1017 [2003]). Here, the mother's rights are unaffected by whether Family Court temporarily placed the child pursuant to Family Court Act § 1017 (2) (a) (ii) or (iii). The child would have remained in the care of the paternal uncle and his girlfriend whether the court granted or denied petitioner's application. In either event, the neglect proceeding had not yet been resolved as of the time the order on appeal was entered, and the mother thus retained the right to seek return of the child to her custody pursuant to Family Court Act § 1028. Inasmuch as the order "left the mother's rights unchanged" (*Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1386 [4th Dept 2019], *lv dismissed* 38 NY3d 1167 [2022]), she was not aggrieved by it.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

712

CA 22-00069

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

ANTONELLA RUTH, AS ADMINISTRATOR OF THE ESTATE OF LUCIA CONSIGLIO, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ELDERWOOD AT AMHERST, ELDERWOOD AT WILLIAMSVILLE, 4459 BAILEY AVENUE OPERATING COMPANY, LLC, 4459 BAILEY AVENUE, LLC, 200 BASSETT ROAD OPERATING COMPANY, LLC, 200 BASSETT ROAD, LLC, POST ACUTE PARTNERS MANAGEMENT, LLC, JEFFREY RUBIN, D.M.D., AND WARREN COLE, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF KENNETH R. HILLER, AMHERST (TIMOTHY HILLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), BUFFALO, FOR DEFENDANTS-RESPONDENTS.

O'CONNELL AND ARONOWITZ, ALBANY (CORNELIUS D. MURRAY OF COUNSEL), FOR THE NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., THE GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION AND THE SOUTHERN NEW YORK ASSOCIATION, AMICI CURIAE.

GREENBERG TRAURIG, LLP, ALBANY (HENRY M. GREENBERG OF COUNSEL), FOR GREATER NEW YORK HOSPITAL ASSOCIATION AND THE HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., AMICI CURIAE.

HOLWELL, SHUSTER & GOLDBERG LLP, NEW YORK CITY (VINCENT LEVY OF COUNSEL), FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, NEW YORK INSURANCE ASSOCIATION, INC., AMERICAN TORT REFORM ASSOCIATION, LAWSUIT REFORM ALLIANCE OF NEW YORK, CENTER FOR JURISPRUDENCE, INC., RESTAURANT LAW CENTER, AND NEW YORK STATE RESTAURANT ASSOCIATION, AMICI CURIAE.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (BRIA A. LEWIS OF COUNSEL), FOR CENTER FOR ELDER LAW & JUSTICE AND EMPIRE JUSTICE CENTER, AMICI CURIAE.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 5, 2021. The order granted defendants' motion to dismiss plaintiff's complaint.

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

Memorandum: In this action arising from the death of plaintiff's decedent from COVID-19 following treatment at certain nursing homes in March and April 2020, plaintiff appeals from an order that granted defendants' pre-answer motion to dismiss the complaint on the ground that, pursuant to the Emergency or Disaster Treatment Protection Act (EDTPA) (Public Health Law former art 30-D, §§ 3080-3082), defendants were immune from liability for the causes of action as alleged in the complaint. We affirm.

By way of background, at the outset of the COVID-19 pandemic in early 2020, then-Governor Cuomo signed executive orders declaring a disaster emergency in New York State (*see* Executive Order [A. Cuomo] No. 202 [9 NYCRR 8.202]) and, among other things, granting health care workers immunity from civil liability, except for instances of gross negligence, for any injury or death alleged to have been sustained directly as a result of providing medical services in support of the State's response to the COVID-19 outbreak (*see* Executive Order [A. Cuomo] No. 202.10 [9 NYCRR 8.202.10]).

The legislature thereafter enacted EDTPA, which was part of an omnibus budget bill (*see* L 2020, ch 56), upon the recognition that "[a] public health emergency that occurs on a statewide basis requires an enormous response from state and federal and local governments working in concert with private and public health care providers in the community," and that "[t]he furnishing of treatment of patients during such a public health emergency is a matter of vital state concern affecting the public health, safety and welfare of all citizens" (Public Health Law former § 3080). The stated purpose of the legislation was "to promote the public health, safety and welfare of all citizens by broadly protecting the health care facilities and health care professionals in this state from liability that may result from treatment of individuals with COVID-19 under conditions resulting from circumstances associated with the public health emergency" (*id.*).

EDTPA initially provided, with certain exceptions, that "any health care facility or health care professional shall have immunity from any liability, civil or criminal, for any harm or damages alleged to have been sustained as a result of an act or omission in the course of arranging for or providing health care services" as long as three conditions were met: the services were arranged for or provided pursuant to a COVID-19 emergency rule or otherwise in accordance with applicable law; the act or omission was impacted by decisions or activities that were in response to or as a result of the COVID-19 outbreak and in support of the State's directives; and the services were arranged or provided in good faith (Public Health Law former § 3082 [1]). Health care facilities included nursing homes (*see* former § 3081 [3]), and health care professionals included individual medical providers as well as administrators and executives of health care facilities (*see* former § 3081 [4]). The health care services covered by the immunity provision included those related to the diagnosis, prevention, or treatment of COVID-19; the assessment or

care of an individual with a confirmed or suspected case of COVID-19; and the care of any other individual who presented at a health care facility or to a health care professional during the period of the COVID-19 emergency declaration (*see* former § 3081 [5]). The immunity conferred by EDTPA did not apply, however, "if the harm or damages were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm by the health care facility or health care professional" (former § 3082 [2]). Although EDTPA was not signed into law until April 3, 2020, the legislature provided that the statute would "take effect immediately and shall be deemed to have been in full force and effect on or after March 7, 2020" and that it would apply to acts or omissions that occurred on or after the date of the COVID-19 emergency declaration (L 2020, ch 56, § 1; part GGG, § 2).

The legislature amended EDTPA in August 2020 to limit certain aspects of the immunity (*see* L 2020, ch 134, §§ 1-2). The legislature provided that the amendment would take effect immediately and would apply to claims for harm or damages if the act or omission occurred on or after the effective date of the amendment (*see* L 2020, ch 134, § 3). On April 6, 2021, just over one year after it was first enacted, EDTPA was repealed; the legislation provided simply that EDTPA was repealed and that "[t]his act shall take effect immediately" (L 2021, ch 96, §§ 1-2).

Plaintiff commenced the present action one week later, alleging, as relevant here, that decedent, a long-term nursing home resident, was not properly tested and treated for COVID-19 at defendant Elderwood at Williamsville in late March and early April 2020, despite exhibiting persistent symptoms associated with infection by the virus that causes COVID-19, and that decedent was not adequately treated for COVID-19 and a stroke when she tested positive for COVID-19 and was transferred to defendant Elderwood at Amherst. Plaintiff asserted causes of action for negligence, violation of Public Health Law §§ 2801-d and 2803-c, deprivation of dignity, medical malpractice, and wrongful death.

Defendants made a pre-answer motion to dismiss pursuant to CPLR 3211 on the ground that, under EDTPA, they were immune from liability for the causes of action alleged in the complaint. Plaintiff opposed the motion by contending, among other things, that defendants were not immune from liability for the causes of action alleged in the complaint because EDTPA had been repealed and the repeal should apply retroactively. Supreme Court determined that the repeal of EDTPA did not apply retroactively and that the immunity conferred by EDTPA warranted dismissal of the complaint.

As a preliminary matter, although we agree with defendants that proof of service of the notice of appeal should have been included in the record (*see* 22 NYCRR 1000.7 [a]), we conclude that dismissal of the appeal is not warranted because, contrary to defendants' contention, the absence of such proof of service "does not 'render[ ] meaningful appellate review impossible' " (*Eldridge v Shaw*, 99 AD3d

1224, 1226 [4th Dept 2012]; *see Luppino v Flannery*, 186 AD3d 1082, 1083 [4th Dept 2020]). Defendants do not deny being served with the e-filed notice of appeal simultaneously with the electronic filing of that document (*see* 22 NYCRR 202.5-b [f] [2] [ii]; 202.5-bb [a] [1]; 1245.7 [b]; Siegel & Connors, NY Prac § 202 at 380 [6th ed 2018]), and we therefore disregard the technical, nonprejudicial omission from the record of the proof of service (*see* CPLR 2001; *Ninth Space LLC v Goldman*, 189 AD3d 686, 686 [1st Dept 2020]) and take judicial notice of the electronic notification sent to defendants confirming that plaintiff had e-filed the notice of appeal (*see generally McCann v Gordon*, 204 AD3d 1449, 1449 [4th Dept 2022], *appeal dismissed* 38 NY3d 1158 [2022]; *Ninth Space LLC*, 189 AD3d at 686), which constitutes proof of service (*see* 22 NYCRR 202.5-b [f] [2] [ii]; 1245.7 [b]; *see also* Siegel & Connors, NY Prac § 531 [6th ed 2018, Cumulative Supp]).

On the merits of the appeal, plaintiff contends that the court erred in granting defendants' motion to dismiss the complaint based on the immunity conferred by EDTPA because, contrary to the court's determination, the repeal of that statute applies retroactively to remove liability protection for conduct that occurred while EDTPA was in effect.

When conducting a retroactivity analysis, a court must first assess whether applying the new law to conduct that occurred prior to its enactment "truly implicates the concerns historically associated with retroactive application of new legislation" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 365 [2020], *rearg denied* 35 NY3d 1079, 1081 [2020]). In that regard, "application of a new statute to conduct that has already occurred may, but does not necessarily, have 'retroactive' effect upsetting reliance interests and triggering fundamental concerns about fairness" (*id.*). In determining whether legislation has retroactive effect, " 'the court must ask whether the new provision attaches new legal consequences to events completed before its enactment' " (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 147 [2017], *cert denied* — US —, 138 S Ct 2601 [2018]). "A statute has retroactive effect if 'it would impair rights a party possessed when [the party] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights" (*Regina Metro. Co., LLC*, 35 NY3d at 365; *see Landgraf v USI Film Prods.*, 511 US 244, 278-280 [1994]; *see also* General Construction Law § 93). Therefore, "the '*extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence' in determining retroactivity" (*Regina Metro. Co., LLC*, 35 NY3d at 367). "On the other hand, a statute that affects only 'the propriety of prospective relief' or the nonsubstantive provisions governing the procedure for adjudication of a claim going forward has no potentially problematic retroactive effect even when the liability arises from past conduct" (*id.* at 365). Where legislation, "if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered" (*id.* at 370).

