SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 17, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 17, 2023

_____	917	KA 21 01358	PEOPLE V TYRELL DOWDELL
_____	942	CAF 21 01468	CARLOS COLON MCKISSEN V LOURDES M. DE LEON
_____	943	CAF 21 01469	CARLOS COLON MCKISSEN V LOURDES M. DE LEON
_____	944	CAF 21 01472	LOURDES M. DE LEON V CARLOS COLON MCKISSEN
_____	945	CA 22 00333	JAY COOK V THE ESTATE OF BARBARA H. ACHZET
_____	952	CA 21 01651	ANN MARIE TURNER V ROSWELL PARK CANCER INSTITUTE C
_____	957	KA 19 00084	PEOPLE V MICHELE A. CASE
_____	966	CA 22 00197	DANIEL EWALD V ERIE INSURANCE COMPANY OF NEW YORK
_____	971	CA 21 01511	COUNSEL FINANCIAL II LLC V BLAINE H. BORTNICK
_____	972	CA 21 01640	COUNSEL FINANCIAL II LLC V BLAINE H. BORTNICK
_____	976	KA 16 01153	PEOPLE V SEAN AUSTIN
_____	984	KA 19 01443	PEOPLE V HENDERSON L. WILLIAMS
_____	992	CA 22 00747	RICHARD STACEY, II V STATE OF NEW YORK
_____	1000	KA 20 00399	PEOPLE V CHARLES J. DEAN, JR.
_____	1003	KA 19 00979	PEOPLE V MIGUEL PARILLA
_____	1009	TP 22 01056	JAMES R. CHARTRAND V NEW YORK STATE DEPARTMENT OF
_____	1010	CA 22 00025	DARLENE CONNORS V COUNTY OF ERIE
_____	1014	CA 21 01798	STATE OF NEW YORK V ROBERT T.
_____	1030	CA 22 01094	DAVID KEVIN D. CORBETT V MARK J.F. SCHROEDER
_____	1036	CA 21 01697	FRANCISCO R. V STATE OF NEW YORK
_____	1042	KA 18 02103	PEOPLE V BRIAN J. JONES
_____	1050	CAF 21 01417	Mtr of MARIA R.
_____	1052	CA 21 01815	MARY BUCHMANN V STATE OF NEW YORK
_____	1057	CA 22 00092	MICHAEL SABINE V STATE OF NEW YORK
_____	2	TP 22 01494	JOHN DOE V SUNY BROCKPORT

_____	4	KA 21 01502	PEOPLE V CARLOS STACKHOUSE
_____	7	KA 19 01414	PEOPLE V AKIL MABRY
_____	9	KA 21 01501	PEOPLE V CARLOS STACKHOUSE
_____	16	CA 22 00466	WILLIAM ARMSTRONG V TOWN OF TONAWANDA
_____	17	CA 22 00012	THOMAS CARCONE V JAMES NOON
_____	18	CA 22 00815	THOMAS E. CARCONE V JAMES NOON
_____	22	CA 22 00382	CHRISTINA M. WESTERMEYER V PAUL A. WHELAN
_____	29	CAF 21 00502	STEUBEN COUNTY DEPARTMENT OF SOCIAL V RYANNA H.
_____	36	CA 22 00603	JEANNIE-MARIE MCGUIRE V F. JAMES MCGUIRE
_____	56	KA 18 01755	PEOPLE V KEITH A. B., JR.
_____	62	CA 22 00315	FORRESTAL GRAY V SUMMIT ASSETS, LLC
_____	68	KA 21 01030	PEOPLE V QUENTIN SUTTLES
_____	71	KA 19 01426	PEOPLE V RASHEEN ROSS
_____	72	KA 20 00393	PEOPLE V JASON F. GILIFORTE
_____	73	KA 20 00394	PEOPLE V JASON F. GILIFORTE
_____	74	KA 19 01038	PEOPLE V CHARLES BYRD
_____	76	KA 21 01400	PEOPLE V MICHAEL S SAWYER
_____	83	CA 22 00216	ACCADIA SITE CONTRACTING, INC. V TOWN OF PENDLETON
_____	93	KA 19 00525	PEOPLE V MICHAEL SCOTT
_____	96	KA 17 00562	PEOPLE V LEVI WRIGHT, JR.
_____	98	KA 20 00059	PEOPLE V QUINTIN J. MCWILLIAMS
_____	100	KA 19 00110	PEOPLE V MARLIN JOSEPH
_____	107	CA 22 00184	ADVANCED PHYSICAL MEDICINE REHABILI V UTICA NATIONAL INSURANCE COMPANY OF
_____	110	CA 22 00430	NIAGARA FALLS CAPTAINS AND LIEUTENANTS ASSOCIATION CITY OF NIAGARA FALLS
_____	118	KA 19 00251	PEOPLE V THOMAS L. DAVIS, JR.
_____	123	CAF 20 01344	Mtr of VASHTI M.
_____	134	KA 21 01613	PEOPLE V DALE J. FINSTER
_____	135	KA 17 00893	PEOPLE V FITZALBERT FULLER, JR.

_____	137	KA 20 01526	PEOPLE V GERALD L. SMITH
_____	139	KA 22 00565	PEOPLE V RANDALL MCGOVERN
_____	140	KA 19 02143	PEOPLE V STEPHEN JONES
_____	141	CAF 21 01809	Mtr of TYASIA T. S.
_____	142	CA 22 00445	JOSE ORTIZ V ANTHONY J. ANNUCCI
_____	148	CA 22 00928	DMT MANAGEMENT, LLC V RICHARD J. HAIGHT
_____	152	CA 22 01112	JOYCE R. INGRASSIO V BEST TILE REALTY, LLC
_____	153	KA 19 01442	PEOPLE V SHANNON J. VICKERS
_____	159	CAF 21 01326	TOURE HENDERSON JOHNSON V FLOR FORTY
_____	170	KA 19 02026	PEOPLE V CONSTANTINE D. MURRELL
_____	171	KA 20 01308	PEOPLE V DAVID STREBER, JR.
_____	172	KA 20 00290	PEOPLE V ALBERT D. MEE
_____	177	KA 20 01309	PEOPLE V DAVID STREBER, JR.
_____	179	CAF 22 00266	Mtr of MILO C.
_____	198	KA 18 02180	PEOPLE V RANDY LOVE
_____	199	KA 18 02179	PEOPLE V RANDY LOVE
_____	219	KA 18 01293	PEOPLE V MALCOM FRAZIER
_____	220	KA 20 01634	PEOPLE V ROBERT BLASZYK
_____	221	KA 22 01462	PEOPLE V JAQUAN GASKIN
_____	225	CAF 19 02315	Mtr of CAMERON J. S.
_____	226	CAF 22 00463	DEREK W. BUSH V SHELBY K. PIERSON
_____	233	CA 22 00688	GANNETT CO., INC. V HERKIMER POLICE DEPARTMENT
_____	234	CA 22 01059	GANNETT CO., INC. V HERKIMER POLICE DEPARTMENT
_____	244	KA 19 01613	PEOPLE V JAMES M. BONACCI
_____	248	CAF 21 01267	SCOTT D. ARMSTRONG V HEIDI J. ARMSTRONG
_____	253	CA 22 00705	THE NEW Y-CAPP, INC. V YELLOWSTONE CAPITAL, LLC
_____	254	CA 22 00706	THE NEW Y-CAPP, INC. V YELLOWSTONE CAPITAL, LLC
_____	255	CA 22 00150	TIMOTHY ALLEN V MICHAEL ANNALETT
_____	256	TP 22 00520	MARK DUBLINO V STEWART ECKERT
_____	258	KA 22 00587	PEOPLE V ZACHARY MARSHALL
_____	264	CAF 20 00349	KAYLA C. V STEVEN L.

_____	265	CAF 20 00350	JOSHUA M. K., SR. V KAYLA C.
_____	267	CAF 22 00068	DARRELL J. FARNEY V MELISSA A. GREENWOOD
_____	277	CA 22 00883	KEVIN T. STOCKER V CITY OF BUFFALO
_____	293	CA 22 01423	CRESSIDA DIXON V EARL D. ZIELINSKI

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

917

KA 21-01358

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRELL DOWDELL, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, ACTING DISTRICT ATTORNEY, AUBURN (RICHARD S. PADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 16, 2020. The judgment convicted defendant upon a nonjury verdict of assault in the second degree, promoting prison contraband in the first degree and promoting prison contraband in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of assault in the second degree under count one of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [3]) and promoting prison contraband in the first degree (§ 205.25 [2]), arising from an incident wherein defendant, during a routine pat frisk for contraband outside his cell at a state correctional facility, retreated into his cell and attempted to close the sliding steel cell door, which slammed against the arm of a correction officer as he reached into the cell to stop defendant.

Defendant contends that the evidence is legally insufficient to support the conviction with respect to the physical injury element of the crime of assault in the second degree as charged in count one of the indictment. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve that contention for our review (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Douglas*, 85 AD3d 1585, 1586 [4th Dept 2011]). We nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), instead of addressing the same contention, as defendant requests us to do in the alternative, in the context of an analysis of the

weight of the evidence (*see People v Barrett*, 188 AD3d 1736, 1737 [4th Dept 2020]; *see generally People v Heatley*, 116 AD3d 23, 28-32 [4th Dept 2014], *appeal dismissed* 25 NY3d 933 [2015]).

As relevant to the offense at issue, a person is guilty of assault in the second degree when, with intent to prevent a peace officer—which includes a correction officer of a state correctional facility (*see* CPL 1.20 [33]; 2.10 [25])—from performing a lawful duty, such person causes physical injury to such peace officer (*see* Penal Law § 120.05 [3]). As limited by the indictment here, " '[p]hysical injury' means . . . substantial pain" (§ 10.00 [9]). Although " 'substantial pain' cannot be defined precisely, . . . it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Pain is, of course, a subjective matter," but the Court of Appeals has cautioned that "the Legislature did not intend a wholly subjective criterion to govern" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]; *see People v Bunton*, 206 AD3d 1724, 1725 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]; *see Chiddick*, 8 NY3d at 447-448).

Here, viewing the evidence in the light most favorable to the People (*see People v Allen*, 36 NY3d 1033, 1034 [2021]), we conclude that it is legally insufficient to establish that the correction officer sustained physical injury in the form of substantial pain (*see Bunton*, 206 AD3d at 1725-1726). Although having a sliding steel prison cell door slammed against one's arm may be "an experience that would normally be expected to bring with it more than a little pain" (*Chiddick*, 8 NY3d at 447; *see Haynes*, 104 AD3d at 1143), the evidence of the injury inflicted here, viewed objectively, established only that the correction officer sustained slight scraping and scratching, perhaps some bruising, minor swelling in the wrist, a small laceration, and abrasions or redness, without any bleeding (*see People v Lunetta*, 38 AD3d 1303, 1304 [4th Dept 2007], *lv denied* 8 NY3d 987 [2007]; *People v Velasquez*, 202 AD2d 1037, 1038 [4th Dept 1994], *lv denied* 83 NY2d 1008 [1994], *reconsideration denied* 84 NY2d 940 [1994]; *cf. Chiddick*, 8 NY3d at 446-448; *People v Guidice*, 83 NY2d 630, 636 [1994]). Indeed, although medical staff at the correctional facility purportedly noted bruising on the correction officer's forearm, no bruising is apparent in the photographs taken shortly after the incident, and the photographs otherwise depict only minimal redness on the correction officer's arm and hand, a minuscule nick on the knuckle of his index finger, and a slight scratch along his arm (*see Haynes*, 104 AD3d at 1143; *cf. People v Abughanem*, 203 AD3d 1710, 1713 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022]).

The correction officer testified that he reported to the medical area at the correctional facility for the purpose of complying with

procedure, not due to any particular physical discomfort. Although he subsequently clarified that he was feeling discomfort and pain in his arm following the incident, he never "testif[ied] with respect to the degree of pain [he] experienced," and the registered nurse at the correctional facility similarly could not recall the type of the pain reported by the correction officer (*Lunetta*, 38 AD3d at 1304; *see Philip A.*, 49 NY2d at 200; *People v Zalevsky*, 82 AD3d 1136, 1137 [2d Dept 2011], *lv denied* 19 NY3d 978 [2012], *reconsideration denied* 19 NY3d 1106 [2012]; *cf. Guidice*, 83 NY2d at 636; *People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]). Moreover, the only immediate treatment recommended by the registered nurse was for the correction officer to clean the area with soap and water and to apply an antibiotic ointment (*see People v Cooney* [appeal No. 2], 137 AD3d 1665, 1668 [4th Dept 2016], *appeal dismissed* 28 NY3d 957 [2016]; *Matter of Jonathan S.*, 55 AD3d 1324, 1325 [4th Dept 2008]). Relatedly, "there was no testimony that the [correction] officer took any pain medication for the injury" (*Bunton*, 206 AD3d at 1725; *see People v Boley*, 106 AD3d 753, 753-754 [2d Dept 2013]; *cf. People v Greene*, 70 NY2d 860, 862-863 [1987], *rearg denied* 70 NY2d 951 [1988]; *People v Hill*, 164 AD3d 1651, 1652 [4th Dept 2018], *lv denied* 32 NY3d 1126 [2018]; *Talbott*, 158 AD3d at 1054).

Even though the correction officer's failure to take off any time from work is "not dispositive in determining whether he sustained a physical injury, inasmuch as 'pain is subjective and different persons tolerate it differently' " (*People v Gerecke*, 34 AD3d 1260, 1261 [4th Dept 2006], *lv denied* 7 NY3d 925 [2006], quoting *Guidice*, 83 NY2d at 636), it nonetheless remains a factor to consider and, here, the correction officer finished his shift by working for another 5½ hours after the incident and he did not thereafter miss any work (*see Bunton*, 206 AD3d at 1725; *Zalevsky*, 82 AD3d at 1137). In addition, while the correction officer testified that he "lost a little bit of mobility bending [his] wrist backward" such that during "regular chores[and] duties at work" he "felt it," he "did not . . . testify that he was unable to perform any activities because of the pain" (*Bunton*, 206 AD3d at 1725). Although the correction officer also testified that he sought medical attention approximately three or four weeks later for a concern about his arm, which was not further explained but presumably related to his unspecified degree of pain, the People did not introduce any medical records from that visit and, in any event, the doctor merely advised the correction officer that he had "probably just bruised tendons" that would resolve shortly thereafter (*see id.*; *Lunetta*, 38 AD3d at 1304). Moreover, the evidence establishes only that defendant's motivation for retreating into his cell and attempting to shut the cell door was to prevent the pat frisk from continuing and to buy time in order to rid himself of contraband on his person, and there is no evidence to support the inference that defendant deliberately sought to inflict pain upon the correction officer (*see Haynes*, 104 AD3d at 1143; *cf. Chiddick*, 8 NY3d at 448).

Based on the foregoing, we modify the judgment by reversing that part convicting defendant of assault in the second degree under count

one of the indictment and dismissing that count of the indictment. We further conclude that the sentence imposed on the remaining counts is not unduly harsh or severe. We note, however, that the uniform sentence and commitment form erroneously states that defendant received an indeterminate term of 3½ to 7 years of imprisonment on the count of promoting prison contraband in the first degree, and that document must therefore be amended to reflect that County Court imposed an indeterminate term of 3 to 6 years of imprisonment on that count (*see People v Williams*, 187 AD3d 1564, 1565 [4th Dept 2020]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

942

CAF 21-01468

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

IN THE MATTER OF CARLOS COLON MCKISSEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LOURDES M. DELEON, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

BRUCE C. ENTELISANO, UTICA, FOR RESPONDENT-APPELLANT.

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

JUSTIN F. BROTHERTON, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered September 20, 2021. The order registered an out-of-state custody and visitation determination.