When the presumption is triggered, "a statute is presumed to apply only prospectively" (*id.*). "This 'deeply rooted' presumption against retroactivity is based on '[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly' " (*id.*). "[C]areful consideration of retroactive statutes is warranted because '[t]he [l]egislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration' and '[i]ts responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals' " (*id.*).

"In light of these concerns, [i]t takes a clear expression of the legislative purpose . . . to justify a retroactive application of a statute . . . , which assures that [the legislative body] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits" (*id.* [internal quotation marks omitted]; *see People v Galindo*, 38 NY3d 199, 207 [2022]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]; *Jacobus v Colgate*, 217 NY 235, 240 [1916, Cardozo, J.]). "The ultimate question . . . , therefore, is one of statutory interpretation: whether the legislature has expressed a sufficiently clear intent to apply the [legislation] retroactively" (*Regina Metro. Co., LLC*, 35 NY3d at 370). "There is certainly no requirement that particular words be used—and, in some instances, retroactive intent can be discerned from the nature of the legislation" (*id.*). "But the expression of intent must be sufficient to show that the legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result" (*id.* at 370-371).

Plaintiff first asserts that applying the repeal of immunity previously conferred under state law to conduct that occurred when EDTPA was in effect would not impact defendants' substantive rights, and thus the presumption against retroactivity is not triggered, because defendants at all times were bound by federal laws and regulations under which they remained liable for negligent nursing home care. We reject that assertion.

Even assuming, arguendo, that certain defendants remained subject to potential or actual federal enforcement remedies for any misconduct similar or equivalent to that alleged in the complaint here (*see e.g.* 42 CFR 483.10, 483.12, 483.25, 488.406), we conclude that applying the repeal of the immunity conferred by EDTPA to defendants' past acts or omissions would "expand[] the *scope* of [defendants'] liability significantly based on conduct that was inoculated by the old law" (*Regina Metro. Co., LLC*, 35 NY3d at 368 [emphasis added]). In particular, at the time of the events alleged in the complaint, EDTPA provided health care facilities and professionals with immunity from, inter alia, civil liability for negligence and medical malpractice while providing health care services under the requisite conditions during the COVID-19 emergency (*see* Public Health Law former § 3082 [1], [2]). In other words, even if certain defendants here faced the prospect of federal regulatory penalties, they were otherwise

protected from liability in state civil actions for any harm or damages caused by acts or omissions other than intentional criminal misconduct or infliction of harm, gross negligence, or reckless misconduct (*see id.*). Thus, applying the repeal to remove immunity for conduct that occurred when EDTPA was in effect would "undoubtedly impose . . . a new disability in respect to past events" and "clearly increase[] the scope of liability for past wrongs" (*Regina Metro. Co., LLC*, 35 NY3d at 367 [internal quotation marks omitted]). Defendants would now, *in addition to* any federal regulatory penalties, face entirely separate liability in state civil actions for conduct that was inoculated by EDTPA. We have considered plaintiff's remaining assertions on this issue and conclude that they lack merit.

We thus conclude that applying the repeal of EDTPA to the allegations in the complaint would have retroactive effect "by impairing rights [defendants] possessed in the past, increasing their liability for past conduct and imposing new duties with respect to transactions already completed" (*Regina Metro. Co., LLC*, 35 NY3d at 369). "Because the [repeal of EDTPA], if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered" (*id.* at 370).

Plaintiff nonetheless asserts that, even though the text of the repeal legislation does not expressly provide for retroactive application, the presumption against retroactivity is overcome because the legislative history and the nature and circumstances of the legislation provide a clear expression of the legislature's intent for the repeal to apply retroactively. We reject that assertion as well.

Initially, the parties dispute whether the repeal of EDTPA constitutes remedial legislation. We agree with defendants, however, that even assuming the repeal of EDTPA is properly classified as remedial, that classification is largely immaterial. Courts have "limit[ed] the continued utility of the tenet that new 'remedial' statutes apply presumptively to pending cases" (*Regina Metro. Co., LLC*, 35 NY3d at 365). Moreover, "[c]lassifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to 'supply some defect or abridge some superfluity in the former law' " (*Majewski*, 91 NY2d at 584; *see Gottwald v Sebert*, 203 AD3d 488, 488-489 [1st Dept 2022]). The Court of Appeals has thus cautioned against placing too much reliance on the remedial nature of legislation, noting that such " '[g]eneral principles may serve as guides in the search for the intention of the [l]egislature in a particular case but only where better guides are not available' " (*Majewski*, 91 NY2d at 584). To that end, inasmuch "[a]s the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself" (*id.* at 583), and "legislative history may also be considered as an aid to interpretation" (*Regina Metro. Co., LLC*, 35 NY3d at 352; *see Majewski*, 91 NY2d at 584).

Here, "[n]othing in the text 'expressly or by necessary implication' requires retroactive application of the [repeal]"

(*Galindo*, 38 NY3d at 207, quoting *Majewski*, 91 NY2d at 584). First, as plaintiff acknowledges, the text of the repeal legislation, unlike the legislation originally enacting EDTPA (*see* L 2020, ch 56, § 1; part GGG, § 2), does not contain an express statement requiring retroactive application (*see* L 2021, ch 96, §§ 1-2). Second, plaintiff's claim that we may infer retroactive intent from the remedial purpose of the repeal coupled with the sense of urgency with which the legislature acted in having the repeal take effect immediately is without merit. Although the text of the legislation provides that the repeal is to "take effect immediately" (L 2021, ch 96, § 2), "the date that legislation is to take effect is a separate question from whether the [legislation] should apply to claims and rights then in existence" (*Majewski*, 91 NY2d at 583). "While the fact that a statute is to take effect immediately 'evinces a sense of urgency,' 'the meaning of the phrase is equivocal' in an analysis of retroactivity" (*id.*, quoting *Becker v Huss Co.*, 43 NY2d 527, 541 [1978]; *see Gottwald*, 203 AD3d at 489). Consequently, the assumption that the repeal of EDTPA is remedial and the fact that the legislature provided that the repeal shall take effect immediately "[do] not support the conclusion that the legislature intended retroactive application of the [repeal]" (*Gottwald*, 203 AD3d at 489).

Plaintiff nevertheless maintains that the legislative sponsors' memoranda demonstrate that the legislature intended the repeal to apply retroactively. We reject that assertion.

The memoranda indicate that the purpose of the legislation was to repeal EDTPA "with the intent of holding health care facilities, administrators, and executives accountable for harm and damages incurred" (Assembly Introducer's Mem in Support, Bill Jacket, L 2021, ch 96; *see also* Sponsor's Mem, 2021 NY Senate Bill S5177). As justification for the repeal, the memoranda provide, in relevant part, that "[a]s the COVID-19 pandemic has progressed in New York State, it is now apparent that negligence by administrators and executives of nursing homes has occurred at an extraordinary degree. The consequences have been tragic: as of early May 2020, . . . thousand[s] of New York's elderly and most vulnerable residents have succumbed to this disease, and to date, there has been zero accountability nor transparency for these preventable deaths . . . In particular, [EDTPA] egregiously uses severe liability standards as a means to insulate health care facilities and specifically, administrators and executives of such facilities, from any civil or criminal liability for negligence. Repealing this article is a much-needed step to holding health care administrators accountable and doing everything possible to stop even more preventable deaths from happening" (*id.*; *see also* Sponsor's Mem, 2021 NY Senate Bill S5177).

We conclude that "[t]he memorand[a] submitted by the [legislators] who introduced the bill . . . [are], at best, inconclusive" on the issue of retroactivity (*Matter of Berson [Corsi]*, 283 App Div 190, 193 [3d Dept 1953]; *see e.g. Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 527 [2019]; *Matter of Niagara Mohawk Power Corp. v Public Serv. Commn. of State of N.Y.*, 69 NY2d

365, 374 [1987], *rearg denied* 69 NY2d 1038 [1987]; *see generally Simmons v Trans Express Inc.*, 37 NY3d 107, 114 [2021]), and thus fall far from "a clear expression of the legislative purpose . . . to justify a retroactive application" of the repeal (*Regina Metro. Co., LLC*, 35 NY3d at 370 [internal quotation marks omitted]). In particular, although the memoranda refer to holding facilities, administrators, and executives accountable for harm and damages "incurred"—a past tense construction that generally relates to past transactions (*see Agawam Bank v Strever*, 18 NY 502, 508 [1859])—the absence of temporal language renders the memoranda equally susceptible to the interpretation that the legislature, recognizing the consequences of its enactment of EDTPA, intended to reverse course on policy and hold nursing home facilities accountable for any harm and damages "incurred" by their residents going forward (*see Matter of Lee E. B.*, 39 NY2d 962, 963 [1976]). Moreover, while the memoranda are ambiguous regarding the time period for which the legislature sought to now hold nursing home facilities accountable for negligence, the memoranda are otherwise unambiguous that the repeal of EDTPA was thought to be a step toward stopping additional preventable deaths from happening in the future (*see* Assembly Mem in Support, Bill Jacket, L 2021, ch 96; Sponsor's Mem, 2021 NY Senate Bill S5177). In other words, the memoranda are clear on the prospective application of the repeal and provide, at most, only the faintest glimmer of intent to remove the immunity conferred by EDTPA retroactively. Consequently, "[t]he language of the [repeal] does not clearly indicate that it should be applied retroactively, nor does examination of the available legislative [sponsors' memoranda] offer up any definitive expression that it was intended to have . . . retrospective application" (*Matter of Thomas v Bethlehem Steel Corp.*, 63 NY2d 150, 154 [1984]).

Contrary to plaintiff's further assertion, we agree with defendants that the legislative floor debates also support the conclusion that the legislature intended the repeal to apply prospectively only rather than retrospectively. Although the declarations of legislators during floor debates "must be cautiously used" as indicators of legislative intent, "these averments 'may be accorded some weight in the absence of more definitive manifestations of legislative purpose' " (*Majewski,* 91 NY2d at 586).

Here, during the floor debate in the Senate, the first senator to speak in support of the bill expressed her understanding that the repeal was "prospective" and would "apply going forward" by restoring the standards of liability to the health care profession in light of the lessons learned over the prior year when EDTPA was in place (NY Senate Debate on Senate Bill S5177, Mar. 24, 2021 at 1834-1836). The sponsor of the bill in the Senate, who was the only other senator to speak regarding the bill and did so after the first senator, did not directly address retroactive application, nor did she dispute the first senator's stated understanding that the repeal was to apply prospectively (*see id.* at 1836-1838).

During floor debate in the Assembly, although the sponsor of the bill expressed his belief that the repeal of the immunity conferred by

EDTPA should apply retroactively, especially with respect to corporate entities and executives, he repeatedly emphasized that, given the absence of express language in the text of the legislation, it would ultimately be left up to the courts to decide whether the repeal of the liability protections should be applied retroactively (*see* NY Assembly Debate on Assembly Bill A3397, Mar. 4, 2021 at 45, 48-49, 62-63, 67-68). Other members, however, expressed concern that retroactive application of the repeal legislation would expose frontline health care workers to liability for treatment they provided at the beginning of the pandemic when far less was known about how to provide appropriate treatment for the novel virus and such workers were tasked with providing care under extraordinary circumstances (*see id.* at 44-46, 50-52, 58, 62, 64-67, 70-72, 84-86). In light of those concerns, and on the ground that the repeal of immunity and the accompanying return to standard liability norms was justified by the fact that medical knowledge and treatment protocols had developed in the year since the onset of the pandemic, the other members who spoke during the debate expressed nearly uniform understanding that the repeal would apply prospectively only, not retroactively (*see id.* at 45, 48, 53, 58-60, 65-66, 73, 77-78, 82, 84-86, 90-93). Some members also agreed with the sentiment that the question of retroactive application would ultimately be decided by the courts (*see id.* at 53-54, 60, 68, 77-78).

The floor debates in the Senate and Assembly thus strongly support the conclusion that the legislature intended the repeal to apply prospectively only and, in any event, the debates contain "nothing that approaches any type of 'clear' expression of legislative intent concerning retroactive application" (*Majewski*, 91 NY2d at 589). Even though certain members of the Assembly may have sought to have the issue of retroactivity "deliberately left to the courts" (*Becker*, 43 NY2d at 541), the legislative history shows that the legislature considered retroactive application of the repeal and yet provided the courts with no clear pronouncement of its intent to recalibrate rights and change public policy by retroactively removing the immunity conferred by EDTPA (*see Morales v Gross*, 230 AD2d 7, 10-11 [2d Dept 1997]; *see generally Regina Metro. Co., LLC*, 35 NY3d at 348). Moreover, to the extent that plaintiff seeks to rely on the affidavit of the Assembly sponsor submitted in other litigation subsequent to the repeal of EDTPA as evidence of legislative intent, we note that "postenactment statements or testimony by an individual legislator, even a sponsor, is [generally] irrelevant," and here we discern no extraordinary circumstances that would warrant consideration of the affidavit (*Civil Serv. Empls. Assn. v County of Oneida*, 78 AD2d 1004, 1005 [4th Dept 1980], *lv denied* 53 NY2d 603 [1981]). Consequently, the expressions of legislative intent are insufficient to show that the legislature, having "contemplated the retroactive impact on substantive rights," nonetheless "intended that extraordinary result" (*Regina Metro. Co., LLC*, 35 NY3d at 370-371).

Based on the foregoing, we conclude that the repeal of EDTPA does not apply retroactively. In light of that determination, there is no need to analyze whether retroactive application of the repeal would comport with the constitutional requirements of due process (*cf. id.*

at 374-375). The court thus properly determined that defendants were entitled to the immunity from liability conferred by EDTPA. Finally, by failing to raise a contention in her brief opposing the dismissal of her complaint on any other ground, plaintiff has abandoned any further challenge to the court's order (*see Tucker v Kalos Health, Inc.*, 202 AD3d 1505, 1506 [4th Dept 2022]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

718

KA 21-00119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER A. LIBERATORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 3, 2020. The judgment revoked a sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed on his conviction for attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]) and sentencing him to a term of incarceration based on his admission that he violated probation by committing acts that constituted a felony. We affirm.

Although defendant initially contends that his waiver of the right to appeal is unenforceable, the record does not reflect that he was asked to waive his right to appeal or that he agreed to do so. In any event, defendant's only substantive contention—that his admission was involuntarily entered—would survive a valid waiver of the right to appeal (*see People v Fairman*, 38 AD3d 1346, 1347 [4th Dept 2007], *lv denied* 9 NY3d 865 [2007]).

Defendant's challenge to the voluntariness of his admission is unpreserved for our review because he "did not move on that ground either to withdraw his admission to the violation of probation or to vacate the judgment revoking his sentence of probation" (*People v Verin*, 191 AD3d 1245, 1246 [4th Dept 2021]; *see also People v Fox*, 159 AD3d 1435, 1435 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). The narrow exception to the preservation rule recognized in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply (*see People v Cruz,* 192 AD3d

1683, 1683 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

721

KA 18-01086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY G. SAUNDERS, DEFENDANT-APPELLANT.

CHRISTY L. COOPER, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered August 30, 2017. The judgment convicted defendant upon a jury verdict of criminal sexual act in the first degree, strangulation in the second degree (three counts), rape in the first degree and predatory sexual assault.

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 one count each of criminal sexual act in the first degree (Penal Law § 130.50 [1]), rape in the first degree (§ 130.35 [1]), and predatory sexual assault (§ 130.95 [2]), and three counts of strangulation in the second degree (§ 121.12). Defendant's conviction arose from separate incidents in which he strangled and raped or sexually assaulted two female victims. Defendant contends that he was denied effective assistance of counsel on the ground that his attorney failed to retain an expert witness to question one of the victims about her bipolar disorder. We reject that contention. Defendant failed to demonstrate that defense counsel had no strategic reason or other legitimate explanation for failing to retain such an expert witness (*see generally People v Hernandez*, 192 AD3d 1528, 1530-1531 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]). Further, defendant failed to establish that expert testimony on the victim's mental health condition was available (*see People v Jones*, 147 AD3d 1521, 1521 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]), that such expert testimony would have assisted the jury, or that he was prejudiced by its absence (*see People v West*, 118 AD3d 1450, 1451 [4th Dept 2014], *lv denied* 24 NY3d 1048 [2014]).

We also reject defendant's contention that defense counsel was ineffective in failing to recall one of the victims to question her regarding whether she had previously engaged in rough sex with

defendant. Defendant failed to demonstrate the absence of a strategic explanation for defense counsel's failure to recall that victim for that purpose (*see generally People v Spencer*, 262 AD2d 1062, 1062 [4th Dept 1999], *lv denied* 94 NY2d 829 [1999]). Indeed, defense counsel may have wanted to avoid the possibility of the victim contradicting defendant's later testimony that the victim enjoyed rough sex (*see generally People v Rivera*, 71 NY2d 705, 708-709 [1988]). " '[A] simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial,' " does not rise to the level of ineffective assistance (*People v Biro*, 85 AD3d 1570, 1571 [4th Dept 2011]; *see People v Healy*, 182 AD3d 1014, 1015 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]).

Defendant's contention that defense counsel was ineffective for failing to inform him about the Rape Shield Law at the time he rejected the plea offer involves matters outside the record on appeal and must be raised by way of a CPL article 440 motion (*see People v Defio*, 200 AD3d 1672, 1674 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]; *People v Timmons*, 151 AD3d 1682, 1684 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]).

We reject defendant's remaining allegations of ineffective assistance of counsel. Viewing defense counsel's representation as a whole and as of the time of the representation, we conclude that defendant "was afforded meaningful representation" (*People v Bynum*, 125 AD3d 1278, 1279 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]).

Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, contrary to defendant's contention, the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Muscarella*, 132 AD3d 1288, 1289 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

727

CA 21-01347

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

RU-JAN LYNCH-MILLER, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 131983.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SEAN P. MIX OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Debra A. Martin, J.), entered September 1, 2021. The order, insofar as appealed from, granted that part of the motion of defendant seeking summary judgment dismissing the claim against defendant.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the claim is reinstated against defendant.

Memorandum: Claimant commenced this action seeking damages for injuries she allegedly sustained when the vehicle that she was driving was struck by the plow of a snowplow operated by an employee of defendant, State of New York (State). The State moved for, inter alia, summary judgment dismissing the claim against it on the ground that the reckless disregard rather than the ordinary negligence standard of care applied based on the applicability of Vehicle and Traffic Law § 1103 (b) and the operator of the snowplow did not act with reckless disregard for the safety of others. The Court of Claims, inter alia, granted the motion to that extent. We agree with claimant that the court erred in granting the motion with respect to the State, and we therefore reverse the order insofar as appealed from.