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

Same memorandum as in *Matter of McKissen v DeLeon* ([appeal No. 2] — AD3d — [Mar. 17, 2023] [4th Dept 2023]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

943

CAF 21-01469

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

IN THE MATTER OF CARLOS COLON MCKISSEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LOURDES M. DELEON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

BRUCE C. ENTELISANO, UTICA, FOR RESPONDENT-APPELLANT.

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

JUSTIN F. BROTHERTON, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered September 20, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner custody of the subject child.

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

Memorandum: In these consolidated appeals arising from proceedings pursuant to Domestic Relations Law article 5-A and Family Court Act article 6, Lourdes M. DeLeon (mother), the respondent in appeal Nos. 1 and 2 and the petitioner in appeal No. 3, appeals from three orders. The order in appeal No. 1 granted the request of Carlos Colon McKissen (father), the petitioner in appeal Nos. 1 and 2 and the respondent in appeal No. 3, to register a custody and visitation determination issued by a court in the State of Florida (Florida determination). The order in appeal No. 2, inter alia, granted the father's petition seeking, in effect, to modify the Florida determination by awarding him custody of the subject child, with visitation to the mother. The order in appeal No. 3 dismissed the mother's petition seeking, following the entry of an order awarding the father temporary custody of the child, an order, inter alia, resuming the custody and visitation arrangement established by the Florida determination.

At the outset, we note that the mother has not raised any contentions with respect to the order in appeal No. 1, and we therefore dismiss her appeal from that order (*see Burns v Grandjean*, 210 AD3d 1467, 1470 [4th Dept 2022]).

We reject the mother's contention in appeal Nos. 2 and 3 that Family Court lacked jurisdiction to modify the Florida determination. As relevant here, Domestic Relations Law § 76-b provides that "a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under [section 76 (1) (a) or (b)] and: 1. The court of the other state determines it no longer has exclusive, continuing jurisdiction under [section 76-a] or that a court of this state would be a more convenient forum under [section 76-f]; or 2. A court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state."

Thus, the first step in the analysis here is to determine whether a New York court would have jurisdiction to make an initial custody determination under Domestic Relations Law § 76 (1) (a) or (b). For purposes of section 76-b, we conclude that a New York court would have had jurisdiction to make an initial custody determination pursuant to section 76 (1) (a) inasmuch as New York was the "home state of the child on the date of the commencement of the proceeding" (§ 76 [1] [a]). The record establishes that the child had been living in New York for more than six months at the time the father commenced the modification proceeding (*see* § 75-a [7]).

Next, contrary to the mother's contention, the court had jurisdiction to modify the Florida determination pursuant to Domestic Relations Law § 76-b (2) because neither the child nor the child's parents resided in the State of Florida. It is undisputed that the child and the father were not Florida residents, and the record supports the conclusion that, although the mother was staying in Florida, she maintained her residence in New York (*see generally Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192-193 [2016]; *Matter of Briggs v Briggs*, 171 AD3d 741, 743 [2d Dept 2019]).

Contrary to the mother's further contentions in appeal Nos. 2 and 3, we conclude that the father met his burden of establishing "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 Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022] [internal quotation marks omitted]; *see Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]), and that the court's custody determination has a sound and substantial basis in the record (*see Fox v Fox*, 177 AD2d 209, 211-212 [4th Dept 1992]). We have reviewed the mother's remaining contentions in appeal Nos. 2 and 3 and conclude that they are without merit.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

944

CAF 21-01472

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

IN THE MATTER OF LOURDES M. DELEON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CARLOS COLON MCKISSEN, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

BRUCE C. ENTELISANO, UTICA, FOR PETITIONER-APPELLANT.

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

JUSTIN F. BROTHERTON, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered September 20, 2021 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of McKissen v DeLeon* ([appeal No. 2] — AD3d — [Mar. 17, 2023] [4th Dept 2023]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

945

CA 22-00333

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

JAY COOK AND CHARLENE COOK, AS TRUSTEES OF
THE COOK FAMILY TRUST, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THE ESTATE OF BARBARA H. ACHZET, DECEASED,
RUSSELL K. ACHZET, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

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

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered October 20, 2021. The order, inter alia, dismissed the complaint.

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

Memorandum: Barbara H. Achzet (decedent) and plaintiffs, who owned adjacent lakefront properties, became engaged in a boundary-line dispute over an area that encompassed space behind plaintiffs' concrete block boathouse and a portion of decedent's breakwall. Decedent, by defendant Russell K. Achzet (Russell) as power of attorney, commenced a prior action seeking to adjudicate the boundary line between the two adjacent properties. Decedent alleged that she owned the disputed area based, in part, on evidence that she and her predecessors in interest had exclusively occupied and maintained the disputed area for the past six decades. Following motion practice, Supreme Court, inter alia, granted decedent's motion for summary judgment on the causes of action that sought to determine the boundary line under the doctrine of practical location and RPAPL article 15. In an order and judgment (judgment) entered November 1, 2019, the court declared that decedent was the lawful owner of the disputed area and that she was vested with absolute and unencumbered title in fee to that premises. The judgment further declared that decedent was entitled to the immediate and exclusive possession of the disputed area free and clear of any lien, claim, right, interest, or easement on the part of plaintiffs. Additionally, the judgment declared that plaintiffs had no claim or right over the disputed area and that they were forever barred from any and all claim to any estate or interest

in the disputed area. Plaintiffs failed to timely perfect their appeal from the judgment, and the appeal was therefore deemed dismissed (*see* 22 NYCRR 1250.10 [a]).

Decedent thereafter died, and Russell was appointed executor of her estate (collectively, defendants), which was then the owner of decedent's property. According to defendants, as Russell was making preparations to sell the property, one of the plaintiffs informed the real estate agent that plaintiffs were still claiming an ownership interest in the disputed area, notwithstanding the judgment in the prior action. Despite a letter from defendants' counsel demanding that plaintiffs cease and desist from making any further claim to the disputed area and interfering with the sale of the property, plaintiffs' attorney responded that plaintiffs would continue to assert their legal rights with respect to the litigation over the disputed area and would consider pursuing other claims. While plaintiffs expressed some interest in purchasing the property, defendants refused to consider a direct sale, and plaintiffs failed to make an offer following a public listing of the property, which ultimately came under contract to be sold to a third-party buyer.

Shortly thereafter, plaintiffs commenced the present action alleging in their first cause of action, under RPAPL article 15, that the judgment resulted in their remaining property becoming a nonconforming lot under unspecified zoning laws, rules, and regulations, and seeking a declaration that they were the owners in "fee absolute" to the disputed area, thereby necessitating the "return" of that property. Plaintiffs alleged in their second cause of action that, alternatively, they were entitled to an easement by necessity over the disputed area. Defendants subsequently moved by order to show cause for an order, inter alia, dismissing the complaint pursuant to CPLR 3211 (a) (5) on the grounds of res judicata and collateral estoppel, cancelling pursuant to CPLR 6514 (a) and (b) the notice of pendency filed by plaintiffs, and awarding costs and expenses, including reasonable attorneys' fees, pursuant to CPLR 6514 (c). The court granted the motion, dismissed the complaint with prejudice, ordered cancellation of the notice of pendency, and awarded costs and expenses to defendants. Plaintiffs now appeal.

Preliminarily, inasmuch as the notice of appeal is prematurely dated and contains a mere inaccuracy as to the entry date of the underlying order, we exercise our discretion to treat the notice of appeal as valid pursuant to CPLR 5520 (c) (*see Foye v Parker*, 15 AD3d 907, 907 [4th Dept 2005]).

Plaintiffs first contend that defendants' pre-answer motion was "premature" because an order to show cause constitutes a motion for summary judgment, and the motion was therefore improperly brought before issue was joined. We conclude that plaintiffs' contention is devoid of merit and constitutes an affront to rudimentary precepts of civil practice.

As defendants correctly point out, the CPLR expressly permits a

party to "move for judgment dismissing one or more causes of action . . . on the ground that . . . the cause of action may not be maintained because of . . . collateral estoppel [or] . . . res judicata" (CPLR 3211 [a] [5]). Such a motion may be made "[a]t any time before service of the responsive pleading is required" (CPLR 3211 [e]). Moreover, contrary to plaintiffs' suggestion that the method used by defendants in bringing the motion was somehow improper, the CPLR also expressly contemplates that, in a proper case, a motion may be initiated by an order to show cause served in lieu of a notice of motion (*see* CPLR 2214 [d]; *see generally* Siegel & Connors, NY Prac § 248 [6th ed 2018]). The Uniform Rules for Trial Courts further provide that a proper case to bring a motion by order to show cause includes one involving "genuine urgency" (22 NYCRR 202.8-d). As defendants also correctly assert, there was genuine urgency here—and plaintiffs do not contend otherwise—inasmuch as the notice of pendency was disrupting the sale of the property, preventing defendants from conveying good title to the third-party buyer, and delaying a scheduled closing. We thus conclude that the motion was not premature and that defendants properly sought, and the court properly signed, the order to show cause for the purpose of expediting disposition of the motion to dismiss (*see* CPLR 2214 [d]).

We also agree with defendants that, insofar as plaintiffs suggest that bringing a pre-answer motion to dismiss via order to show cause necessarily converts the motion into one for summary judgment, plaintiffs are incorrect. It is incontestable that a pre-answer motion to dismiss may be brought by order to show cause (*see* CPLR 2214 [d]; 3211 [a], [e]; 22 NYCRR 202.8-d). The case law relied upon by plaintiffs stands for the unremarkable proposition that a motion by a plaintiff to obtain the ultimate relief requested in the complaint is in the nature of summary judgment (*see Matter of Estate of Jason v Herdman*, 70 AD3d 1382, 1382 [4th Dept 2010]). That case law is inapposite here. Defendants' motion brought by order to show cause is undoubtably not one for summary judgment but, instead, in the nature of a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (5).

Plaintiffs next contend the court erred in granting the motion to dismiss based on res judicata because the present action raises "new legal issues" stemming from the judgment in the prior action, namely, boundary-line and title issues that could not have been anticipated during the prior action. We agree with defendants that plaintiffs' contention lacks merit.

Res judicata, i.e., claim preclusion, "bars the parties or their privies from relitigating issues that were or *could have* been raised in that action" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). "The doctrine 'encompasses the law of merger and bar'—it precludes the relitigation of all claims falling within the scope of the judgment, regardless of whether or not those claims were in fact litigated" (*id.*). "As such, claim preclusion serves to bar not only 'every matter which was offered and received to sustain or defeat the claim or demand,' but also 'any other admissible matter which might have been offered for that purpose' " (*id.*). "In other words, claim preclusion may 'foreclos[e] litigation of a matter that

never has been litigated, because of a determination that it should have been advanced in an earlier suit' " (*id.* at 73). "[U]nder New York's transactional analysis approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Matter of Hunter*, 4 NY3d 260, 269 [2005], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Consequently, "[t]o establish claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions" (*Paramount Pictures Corp.*, 31 NY3d at 73).

Here, as plaintiffs concede, defendants indisputably established the first two conditions inasmuch as there is a final, unappealed judgment on the merits in the prior action that determined the parties' rights to the disputed area and the requisite identity among the parties. With respect to the third condition, we agree with defendants that plaintiffs' claims in the present action are sufficiently related to their claims in the prior action so as to preclude the present action under the doctrine of claim preclusion (*see id.* at 79). In the prior action, plaintiffs claimed that they owned the same disputed area that is the subject of the present action and that a portion of decedent's breakwall in the disputed area was a structure encroaching on their property. After that issue was fully litigated, the court rejected plaintiffs' claim and determined, instead, that decedent was the lawful owner of the disputed area, to which she was entitled to exclusive possession free and clear of any lien, claim, right, interest, or easement on the part of plaintiffs. The court also declared that plaintiffs had no claim or right over the disputed area and that they were forever barred from any and all claim to any estate or interest in the disputed area. Ignoring the preclusive language in the judgment, plaintiffs claim in the present action that they are entitled to either the "return" of disputed area owned by them or, alternatively, an easement by necessity over the disputed area. Thus, plaintiffs' claim to ownership or an easement over the disputed area in the present action arises out of the same transaction or occurrence, i.e., the dispute over the boundary line between the two adjacent properties.

Where, as here, "a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien*, 54 NY2d at 357). Plaintiffs assert that their claim to ownership or an easement over the disputed area is premised on "new legal issues" arising from the determination of the boundary line in the prior action, namely, that the boundary line rendered a portion of their property inaccessible for maintenance and nonconforming under some unspecified setback ordinance. That, however, is just another way of saying that they disagree with the judgment in the prior action determining ownership of the disputed area and the location of the boundary line between the parties' properties. In other words, plaintiffs impermissibly seek to relitigate ownership of the disputed area and the propriety of the boundary line—which were conclusively and finally determined in the

prior action—based upon different theories and by seeking a different remedy (*see Parris v Oliva*, 276 AD2d 762, 762 [2d Dept 2000]; *Koether v Generalow*, 213 AD2d 379, 380-381 [2d Dept 1995]; *O'Connell v Hill*, 179 AD2d 1057, 1057-1058 [4th Dept 1992]).

Moreover, contrary to plaintiffs' suggestion, the issues that plaintiffs seek to raise in the present action "could have been raised in the prior litigation" (*Hunter*, 4 NY3d at 269; *see generally Incredible Invs. Ltd. v Grenga* [appeal No. 2], 125 AD3d 1362, 1363 [4th Dept 2015]). Decedent's verified complaint in the prior action incorporated by reference an attached survey map of the disputed area depicting the boundary lines between the properties. Decedent claimed, among other things, that the boundary line between the properties as depicted in the survey map had been established by the requisite acquiescence of plaintiffs and their predecessors in interest under the doctrine of practical location. Thus, given decedent's claim and the location of the boundary line as depicted in the survey map, plaintiffs readily could have asserted that the claimed boundary line would infringe upon lawful access to their property or render their boathouse in violation of setback requirements in local zoning ordinances (*see e.g. Paramount Pictures Corp.*, 31 NY3d at 79-80).

Based on the foregoing, we conclude that "[t]his is precisely the type of repetitive litigation the doctrine of claim preclusion is designed to avoid" (*Matter of Reilly v Reid*, 45 NY2d 24, 31 [1978]), and that the court properly dismissed the complaint based on the doctrine of claim preclusion (*see Parris*, 276 AD2d at 762; *Koether*, 213 AD2d at 380-381; *O'Connell*, 179 AD2d at 1057-1058).

Plaintiffs lastly contend that the court erred in granting that part of the motion seeking costs and expenses pursuant to CPLR 6514 (c) upon cancelling the notice of pendency. We reject that contention.

A court, in its discretion, "may direct any county clerk to cancel a notice of pendency, if the plaintiff has not commenced or prosecuted the action in good faith" (CPLR 6514 [b]). Additionally, "[t]he court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action" (CPLR 6514 [c]). "[A] trial court is in the best position to determine those factors integral to fixing [attorneys'] fees . . . and, absent an abuse of discretion, the trial court's determination will not be disturbed" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1290 [4th Dept 2014] [internal quotation marks omitted]; *see GDG Realty, LLC v 149 Glen St. Corp.*, 187 AD3d 994, 995 [2d Dept 2020]).