Vehicle and Traffic Law § 1103 (b) "exempts from the rules of the road all vehicles, including [snowplows], which are 'actually engaged in work on a highway' . . . , and imposes on such vehicles a recklessness standard of care" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [2015]; *see Riley v County of Broome*, 95 NY2d 455, 461 [2000]; *Chase v Marsh*, 162 AD3d 1589, 1590 [4th Dept 2018]; *Arrahim v City of Buffalo*, 151 AD3d 1773, 1773 [4th Dept 2017]). The exemption "applies only when such work is in fact being

performed at the time of the accident" (*Hofmann v Town of Ashford*, 60 AD3d 1498, 1499 [4th Dept 2009]), which includes a snowplow engaged in plowing or salting a road (*see Harris v Hanssen*, 161 AD3d 1531, 1533 [4th Dept 2018]; *Arrahim*, 151 AD3d at 1773). Although the exemption does "not apply if the snowplow . . . [is] merely traveling from one route to another route" (*Arrahim*, 151 AD3d at 1773; *see Hofmann*, 60 AD3d at 1499), a snowplow may be "engaged in work even if the plow blade [is] up at the time of the accident and no salting [is] occurring" when the snowplow is nevertheless "working [its] 'run' or 'beat' at the time of the accident" (*Arrahim*, 151 AD3d at 1773; *see Clark v Town of Lyonsdale*, 166 AD3d 1574, 1574 [4th Dept 2018]; *Harris*, 161 AD3d at 1533; *Matsch v Chemung County Dept. of Pub. Works*, 128 AD3d 1259, 1260-1261 [3d Dept 2015], *lv denied* 26 NY3d 997 [2015]).

Here, viewing the evidence in the light most favorable to claimant as the nonmoving party and drawing every available inference in her favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that the State failed to establish as a matter of law that the snowplow was "actually engaged in work on a highway" at the time of the accident (Vehicle and Traffic Law § 1103 [b]; *see Arrahim*, 151 AD3d at 1773).

It is undisputed that the plow was in the raised position and that the operator was not plowing snow at the time of the accident. Moreover, the State's own submissions raised a triable issue of fact whether the operator was salting the road at that time (*see Arrahim*, 151 AD3d at 1773). In particular, although the State submitted an excerpt of the operator's deposition testimony in which he testified that he was actively salting the road at the time of the accident, which was reiterated in an accident report, the State also submitted an excerpt of claimant's deposition testimony that called into question that account inasmuch as claimant testified that, despite the snowplow proceeding some distance and pulling in front of her vehicle following the collision, she noticed no salt on the ground in front of her vehicle or to the side when she got out to survey the damage. Viewed in the appropriate light, claimant's testimony supports the inference that the operator may not have been actively salting the road as he claimed because, if he had been, one would expect such salt to be noticeably present on the ground in the area, yet claimant observed none. Even assuming, arguendo, that the State met its initial burden on this issue, we conclude that claimant raised a question of fact by submitting her testimony and the affidavit of her son, who averred that, when he arrived at the scene, he observed no salt on the road either at the point of the collision or anywhere on the road between that point and the intersection from which claimant's vehicle and the snowplow had been driving (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We agree with claimant that, contrary to the State's assertion, the court improperly resolved credibility issues on the motion for summary judgment when it discounted the observations of claimant and her son as speculative (*see Carrier Corp. v Allstate Ins. Co.*, 187 AD3d 1616, 1620 [4th Dept 2020]; *Rew v County of Niagara*, 115 AD3d

1316, 1318 [4th Dept 2014]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]) and, here, the statements of claimant and her son were "based on [their] personal observations of [the roadway following] the accident, not speculation" (*Brown v Askew*, 202 AD3d 1501, 1503 [4th Dept 2022]).

Next, although the operator "may have nevertheless been engaged in work even if the plow blade was up at the time of the accident and no salting was occurring," we conclude that the State "failed to establish as a matter of law that [the operator] was working his 'run' or 'beat' at the time of the accident" (*Arrahim*, 151 AD3d at 1773; *cf. Clark*, 166 AD3d at 1574; *Harris*, 161 AD3d at 1533). The vague and equivocal excerpt of the operator's deposition testimony in which he did not even describe his route was insufficient to meet the State's initial burden (*see Indarjali v Indarjali*, 132 AD3d 1277, 1277 [4th Dept 2015]; *Artalyan, Inc. v Kitridge Realty Co., Inc.*, 79 AD3d 546, 547 [1st Dept 2010]; *Pizzuto v Poss* [appeal No. 1], 198 AD2d 910, 910 [4th Dept 1993]), and the State's moving papers otherwise failed to eliminate the question whether the operator was "merely traveling from one route to another route" on a road that did not constitute part of his run or beat (*Arrahim*, 151 AD3d at 1773; *see Hofmann*, 60 AD3d at 1499). A moving party's "[f]ailure to make [a] prima facie showing requires a denial of [a] motion [for summary judgment], regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Vega*, 18 NY3d at 503 [2012]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We thus conclude that, inasmuch as the State failed to meet its burden on the motion insofar as it sought summary judgment dismissing the claim against it, the court was required to deny that part of the motion without regard to the sufficiency of the opposing papers (*see Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1760 [4th Dept 2019]).

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

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

729

CA 21-01109

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

MELISSA STUBER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RUSSELL J. STUBER, DEFENDANT-APPELLANT.

TRONOLONE & SURGALLA, PC, BUFFALO (JOHN B. SURGALLA OF COUNSEL), FOR DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered June 24, 2021. The order, among other things, denied defendant's motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking to set aside a property settlement agreement (agreement), which was incorporated but not merged into the parties' judgment of divorce, on grounds of fraud, undue influence, unconscionability, and duress. Defendant appeals from an order that, inter alia, denied his motion to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7). We reverse.

A movant contending that a pleading fails to state a cause of action pursuant to CPLR 3211 (a) (7) may submit affidavits and evidence to demonstrate conclusively that the plaintiff does not have a cause of action (*see Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 88-90 [4th Dept 2015]). Here, plaintiff's vague allegations that defendant failed to make full financial disclosure when the agreement was entered into are belied by the evidence produced in defendant's motion papers. Thus, we conclude that the agreement, together with the evidence submitted by defendant, "flatly contradict[s]" plaintiff's allegations that she was not provided with complete disclosure regarding the subject assets at the time she executed the agreement (*Simkin v Blank*, 19 NY3d 46, 52 [2012]; *see Liberty Affordable Hous., Inc.*, 125 AD3d at 92; *Mesiti v Mongiello*, 84 AD3d 1547, 1549 [3d Dept 2011]). Further, "when confronted with defendant's motion to dismiss, plaintiff failed to come forth with any facts or circumstances" supporting her allegations (*Greschler v Greschler*, 51 NY2d 368, 375 [1980]; *see Merrill Lynch Credit Corp. v*

Smith, 87 AD3d 1391, 1392-1393 [4th Dept 2011]).

Inasmuch as plaintiff only vaguely contended, in response to the motion, that she learned after the agreement was executed that defendant failed to make disclosure of marital financial information and inasmuch as her complaint contains no facts to support those allegations, the complaint also fails to state a cause of action to rescind the agreement based on unconscionability, fraud, or duress and undue influence (*see generally Medical Care of W. N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]; *Shah v Mitra*, 171 AD3d 971, 973 [2d Dept 2019]; *Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307 [4th Dept 2015]). Thus, Supreme Court erred in denying defendant's motion insofar as it sought dismissal of the complaint pursuant to CPLR 3211 (a) (7). We therefore reverse the order and dismiss the complaint. We note, however, that the dismissal is without prejudice to an application by plaintiff to Supreme Court for leave to serve an amended complaint (*see Leonardi v County of Cayuga*, 103 AD3d 1232, 1234 [4th Dept 2013]; *see also Credit Alliance Corp. v Arthur Andersen & Co.*, 66 NY2d 812, 812 [1985]; *see generally* CPLR 3014, 3016 [b]).

In light of our determination, defendant's remaining contentions are academic (*see Shenoy v Kaleida Health*, 162 AD3d 1703, 1703 [4th Dept 2018]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

735

KA 10-01828

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL FLAGG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 24, 2010. The appeal was held by this Court by order entered November 15, 2013, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (111 AD3d 1438 [4th Dept 2013]). The proceedings were held and completed.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed, and the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [b]), defendant contends that his waiver of the right to appeal is invalid, that County Court abused its discretion in declining to adjudicate him a youthful offender, and that the sentence is unduly harsh and severe. 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" (*People v Kingdollar*, 196 AD3d 1146, 1147 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *see People v Webber*, 203 AD3d 1660, 1660 [4th Dept 2022]; *see generally People v Pacherille*, 25 NY3d 1021, 1024 [2015]) and assuming further that defendant is an eligible youth under CPL 720.10 (3) (i) (*see People v Garcia*, 84 NY2d 336, 342 [1994]; *cf. People v Williams*, 202 AD3d 1162, 1164 [3d Dept 2022], *lv denied* 38 NY3d 954 [2022]; *see generally People v Middlebrooks*, 25 NY3d 516, 524-526 [2015]), we nevertheless conclude, based upon our review of the appropriate factors (*see generally People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625 [1986]), that the court did not abuse its discretion in refusing to adjudicate defendant a youthful offender (*see People v Spencer*, 197 AD3d 1004, 1005 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]). We decline to

exercise our interest of justice jurisdiction to afford him that status (*see id.*; *People v Lang*, 178 AD3d 1362, 1363 [4th Dept 2019], *lv denied* 34 NY3d 1160 [2020]).