Here, "inasmuch as [claim preclusion] bars plaintiff[s'] suit, 'plaintiff[s] do[ ] not have a valid claim against [defendants,] and the notice of pendency was properly cancelled' " (*Divito v Meegan*, 156 AD3d 1408, 1410 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see*

CPLR 6514 [b]; *Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465, 465-466 [1st Dept 2010]; *Maiorino v Galindo*, 65 AD3d 525, 527 [2d Dept 2009]). We agree with defendants that, unlike the cases relied upon by plaintiffs, the filing of the notice of pendency here was wrongful inasmuch as the present action is plainly barred by claim preclusion and by the terms of the judgment (*cf. GDG Realty, LLC*, 187 AD3d at 995; *DeCaro v East of E., LLC*, 95 AD3d 1163, 1164 [2d Dept 2012]). Contrary to plaintiffs' suggestion, even a cursory review of well-settled law would have revealed that res judicata bars all other claims arising out of the same transaction or occurrences even where, as here, ostensibly new claims are based upon different theories or seek a different remedy (*see e.g. Hunter*, 4 NY3d at 269; *O'Brien*, 54 NY2d at 357). Consequently, the court properly cancelled the notice of pendency (*see* CPLR 6514 [b]; *Divito*, 156 AD3d at 1410) and was therefore afforded the discretion to award costs and expenses (*see* CPLR 6514 [c]).

Contrary to plaintiffs' related assertion, the record permits meaningful appellate review of the court's award, which is amply supported by the record. Defendants submitted their counsel's affirmation in support of their cost and expenses request along with a copy of the pre-bill time and rate table, which collectively explained and documented in detail the nature and date of the work performed, the billed hours for each task, and the hourly rates for counsel and an associate who performed the legal services. Although defendants requested $14,144 in attorneys' fees, the court exercised its discretion in awarding a reasonable lesser amount of $6,000 (*see Meadowlands Portfolio, LLC v Manton*, 118 AD3d 1439, 1441 [4th Dept 2014]; *A&M Global Mgt. Corp.*, 115 AD3d at 1290; *Matter of Dessauer*, 96 AD3d 1560, 1560-1561 [4th Dept 2012]). Plaintiffs do not put forth any argument in their briefs on appeal that the amount awarded was unreasonable or excessive.

Based on the foregoing, we conclude that the court did not abuse its discretion in granting that part of defendants' motion for an award of costs and expenses pursuant to CPLR 6514 (c) (*see Lake Valhalla Civic Assn., Inc. v BMR Funding, LLC*, 194 AD3d 803, 805 [2d Dept 2021]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

952

CA 21-01651

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

ANN MARIE TURNER, CLAIMANT-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANT.
(CLAIM NO. 136410.)

KEVIN T. STOCKER, TONAWANDA, FOR CLAIMANT-APPELLANT-RESPONDENT.

CONNORS LLP, BUFFALO (SETH A. HISER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered October 28, 2021. The order granted in part claimant's application for leave to serve a late notice of claim.

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

Memorandum: In February 2020, claimant underwent a thyroidectomy procedure at defendant Roswell Park Cancer Institute Corporation (Roswell Park) to remove a cancerous tumor from her thyroid. During the procedure, the doctor performing the surgery severed claimant's recurrent laryngeal nerve while attempting to dissect the tumor, which had become stuck to the nerve. Although the doctor attempted to repair the nerve during the surgery, the damage to the nerve was ultimately determined to be permanent, which manifested in a host of symptoms presented by claimant, including, inter alia, trouble eating, shortness of breath, and difficulty raising her voice. In May 2021, claimant sought leave, pursuant to General Municipal Law § 50-e (5), to serve a late notice of claim alleging, inter alia, that the injuries sustained as a result of the severed nerve were the result of medical malpractice and that she lacked informed consent with respect to the thyroidectomy procedure. Claimant appeals from that part of an order that denied her application for leave to serve a late notice of claim on Roswell Park with respect to the lack of informed consent cause of action. Roswell Park cross-appeals from that part of the same order granting claimant's application for leave to serve a late notice of claim on Roswell Park with respect to the medical malpractice cause of action. We affirm.

"Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation . . . must serve a notice of claim on the prospective defendant 'within ninety days after the claim arises' " (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], *rearg denied* 29 NY3d 963 [2017]). "General Municipal Law § 50-e (5) permits a court, in its discretion, to [grant leave] extend[ing] the time for a [claimant] to serve a notice of claim" (*id.* at 460-461; *see Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020]). "The decision whether to grant such leave 'compels consideration of all relevant facts and circumstances,' including the 'nonexhaustive list of factors' in section 50-e (5)" (*Dalton v Akron Cent. Schools*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013], quoting *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). " 'It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [public corporation] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [public corporation] in maintaining a defense on the merits' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). " '[T]he presence or absence of any one of the numerous relevant factors the court must consider is not determinative' . . . , and '[t]he court is vested with broad discretion to grant or deny the application' " (*Dalton*, 107 AD3d at 1518). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*id.* [internal quotation marks omitted]).

As a preliminary matter, we reject the contention of Roswell Park that the Court of Claims improperly considered the medical records submitted by claimant for the first time in her reply papers. Under the circumstances here, we conclude that the court did not abuse its discretion to consider those medical records because the court provided Roswell Park with "ample opportunity to respond to" those submissions, either in a surreply or during oral argument before the court (*Dusch*, 184 AD3d at 1170 [internal quotation marks omitted]; *see Bayly v Broomfield*, 93 AD3d 909, 910-911 [3d Dept 2012]). Roswell Park repeatedly declined the court's invitation to respond to the medical records submitted for the first time in reply, and therefore cannot now claim that it suffered any prejudice by the court's consideration of those records (*see Dusch*, 184 AD3d at 1170;—*Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006]).

On claimant's appeal, we conclude that the court properly denied the application with respect to the lack of informed consent cause of action against Roswell Park because that cause of action against Roswell Park is "patently meritless" (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179 [2004]; *see Matter of LoTempio v Erie County Health Dept.*, 17 AD3d 1161, 1161-1162 [4th Dept 2005]). Claimant's own submissions—including those submitted for the first time in reply—conclusively establish that, on multiple occasions prior to the

surgery, Roswell Park "disclose[d] the risks, benefits and alternatives to the procedure or treatment" to her (*Tirado v Koritz*, 156 AD3d 1342, 1344 [4th Dept 2017] [internal quotation marks omitted]). In particular, according to claimant's medical records, prior to the surgery, Roswell Park explained at length to claimant "[t]he nature of the procedure including potential outcomes, risks, benefits, and alternatives," and "all questions were answered to [claimant's] satisfaction."

On Roswell Park's cross appeal, we conclude that the court did not abuse its discretion in granting the application with respect to the medical malpractice cause of action against Roswell Park. Claimant demonstrated that she had a reasonable excuse for her delay because, following the surgery, she was informed by Roswell Park personnel that she had to wait a year to see if the damage to the nerve from the surgery would be permanent, a representation on which she reasonably relied. Upon learning from Roswell Park that the damage would be permanent, claimant immediately filed the underlying application seeking leave to serve a late notice of claim.

Claimant also demonstrated, through the submission of her medical records, that Roswell Park had actual knowledge of the essential facts constituting the medical malpractice cause of action against it. The actual knowledge requirement of General Municipal Law § 50-e (5) "contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" (*Williams*, 6 NY3d at 537; *see Wally G. v New York City Health & Hosps. Corp. [Metro Hosp.]*, 27 NY3d 672, 677 [2016], *rearg denied* 28 NY3d 905 [2016]). "A medical provider's mere possession or creation of medical records does not ipso facto establish that it had 'actual knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury' " (*Wally G.*, 27 NY3d at 677, quoting *Williams*, 6 NY3d at 537).

Here, contrary to Roswell Park's contention, claimant's "medical records . . . 'evince that [Roswell Park's] medical staff, by its acts or omissions, inflicted an[] injury on [claimant]' " (*id.*; *see Dusch*, 184 AD3d at 1170). The records indicate that, during the surgery, the doctor performing the procedure knew that he had severed the nerve and that it "seemed to be compromised." According to his operative report, the doctor sutured the nerve before finishing the surgery prematurely. Claimant's postsurgery medical records and continued treatment at Roswell Park demonstrate that she presented there with symptoms associated with the severed nerve that could result in permanent nerve damage. Based on what occurred during the surgery and claimant's postsurgery symptoms, we conclude that Roswell Park timely acquired actual knowledge of the essential facts constituting the claim (*see Dusch*, 184 AD3d at 1171).

Finally, we also conclude that claimant met her initial burden of showing that the late notice would not substantially prejudice Roswell Park—particularly in light of its actual knowledge of the essential facts—and, in opposition, Roswell Park failed to make a

"particularized showing" of substantial prejudice caused by the late notice (*Newcomb*, 28 NY3d at 468; *see Dusch*, 184 AD3d at 1171).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

957

KA 19-00084

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHELE A. CASE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated November 1, 2018. The order directed defendant to pay restitution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reducing the amount of restitution ordered with respect to Community Care of Western New York, Inc., doing business as HomeCare and Hospice to $1,000, and as modified the order is affirmed.

Memorandum: Defendant appeals from an order directing her to pay restitution in the amount of $24,469.10 payable in part to her former employer, Community Care of Western New York, Inc., doing business as HomeCare and Hospice (HomeCare) and in part to HomeCare's insurance carrier, plus a five percent collection surcharge pursuant to Penal Law § 60.27 (8). Defendant was charged with grand larceny in the third degree after HomeCare conducted an audit of her time sheets and mileage vouchers and determined that she had received more than $14,000 in overpayments during the course of her employment as a registered nurse. Following a jury trial in 2012, defendant was convicted as charged. Several months later, County Court (Robert C. Noonan, J.) conducted a hearing and determined that HomeCare and its insurance carrier were entitled to restitution in the amount of $24,469.10, broken down as follows: $14,207.67 for overpayments made to defendant in wages and mileage reimbursements, of which HomeCare's insurance carrier was entitled to $13,207.67 and HomeCare was entitled to its deductible payment of $1,000; $9,658.02 to HomeCare for labor costs incurred with respect to its employees who investigated defendant's crime and appeared at her trial; and $603.41 to HomeCare for mileage, meal and hotel expenses incurred by its employees who appeared at trial.

On appeal from the initial judgment of conviction, we reversed and granted defendant a new trial based on an erroneous evidentiary ruling (*People v Case*, 114 AD3d 1308 [4th Dept 2014]). Defendant was

tried and convicted again, and the court imposed the same sentence as before, denied defendant's request for a new restitution hearing, and adhered to its prior restitution ruling. On appeal from the second judgment of conviction, we modified the judgment by vacating the amount of restitution ordered, and we remitted the matter for a hearing to determine the amount of restitution (*People v Case*, 160 AD3d 1448 [4th Dept 2018], *lv denied* 31 NY3d 1146 [2018]), and otherwise affirmed. The parties thereafter agreed to forgo a hearing and allow County Court (Charles N. Zambito, J.) to determine the amount of restitution based on the evidence adduced at the prior hearing. In the order at issue in this appeal, the court awarded restitution to HomeCare and its insurer in the amount previously determined, i.e., $24,469.10.

We now modify the order by reducing the amount of restitution ordered with respect to HomeCare to $1,000. In our view, HomeCare was not entitled to restitution or reparation for the wages it paid to salaried employees who investigated defendant's theft or for expenses incurred by employees who testified or attended defendant's trial.

Pursuant to Penal Law § 60.27 (1), a court can order a defendant to "make restitution of the fruits of his or her offense or reparation for the actual out-of-pocket loss and, in the case of a violation of section 190.78, 190.79, 190.80, 190.82 or 190.83 of this chapter[, i.e., certain identity theft and unlawful possession of personal identification information offenses], any costs or losses incurred due to any adverse action, caused thereby to the victim." An adverse action "shall mean and include actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses from such action" (§ 60.27 [1]).

Here, there is no dispute regarding the amount representing the "fruits" of defendant's offense; defendant acknowledges that she must pay the $14,207.67 that she stole from HomeCare. HomeCare had insurance coverage for the loss with a $1,000 deductible, receiving $13,207.67 from its insurance carrier. Defendant therefore owes restitution of $1,000 to HomeCare and the balance to the insurance carrier. The dispute concerns the $9,658.02 awarded by the court to HomeCare for labor costs incurred by HomeCare during its investigation into defendant's crime and the $603.41 in travel expenses incurred by HomeCare employees who appeared at defendant's trial.

We conclude that the labor costs allegedly incurred by HomeCare for employees who investigated the crime are not "actual out-of-pocket" losses within the meaning of Penal Law § 60.27. Instead, they are more akin to "consequential financial losses" incurred from taking adverse action (§ 60.27 [1]), which are not recoverable by HomeCare because defendant was not convicted of one of the identity theft or unlawful possession of personal identification information offenses enumerated in section 60.27. With respect to the travel expenses incurred by HomeCare employees who appeared at defendant's trial, we note that every victim who testifies at trial must travel to the

courthouse to do so, and section 60.27 does not impose a duty on the defendant to pay for the costs associated therewith inasmuch as such expenses are not directly caused by the defendant's crime. Instead, they flow from the defendant's election to exercise his or her constitutional right to a trial, which should not come with a price tag.

The People rely on *People v Denno* (56 AD3d 902, 903-904 [3d Dept 2008], *lv denied* 12 NY3d 757 [2009]), where the Third Department determined that the sentencing court did not improvidently exercise its discretion when it ordered that the defendant pay reparations to the victim's mother to cover the expenses of traveling by airplane from Florida to New York to speak at sentencing, and to cover the lost wages caused by missing four days of work. We note that the rationale of *Denno* would allow the award of reparations for travel expenses arising from the appearance of HomeCare's employees at trial, but would not apply to the labor costs associated with HomeCare's internal investigation of defendant's crime. Nevertheless, we do not follow *Denno* because we do not read Penal Law § 60.27 as requiring a criminal defendant to pay for expenses incurred by the victim to testify at trial or investigatory costs incurred by the victim. In any event, even assuming, arguendo, that such investigatory costs are recoverable, we agree with defendant's alternative contention that the People failed to establish the amount of restitution with respect to such expenses by a preponderance of the evidence (*see generally People v Eatmon*, 207 AD3d 1160, 1161-1162 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

966

CA 22-00197

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

DANIEL EWALD AND REBECCA EWALD,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY OF NEW YORK,
DEFENDANT-RESPONDENT.

LYNN LAW FIRM LLP, SYRACUSE (KELSEY W. SHANNON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered January 11, 2022. The order denied the motion of plaintiffs for partial summary judgment and granted the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the complaint is reinstated, the motion is granted, and judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that defendant is obligated to provide coverage to plaintiffs for the underlying claim.

Memorandum: Plaintiffs owned a two-story house covered by an all-risk homeowner's insurance policy issued by defendant. Plaintiffs hired contractors to perform a remodeling project of the bathroom in the owners' suite on the second floor, including construction of a walk-in shower. Toward the end of the multi-week job, the remodeling project was nearly finished inasmuch as the shower was complete and only finishing materials such as molding and lighting remained to be installed. The contractors stopped working one day in the late afternoon and plaintiffs, who were not sleeping in the owners' suite during the renovation and did not notice any issues with the bathroom that day or night, eventually went to sleep in other rooms in the house. When they awoke the following morning, however, plaintiffs observed significant amounts of water flowing and pooling throughout the entire house. Plaintiffs immediately shut off the water supply and then called a plumber, who opened the wall of the renovated shower in which the plumbing was enclosed and then capped a leak in the plumbing. The house sustained extensive water damage, and plaintiffs

promptly reported the loss to defendant. A forensic inspection by an engineer retained by defendant later revealed that the water loss from the plumbing behind the sheetrock of the renovated shower was caused by a failure of a glued connection between different types of plumbing due to the contractors' use of incorrect solvent adhesion materials and methods.

As a result of its investigation, defendant denied plaintiffs' claim for coverage in its entirety based on several policy exclusions including, as relevant here, the faulty workmanship exclusion. Plaintiffs thereafter commenced this breach of contract and declaratory judgment action alleging, among other things, that defendant had breached the insurance contract because, contrary to defendant's denial of coverage, the ensuing loss exception to the faulty workmanship exclusion applied to provide coverage for the loss—defined as the massive water damage throughout the house—insofar as such damage constituted an ensuing loss. Supreme Court denied plaintiffs' motion for partial summary judgment on the issue of liability and granted defendant's cross motion for summary judgment dismissing the complaint. On appeal, plaintiffs contend that the court erred in denying their motion and granting defendant's cross motion because the water damage to their house is covered under the ensuing loss exception to the faulty workmanship exclusion in the policy. We agree, and we therefore reverse.

"In determining a dispute over insurance coverage, [courts] first look to the language of the policy" and, "[a]s with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 681-682 [2017] [internal quotation marks omitted]). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]) and "in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' " (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222 [2002]).

"[A]lthough the insurer has the burden of proving the applicability of an exclusion . . . , it is the insured's burden to establish the existence of coverage" (*Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]). "Thus, '[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied' " (*id.*). The exception to the exclusion at issue here is "an ensuing loss provision, which 'provide[s] coverage when, as a result of an excluded peril, a covered peril arises and causes damage' " (*id.* at 695). "These provisions are a product of the San Francisco earthquake of 1906. In the wake of that natural disaster, some insurers argued that because earth movement was an excluded peril under property insurance policies, so was the damage caused by the devastating fires sparked by gas emitted from pipes broken by the

shaking of the earth, even though fire was a covered peril. The California Legislature enacted statutes to prevent insurers from disclaiming coverage in the future under such circumstances. To comply with California law and similar statutes enacted by other states, insurers then added exceptions to their earthquake exclusions to preserve coverage for ensuing fires. Ensuing loss clauses were subsequently incorporated into other types of exclusions, for example, exclusions in all risks policies for faulty workmanship" (*id.*). "Thus, true to its historical origins and purpose, the ensuing loss exception preserve[s] coverage for insured losses, such as the fires after the San Francisco earthquake, and [does not] create a grant-back through which coverage may be had for the original excluded loss, whether it be an earthquake, a design defect, or any other excluded cause of loss" (*id.* [internal quotation marks omitted]).

Given the aforementioned, " '[w]here a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk' " (*id.* at 694; *see Narob Dev. Corp. v Insurance Co. of N. Am.*, 219 AD2d 454, 454 [1st Dept 1995], *lv denied* 87 NY2d 804 [1995]). For example, "where the policy excluded losses for faulty workmanship, [a] court rejected the insured's claim for the collapse of a defectively designed facade, explaining that '[a]n ensuing loss provision does not cover loss caused by the excluded peril, but rather covers loss caused to other property wholly separate from the defective property itself' " (*Platek*, 24 NY3d at 694, quoting *Montefiore Med. Ctr. v American Protection Ins. Co.*, 226 F Supp 2d 470, 479 [SD NY 2002]). "Stated another way, an ensuing loss at least requires a new loss to property that is of a kind not excluded by the policy . . . ; it [does not] resurrect coverage for an excluded peril" (*id.* at 695 [internal quotation marks omitted]).

Conversely, an insured "would be entitled to coverage under an exception for ensuing loss . . . if and to the extent that [the insured] c[an] prove that 'collateral or subsequent' damage occurred to other insured property as a result of the [excluded peril]" (*Montefiore Med. Ctr.*, 226 F Supp 2d at 479, quoting *Narob Dev. Corp.*, 219 AD2d at 454). For example, where an all-risk policy excluded coverage for faulty workmanship and the insureds claimed coverage for damage to their home arising from a fire that was caused by improper conditions in an electrical junction box, the Second Department determined that the ensuing loss exception to the exclusion applied to provide coverage for the fire loss because "[t]he evidence in the record demonstrated that the fire occurred two years after the alleged faulty workmanship related to the junction box, and caused ensuing loss to property 'wholly separate from the defective property itself' " (*Fruchthandler v Tri-State Consumer Ins. Co.*, 171 AD3d 706, 708 [2d Dept 2019]).

Here, plaintiffs established, and defendant does not dispute, that they sustained "direct physical loss to property insured under" the policy in the form of extensive water damage to their house for which defendant would be obligated to pay unless the loss was excluded

elsewhere under the policy. Not only is any direct physical loss to property covered unless specifically excluded, the policy expressly provides that there is coverage for a "sudden and accidental" loss caused by water leakage from a plumbing system.

Defendant nonetheless denied plaintiffs' claim for coverage on the ground that it was not obligated to "pay for loss resulting directly or indirectly from" various exclusions, including the faulty workmanship exclusion for loss "caused by, resulting from, contributed to or aggravated by faulty or inadequate . . . design, development of specifications, workmanship, construction[, or] materials used in construction . . . of or related to property whether on or off the 'residence premises' by any person, group, organization, or governmental body." Defendant supported the denial with the forensic inspection report, which showed that the water leakage from the plumbing for the renovated shower was caused by a failure occurring in a glued connection between certain piping materials, namely, the contractors employed incorrect solvent adhesion materials and methods. In seeking to establish coverage, plaintiffs rely upon the ensuing loss exception to the faulty workmanship exclusion, which provides that "[a]ny ensuing loss not excluded is covered." Consequently, inasmuch as " 'the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, [plaintiffs] ha[ve] the duty of demonstrating that it has been satisfied' " (*Platek*, 24 NY3d at 694). Plaintiffs have met that burden.

The record establishes that the contractors performed defective work on the plumbing system for the renovated shower by using an improper adhesion material on a pipe connection and enclosed that faulty pipe work in the wall of the bathroom at some unknown point during the two weeks prior to the leak. The plumbing connection subsequently failed, which resulted in the discharge of water from the plumbing that traveled throughout the house, causing extensive water damage. We conclude that the ensuing loss exception applies to provide coverage for the household water damage because the excluded peril of faulty workmanship resulted in "collateral or subsequent damage" (*Narob Dev. Corp.*, 219 AD2d at 454) "to property 'wholly separate from the defective property itself' " (*Fruchthandler*, 171 AD3d at 708), and plaintiffs' claim is for "a new loss to property that is of a kind not excluded by the policy," i.e., sudden and accidental water leakage from within a plumbing system (*Platek*, 24 NY3d at 695 [internal quotation marks omitted]). In other words, the ensuing loss exception provides coverage here because, as a result of an excluded peril (faulty workmanship), a covered peril arose (water discharge from a plumbing system) and caused other harm (water damage) to separate property (areas throughout the house) (*see generally id.*).

Indeed, we conclude that the circumstances in *Fruchthandler* are functionally equivalent to the circumstances in the present case inasmuch as the excluded peril of faulty workmanship gave rise to defective property (junction box; plumbing), which subsequently resulted in conditions (electrical fire; discharged water) that caused the claimed damage to property (the respective houses) other than the subject of the faulty work. Defendant's attempt to distinguish

Fruchthandler is unavailing. The language of the exception here does not include a requirement that the excluded faulty workmanship and the ensuing loss be separated by any specific amount of time, and there was no such requirement noted in *Fruchthandler* either. Not only would a specific temporal requirement be atextual, there would be no principled manner to determine whether an adequate amount of time had passed for the claimed damage to constitute an ensuing loss. In our view, the better reading of *Fruchthandler* is that the Second Department simply used the fact that the fire occurred two years after the improper work, which was particular to that case, to emphasize that the claimed loss (fire damage to the house), which was covered under the all-risk policy, was wholly separate from the defect in the property that was created by the faulty workmanship (junction box), which was excluded from coverage (*see Fruchthandler*, 171 AD3d at 706-707).

We also reject defendant's assertion and the court's conclusion that plaintiffs are attempting to resurrect coverage for an excluded peril. To the contrary, as plaintiffs correctly contend, they are not attempting to resurrect coverage for an *excluded* peril because sudden and accidental leakage of water from a plumbing system is a *covered* peril under the all-risk policy, and they are not seeking coverage for the cost of correcting the faulty workmanship, i.e., repair of the plumbing defect itself. In that regard, we agree with plaintiffs that "[t]his case is distinguishable from those cases [relied upon by defendant] where the insured sought coverage under an ensuing loss exception for the cost of correcting the faulty or defective workmanship" (*id.* at 708; *cf. Platek*, 24 NY3d at 695-697; *Copacabana Realty, LLC v Fireman's Fund Ins. Co.*, 2013 NY Slip Op 30960[U], *1-5 [Sup Ct, Suffolk County 2013], *affd* 130 AD3d 771 [2d Dept 2015], *lv denied* 26 NY3d 911 [2015]; *Broome County v Travelers Indem. Co.*, 125 AD3d 1241, 1244-1245 [3d Dept 2015], *lv denied* 25 NY3d 908 [2015]; *Narob Dev. Corp.*, 219 AD2d at 454). Here, by contrast, plaintiffs seek coverage not for fixing or repairing the plumbing, but rather for the extensive damage that ensued elsewhere throughout the house as a result of the discharge of water from the previously installed and enclosed plumbing system of the renovated shower.

We have considered the remaining assertions of defendant regarding the purported inapplicability of the ensuing loss exception and conclude that they are without merit. Based on the foregoing, we conclude that plaintiffs' claim for water damage to their house is covered under the ensuing loss exception to the faulty workmanship exclusion in the policy. In light of our determination, plaintiffs' procedural challenges to defendant's cross motion are academic.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

971

CA 21-01511

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

COUNSEL FINANCIAL II LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BLAINE H. BORTNICK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 23, 2021. The order granted plaintiff's motion for summary judgment in lieu of complaint.

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

Same memorandum as in *Counsel Fin. II LLC v Bortnick* ([appeal No. 2] — AD3d — [Mar. 17, 2023] [4th Dept 2023]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

972

CA 21-01640

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

COUNSEL FINANCIAL II LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BLAINE H. BORTNICK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered October 28, 2021. The amended judgment awarded plaintiff the sum of $4,547,867.38 as against defendant.

It is hereby ORDERED that the amended judgment so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: Plaintiff, a commercial lending institution specializing in the business of providing loans to law firms, sought by motion for summary judgment in lieu of complaint (*see* CPLR 3213) to recover from defendant on a revolving promissory note (note) executed by a law firm and allonges thereto, and on a guaranty for payment and performance (guaranty) (collectively, financial instrument) for the note executed by defendant and other partners then with the law firm. Monies advanced under the line of credit evidenced by the note were for the purpose of satisfying the law firm's preexisting debt with a bank, paying any existing tax lien up to a certain amount, and funding the law firm's operating expenses or interest payments due under the note. The guaranty obligated defendant and the other then-partners to "irrevocably, absolutely and unconditionally" guarantee to plaintiff "the punctual payment and performance" of the debt owed by the law firm and to waive all defenses thereto. Defendant appeals in appeal No. 1 from an order granting plaintiff's motion, and he appeals in appeal No. 2 from an amended judgment awarding plaintiff damages in the amount of $4,547,867.38.

We note at the outset that appeal No. 1 must be dismissed inasmuch as the right to appeal from the order granting plaintiff's motion for summary judgment in lieu of complaint terminated upon the

subsequent entry of the amended judgment in appeal No. 2 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Wiedenhaupt v Hogan* [appeal No. 2], 89 AD3d 1525, 1526 [4th Dept 2011]). Nonetheless, the appeal from the amended judgment in appeal No. 2 "brings up for review" the order in appeal No. 1, "which necessarily affects the final judgment" here (CPLR 5501 [a] [1]; *see Aho*, 39 NY2d at 248).

Defendant first contends that the guaranty is not a qualifying instrument under CPLR 3213 because, in addition to guaranteeing the law firm's obligation to make payment under the note, it contains language obligating defendant and the other then-partners to guarantee performance under the note. Even assuming, arguendo, that defendant's contention "involves an issue 'of law appearing on the face of the record that [plaintiff] could not have countered had it been raised in the court of first instance' and thus may be raised for the first time on appeal" (*Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143 [4th Dept 2008]; *see 27 W. 72nd St. Note Buyer LLC v Terzi*, 194 AD3d 630, 631 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021]), we conclude that it lacks merit (*see Counsel Fin. Holdings LLC v Sullivan Law, L.L.C.* [appeal No. 2], 208 AD3d 1028, 1030 [4th Dept 2022] [*Sullivan Law*]).

We agree with defendant, however, that the action is not "based upon an instrument for the payment of money only" (CPLR 3213) because defendant's liability cannot be ascertained without resort to impermissible extrinsic evidence outside the financial instrument. Pursuant to CPLR 3213, "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint." The statute thus "recognizes that some claims have greater presumptive merit than others and should have easier access to the courts than an ordinary plenary action gets. It singles out these claims and permits them to be brought on by a summary judgment motion at the outset" (David D. Siegel & Patrick M. Connors, New York Practice § 288 at 543 [6th ed 2018] [Siegel & Connors]). Indeed, CPLR 3213 "was enacted to provide quick relief on documentary claims so presumptively meritorious that a formal complaint is superfluous, and even the delay incident upon waiting for an answer and then moving for summary judgment is needless" (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 491-492 [2015] [*Cooperatieve Centrale*] [internal quotation marks omitted]; *see Weissman v Sinorm Deli*, 88 NY2d 437, 443 [1996]). Under the "stringent" requirement that the action be based upon an instrument for the payment of money only, "a document comes within CPLR 3213 'if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms' " (*Weissman*, 88 NY2d at 443-444, quoting *Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 155 [1975]). Conversely, "[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*id.* at 444).

"An unconditional guaranty is [typically] an instrument for the payment of 'money only' within the meaning of CPLR 3213" (*Cooperatieve Centrale*, 25 NY3d at 492), and a plaintiff seeking to recover on an unconditional guaranty of a note that extended a line of credit is entitled to rely upon de minimis extrinsic evidence such as a line of credit statement to establish the amount of the underlying debt (*see generally Sullivan Law*, 208 AD3d at 1030; *Stache Invs. Corp. v Ciolek*, 174 AD3d 1393, 1393 [4th Dept 2019]; *Counsel Fin. Servs., LLC v David McQuade Leibowitz, P.C.*, 67 AD3d 1483, 1484 [4th Dept 2009]). Here, however, plaintiff's action is not based on defendant's capped liability under the guaranty as modified by the allonges to the note with simple evidence such as a line of credit statement that the total underlying debt exceeded that amount. Instead, plaintiff seeks to recover the amount of defendant's capped liability as reduced by the amount of two contingency fees that defendant arranged to have paid to plaintiff for which the parties separately agreed, upon defendant's offer and plaintiff's acceptance, that defendant would receive a dollar-for-dollar offset against his liability under the guaranty. As proof of the agreement to reduce defendant's liability under the guaranty and the amount of that reduction, plaintiff relies on evidence extrinsic to the instrument consisting of representations in the affidavit of its chief operating officer, deposit receipt printouts from the online system of plaintiff's bank, and a guaranty balance chart apparently generated by plaintiff showing the calculation of defendant's revised liability.

In our view, "[g]oing that far afield from the [financial] instrument itself does not appear to comport with the simple standards" embodied in the statute and related case law (Siegel & Connors § 289 at 544). Indeed, inasmuch as plaintiff's moving papers demonstrate that outside evidence beyond "simple proof of nonpayment or a similar de minimis deviation from the face of the document[s]" is needed to determine the amount due, we conclude that "[p]laintiff's action falls far short of satisfying the [CPLR] 3213 threshold requirement" (*Weissman*, 88 NY2d at 444; *see Ippolito v Family Medicine of Tarrytown & Ossining, LLP*, 46 AD3d 752, 753 [2d Dept 2007]; *cf. Ring v Jones*, 13 AD3d 1078, 1079 [4th Dept 2004]). The reduction of defendant's liability by the amount of two contingency fees effectively represents a separate offset or credit agreement requiring outside proof beyond de minimis extrinsic evidence to establish the amount due, thereby rendering resort to CPLR 3213 inappropriate (*see generally Express Valentine Auto Repair Shop, Inc. v New York Taxi 2, Inc.*, 185 AD3d 550, 552 [2d Dept 2020]; *Grossman v Clarey*, 133 AD2d 443, 444 [2d Dept 1987]).