Finally, we dismiss the appeal to the extent that defendant challenges the severity of his sentence inasmuch as defendant has completed serving the sentence, including any period of postrelease supervision, and thus that part of the appeal is moot (*see People v Finch*, 137 AD3d 1653, 1655 [4th Dept 2016]; *People v Boley*, 126 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

736

KA 19-01917

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM GRIFFIN, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 6, 2019. 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 reject defendant's contention that County Court improperly denied his request to represent himself. The right to counsel may be waived, allowing a defendant to proceed pro se, when: " '(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues' " (*People v Silburn*, 31 NY3d 144, 150 [2018]; *see generally People v Crampe*, 17 NY3d 469, 481-482 [2011], *cert denied* 565 US 1261 [2012]). Here, defendant failed to satisfy the first factor, inasmuch as his request to proceed with either retained counsel or to appear as co-counsel alongside his currently assigned public defender did not " 'demonstrate an actual fixed intention and desire to proceed without professional assistance in his defense' " (*Silburn*, 31 NY3d at 150; *see People v Griffith*, 181 AD3d 1170, 1171 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]). We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

737

KA 21-01031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. CLEMENT, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Lewis County Court (John H. Crandall, A.J.), entered November 23, 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 ([SORA] Correction Law § 168 *et seq.*), defendant contends that he received ineffective assistance of counsel because defense counsel did not contest the assessment of points by the Board of Examiners of Sex Offenders (Board) or request a downward departure. " '[A] sex offender facing risk level classification under SORA has a right to the effective assistance of counsel' " (*People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *see People v Morancis*, 201 AD3d 751, 751 [2d Dept 2022]). "To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation" (*People v Flores*, 84 NY2d 184, 187 [1994]). Here, we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, defendant received effective assistance of counsel" (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]; *see People v Hackett*, 198 AD3d 1323, 1324 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defense counsel successfully opposed additional points sought by the People in their risk assessment instrument. Defendant contends that defense counsel should have opposed the Board's assessment of 20 points under risk factor 4, for a continuing course of sexual misconduct. Even assuming, arguendo, that the People did not show by clear and convincing evidence that at least 24 hours separated the two

acts of sexual contact with the victim (*see People v Farrell*, 142 AD3d 1299, 1299-1300 [4th Dept 2016]; *People v Filkins*, 107 AD3d 1069, 1069 [3d Dept 2013]), we note that defendant remained a level three risk even without those points, and there was no colorable basis to contest the assessment of any other points (*see People v Kingdollar*, 196 AD3d 1146, 1147 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *People v Allport*, 145 AD3d 1545, 1546 [4th Dept 2016]; *see also People v Mangione*, 169 AD3d 1370, 1371 [4th Dept 2019], *lv denied* 33 NY3d 904 [2019]). With respect to defense counsel's failure to request a downward departure, 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 Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see Mangione*, 169 AD3d at 1371). Here, there was nothing in the case summary that would support such a request (*see Kingdollar*, 196 AD3d at 1147-1148; *People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]; *People v Reid*, 59 AD3d 158, 159 [1st Dept 2009], *lv denied* 12 NY3d 708 [2009]).

We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

738

KA 19-01646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIK G. KENNEY, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (MICHAEL T. JOHNSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered March 28, 2019. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the first degree (Penal Law § 130.35 [1]), arising from allegations that defendant engaged in sexual intercourse by forcible compulsion with a 19-year-old camper (victim) at the camping resort at which he was employed. We affirm.

To the extent that defendant contends that the evidence is legally insufficient to support the conviction because the victim was incredible as a matter of law, that contention is not preserved for our review inasmuch as defendant did not raise that ground in support of his motion for a trial order of dismissal (*see People v Graham*, 174 AD3d 1486, 1490 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Abon*, 132 AD3d 1235, 1235-1236 [4th Dept 2015], *lv denied* 27 NY3d 1127 [2016]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]).

Defendant also contends that the verdict is against the weight of the evidence because the victim's testimony was incredible as a matter of law. We reject that contention. Even assuming, arguendo, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of the crime as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury's determination to credit the

victim's testimony with respect to the incident is supported by the weight of the evidence. Specifically, the victim consistently testified that, after accepting defendant's invitation to accompany him around the camping resort and then to an unoccupied cottage, defendant exited the bathroom of the cottage with his pants undone, informed the victim that he was sexually aroused, quickly approached the victim, placed all his weight on top of her such that she fell backward onto the mattress of a bunk bed and, despite her protest, pulled down the victim's sweatpants and engaged in vaginal sexual intercourse with her by forcible compulsion (*see People v Johnson*, 153 AD3d 1606, 1607 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]; *People v Hazzard*, 129 AD3d 1598, 1599 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]; *see also People v Schinnerer*, 192 AD3d 1395, 1396 [3d Dept 2021], *lv denied* 37 NY3d 968 [2021]). Additionally, the People introduced evidence that defendant's DNA matched that of the major male contributor to the DNA found on the waistband of the victim's sweatpants, which was consistent with the victim's account of defendant's actions during the incident (*see Hazzard*, 129 AD3d at 1599).

Contrary to defendant's challenges to the victim's credibility, "nothing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of [the] crime[]" (*People v Woods*, 26 AD3d 818, 819 [4th Dept 2006], *lv denied* 7 NY3d 765 [2006]; *see Johnson*, 153 AD3d at 1607). The DNA found on the sweatpants supported the victim's account, and the fact that the victim's ex-boyfriend was found to be the major contributor of DNA located on a pair of the victim's shorts, which she may not have been wearing at the time of her interactions with defendant, was consistent with the victim's testimony that she had consensual sexual relations with the ex-boyfriend back home a few days after the subject incident at the camping resort. In addition, we conclude that "[any] inconsistencies in the victim's testimony, the fact that she had consumed alcohol [to the point of intoxication at some time] prior to the rape[,] and her delay in reporting the incident[] until [a few days after] she arrived home were fully explored during trial and did not render the victim's account incredible as a matter of law" (*People v Littebrant*, 55 AD3d 1151, 1155 [3d Dept 2008], *lv denied* 12 NY3d 818 [2009]; *see People v Dawson*, 195 AD3d 1157, 1161 [3d Dept 2021], *affd* 38 NY3d 1055 [2022]).

Based on the foregoing, we conclude that the verdict is not against the weight of the evidence because " 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Swank*, 109 AD3d 1089, 1089 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014]; *see generally Bleakley*, 69 NY2d at 495).

Next, defendant contends that County Court erred in admitting, without conducting a hearing, alleged *Molineux* evidence in the form of testimony by a female coworker that she had previously accompanied defendant during a training session to a cottage where defendant, while lamenting his ongoing separation from his wife, mentioned that

he could at least now do what he wanted. Defendant failed to preserve that contention for our review inasmuch as he "did not object on *Molineux* grounds to the admission of [the] testimony . . . nor did he request a *Ventimiglia* hearing" (*People v Thomas*, 226 AD2d 1071, 1071 [4th Dept 1996], *lv denied* 88 NY2d 995 [1996]; *see People v Conley*, 192 AD3d 1616, 1620 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *People v Powell*, 303 AD2d 978, 979 [4th Dept 2003], *lv denied* 100 NY2d 565 [2003], *reconsideration denied* 1 NY3d 541 [2003]). 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]; *Powell*, 303 AD2d at 979). We also reject defendant's related contention that defense counsel was ineffective for not adequately opposing the admission of the coworker's testimony. Defendant "has failed to demonstrate the absence of strategic or other legitimate explanations for the failure of defense counsel to pursue a . . . *Ventimiglia* hearing, or to object to the admission of [such evidence] at trial" (*People v Hogue*, 133 AD3d 1209, 1211 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016] [internal quotation marks omitted]; *see People v Francis*, 206 AD3d 1605, 1606 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *see generally People v Rivera*, 71 NY2d 705, 709 [1988]).

Defendant further contends that the court erred in permitting the victim's parents to testify with respect to the victim's disclosure of the rape to them, which purportedly served to improperly bolster the victim's testimony, and that the court should have given a limiting instruction with respect to the parents' testimony. Defendant failed to preserve that contention for our review inasmuch as he did not object to the admission of the parents' testimony and never requested a limiting instruction with respect thereto (*see People v Hall*, 194 AD3d 1372, 1373 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *People v Clark*, 281 AD2d 957, 957 [4th Dept 2001], *lv denied* 96 NY2d 860 [2001]). 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]; *Clark*, 281 AD2d at 957). Relatedly, defendant contends that defense counsel was ineffective for failing to object to the parents' testimony and failing to request a limiting instruction. We reject that contention because defendant has "failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged failures" (*Hall*, 194 AD3d at 1373; *see People v Reed*, 151 AD3d 1821, 1822 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]).

Defendant also contends that the court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (1) and (2), which was premised on the claim that the jurors improperly came into possession of evidence not introduced at trial when they opened an exhibit in the jury room during deliberations. We reject that contention as well.

" 'A trial court's authority to set aside a verdict under CPL 330.30 (1) is limited to grounds which, if raised on appeal, would require reversal as a matter of law . . . Accordingly, only a claim of error that is properly preserved for appellate review may serve as the

basis to set aside the verdict' " (*People v Sheltray*, 244 AD2d 854, 854-855 [4th Dept 1997], *lv denied* 91 NY2d 897 [1998]; *see People v Albert*, 85 NY2d 851, 853 [1995]). Here, despite being afforded an opportunity to object or seek further relief when the court brought the issue to the parties' attention during deliberations, defendant did not do so and thus failed to preserve his claim (*see* CPL 470.05 [2]). The court therefore properly denied without a hearing the motion insofar as it was based on CPL 330.30 (1) because defendant's unpreserved argument "did not furnish a proper predicate for setting aside the verdict" (*Albert*, 85 NY2d at 853; *see People v Schultz*, 266 AD2d 919, 919 [4th Dept 1999], *lv denied* 94 NY2d 906 [2000]; *People v Amato*, 238 AD2d 432, 433 [2d Dept 1997], *lv denied* 90 NY2d 937 [1997]).

A trial court is also authorized to set aside a verdict on the ground that "during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2]; *see People v Rodriguez*, 100 NY2d 30, 35 [2003]). Here, the record establishes that the alleged juror misconduct "was addressed by the court and counsel on the record at the time of trial" and that defendant thus "had knowledge of the matter prior to the verdict" (*People v Scanlon*, 52 AD3d 1035, 1039 [3d Dept 2008], *lv denied* 11 NY3d 741 [2008]). We therefore conclude that the court properly denied without a hearing the motion insofar as it was based on CPL 330.30 (2) because "the juror misconduct alleged was known to . . . defendant and . . . defendant had the opportunity to act on the information but failed to do so prior to the verdict" (*People v Walsh*, 222 AD2d 735, 736 [3d Dept 1995], *lv denied* 88 NY2d 855 [1996]; *see People v Lowe*, 166 AD3d 901, 902 [2d Dept 2018], *lv denied* 32 NY3d 1206 [2019]; *People v Barrett*, 231 AD2d 806, 807 [3d Dept 1996]).