Based on the foregoing, we conclude that Supreme Court erred in granting plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213, and we therefore reverse and, in accordance with CPLR 3213, "the moving and answering papers shall be deemed the complaint and answer, respectively." In light of our determination,

we do not address defendant's remaining contentions.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

976

KA 16-01153

PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN AUSTIN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 4, 2014. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), robbery in the first degree (three counts), and robbery in the second degree (five counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), three counts of robbery in the first degree (§ 160.15 [2], [4]), and five counts of robbery in the second degree (§ 160.10 [1], [2] [b]). The conviction arises from six separate robberies that took place in the City of Buffalo over a period of three months; during one of the robberies, the victim was shot and killed.

We reject defendant's contention that Supreme Court erred in refusing to suppress evidence seized during a warrantless search of his home. The People established at the suppression hearing that the search of the home was lawful pursuant to the emergency doctrine exception to the warrant requirement (*see People v Gibson*, 117 AD3d 1317, 1318-1320 [3d Dept 2014], *affd* 24 NY3d 1125 [2015]; *People v Turner*, 175 AD3d 1783, 1783 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]*; see also People v Stevens*, 57 AD3d 1515, 1516 [4th Dept 2008], *lv denied* 12 NY3d 822 [2009]). The emergency doctrine exception comprises "three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable

cause, to associate the emergency with the area or place to be searched" (*People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]).

Here, police witnesses testified during the suppression hearing that, when they responded to a call of a robbery, the victim informed them that he had been robbed by four individuals, one of whom was armed with a rifle. The victim further stated that the individuals had fled behind a row of nearby houses. As the officers neared the area identified by the victim, a witness called out from one of the houses, stating that she had seen multiple individuals run inside the last house in the row, and officers observed that the back sliding door of that house was open. After speaking with a resident of the house, who informed the officers that her son was inside asleep, officers entered the house to search for the assailants. The police found defendant hiding in the basement and, during the course of the search, seized clothing, cash, cell phones, a rifle scope, and other items that they believed to be incriminating evidence against defendant and the other assailants. We conclude that the People established through that testimony that all three elements of the standard were satisfied (*see People v Junious*, 145 AD3d 1606, 1608-1609 [4th Dept 2016], *lv denied* 29 NY3d 1033 [2017], *reconsideration denied* 29 NY3d 1129 [2017]). Contrary to defendant's further contention, the court properly determined that the ensuing showup identification procedure, which was conducted soon after defendant was detained as part of the lawful search of the house and during which the robbery victim identified defendant, was not unduly suggestive (*see People v Johnson*, 202 AD3d 1471, 1471-1472 [4th Dept 2022], *lv denied* 38 NY3d 1033 [2022]; *People v Norman*, 183 AD3d 1240, 1240-1241 [4th Dept 2020], *lv denied* 35 NY3d 1047 [2020]; *People v Carson*, 122 AD3d 1391, 1391-1392 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]).

We agree with defendant that the court erred in refusing to suppress a .22 caliber magazine that was recovered from defendant's pocket after he was pursued and detained by police as part of a separate incident. At the suppression hearing, the police witness testified that he received a report that two black males wearing dark clothing had fled the scene of an armed robbery. Soon after receiving the report, while driving in the vicinity of the incident, the officer observed two individuals in dark clothing, who fled as soon as the officer stopped his vehicle. The officer could not determine the gender or race of the individuals as he approached because they were facing away from him. Assuming, arguendo, that police lawfully approached defendant and the second individual to request information about the robbery (*see People v De Bour*, 40 NY2d 210, 220 [1976]), we conclude that the subsequent pursuit of defendant was unlawful. The officer's testimony did not establish that he determined that the individuals matched the sex or race of the robbery suspects before he undertook pursuit, and the evidence was therefore insufficient to demonstrate that the officer had " 'a reasonable suspicion that defendant ha[d] committed or [was] about to commit a crime' " (*People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010], quoting *People v Martinez*, 80 NY2d 444, 446 [1992]; *cf. People*

v McKinley, 101 AD3d 1747, 1748-1749 [4th Dept 2012], *lv denied* 21 NY3d 1017 [2013]). Although defendant ran from the officer, "[f]light alone is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry" (*Riddick*, 70 AD3d at 1422 [internal quotation marks omitted]; *see People v Holmes*, 81 NY2d 1056, 1058 [1993]; *People v Ross*, 251 AD2d 1020, 1021 [4th Dept 1998], *lv denied* 92 NY2d 882 [1998]).

Defendant further contends that the court erred in refusing to suppress evidence seized from his home pursuant to a search warrant because the application was based on illegally seized evidence and the warrant thus was not supported by probable cause. Although the illegally seized .22 caliber magazine should not have been included among the evidence supporting the warrant application, we conclude that the remaining information in the warrant application—which included the evidence seized during the prior warrantless search of defendant's house, the show-up identification immediately after that search, and additional information linking defendant to multiple robberies through his cell phone use, public Facebook posts, and video evidence—provided probable cause to support the issuance of the search warrant (*see People v Herron*, 199 AD3d 1476, 1478 [4th Dept 2021]; *People v Rhodafox*, 134 AD3d 1581, 1582 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]; *see also People v Martin*, 163 AD2d 865, 865 [4th Dept 1990]).

Although the court further erred in admitting the .22 caliber magazine in evidence at trial, that error is harmless because the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that any error in admitting that evidence contributed to his conviction (*see People v Watson*, 90 AD3d 1666, 1667 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]; *see also People v Francois*, 208 AD3d 518, 518 [2d Dept 2022], *lv denied* 38 NY3d 1188 [2022]*; see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Defendant failed to preserve for our review his challenge to the sufficiency of the scientific evidence of his identity as the perpetrator (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends for the first time on appeal that he was denied his right to counsel because police questioning did not immediately stop upon the arrival of his attorney at the police station (*see People v Grice*, 100 NY2d 318, 321-324 [2003]; *cf. People v Wade*, 164 AD3d 840, 841 [2d Dept 2018], *lv denied* 32 NY3d 1116 [2018]). "[T]he rule 'authorizing review of unpreserved constitutional right-to-counsel claims' has been applied 'only when

the constitutional violation was established on the face of the record' " (*People v McLean*, 15 NY3d 117, 121 [2010], quoting *People v Ramos*, 99 NY2d 27, 37 [2002]). Here, because "the record does not make clear, irrefutably, that a right to counsel violation has occurred, the claimed violation can be reviewed only on a post-trial motion under CPL 440.10, not on direct appeal" (*id.*).

Contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

984

KA 19-01443

PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENDERSON L. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 15, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Defendant contends that Supreme Court erred in refusing to suppress physical evidence, specifically a gun. We reject that contention. The evidence at the suppression hearing established that the police lawfully stopped defendant's vehicle after they observed him violate a provision of the Vehicle and Traffic Law by failing to stop at a stop sign (*see People v Ricks*, 145 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *see generally* Vehicle and Traffic Law § 1172 [a]; *People v Robinson*, 97 NY2d 341, 349-350 [2001]; *People v Addison*, 199 AD3d 1321, 1321-1322 [4th Dept 2021]). During the ensuing traffic stop, the police learned, by accessing a Department of Motor Vehicles database, that defendant had a suspended driver's license.

Defendant contends that the court erred in refusing to suppress the gun because it was recovered during an unlawful inventory search of the vehicle he was driving. We reject that contention. "[W]here a vehicle has been lawfully impounded, the inventory search itself must be conducted pursuant to 'an established procedure' that is related 'to the governmental interests it is intended to promote' and that provides 'appropriate safeguards against police abuse' " (*People v*

Walker, 20 NY3d 122, 126 [2012], quoting *People v Galak*, 80 NY2d 715, 716 [1993]; *see People v Tardi*, 122 AD3d 1337, 1338 [4th Dept 2014], *affd* 28 NY3d 1077 [2016]). "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*People v Johnson*, 1 NY3d 252, 256 [2003]). The evidence at the suppression hearing established that it is the policy of the Buffalo Police Department (BPD) to tow a vehicle in its control whenever, inter alia, it is necessary to safeguard the vehicle and its contents from damage or theft, the vehicle presents a hazard or inconvenience to the public, or the vehicle is not drivable and the owner is unable to make arrangements for immediate private towing. Here, the police properly decided to tow and impound defendant's vehicle because there was no licensed driver present, the vehicle was illegally parked in a way that impeded the flow of traffic, and the vehicle's owner—a rental car company—was not available to make immediate arrangements for private towing of the vehicle (*see People v David*, 209 AD3d 1276, 1277 [4th Dept 2022]; *People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]).

We further conclude that the suppression hearing testimony established that "the police followed the procedure set forth in the applicable [policy] of the [BPD] in conducting the inventory search" (*People v Nesmith*, 124 AD3d 1325, 1326 [4th Dept 2015], *lv denied* 26 NY3d 1042 [2015]; *see Wilburn*, 50 AD3d at 1618; *People v Scott*, 210 AD2d 920, 921 [4th Dept 1994], *lv denied* 85 NY2d 942 [1995]). The BPD policy provided, in relevant part, that during an inventory search, the police could inspect unlocked trunks as well as any unlocked or unsealed containers found in the vehicle. Here, the police reasonably acted in compliance with that policy when, during the inventory search, they opened a zipped backpack found in the trunk to ensure that no valuables were contained therein (*see generally Colorado v Bertine*, 479 US 367, 369 [1987]). The contents of the zipped backpack were readily accessible by anyone who opened the trunk, which itself could be readily opened from inside the passenger compartment, and therefore opening the bag was necessary for the police to fulfill the purpose of BPD's policy to safeguard the contents of impounded vehicles from damage or theft.

We conclude that the court did not err in refusing to suppress statements made by defendant to the police following his arrest. The record supports the court's determination that defendant was advised of his *Miranda* rights, that he waived those rights, and that his statements were voluntary (*see People v Wurthmann*, 26 AD3d 830, 831 [4th Dept 2006], *lv denied* 7 NY3d 765 [2006]). The court's determination that defendant's statements were made voluntarily is entitled to deference (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), and we perceive no basis on this record to disturb that determination. We reject defendant's contention that testimony elicited on cross-examination undermined the conclusion that his statements were made voluntarily; defendant did not supply a "bona fide factual predicate in support of his conclusory speculation that his statement[s were] coerced" (*People v Wilson*, 120 AD3d 1531, 1533 [4th Dept 2014], *affd* 28 NY3d 67 [2016], *rearg denied* 28 NY3d 1158

[2017]; *see People v Rapley* [appeal No. 1], 59 AD3d 927, 927 [4th Dept 2009], *lv denied* 12 NY3d 858 [2009]).

Finally, we have considered defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

992

CA 22-00747

PRESENT: WHALEN, P.J., SMITH, CURRAN, MONTOUR, AND OGDEN, JJ.

RICHARD STACEY, II, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 134644.)

LAW OFFICE OF FRANK POLICELLI, UTICA (FRANK POLICELLI OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Christopher J. McCarthy, J.), entered April 4, 2022. The order denied the motion of claimant for partial summary judgment on the issue of liability and dismissed the claim.

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

Memorandum: In this action pursuant to Court of Claims Act § 8-b seeking damages based on allegations that he was wrongly convicted and imprisoned, claimant appeals from an order that denied his motion for partial summary judgment on the issue of liability and dismissed the claim. We affirm.

As relevant here, "[i]n order to present [a] claim for unjust conviction and imprisonment, claimant must establish by documentary evidence that[, inter alia] . . . his judgment of conviction was reversed or vacated . . . and the accusatory instrument dismissed" on one or more of the grounds enumerated in CPL 440.10 (1) (a), (b), (c), (e), or (g) (Court of Claims Act § 8-b [3] [b] [ii] [A]). Here, claimant "failed to annex the documentary evidence required by section 8-b (3)" of the Court of Claims Act (*Piccarreto v State of New York*, 144 AD2d 920, 920 [4th Dept 1988]) and thus failed to establish that his judgment of conviction was reversed or vacated on any of the statutorily enumerated grounds for relief (*see* § 8-b [3] [b] [ii] [A]; *Ortiz v State of New York* [appeal No. 3], 203 AD3d 1731, 1733 [4th Dept 2022], *lv denied* 38 NY3d 911 [2022]). The record shows that claimant did not move to vacate the judgment under a specific statutory provision, the transcript of the hearing at which County Court vacated the judgment identifies no statutory basis for the court's reasoning, and claimant has presented no other documentary

evidence to establish the ground on which the relief was granted. Although claimant contends that vacatur was granted based on newly discovered evidence pursuant to CPL 440.10 (1) (g), we note that the vacated conviction was entered on claimant's plea of guilty and, "[b]y its express terms, [CPL 440.10 (1) (g)] is inapplicable to judgments obtained by guilty pleas" (*People v Tiger*, 32 NY3d 91, 99 [2018]).

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1000

KA 20-00399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES J. DEAN, JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 17, 2013. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2]), defendant contends that Supreme Court erred in admitting evidence at trial that police officers had observed him engage in prior uncharged drug sales. The court admitted the evidence pursuant to *People v Molineux* (168 NY 264, 293-294 [1901]) on the ground that it was relevant to whether defendant intended to sell the controlled substance in his possession. According to defendant, the evidence was unnecessary to prove intent to sell because such an intent may be easily inferred from the quantity of drugs and paraphernalia in his possession and he did not challenge the intent element at trial. We reject defendant's contention and conclude that the court did not abuse its discretion in admitting the evidence in question (*see generally People v Dorm*, 12 NY3d 16, 19 [2009]).

As a preliminary matter, we note that defendant's contention is preserved for our review inasmuch as the court, in ruling on the People's *Molineux* applications, "expressly decided" the question of admissibility of the evidence regarding prior uncharged sales (CPL 470.05 [2]; *see People v DuBois*, 203 AD3d 1621, 1622 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]; *see generally People v Bailey*, 32 NY3d

70, 82 [2018]).

With respect to the merits, it is well established that "[e]vidence of prior criminal acts to prove intent will often be unnecessary, and therefore should be precluded even though marginally relevant, where intent may be easily inferred from the commission of the act itself" (*People v Alvino*, 71 NY2d 233, 242 [1987]; *see People v Leonard*, 29 NY3d 1, 8 [2017]). Here, the People presented evidence that defendant possessed two "eight balls" of cocaine along with unused glassine envelopes commonly used to package smaller amounts of cocaine for sale. The question presented is whether an intent to sell "may be easily inferred" from the mere act of possessing those items (*Alvino*, 71 NY2d at 242).

We conclude that an intent to sell may not be *easily* inferred from the possession of two "eight balls" of cocaine and empty glassine envelopes. As the Court of Appeals has noted in another context, "[b]ased on day-to-day experience, common observation and knowledge, the average juror may not be aware of the quantity and packaging of [cocaine possessed] by someone who sells drugs, as opposed to someone who merely uses them" (*People v Hicks*, 2 NY3d 750, 751 [2004]). We further conclude that the probative value of the evidence regarding the prior uncharged sales outweighed any prejudice (*see People v Graham*, 117 AD3d 1584, 1584 [4th Dept 2014], *lv denied* 23 NY3d 1037 [2014]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1003

KA 19-00979

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIGUEL PARILLA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 5, 2018. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fourth degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and one count each of criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [1]). We affirm.

Defendant contends that, because the mistrial declared over his objection during his first bench trial was necessitated by a deliberate intent on the part of the People to provoke a mistrial, his second trial was barred by the double jeopardy clauses of the federal and state constitutions. We reject that contention. "Where a court grants a mistrial over the objection of a defendant or without obtaining the defendant's consent, the double jeopardy provisions of both our State Constitution (NY Const, art I, § 6) and Federal Constitution (US Const 5th Amend) prohibit retrial for the same crime unless there was a 'manifest necessity' for the mistrial or 'the ends of public justice would otherwise be defeated' " (*People v Magee*, 254 AD2d 825, 826 [4th Dept 1998], *lv denied* 92 NY2d 1035 [1998], quoting *United States v Perez*, 22 US 579, 580 [1824]; *see People v Ferguson*, 67 NY2d 383, 387-388 [1986]).

Here, during the first bench trial, before a County Court Judge, the People promptly disclosed to the Judge that their final witness—a longtime girlfriend of defendant—had disclosed after taking the stand and becoming aware that the Judge was presiding that defendant had previously suggested to her that he had personal knowledge of the Judge having engaged in certain serious improprieties off the bench. Following discussions that took place over the course of multiple days during which the Judge vehemently denied the allegation, the Judge ultimately declared a mistrial pursuant to CPL 280.10 (3) on his own motion because the Judge, as the trier of fact, had been placed in the untenable position of having to assess the credibility of a witness who had made a spurious allegation against him. We conclude that the mistrial was justified by manifest necessity in these circumstances because the Judge—upon a " 'scrupulous exercise of judicial discretion' . . . after consideration of the 'vital competing interests' of the prosecution and the accused"—had a "basis of demonstrable substance" for declaring a mistrial given that "the appearance of impropriety may sometimes[, as here,] be as devastating as the reality" (*Matter of Ferlito v Judges of County Ct., Suffolk County*, 31 NY2d 416, 419-420 [1972]). Indeed, contrary to defendant's contention, the record establishes that the Judge fulfilled his "duty to consider alternatives to a mistrial and to obtain enough information so that it [was] clear that a mistrial [was] actually necessary" (*Ferguson*, 67 NY2d at 388; *cf. Matter of McNair v McNamara*, 206 AD3d 1689, 1691-1692 [4th Dept 2022]). Moreover, the record does not support defendant's "claim that the mistrial . . . was necessitated by a deliberate intent on the part of the prosecution to provoke a mistrial" (*People v Reardon*, 126 AD2d 974, 974 [4th Dept 1987]; *see People v Haffa*, 197 AD3d 964, 965 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]; *People v Maldonado*, 122 AD3d 1379, 1380 [4th Dept 2014], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). We therefore conclude that Supreme Court properly determined that the second trial was not barred by double jeopardy. To the extent that defendant raises an additional double jeopardy challenge, we conclude that it does not warrant reversal or modification of the judgment.

We reject defendant's contention that the court erred in its rulings during witness testimony that, pursuant to *People v Molineux* (168 NY 264 [1901]), the People were permitted to introduce evidence of defendant's prior drug sales. The testimony concerning defendant's prior drug sales was admissible with respect to the issue of his intent to sell drugs (*see People v Kims*, 24 NY3d 422, 439 [2014]; *People v Harrison*, 200 AD3d 1731, 1731 [4th Dept 2021]), as well as " 'to complete the narrative of events leading up to the crime[s] for which defendant [was] on trial' " (*People v Ray*, 63 AD3d 1705, 1706 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *see People v Whitfield*, 115 AD3d 1181, 1182 [2014], *lv denied* 23 NY3d 1044 [2014]), and we conclude that the probative value of such evidence outweighed the danger of prejudice (*see People v Alvino*, 71 NY2d 233, 242 [1987]; *Whitfield*, 115 AD3d at 1182). Further, even assuming, arguendo, that the court "erred in admitting [the] evidence of prior [drug sales] without a prior ruling that [such] evidence was admissible," we conclude that any such error is harmless (*People v Smith* [appeal No.

1], 266 AD2d 889, 889 [4th Dept 1999], *lv denied* 94 NY2d 907 [2000]; *see People v Hogue*, 133 AD3d 1209, 1211 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]).

Defendant's challenge to the legal sufficiency of the evidence is preserved only in part because, in moving for a trial order of dismissal, defendant raised only some of the specific grounds raised on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Dibble*, 176 AD3d 1584, 1586 [4th Dept 2019], *lv denied* 34 NY3d 1077 [2019]). In any event, contrary to defendant's contention, there is a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that defendant committed the crimes of which he was convicted. Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, we conclude that defense counsel was not ineffective for failing to move to suppress the drugs located in a bedroom of a house at which defendant resided because "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Carver*, 27 NY3d 418, 421 [2016]).

We reject defendant's contention that the sentence is unduly harsh and severe. We note, however, that the certificate of conviction and uniform sentence and commitment form should be amended to reflect that defendant was sentenced as a second felony drug offender (*see People v Barksdale*, 191 AD3d 1370, 1373 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1009

TP 22-01056

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

IN THE MATTER OF JAMES R. CHARTRAND, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, RESPONDENT.

LEONARD CRIMINAL DEFENSE GROUP, PLLC, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Lewis County [James P. McClusky, J.], entered January 31, 2022) to review a determination of respondent. The determination revoked the driver's license of petitioner.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated (DWI). A sheriff's deputy, responding to a report of a burglary in progress, initially stopped petitioner after observing him driving a vehicle that matched the description given of the vehicle in which the suspect had fled from the burglary. The deputy took petitioner into custody after petitioner exhibited signs of intoxication and failed field sobriety tests. Petitioner refused to submit to a chemical test and, based on that refusal, his license was temporarily suspended. A refusal revocation hearing was thereafter held pursuant to Vehicle and Traffic Law § 1194 (2) (c). The Administrative Law Judge revoked petitioner's license after concluding that all of the relevant elements of Vehicle and Traffic Law § 1194 (2) (c) had been established. Respondent confirmed the determination upon petitioner's administrative appeal.

As petitioner contends and respondent correctly concedes, respondent reviewed the determination whether the initial stop of petitioner's vehicle was lawful under an incorrect legal standard.

Since *People v Ingle* (36 NY2d 413 [1975]), "the Court of Appeals has made it abundantly clear . . . that police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime . . . [,] or where the police have probable cause to believe that the driver . . . has committed a traffic violation" (*Matter of Deveines v New York State Dept. of Motor Vehs. Appeals Bd.*, 136 AD3d 1383, 1384 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Deraway v New York State Dept. of Motor Vehs. Appeals Bd.*, 181 AD3d 1150, 1151 [4th Dept 2020]). We nevertheless reject petitioner's contention that the record lacks substantial evidence to support the determination that the stop was lawful (*see Deveines*, 136 AD3d at 1384). Here, the record establishes that the deputy had " 'a reasonable suspicion that [petitioner,] the driver . . . of the vehicle[,] ha[d] committed . . . a crime' " (*People v Washburn*, 309 AD2d 1270, 1271 [4th Dept 2003]; *see People v Bolden*, 109 AD3d 1170, 1172 [4th Dept 2013], *lv denied* 22 NY3d 1039 [2013]; *People v Black*, 48 AD3d 1154, 1155 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]).

Further, contrary to petitioner's contention, the determination that petitioner refused to submit to a chemical test after receiving the requisite warnings is supported by substantial evidence (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]). The deputy's testimony, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to a chemical test after he was arrested for DWI and provided with three clear and unequivocal warnings of the consequences of such refusal (*see id.* at 1246; *see generally* Vehicle and Traffic Law § 1194 [2] [b]). We reject petitioner's contention that it was error to consider the refusal report in addition to the deputy's testimony (*see generally Malvestuto*, 207 AD3d at 1246; *Matter of Bersani v New York State Dept. of Motor Vehs.*, 162 AD3d 1553, 1553 [4th Dept 2018]; *Matter of Huttenlocker v New York State Dept. of Motor Vehs. Appeals Bd.*, 156 AD3d 1464, 1464 [4th Dept 2017]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

1010

CA 22-00025

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

DARLENE CONNORS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (AMANDA M. SOMMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOTEMPIO P.C. LAW GROUP, BUFFALO (ANDREW T. GILL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered November 30, 2021. The order denied the motion of defendant County of Erie to dismiss the complaint against it.

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

Memorandum: In this slip and fall personal injury action, defendant County of Erie (County) appeals from an order that denied its motion to dismiss the complaint against it. In its decision, Supreme Court rejected the County's contentions that the complaint should be dismissed because the notice of claim, which contained the incorrect date of the accident, was a nullity and the amended notice of claim served by plaintiff prejudiced the County. Contrary to the County's contention, the court did not commit reversible error in denying the motion. We therefore affirm.

The amended notice of claim changed the date of the accident set forth in the original notice of claim from January 6, 2019 to February 6, 2019. General Municipal Law § 50-e (6) states in relevant part that a court, at "any time" and at "any stage" of the action or proceeding, has discretion to permit a notice of claim to be "corrected" provided that the "mistake, omission, irregularity or defect" was made in good faith and that the other party would not be prejudiced thereby (*see Copeland v City of New York*, 90 AD3d 691, 691 [2d Dept 2011]; *Betette v County of Monroe*, 82 AD3d 1708, 1710 [4th Dept 2011]). Here, there is no dispute that the mistake in the notice of claim with regard to the date of plaintiff's accident was made in good faith, and we conclude that the court did not abuse its discretion in determining that the County failed to establish

prejudice arising from the amendment.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

1014

CA 21-01798

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

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

V MEMORANDUM AND ORDER

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

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

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

Appeal from an order of the Supreme Court, Orleans County (Terrence M. Parker, A.J.), dated November 15, 2021 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a dangerous sex offender requiring confinement in a secure treatment facilty.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a nonjury trial, that he is a detained sex offender who has a mental abnormality (*see* §§ 10.03 [g], [i]; 10.07 [d]) and determining, following a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility (*see* §§ 10.03 [e]; 10.07 [f]). We affirm.

Respondent contends that he was denied due process due to an inordinate delay in holding the trial to determine if he was a detained sex offender suffering from a mental abnormality. Inasmuch as respondent failed to raise any objection to the delay, he failed to preserve that contention for our review (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1302 [4th Dept 2012], *lv denied* 20 NY3d 856 [2013]; *see also Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]), and we decline to exercise our power to review it in the interest of justice (*see generally Matter of State of New York v Castleberry*, 120 AD3d 1535, 1535 [4th Dept 2014], *lv denied* 25 NY3d 908 [2015]; *Matter of State of New York v Muench*, 85 AD3d 1581, 1582 [4th Dept 2011]; *Matter of State of New York v Campany*, 77 AD3d 92, 100 [4th Dept 2010], *lv*

denied 15 NY3d 713 [2010]).

Respondent further contends that he was denied effective assistance of counsel throughout the proceedings. Inasmuch as "respondent is subject to civil confinement, the standard for determining whether effective assistance of counsel was provided in criminal matters is applicable here" (*Matter of State of New York v Carter*, 100 AD3d 1438, 1439 [4th Dept 2012]; *see Matter of State of New York v Karl M.*, 192 AD3d 1119, 1123 [2d Dept 2021], *lv denied* 37 NY3d 912 [2021]). Respondent's attorney conceded that he advised respondent to participate in an interview with the independent expert appointed by Supreme Court based on the attorney's mistaken belief that the independent expert was respondent's expert and that respondent's statements would be protected by either the attorney-client or the doctor-patient privilege.

We nevertheless conclude that the single mistake made by respondent's attorney "was 'not so egregious and prejudicial that [it] deprived [respondent] of his right to a fair trial' " (*People v Reitz*, 125 AD3d 1425, 1425 [4th Dept 2015], *lv denied* 26 NY3d 93 [2015], *reconsideration denied* 26 NY3d 1091 [2015]; *see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Irvine*, 197 AD3d 988, 990-991 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Viewing the evidence, the law, and the circumstances of this case as a whole and at the time of the representation, we conclude that respondent received effective assistance of counsel (*see Matter of State of New York v Treat*, 100 AD3d 1513, 1513-1514 [4th Dept 2012]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, we reject respondent's contention that the court's determination that respondent was a detained sex offender who suffered from a mental abnormality (*see* Mental Hygiene Law § 10.07 [d]) and a dangerous sex offender requiring confinement (*see* § 10.07 [f]) is against the weight of the evidence. With respect to the determination that respondent suffered from a mental abnormality, we conclude that "the evidence does not preponderate so greatly in respondent's favor that the court could not have reached its conclusion on any fair interpretation of the evidence" (*Matter of State of New York v Orlando T.*, 184 AD3d 1149, 1149 [4th Dept 2020]; *see also Trombley*, 98 AD3d at 1301).

With respect to the determination that respondent was a dangerous sex offender requiring confinement, we conclude that "[t]he evidence presented by respondent that conflicted with that presented by petitioner merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its 'opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting . . . testimony' " (*Matter of State of New York v Stein*, 85 AD3d 1646, 1647 [4th Dept 2011], *affd* 20 NY3d 99 [2012], *cert denied* 568 US 1216 [2013]). We see no basis to disturb the court's decision to credit the testimony of petitioner's experts and

the independent expert (*see Trombley*, 98 AD3d at 1301).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

1030

CA 22-01094

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF DAVID KEVIN D. CORBETT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARK J.F. SCHROEDER, COMMISSIONER, NEW YORK
STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (John J. Ark, J.), entered February 10, 2022 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determination is confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. As a preliminary matter, we conclude that Supreme Court should have transferred the proceeding to this Court. The petition raises a question of substantial evidence, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g). We therefore vacate the judgment, and we treat the proceeding as if it had been properly transferred and review petitioner's contentions de novo (*see Matter of Elderwood at Cheektowaga v Zucker*, 188 AD3d 1578, 1579 [4th Dept 2020]; *Matter of Hope Day Care, LLC v New York State Off. of Children & Family Servs.*, 162 AD3d 1639, 1640 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]).

We conclude that the determination is supported by substantial evidence (*see Matter of Thompson v New York State Dept. of Motor Vehs.*, 170 AD3d 1657, 1657-1658 [4th Dept 2020]). The arresting officer's testimony at the hearing established that the officer lawfully stopped the vehicle driven by petitioner based on a

reasonable suspicion that petitioner was committing the crime of driving while intoxicated (*see People v White*, 27 AD3d 1181, 1182 [4th Dept 2006]). The officer testified that he arrived at an establishment after responding to a 911 call about a patron who was "causing trouble." There, the officer spoke with petitioner, and the officer detected an odor of alcohol emanating from petitioner and observed that petitioner had "glassy eyes," spoke with a "slow pace of speech," and swayed while he was standing. The officer shortly thereafter learned from the establishment's security guard that petitioner had left the area driving an SUV, and that the vehicle was traveling in a southeasterly direction. After the officer drove in that direction for a few minutes and reached an area approximately one mile away from the establishment, the officer observed an SUV—the only one in the area—traveling in the same direction, and thereafter conducted a traffic stop. Although the SUV was gray, and not green as reported by the security guard, we conclude that the discrepancy in that regard did not negate the officer's reasonable suspicion that petitioner was driving the SUV in question while intoxicated inasmuch as "the totality of the information known to the [officer] at the time" justified the traffic stop (*People v Finch*, 137 AD3d 1653, 1654 [4th Dept 2016]). Once the officer stopped petitioner's vehicle, petitioner continued to display signs of intoxication, and he failed two field sobriety tests. Thus, the officer then had probable cause to arrest petitioner for driving while intoxicated. In addition, the officer's testimony, along with his refusal report, which was entered into evidence, established that petitioner refused to submit to the chemical test after he was arrested and that he was warned of the consequences of such refusal (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]).

We have reviewed petitioner's remaining contention and conclude that it does not require a different result.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1036

CA 21-01697

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

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

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENCE LEGAL SERVICE, SYRACUSE (MICHAEL H. MCCORMICK OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Oneida County Court (Walter W. Hafner, Jr., A.J.), entered November 3, 2021. The order, inter alia, continued petitioner's placement in a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]).