Defendant failed to preserve for our review both his assertion that the court, in determining the sentence to be imposed, penalized him for exercising his right to a jury trial because the sentence imposed is longer than the pretrial plea offer (*see People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]), and his conclusory contention that the sentence constitutes cruel and unusual punishment (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Suprunchik*, 208 AD3d 1058, 1059 [4th Dept 2022]). 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]; *Suprunchik*, 208 AD3d at 1059; *People v Elmore*, 195 AD3d 1575, 1577 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

740

KA 21-01015

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT A. COREY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 24, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of a firearm, unlawful sale or possession of dangerous substances and criminally using drug paraphernalia in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of defendant's omnibus motion seeking to suppress his statements is granted to the extent of suppressing his statements in the hospital other than "I'm beat up," and the matter is remitted to Cayuga County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress the statements he made to an officer while defendant was receiving treatment at a hospital. We agree in part.

It is well settled that "both the elements of police custody and police interrogation must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016] [internal quotation marks omitted]). Here, it is undisputed that defendant was in police custody at the time he made the statements and that no one read defendant his *Miranda* warnings prior to defendant making the statements.

The officer testified at the suppression hearing that defendant

"called [the officer] over" to his bed and said "I'm beat up," after which the officer asked defendant "what happened." Defendant then explained the circumstances surrounding how he allegedly came into possession of a weapon he was not legally authorized to possess. We conclude that defendant's initial statement, "I'm beat up," was not subject to suppression because it was " 'spontaneous and not the result of inducement, provocation, encouragement or acquiescence' " (*People v Rodriguez-Rivera*, 203 AD3d 1624, 1626 [4th Dept 2022]). The court, however, erred in refusing to suppress the remainder of his statements, which were made in response to the officer's question that was intended to elicit a response, and thus those statements cannot be said to have been "genuine[ly] spontane[ous]," i.e., they were not " 'spontaneous in the literal sense of that word as having been made without apparent external cause' " (*People v Ibarrondo*, 150 AD3d 1644, 1645 [4th Dept 2017]; *see People v Paulman*, 11 AD3d 878, 879 [4th Dept 2004], *affd* 5 NY3d 122 [2005]; *People v Sylvester*, 187 AD3d 798, 799-800 [2d Dept 2020], *lv denied* 36 NY3d 976 [2020]; *People v Ackerman*, 162 AD2d 793, 794 [3d Dept 1990]).

In the absence of any proof that defendant would have pleaded guilty even if the relevant statements were suppressed, we conclude that the plea must be vacated " '[i]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty' " (*People v Glanton*, 72 AD3d 1536, 1538 [4th Dept 2010]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

741

KA 21-01755

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

PAUL R. ALLEN, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), entered August 23, 2021. The order granted the motion of defendant to set aside a jury verdict.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, the verdict is reinstated and the matter is remitted to Oswego County Court for sentencing.

Memorandum: The People appeal from an order granting defendant's motion pursuant to CPL 330.30 (1) to set aside the jury verdict finding him guilty of, inter alia, two counts of sexual abuse in the first degree (Penal Law § 130.65 [2], [4]). We agree with the People that County Court erred in granting the motion. Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on "[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court." Defendant's motion to set aside the verdict pursuant to CPL 330.30 (1) was procedurally improper because it was "premised on matters outside the existing trial record, and CPL 330.30 (1) did not permit defendant[] to expand the record to include matters that did not 'appear[ ] in the record' prior to the filing of the motion[]" (*People v Giles*, 24 NY3d 1066, 1068 [2014], *cert denied* 577 US 828 [2015]; *see People v Robinson*, 158 AD3d 1263, 1265 [4th Dept 2018], *lv denied* 32 NY3d 1067 [2018]). We therefore reverse the order, deny the motion, and reinstate the verdict inasmuch as defendant's claim was not reviewable pursuant to CPL 330.30 (1) (*see generally Robinson*, 158 AD3d at 1265); we remit the matter to

County Court for sentencing.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

742

KA 20-00319

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH SEYMOUR, DEFENDANT-APPELLANT.

HUNT LAW OFFICE, SYRACUSE (MARSHA A. HUNT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered September 27, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree (three counts) and criminal possession of a firearm (three 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 three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and three counts of criminal possession of a firearm (§ 265.01-b [1]). Contrary to defendant's contention, County Court did not err in concluding that defendant was not an eligible youth and therefore denying defendant youthful offender treatment (*see People v Williams*, 197 AD3d 975, 976 [4th Dept 2021], *lv denied* 37 NY3d 1062 [2021]; *People v Gonzalez*, 185 AD3d 1436, 1436-1437 [4th Dept 2020], *lv denied* 35 NY3d 1094 [2020]). Where, as here, a defendant is convicted of an armed felony (*see* CPL 1.20 [41]; *People v Meridy*, 196 AD3d 1, 3-6 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]), he or she may be adjudicated a youthful offender only where he or she was not the sole participant in the crime and his or her participation was relatively minor (*see* CPL 720.10 [3] [ii]), or where there are "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]), i.e., circumstances that "bear directly on defendant's personal conduct in committing the crime" (*People v Garcia*, 84 NY2d 336, 342 [1994]; *see People v Jones*, 166 AD3d 1479, 1480 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]). As we noted in a codefendant's appeal, defendant was one of three participants who police officers saw pointing guns in the direction of a gas station after they heard gunshots while on patrol (*see Meridy*, 196 AD3d at 3, 7). The officers

heard more gunshots as the three men ran away and observed muzzle flash on at least one of the firearms. Defendant's participation in the offense was therefore not minor, and we also conclude that there were no mitigating circumstances bearing directly upon the manner in which the crime was committed (*see id.* at 7).

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

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

743

CAF 19-00406

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

IN THE MATTER OF GRAYSON S. (FORMERLY KNOWN AS STARLIA S.)

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS S., RESPONDENT-APPELLANT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered January 2, 2019 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent had neglected the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition against respondent is dismissed.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudged that he neglected the subject child based on his conduct during an altercation. The evidence presented by petitioner at the fact-finding hearing established that the father, his girlfriend, and the girlfriend's 18-year-old daughter arrived by vehicle at the home of the paternal grandparents, where the 14-year-old child and his 15-year-old sister were residing, for the purpose of picking up some toys for two younger children that the father and the girlfriend had together. A verbal dispute then arose in which the father argued with the grandfather and the child primarily over the ownership of a certain toy, with the child maintaining that the toy belonged to him and that he was not obligated to give it to the younger children. The sister joined the child outside in arguing with the father, who was joined by the girlfriend and the girlfriend's daughter after they both exited the vehicle. The argument subsequently turned physical with the sister beating up the girlfriend's daughter while the father and the girlfriend attempted to stop the sister. During the altercation, the child threw a rock at the vehicle, at which point the father struck

the child once. Family Court concluded from the evidence presented that the child was neglected by the father pursuant to Family Court Act § 1012 (f) (i) (B).

As a preliminary matter, petitioner and the Attorney for the Child (AFC) contend that the father did not take his appeal within the time period allotted by Family Court Act § 1113 and that the appeal should therefore be dismissed as untimely. We reject that contention.

Pursuant to Family Court Act § 1113, an appeal from a Family Court order "must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest." Indeed, the statute was specifically amended to permit the time to take an appeal to begin running upon service by the court either during an appearance in court or via mailing (*see* L 1997, ch 461, § 1; *Matter of Miller v Mace*, 74 AD3d 1442, 1443 [3d Dept 2010], *lv denied* 15 NY3d 705 [2010]; Mem of Unified Ct System, Bill Jacket, L 1997, ch 461 at 7-10). Furthermore, "[w]hen service of the order is made by the court, the time to take an appeal shall not commence unless the order contains [a statutorily required] statement and there is an official notation in the court record as to the date and the manner of service of the order" (§ 1113; *see Matter of Fraser v Fraser*, 185 AD3d 1444, 1445 [4th Dept 2020]). "An appeal as of right [is] taken by filing the original notice of appeal with the clerk of the [F]amily [C]ourt in which the order was made and from which the appeal is taken" (§ 1115).

Here, "[t]here is no evidence in the record that the father was served with the order of fact-finding and disposition by a party or the child's attorney, that he received the order in court, or that the Family Court mailed the order to the father" (*Matter of Batts v Muhammad*, 198 AD3d 750, 751 [2d Dept 2021]). Instead, despite using a form order that provided typewritten check boxes for the two methods of service by the court mentioned in the statute (i.e., in court or by mail) (*see* Family Ct Act § 1113), the court here crossed out the word "mailed" and edited the form to indicate that the order was emailed to, among others, the father's attorney. The statute, however, does not provide for service by the court through email or any other electronic means (*see id.*) and, contrary to the assertions of petitioner and the AFC, traditional mail and email are not indistinguishable (*see* CPLR 2103 [f] [1]; *see generally* Family Ct Act §§ 165 [a]; 1118). It is well settled that "[c]ourts should construe clear and unambiguous statutes so as to give effect to the plain meaning of the words used" (*Matter of Alonzo M. v New York City Dept. of Probation*, 72 NY2d 662, 665 [1988]) and, here, the statute permits court service by mail but does not provide for such service by electronic means (*see* § 1113), despite the fact that the legislature has had the opportunity to include those means in the years since email has become more prevalent (*see e.g.* L 2010, ch 41, § 83). Inasmuch as the father was served the order by the court via email,

which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely (*see Batts*, 198 AD3d at 751; *Matter of Tynell S.*, 43 AD3d 1171, 1172 [2d Dept 2007]).

On appeal, the father contends that the evidence presented at the fact-finding hearing failed to establish by a preponderance of the evidence that he neglected the child. We agree, and we therefore reverse the order insofar as appealed from and dismiss the petition against the father.

As relevant here, a neglected child is defined as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i] [B]). "Thus, a party seeking to establish neglect must show, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* § 1012 [f] [i] [B]; *Matter of Isabella S. [Nicole S.]*, 203 AD3d 1651, 1652 [4th Dept 2022]).

"The first statutory element requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child" (*Nicholson*, 3 NY3d 369). "This prerequisite to a finding of neglect ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*id.*). The second statutory element tests whether the parent failed to provide a " '*minimum* degree of care'—not maximum, not best, not ideal—and the failure must be actual, not threatened" (*id.* at 370). "This is an objective test that asks whether 'a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances' " (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011], quoting *Nicholson*, 3 NY3d at 370).

Although a parent may use reasonable force to discipline his or her child and to promote the child's welfare (*see Matter of Damone H., Jr. [Damone H., Sr.]* [appeal No. 2], 156 AD3d 1437, 1438 [4th Dept 2017]), the infliction of excessive corporal punishment constitutes neglect (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]). "A single incident of excessive corporal punishment can be sufficient to support a finding of neglect" (*Balle S.*, 194 AD3d at 1395).

Addressing first the father's procedural and evidentiary challenges, we conclude that, contrary to the father's assertion, the court met its obligation of setting forth the "facts it deem[ed] essential" to its neglect determination (CPLR 4213 [b]; *see Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1692 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019]). We also reject the father's contention that the out-of-court statements by the child and the sister regarding the altercation were not sufficiently corroborated (*see generally* Family Ct Act § 1046 [a] [vi]). The statements of the child and the sister to a caseworker and to an investigator provided sufficient cross-corroboration inasmuch as they "tend to support the statements of the other[] and, viewed together, give sufficient indicia of reliability to each [of their] out-of-court statements" (*Matter of Nicole V.*, 71 NY2d 112, 124 [1987], *rearg denied* 71 NY2d 890 [1988]; *see Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1460-1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]).

We nonetheless agree with the father on the merits that, "[a]lthough a single incident may sometimes suffice to sustain a finding of neglect . . . , the record does not support such a finding here" (*Matter of Allyssa O. [Edward N.]*, 132 AD3d 768, 769 [2d Dept 2015]). In particular, we conclude that, "[g]iven the age of the subject child, the provocation, and the dynamics of the incident, the [father's] act against [the child] did not constitute neglect" (*id.*). The record establishes that, during the course of a multi-person melee that included the 15-year-old sister beating up the 18-year-old daughter of the father's girlfriend, the 14-year-old child threw a rock at the vehicle causing the window to break, to which provocation the father instantly reacted by striking the child once either in the face or the back of the head (*cf. Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1413 [4th Dept 2022]). Petitioner presented no evidence that the child sustained any injury or required medical treatment as a result of the single strike by the father during the altercation, and the police who investigated the incident did not file any charges (*see Matter of Christian O.*, 51 AD3d 402, 402-403 [1st Dept 2008]). Moreover, petitioner "presented no [competent] proof of a pattern of excessive force by the father; indeed, the proof establishes that this was a single, isolated incident" (*Matter of Stephanie K. [James K.]* [appeal No. 2], 1 AD3d 939, 940 [4th Dept 2003]). Consequently, even though the court properly drew the strongest possible negative inference against the father after he failed to appear or testify at the fact-finding hearing (*see Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1437 [4th Dept 2018]), the evidence presented by petitioner established nothing more than "an isolated incident, and '[w]hile losing one's temper does not excuse striking and [potentially] injuring one's child, one such event does not necessarily establish . . . neglect' " (*Christian O.*, 51 AD3d at 403). We thus conclude that petitioner failed to establish by a preponderance of the evidence that the father neglected the child by virtue of the single incident at issue here (*see Matter of Israel S. [Khadine S.]*, 156 AD3d 889, 889-890 [2d Dept 2017]; *Allyssa O.*, 132 AD3d at 769; *Matter of Corey Mc. [Tanya Mc.]*, 67 AD3d 1015, 1015-1016 [2d Dept 2009]; *Christian O.*, 51 AD3d at 402-403; *Matter of Amanda E.*,

279 AD2d 917, 918 [3d Dept 2001]; *see generally Damone H., Jr.*, 156 AD3d at 1437-1438).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

746

CAF 21-01475

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

IN THE MATTER OF DEREK R. JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KENYA I. JOHNSON, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 1.)

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

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered August 31, 2021 in a proceeding pursuant to Family Court Act article 6. The order dismissed "the petition."

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

Same memorandum as in *Matter of Johnson v Johnson* ([appeal No. 2] — AD3d — [Oct. 7, 2022] [4th Dept 2022]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

747

CAF 21-01737

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

MATTER OF DEREK R. JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KENYA I. JOHNSON, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 2.)

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

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered November 17, 2021 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, dismissed the amended petition.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, the amended petition is granted, and the matter is remitted to Family Court, Jefferson County, for further proceedings in accordance with the following memorandum: In these child custody and visitation proceedings, petitioner father and the Attorney for the Child (AFC) appeal in appeal No. 1 from an order dismissing the father's petition against respondent mother alleging a violation of a prior order of joint custody and his amended petition seeking a modification of the custody order by awarding him sole custody of the parties' child and granting visitation to the mother. In appeal No. 2, the father and the AFC appeal from a subsequent order that, inter alia, clarified that the order in appeal No. 1 applied nunc pro tunc to both petitions. As limited by their briefs, they appeal from the order in appeal No. 2 insofar as it dismissed the father's amended petition on the ground that the father failed to establish a change in circumstances.

We note at the outset that the appeals from the order in appeal No. 1 must be dismissed inasmuch as that order was superseded by the order in appeal No. 2 (*see Matter of Tuttle v Mateo* [appeal No. 3],

121 AD3d 1602, 1603 [4th Dept 2014]; *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]). We further note that the mother's contentions concerning alleged evidentiary errors and ineffective assistance of counsel at the hearing are not properly before us inasmuch as the mother failed to take a timely appeal from either order (*see Matter of Saunders v Hamilton*, 75 AD3d 1172, 1173 [4th Dept 2010], *lv denied* 15 NY3d 713 [2010]; *see generally Matter of Jasper QQ.*, 64 AD3d 1017, 1019-1020 [3d Dept 2009], *lv denied* 13 NY3d 706 [2009]). In any event, the mother was not aggrieved by the orders inasmuch as they dismissed the father's petitions (*see* CPLR 5511; *Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1385 [4th Dept 2019]; *Saunders*, 75 AD3d at 1173).

With respect to the merits, "[a] party seeking to modify an existing custody arrangement must demonstrate a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child[ ]" (*Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]; *see Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1768 [4th Dept 2016]; *Matter of Foster v Foster*, 128 AD3d 1381, 1381 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]). Although, as a general rule, the custody determination of the trial court is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]), "[s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record" (*Fox v Fox*, 177 AD2d 209, 211-212 [1992]). Moreover, "[o]ur authority in determinations of custody is as broad as that of Family Court" (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1450 [4th Dept 2007]; *see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]).

We agree with the father and the AFC that the father met his burden of establishing a change in circumstances. It is well settled that " 'the continued deterioration of the parties' relationship is a significant change in circumstances justifying a change in custody' " (*Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]; *see Matter of Gaudette v Gaudette*, 262 AD2d 804, 805 [3d Dept 1999], *lv denied* 94 NY2d 790 [1999]). Here, the court had previously awarded joint custody to the parties on the basis that communications between them had "improved and the two were working together more than ever before, the results of which were positive for [the subject child]." However, the evidence at the hearing established that, after the initial custody award was entered, the parties reverted to " 'an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances' " (*Matter of Keller v Keller*, 176 AD3d 1573, 1574 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]; *see Matter of Cooley v Roloson*, 201 AD3d 1299, 1300 [4th Dept 2022]; *see also Leonard v Leonard*, 109 AD3d 126, 128 [4th Dept 2013]). Thus, on this record, we conclude that there has been a sufficient change in circumstances warranting an inquiry into whether the best interests of the child would be served by modifying the existing custody arrangement.

Inasmuch as the record is sufficient for this Court to make a best interests determination, we will do so "in the interests of judicial economy and the well-being of the child" (*Bryan K.B.*, 43 AD3d at 1450; *see Matter of Cole v Nofri*, 107 AD3d 1510, 1512 [4th Dept 2013], *appeal dismissed and lv denied* 22 NY3d 1082 [2014]). After reviewing the relevant factors (*see generally Eschbach*, 56 NY2d at 171-174; *Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]), we conclude that it is in the child's best interests to award the father sole custody. Although the parties have shared alternating week custody since the entry of the prior custody order, the evidence at the hearing established that the father "provided a more stable environment for the child and was better able to nurture the child" (*Matter of Unczur v Welch*, 159 AD3d 1405, 1406 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]). The evidence further established that the mother made a concerted effort to interfere with the father's contact with the child by, inter alia, disparaging him to educational and medical professionals, which raises a strong probability that the mother " 'is unfit to act as custodial parent' " (*Matter of Fowler v Rothman*, 198 AD3d 1374, 1375 [4th Dept 2021], *lv dismissed* 38 NY3d 995 [2022]) and warrants the grant of sole custody to the father. We therefore reverse the order in appeal No. 2 insofar as appealed from and grant the amended petition by awarding the father sole custody of the child and visitation to the mother, and we remit the matter to Family Court to fashion an appropriate visitation schedule.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

750

CA 21-00651

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

SCHACHTLER STONE PRODUCTS, LLC, SCHACHTLER FAMILY TRUST, ERIC T. SCHACHTLER AND PJK PROPERTIES, LLC,
PLAINTIFFS-PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF MARSHALL, TOWN BOARD OF TOWN OF MARSHALL, ZONING BOARD OF APPEALS OF TOWN OF MARSHALL AND CODE ENFORCEMENT OFFICER DANIEL J. FORD, DEFENDANTS-RESPONDENTS-APPELLANTS.

JOHN VON BERGEN AND HEIDI VON BERGEN,
PROPOSED INTERVENORS-APPELLANTS.
(APPEAL NO. 1.)

ROSSI & ROSSI, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

PETER J. DIGIORGIO, JR., UTICA, FOR PROPOSED INTERVENORS-APPELLANTS.

BROWN, DUKE & FOGEL, P.C., SYRACUSE (MICHAEL A. FOGEL OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-RESPONDENTS.