We reject petitioner's contention that the determination that he is a dangerous sex offender requiring confinement is against the weight of the evidence. Pursuant to the Mental Hygiene Law, a person is classified as a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). Here, we conclude that the evidence does not preponderate so greatly in petitioner's favor that the factfinder could not have reached its

conclusion that petitioner continues to suffer from a mental abnormality on any fair interpretation of the evidence (*see Matter of State of New York v Connor*, 134 AD3d 1577, 1578 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). The evidence established that petitioner has been diagnosed with antisocial personality disorder (ASPD), and alcohol, cannabis, and opioid use disorders, which, along with his high degree of psychopathy, predispose him to commit sex offenses and result in serious difficulty in controlling such conduct (*see Matter of Vega v State of New York*, 140 AD3d 1608, 1609 [4th Dept 2016]; *Connor*, 134 AD3d at 1578; *see also Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]; *Matter of Luis S. v State of New York*, 166 AD3d 1550, 1551-1552 [4th Dept 2018], *appeal dismissed* 35 NY3d 985 [2020]). Contrary to petitioner's contention, County Court did not conclude that a diagnosis of ASPD, in conjunction with the condition of psychopathy, constitutes as a matter of law a mental abnormality. Rather, the court noted that it *may* constitute evidence of a mental abnormality before it conducted an individualized determination "with[ ] regard to petitioner's specific case," as is required (*Matter of Doy S. v State of New York*, 196 AD3d 1165, 1167 [4th Dept 2021]; *see Matter of State of New York v Francisco R.*, 191 AD3d 989, 991 [2d Dept 2021], *lv denied* 37 NY3d 986 [2021]; *Matter of State of New York v Marcello A.*, 180 AD3d 786, 787-790 [2d Dept 2020], *appeal dismissed* 36 NY3d 940 [2020], *lv denied* 37 NY3d 911 [2021]; *see also Matter of Suggs v State of New York*, 142 AD3d 1283, 1284 [4th Dept 2016]).

The court's determination that petitioner requires continued confinement is also not against the weight of the evidence. Respondent's expert witness testified that petitioner's engagement with treatment had not resulted in any insight into his offending behavior and that petitioner continued to fall within the well above average range for risk of reoffending based upon his scores on the Violence Risk Scale-Sex Offender Version and the Static-99 (*see Charles B.*, 192 AD3d at 1585-1586; *Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1135 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]; *Matter of Billinger v State of New York*, 137 AD3d 1757, 1758 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]). Although petitioner presented expert testimony that would support a contrary finding, that "merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference given its opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting expert testimony" (*Luis S.*, 166 AD3d at 1554 [internal quotation marks omitted]; *see Matter of State of New York v Chrisman*, 75 AD3d 1057, 1058 [4th Dept 2010]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

1042

KA 18-02103

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN J. JONES, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (FABIENNE SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 10, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and resisting arrest (§ 205.30) and sentencing him to concurrent terms of incarceration to be followed by a period of postrelease supervision. Defendant contends that County Court erred in failing to order an updated presentence investigation report before sentencing defendant and that the sentence is unduly harsh and severe. The former contention is raised for the first time on appeal and is thus not preserved for our review (*see People v Jones*, 148 AD3d 1807, 1808 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *People v Carey*, 86 AD3d 925, 925 [4th Dept 2011], *lv denied* 17 NY3d 814 [2011]). In any event, both contentions have been rendered moot "inasmuch as defendant has already served his sentence" (*People v King*, 90 AD3d 1533, 1534 [4th Dept 2011], *lv denied* 18 NY3d 959 [2012]; *see People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017]).

Defendant further contends that he was denied effective assistance of counsel at the violation of probation hearing when defense counsel failed to seek suppression of evidence seized during the execution of a search warrant. The record on appeal, however, contains neither the search warrant nor the search warrant application

and, as a result, the claim of ineffective assistance of counsel cannot be resolved without reference to matters outside of the record. Therefore, "a CPL 440.10 proceeding is the appropriate forum for reviewing the . . . claim" (*People v Barzee*, 204 AD3d 1422, 1423 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022] [internal quotation marks omitted]; *see People v Green*, 196 AD3d 1148, 1150 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]; *see also People v Gianni*, 94 AD3d 1477, 1477 [4th Dept 2012], *lv denied* 19 NY3d 973 [2012]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1050

CAF 21-01417

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

IN THE MATTER OF MARIA R.

HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL R., RESPONDENT-APPELLANT.

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

MICHELLE K. FASSETT, HERKIMER, FOR PETITIONER-RESPONDENT.

KACIE M. CROUSE, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (Thaddeus J. Luke, J.), entered September 28, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

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

Contrary to the father's contention, a "parent who has been prohibited from direct contact with the child, in the child's best interest[s], continues to have an obligation to maintain contact with the person having legal custody of the child" (*Matter of Lucas B.*, 60 AD3d 1352, 1352 [4th Dept 2009] [internal quotation marks omitted]; *see generally Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469, 1470 [4th Dept 2014]). Here, petitioner has legal custody of the child, and there is no evidence that the father made any effort to maintain contact with petitioner. We conclude that petitioner established by the requisite clear and convincing evidence that the father abandoned the subject child (*see Matter of Anthony J.A. [Jason A.A.]*, 180 AD3d 1376, 1377 [4th Dept 2020], *lv denied* 35 NY3d 902 [2020]). Finally, we have reviewed the father's remaining contentions and conclude that they are without merit.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

1052

CA 21-01815

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

MARY BUCHMANN AND JOSEPH BUCHMANN,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 131744.)

DEFRANCISCO & FALGIATANO LAW FIRM, EAST SYRACUSE (JEFF D. DEFRANCISCO OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

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

Appeal from a judgment of the Court of Claims (Catherine E. Leahy-Scott, J.), entered October 1, 2021. The judgment dismissed the claim.

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

Memorandum: Claimants commenced this action seeking damages for injuries that Mary Buchmann (claimant) sustained as a result of negligence or medical malpractice allegedly committed by defendant's employees during a medical procedure. The Court of Claims concluded, following a bifurcated trial on liability, that defendant is not liable for the injuries. We now affirm.

Claimants contend that they are entitled to a new trial because the trial judge should have recused herself to avoid the appearance of impropriety, inasmuch as she was being represented in unrelated litigation by the Attorney General's Office, which was also representing defendant in this action. Although claimants correctly concede that they waived any potential conflict (*see People v Huebsch*, 199 AD3d 1174, 1176 [3d Dept 2021], *lv denied* 37 NY3d 1161 [2022]; *People v Brooks*, 128 AD3d 1467, 1467-1468 [4th Dept 2015]), they contend that the waiver was under duress because the court did not inform them of the potential conflict until moments before the trial was set to begin. Even assuming, arguendo, that the waiver was not valid and we can reach the merits of the issue, we conclude that the judge did not abuse her discretion in declining to recuse herself (*see Matter of Khan v Dolly*, 39 AD3d 649, 650-651 [2d Dept 2007]; *see generally People v Moreno*, 70 NY2d 403, 405-406 [1987]). Indeed, " '[a] judge has an obligation not to recuse himself or herself . . .

unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact or appearance' " (*Tripi v Alabiso*, 189 AD3d 2060, 2062 [4th Dept 2020]; *see Matter of Wilson v Brown*, 162 AD3d 1054, 1056 [2d Dept 2018]; *Matter of Hunter v Brown-Ledbetter*, 160 AD3d 955, 957 [2d Dept 2018]) and, here, the court concluded that it could "objectively render a fair and impartial decision."

Claimants further contend that they are entitled to a new trial because the court's conclusion following the trial on liability could not have been reached under any fair interpretation of the evidence. We reject that contention. Although our authority in reviewing a verdict in a nonjury trial is as broad as that of the trial court and we have the power to render the judgment we find warranted by the facts (*see McDevitt v State of New York*, 197 AD3d 852, 853 [4th Dept 2021]), we view the evidence in the light most favorable to the prevailing party and defer to the court's credibility determinations (*see Destino v State of New York*, 203 AD3d 1598, 1599 [4th Dept 2022]; *Williams v State of New York*, 187 AD3d 1522, 1522 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]; *Bobik v State of New York*, 172 AD3d 1924, 1925 [4th Dept 2019]). Where, as here, we are reviewing the evidence from a nonjury trial, "the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Reames v State of New York*, 191 AD3d 1304, 1305 [4th Dept 2021], *affd* 37 NY3d 1152 [2022] [internal quotation marks omitted]; *see Williams*, 187 AD3d at 1522).

Upon our review of the evidence, we conclude that the court's conclusion, which was largely based on credibility determinations, is supported by a fair interpretation of the evidence. The main issue at trial was whether defendant's employees adequately sterilized an IV site on claimant's right hand before the medical procedure. Claimants testified that they did not; defendant's employees testified that they did. Claimants' expert testified that the injuries were caused by a lack of sterilization, but defendant's expert testified that defendant's employees met the standard of care with respect to sterilization of the IV site. We defer to the court's credibility determinations (*see generally Destino*, 203 AD3d at 1599; *Bobik*, 172 AD3d at 1925).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

1057

CA 22-00092

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

MICHAEL SABINE, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125759.)

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR NEW YORK STATE ACADEMY OF TRIAL LAWYERS, AMICUS CURIAE.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered December 22, 2021. The judgment awarded claimant money damages of $550,000.00 plus interest.

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

Memorandum: Claimant commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident that occurred when a truck owned by defendant and driven by one of its employees collided with the vehicle that claimant was driving. Claimant moved for, inter alia, partial summary judgment on the issue of "liability." The Court of Claims initially denied the motion insofar as it sought partial summary judgment, because, inter alia, the court concluded that defendant raised a triable issue of fact whether claimant was comparatively negligent. Claimant moved for leave to renew his motion for partial summary judgment, based on the decision of the Court of Appeals in *Rodriguez v City of New York* (31 NY3d 312 [2018]), and the court granted claimant's motion to renew and, on renewal, granted claimant's motion for partial summary judgment on the issue of negligence. Following a bench trial, the court determined, inter alia, that claimant had established that he sustained a serious injury within the meaning of Insurance Law § 5102 (d) and awarded him $550,000.00 in damages. Claimant now appeals from that part of a judgment that calculated the award of prejudgment interest from "the date of [the] decision establishing serious injury and damages . . . instead of the date that common-law liability attached by summary judgment in [c]laimant's favor." We affirm.

Claimant contends that the prejudgment interest in this automobile accident case should have run from the date of a "decision awarding common-law liability." Initially, we note that, even assuming, arguendo, that claimant failed to preserve his contention for our review, his contention falls within a recognized "exception to the preservation rule" and therefore preservation of the contention was not required (*Harriger v State of New York*, 207 AD3d 1045, 1046 [4th Dept 2022]). Specifically, claimant raises "[a] question of law appearing on the face of the record [that] may be raised for the first time on appeal [inasmuch as] it could not have been avoided by the opposing party if brought to that party's attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). The contention represents a purely legal issue that could not "have been obviated or cured by factual showings or legal countersteps in the trial court" (*id.* [internal quotation marks omitted]), related to the law in this Department with respect to the calculation of prejudgment interest in automobile accident cases.

Nevertheless, we reject claimant's contention. Under CPLR 5002, prejudgment interest begins to run from the date on which a "defendant's obligation to pay [a] plaintiff is established, and the only remaining question is the precise amount that is due" (*Love v State of New York*, 78 NY2d 540, 544 [1991]; *see Manzano v O'Neil*, 298 AD2d 829, 830 [4th Dept 2002]). "By enacting the No-Fault Law, the Legislature modified the common-law rights of persons injured in automobile accidents . . . to the extent that plaintiffs in automobile accident cases no longer have an unfettered right to sue for injuries sustained" (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *see* Insurance Law article 51). As a result, "[a] defendant is not liable for noneconomic loss under Insurance Law § 5104 (a) unless the plaintiff proves that he or she sustained a serious injury" (*Ruzycki v Baker*, 301 AD2d 48, 51 [4th Dept 2002]; *see* Insurance Law § 5102 [d]). Thus, "the issue of serious injury must be decided either by the court as a matter of law or by the trier of fact before a defendant will be held liable for damages for a plaintiff's noneconomic loss" (*Ruzycki*, 301 AD2d at 51). Here, claimant's pretrial motions sought summary judgment on the issue of "liability" without raising the issue of serious injury, and the court properly concluded that the relief sought was on the issue of negligence and granted summary judgment on that issue alone (*see id.*). Defendant's obligation to pay damages to claimant was not established "until the issue of causation with respect to [claimant's] injuries was resolved . . . and '[claimant] prove[d] at trial that [claimant] sustained a serious injury' " (*Manzano*, 298 AD2d at 830; *see DePetres v Kaiser*, 244 AD2d 851, 852 [4th Dept 1997]). The court was bound to apply the law as promulgated by this Court (*see Phelps v Phelps*, 128 AD3d 1545, 1547 [4th Dept 2015]). The court therefore properly calculated the award of prejudgment interest from the date of the decision determining, inter alia, that claimant sustained a serious injury.

All concur except CURRAN, and OGDEN, JJ., who concur in the result in the following memorandum: We concur in the result inasmuch as we conclude that claimant's sole contention on appeal—concerning the accrual date for the calculation of prejudgment interest—is

unpreserved for our review, requiring that we affirm the judgment (*see Panaro v Athenex, Inc.*, 207 AD3d 1069, 1070 [4th Dept 2022]; *Jones v Brilar Enters.*, 184 AD2d 1077, 1078 [4th Dept 1992]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). The majority assumes that the issue is unpreserved but reaches the merits of claimant's contention through application of an exception to the preservation rule (*see Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). In other words, on this appeal as of right from a final judgment (*see* CPLR 5701 [a] [1]), the majority is not limiting this Court's scope of review to those matters brought up for review pursuant to CPLR 5501 (a). We respectfully disagree with the majority to the extent that it elects to address an unpreserved issue of statewide interest inasmuch as it does nothing more than adhere to this Court's well-settled and decades-long precedent on that particular issue (*see generally Ruzycki v Baker*, 301 AD2d 48, 51 [4th Dept 2002]). In short, under the circumstances of this case, we disagree with the majority's decision to invoke what should be a very rare exception to rules of preservation only just to double down on our long-standing precedent. Indeed, by reaching claimant's contention challenging that precedent, the majority fails to fully recognize that the policy reasons underlying the preservation rule, and the rarity of times when we except from it, are "especially acute when the new issue seeks change in a long-established common-law rule," as is the case here (*Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]).

Even though it appears that this Court's precedent governing claimant's contention directly conflicts with precedent in other departments (*compare Ruzycki*, 301 AD2d at 51, *with Van Nostrand v Froehlich*, 44 AD3d 54, 55, 59 [2d Dept 2007], *appeal dismissed* 10 NY3d 837 [2008]), we note that, under the circumstances of this case, the Court of Appeals likely will not review the issue because it was not raised before the Court of Claims (*see Telaro v Telaro*, 25 NY2d 433, 438-439 [1969]; *see generally* Arthur Karger, Powers of the New York Court of Appeals § 14:1 [3d ed rev, Aug. 2022 update]), and would decline to resolve the conflict based on this appeal. Consequently, we see no reason to reach claimant's unpreserved contention merely to reiterate our settled precedent. We accordingly concur in the result only.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

2

TP 22-01494

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

IN THE MATTER OF JOHN DOE, PETITIONER,

V MEMORANDUM AND ORDER

SUNY BROCKPORT, RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (CHRIS LIBERATI-CONANT OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Victoria M. Argento, J.], entered July 14, 2022) to review a determination of respondent. The determination found petitioner responsible for various violations of respondent's code of student conduct and imposed a penalty.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul a determination finding him responsible for violations of respondent's code of student conduct and, inter alia, suspending him for a period of two years. We confirm the determination.