Appeals from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 18, 2021. The judgment, among other things, granted relief to plaintiffs-petitioners on their amended complaint-petition and denied a motion to intervene.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the first decretal paragraph and vacating the third decretal paragraph to the extent that it granted a declaration and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 1, defendants-respondents (respondents) appeal from a judgment that, inter alia, vacated and annulled three documents issued by defendant-respondent Daniel J. Ford, the Code Enforcement Officer (CEO) for defendant-respondent Town of Marshall (Town), vacated and annulled a resolution issued by defendant-respondent Zoning Board of Appeals of Town of Marshall (ZBA), restrained respondents from regulating the mining activity at issue here, denied a motion to intervene, and granted a declaration in favor of plaintiffs-petitioners (petitioners). In appeal No. 2,

respondents and proposed intervenors appeal from an amended judgment that made no substantive changes to the judgment in appeal No. 1. Finally, in appeal No. 3, respondents appeal from an order that denied their motion for leave to reargue and renew their arguments in opposition to the amended complaint-petition pursuant to CPLR 2221. Contrary to the contentions of respondents and proposed intervenors, we conclude that they are not entitled to any relief on their appeals.

Petitioners are the owners or operators of a quarry located on property situated in an A-1 Agricultural zone in the Town. Pursuant to the Town's Zoning Ordinance, mining is permitted in such districts by special use permit (SUP). In 2012, petitioners applied to the ZBA for an SUP. In 2013, the ZBA purportedly issued an SUP to petitioners approving the application for mining at the property. Although the purported SUP contained numerous conditions, the ZBA adopted a resolution in 2019 recognizing that those conditions were "not enforceable" (*see* ECL 23-2703 [2]).

Following the issuance of the purported SUP, petitioners applied to the Department of Environmental Conservation (DEC) for a mining permit, which was granted in October 2018. That initial permit, which ran from October 2018 through October 2023, did not permit blasting at the mine. Subsequently, petitioners applied for and received a modified DEC mining permit, which allowed blasting and drilling. Certain neighbors, including the CEO, complained to the DEC and sought to prevent the blasting and drilling. The CEO stated in a letter to the DEC that his property would "most likely lose a of its value."

In 2020, after the modified DEC permit had been issued, the CEO issued a notice of violation (NOV), alleging that petitioners were "in violation of the original Special Use Permit." No specific violation was identified. Thereafter, the CEO issued a "Stop Work Order" (SWO), directing that petitioners desist from any mining at the property. Petitioners appealed to the ZBA, which would have stayed all proceedings in furtherance of the NOV and SWO (*see* Town Law § 267-a [6]), except that the CEO "certifie[d]" that a stay would "cause imminent peril to life or property" (*id.*). Petitioners then appealed the issuance of that "Certification" to the ZBA. Following a hearing on the two appeals, the ZBA issued a resolution in 2020 determining that the purported SUP was "null and void" and affirming the "Stop Work Orders [sic]."

Petitioners thereafter commenced this action-proceeding, seeking, inter alia, a judgment declaring that respondents' attempt to regulate petitioners' mining operation was superseded and unenforceable pursuant to the Mined Land Reclamation Law (MLRL) (*see* ECL 23-2701 *et seq.*), vacating and annulling the three documents issued by the CEO as well as the 2020 ZBA resolution, and enjoining respondents from regulating or prohibiting mining on petitioners' property. Respondents counterclaimed. Certain neighbors, including proposed intervenors, sought to intervene.

Addressing first the procedural issues, we conclude that,

inasmuch as the amended judgment in appeal No. 2 did not make any substantive changes to the judgment in appeal No. 1, the appeal from the amended judgment in appeal No. 2 should be dismissed (*see Town of W. Seneca v Kideney Architects, P.C.*, 187 AD3d 1509, 1510 [4th Dept 2020]; *see generally Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]). Nevertheless, we exercise our discretion to treat the notice of appeal of proposed intervenors as valid and deem their appeal as taken from the judgment in appeal No. 1 (*see* CPLR 5520 [c]; *see generally Miller v Richardson*, 48 AD3d 1298, 1300 [4th Dept 2008], *lv denied* 11 NY3d 710 [2008]). With respect to appeal No. 3, respondents correctly recognize that the denial of a motion for leave to reargue is not appealable (*see Britt v Buffalo Mun. Hous. Auth.*, 115 AD3d 1252, 1252 [4th Dept 2014]). As a result, we dismiss the appeal from that portion of the order in appeal No. 3 (*see Matter of Rochester Genesee Regional Transp. Auth. v Stensrud*, 162 AD3d 1495, 1495 [4th Dept 2018], *lv dismissed* 35 NY3d 950 [2020]; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]), and we reject respondents' contention in appeal No. 3 that we should nevertheless reach issues raised in the reargument motion.

We also note that a declaratory judgment action is not an appropriate procedural vehicle for challenging respondents' administrative determinations and as a result this purported hybrid declaratory judgment action and CPLR article 78 proceeding "is properly only a proceeding pursuant to CPLR article 78" (*Matter of Barker Cent. School Dist. v Niagara County Indus. Dev. Agency*, 62 AD3d 1239, 1240 [4th Dept 2009]). We conclude that Supreme Court erred in making a declaration (*see Matter of Destiny USA Dev., LLC v New York State Dept. of Envtl. Conservation*, 63 AD3d 1568, 1568 [4th Dept 2009], *lv denied* 14 NY3d 703 [2010]), and we therefore modify the judgment in appeal No. 1 accordingly.

With respect to respondents' substantive contentions in appeal No. 1, we conclude that the court properly determined that the ZBA's determination that no SUP was issued in 2013 is not supported by substantial evidence (*see generally* CPLR 7803 [4]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). It is clear from multiple documents in the record on appeal that an SUP was issued. Indeed, the Town's attorney acknowledged in a 2019 letter to the ZBA that a "special use permit" had been issued in 2013, albeit with "improper" conditions. Moreover, the ZBA properly concluded in its 2019 resolution that those conditions "included in the Special Use Permit" were "not enforceable," inasmuch as they related to "the specifics of the extractive mining or reclamation process" (*Philipstown Indus. Park v Town Bd. of Town of Philipstown*, 247 AD2d 525, 527-528 [2d Dept 1998]; *see* ECL 23-2703 [2]; *see generally Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 NY2d 126, 133-134 [1987]). We conclude that, although the SUP contained certain invalid conditions, the ZBA's conclusion that there was never a valid SUP is not supported by substantial evidence. Based on our determination that the ZBA issued an SUP in 2013, we need not address petitioners' alternative grounds for affirmance in appeal No. 1. Contrary to

respondents' alternative contention in appeal No. 1, the court properly determined that the SUP, which was directed "to run concurrently with" any DEC permit, did not expire before the expiration date of the DEC permit.

We likewise reject respondents' contention in appeal No. 1 that the injunction issued by the court is "wrong" or "overbroad." As the court properly determined, respondents' attempt to regulate petitioners' mining operation was prohibited by the MLRL (*see* ECL 23-2703 [2]; *Frew Run Gravel Prods*., 71 NY2d at 133-134). Based on our determination concerning the validity of the SUP, we further conclude that the court properly dismissed respondents' counterclaims.

Contrary to respondents' contention in appeal No. 3, we conclude that the court properly denied their motion insofar as it sought leave to renew their arguments in opposition to the amended complaint-petition. We conclude that respondents' newly discovered evidence on the motion insofar as it sought leave to renew was " 'cumulative with respect to the factual material submitted in connection with the original [papers]' " (*Giangrosso v Kummer Dev. Corp.*, 16 AD3d 1094, 1094 [4th Dept 2005]), and would not have "change[d] the prior determination" (CPLR 2221 [e] [2]; *see Violet Realty, Inc. v Gerster Sales & Serv., Inc.* [appeal No. 2], 128 AD3d 1348, 1350 [4th Dept 2015]; *see generally DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp*., 134 AD3d 1418, 1419 [4th Dept 2015]).

Finally, we have reviewed the contentions of proposed intervenors with respect to appeal No. 1 and conclude that none warrants modification or reversal of the judgment.

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

751

CA 21-00652

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

SCHACHTLER STONE PRODUCTS, LLC, SCHACHTLER FAMILY TRUST, ERIC T. SCHACHTLER AND PJK PROPERTIES, LLC, PLAINTIFFS-PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF MARSHALL, TOWN BOARD OF TOWN OF MARSHALL, ZONING BOARD OF APPEALS OF TOWN OF MARSHALL AND CODE ENFORCEMENT OFFICER DANIEL J. FORD, DEFENDANTS-RESPONDENTS-APPELLANTS. (APPEAL NO. 2.)

ROSSI & ROSSI, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

BROWN, DUKE & FOGEL, P.C., SYRACUSE (MICHAEL A. FOGEL OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-RESPONDENTS.

Appeal from an amended judgment (denominated amended order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered March 25, 2021. The amended judgment, among other things, granted relief to plaintiffs-petitioners on their amended complaint-petition and denied a motion to intervene.

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

Same memorandum as in *Schachtler Stone Prods., LLC v Town of Marshall* ([appeal No. 1] — AD3d — [Oct. 7, 2022] [4th Dept 2022]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court

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

752

CA 21-01155

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

SCHACHTLER STONE PRODUCTS, LLC, SCHACHTLER FAMILY TRUST, ERIC T. SCHACHTLER, AND PJK PROPERTIES, LLC,
PLAINTIFFS-PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF MARSHALL, TOWN BOARD OF TOWN OF MARSHALL, ZONING BOARD OF APPEALS OF TOWN OF MARSHALL, AND CODE ENFORCEMENT OFFICER DANIEL J. FORD, DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 3.)

ROSSI & ROSSI, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

BROWN, DUKE & FOGEL, P.C., SYRACUSE (MICHAEL A. FOGEL OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 20, 2021. The order, among other things, denied defendants-respondents' motion for leave to reargue and renew their opposition to the amended complaint-petition.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Schachtler Stone Prods., LLC v Town of Marshall* ([appeal No. 1] — AD3d — [Oct. 7, 2022] [4th Dept 2022]).

Entered: October 7, 2022

Ann Dillon Flynn
Clerk of the Court