In reviewing the determination here, this Court "must accord deference to the findings of the administrative decision-maker" and has " 'no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence' " (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1045 [2018]; *see generally* CPLR 7803 [4]). Substantial evidence is "less than a preponderance of the evidence . . . and demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Haug*, 32 NY3d at 1045-1046 [internal quotation marks omitted]). Where there is substantial evidence to support a determination, the "determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions" (*Matter of Collins v Codd*, 38 NY2d 269, 270 [1976]; *see Haug*, 32 NY3d at 1046). Further, in considering whether a determination is supported by substantial evidence, it is "the

province of the hearing board to resolve any conflicts in the evidence and make credibility determinations" (*Haug*, 32 NY3d at 1046).

Here, the question is not whether petitioner violated a law or regulation of the State of New York, but whether petitioner violated respondent's code of student conduct, with which petitioner agreed to comply when he enrolled as a student. Contrary to petitioner's contention, respondent's determination after a hearing that petitioner violated certain provisions of the code governing sexual contact between students is supported by substantial evidence. In finding petitioner responsible for the alleged violations, respondent applied the code's definition of "[a]ffirmative consent," which provides that consent must be "active, not passive" and must consist of "words or actions [that] create clear permission regarding [a person's] willingness to engage in the sexual activity." As defined, affirmative consent does not include "[s]ilence or lack of resistance" and a person may be unable to affirmatively consent depending upon the degree of their intoxication due to alcohol, drugs, or other intoxicants. Further, the code provides that the charged student's own intoxication is not a defense to an allegation of sexual misconduct. Here, after affording due deference to respondent's credibility determinations and its weighing of the conflicting evidence, we conclude that there is substantial evidence in the record to support respondent's determination and, thus, we "may not substitute [our] judgment for that of [respondent], even if [we] would have decided the matter differently" (*id.*).

Contrary to petitioner's further contention, we conclude that respondent substantially adhered to its own procedural rules during the disciplinary proceeding and did not otherwise fail to act as a fair and detached factfinder (*see Matter of Alexander M. v Cleary*, 205 AD3d 1073, 1078 [3d Dept 2022]; *Matter of Mavrogian v State Univ. of N.Y. at Buffalo*, 186 AD3d 975, 975 [4th Dept 2020]; *see also Matter of Agudio v State Univ. of N.Y.*, 164 AD3d 986, 991-992 [3d Dept 2018]).

We also reject petitioner's contention that the sanctions imposed by respondent were "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks omitted]). Petitioner's additional challenge to the sanctions imposed was not raised during the administrative process or on the administrative appeal and, thus, it is not properly before us (*see Mavrogian*, 186 AD3d at 977; *see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

4

KA 21-01502

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS STACKHOUSE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (REID W. GULSVIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 24, 2021. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Same memorandum as in *People v Stackhouse* ([appeal No. 1] — AD3d — [Mar. 17, 2023] [4th Dept 2023]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

7

KA 19-01414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AKIL B. MABRY, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 9, 2019. The judgment convicted defendant upon a nonjury verdict of assault in the second degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, tampering with physical evidence and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three of the indictment and imposing an indeterminate sentence of imprisonment of 3½ to 7 years on that count, to run concurrently with the sentences imposed on the remaining counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [2]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant's conviction stems from two separate incidents. In the first incident, defendant struck the victim with a barstool after they had a verbal argument. In the second incident, the victim spotted defendant approximately six weeks later while she was walking down the street and contacted the police, who apprehended him and eventually recovered a semiautomatic pistol in his possession.

Defendant contends that he is entitled to modification of the judgment of conviction and dismissal of the second count of the indictment charging him with criminal possession of a weapon in the second degree because "criminal convictions under Penal Law § 265.03 (3) are necessarily unconstitutional" under the Second Amendment of

the United States Constitution as interpreted by the United States Supreme Court in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Defendant correctly concedes that his constitutional challenge is not preserved for our review inasmuch as he failed to raise any such challenge before the trial court, and we reject defendant's claims that his constitutional challenge to his conviction under section 265.03 (3) is exempt from preservation (*see People v McWilliams*, — AD3d —, — [Mar. 17, 2023] [4th Dept 2023]).

Defendant next contends that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the second degree because there is insufficient evidence that the pistol he possessed was operable at the time he possessed it. That contention is not preserved for our review inasmuch as defendant did not renew his motion for a trial order of dismissal after presenting evidence (*see People v Brown*, 194 AD3d 1398, 1399 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]).

In any event, defendant's contention is without merit. It is well settled that, "to establish criminal possession of a handgun[,] the People must prove that the weapon [possessed] is operable" (*People v Longshore*, 86 NY2d 851, 852 [1995]; *see People v Redmond*, 182 AD3d 1020, 1022 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *People v Bailey*, 19 AD3d 431, 432 [2d Dept 2005], *lv denied* 5 NY3d 785 [2005]). Here, when the police apprehended defendant after the victim's identification of him, he was brought to the police station and placed in an interview room. While in that room, defendant removed a pistol from his pants and disassembled it. The police observed defendant's actions through the live camera feed, entered the room, and seized the weapon, which was in two pieces. A few days later, a firearms examiner determined that the pistol was missing a disassembly pin and, without that pin, the pistol was inoperable. The police searched the interview room and located a pin on the floor. The firearms examiner inserted that pin into the reassembled pistol and was able to fire rounds from it. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that the pistol was operable at the time defendant possessed it, even though it was rendered temporarily inoperable after defendant disassembled it (*see People v Habeeb*, 177 AD3d 1271, 1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]).

Defendant contends that Supreme Court erred in denying his request for a missing witness charge with respect to a purported witness to the assault of the victim. We reject that contention. The court properly denied the request because defendant failed to establish that the witness was " 'believed to be knowledgeable about a material issue pending in the case' " (*People v Smith*, 33 NY3d 454, 458-459 [2019]; *see People v Goldson*, 196 AD3d 599, 600 [2d Dept 2021], *lv denied* 37 NY3d 1161 [2022]; *People v Desius*, 188 AD3d 1626, 1629 [4th Dept 2020], *lv denied* 36 NY3d 1096 [2021]). In any event, we conclude that any alleged error in the court's refusal to give a missing witness charge is harmless inasmuch as the evidence of defendant's guilt of the assault is overwhelming and there is no

significant probability that defendant would have been acquitted of that count but for the error (*see People v Cehfus*, 140 AD3d 1644, 1644-1645 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016], *lv denied* 30 NY3d 1059 [2017]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's contention, the sentence imposed on the count of criminal possession of a weapon in the second degree is not unduly harsh or severe. However, the determinate sentence and period of postrelease supervision imposed by the court on the criminal possession of a weapon in the third degree count (Penal Law § 265.02 [1]) is illegal inasmuch as that conviction is a nonviolent class D felony (*see* §§ 70.06 [3] [d]; [4] [b]; 70.45 [1]; *People v McCoy*, 100 AD3d 1422, 1423 [4th Dept 2012]). Defendant should have been sentenced as a second felony offender to an indeterminate sentence of imprisonment with a maximum term between 4 to 7 years and a minimum term of one-half the maximum, with no postrelease supervision (Penal Law §§ 70.06 [2], [3] [d]; [4] [b]; 70.45 [1]). " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]). In the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence (*see People v Thacker*, 156 AD3d 1482, 1483-1484 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). We therefore modify the judgment by vacating the sentence imposed on count three of the indictment and imposing an indeterminate sentence of imprisonment of 3½ to 7 years with no postrelease supervision, to run concurrently with the remaining counts (*see id.; see also People v Dubois*, 203 AD3d 1621, 1624 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

9

KA 21-01501

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS STACKHOUSE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (REID W. GULSVIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 24, 2021. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty during a single plea proceeding of, respectively, manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the second degree (§ 120.05 [7]). We affirm in both appeals.

Contrary to defendant's contention in each appeal, the record establishes that he validly waived his right to appeal (*see People v Cromie*, 187 AD3d 1659, 1659 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]; *see generally People v Thomas*, 34 NY3d 545, 557-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The valid waiver of the right to appeal forecloses appellate review of defendant's challenges in appeal No. 1 to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]) and County Court's discretionary decision to deny youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1024 [2015]).

Contrary to defendant's contention in appeal No. 2, the record establishes that, in addition to rendering a youthful offender determination with respect to the manslaughter conviction, the court fulfilled its obligation to make such a determination with respect to the assault conviction as well (*see People v Peyrefitte*, 210 AD3d 438, 438 [1st Dept 2022]; *see generally* CPL 720.20 [1]; *People v Rudolph*, 21 NY3d 497, 499 [2013]). Although the court understandably focused

most of its attention on the more serious crime of manslaughter, the transcript of the combined sentencing proceeding demonstrates that the court expressly acknowledged its contemplation of a youthful offender adjudication with respect to each conviction and that, after weighing the requisite factors, determined that it would "not grant[ ] youthful offender adjudication in this matter"—i.e., the matter set for sentencing involving both crimes. The court effectively determined that "the seriousness and volume of defendant's crimes (which included a homicide and [an]other violent act[]) rendered him an unsuitable candidate for youthful offender treatment as to [either] of his convictions" (*Peyrefitte*, 210 AD3d at 438). Defendant's valid waiver of the right to appeal forecloses appellate review of any challenge to the court's discretionary decision to deny youthful offender status on the assault conviction in appeal No. 2 (*see Pacherille*, 25 NY3d at 1024).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

16

CA 22-00466

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

WILLIAM ARMSTRONG, ET AL., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER P. MAUGANS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 14, 2022. The order granted the motion of defendant 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 denied and the complaint is reinstated.

Memorandum: Plaintiffs, retired employees of defendant, Town of Tonawanda, commenced this breach of contract action seeking to compel defendant to reimburse health insurance premiums, which they allege they are entitled to pursuant to the terms of a collective bargaining agreement (CBA) between defendant and the union that represented plaintiffs during their employment (union). Defendant moved to dismiss the complaint, contending, inter alia, that the grievance procedure in the CBA was the exclusive procedure by which plaintiffs could seek redress and that plaintiffs were required to bring their claims through the grievance procedure despite their status as retirees. Plaintiffs opposed defendant's motion, arguing, inter alia, that the CBA restricted the class of individuals who could file a grievance to active employees. Supreme Court determined that the language of the CBA contained no such restriction and granted defendant's motion. We agree with plaintiffs that the court erred in its interpretation of the CBA, and we therefore reverse the order, deny defendant's motion, and reinstate the complaint.

It is well settled that, "when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract" (*Matter of Board of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508 [1987], *cert denied* 485

US 1034 [1988]; *see Clark v County of Cayuga*, 212 AD2d 963, 963 [4th Dept 1995]). There are two exceptions to that rule. "The first exception applies when the contract provides otherwise . . . , i.e., the contract either expressly allows such suits or implicitly does so by excluding the dispute at issue from, or not covering it within, the ambit of the contractual dispute resolution procedures" (*Buff v Village of Manlius*, 115 AD3d 1156, 1157 [4th Dept 2014] [internal quotation marks omitted]; *see Ledain v Town of Ontario*, 192 Misc 2d 247, 251 [Sup Ct, Wayne County 2002], *affd* 305 AD2d 1094 [4th Dept 2003]). "The second exception applies when the union fails in its duty of fair representation . . . , but the employee must allege and prove that the union breached its duty to provide fair representation to the employee" (*Buff*, 115 AD3d at 1157 [internal quotation marks omitted]; *see Ambach*, 70 NY2d at 508). Here, plaintiffs did not allege or show that the union breached its duty of fair representation (*see Clark*, 212 AD2d at 963), and therefore only the first exception is at issue.

In relevant part, the CBAs in effect prior to plaintiffs' retirement provide that the grievance process is intended to settle any "grievance which may arise between the parties over the application, meaning or interpretation of this [CBA]." Each CBA further provides that the first step of the grievance procedure requires "[a]n employee covered by this agreement . . . [to] file a grievance in writing to his department head." Inasmuch as plaintiffs were not aggrieved until after they had retired, and inasmuch as the CBAs "expressly limit[] the availability of the grievance procedure to current employees," we conclude that "the clear and unambiguous terms of the [CBAs]" establish that the grievance process was not available to plaintiffs at the time they became aggrieved (*Matter of DeRosa v Dyster*, 90 AD3d 1470, 1471-1472 [4th Dept 2011]; *see Buff*, 115 AD3d at 1158; *cf. Ledain*, 192 Misc 2d at 251-252).

We have considered defendant's contentions raised as alternative grounds for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Matter of Harnischfeger v Moore*, 56 AD3d 1131, 1131-1132 [4th Dept 2008]) and conclude that they lack merit.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

17

CA 22-00012

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

THOMAS E. CARCONE, IN HIS CAPACITY AS A MEMBER OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA AND ON BEHALF OF ALL MEMBERS OF THE UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES NOON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, AND UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

ZACHARY C. OREN, UTICA (DAVID A. LONGERETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (RONALD G. DUNN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered October 28, 2021. The order, inter alia, denied the motion of defendants to dismiss the second amended complaint.

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

Memorandum: In this derivative action, plaintiffs, in their capacity as purported members of defendant Utica Paid Firemen's Relief Association of City of Utica (Association), seek several forms of relief on behalf of the members of the Association. In appeal No. 1, defendants, as limited by their brief, appeal from an order insofar as it denied their motion to dismiss the second amended complaint. In appeal No. 2, defendants appeal from an order denying their motion to dismiss the third amended complaint.

Initially, we dismiss the appeal from the order in appeal No. 1 as moot inasmuch as the third amended complaint superseded the second amended complaint and became the only operative complaint in the action (*see Basile v Riley*, 188 AD3d 1607, 1608 [4th Dept 2020]; *Morrow v MetLife Invs. Ins. Co.*, 177 AD3d 1288, 1288 [4th Dept 2019]). We nonetheless conclude in appeal No. 2 that, contrary to defendants' contention, Supreme Court properly denied their motion to dismiss the

third amended complaint (*see generally Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

18

CA 22-00815

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

THOMAS E. CARCONE, GERALD ALSANTE, MATT BUTTONSHON, FRANCIS GUARASCIO, WILLIAM MASON, ERIC SPRINGER, AND MARCEL WROBEL, IN THEIR CAPACITY AS MEMBERS OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA AND ON BEHALF OF ALL MEMBERS OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES NOON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA AND UTICA PAID FIREMEN'S RELIEF ASSOCIATION OF CITY OF UTICA, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

ZACHARY C. OREN, UTICA (DAVID A. LONGERETTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (RONALD G. DUNN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 13, 2022. The order denied the motion of defendants to dismiss the third amended complaint.

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

Same memorandum as in *Carcone v Noon* ([appeal No. 1] — AD3d — [Mar. 17, 2023] [4th Dept 2023]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

22

CA 22-00382

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

CHRISTINA M. WESTERMEYER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL A. WHELAN AND LORI A. WHELAN,
DEFENDANTS-RESPONDENTS.

LOTEMPIO P.C. LAW GROUP, BUFFALO (ANDREW T. GILL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 22, 2022. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when she fell after stepping off the front stoop of a home owned by defendants. Plaintiff appeals from an order that granted defendants' motion for summary judgment dismissing the complaint. We affirm.

Defendants met their initial burden by submitting evidence establishing that there was no dangerous or defective condition existing on the property at the location where plaintiff fell and that the stoop "was in compliance with the applicable codes" (*Corbett v Adelphia W. N.Y. Holdings, LLC*, 45 AD3d 1293, 1294 [4th Dept 2007]; *see Mann v Autozone Northeast, Inc.*, 148 AD3d 1646, 1646 [4th Dept 2017]; *Zammiello v Senpike Mall Co.*, 300 AD2d 1124, 1125 [4th Dept 2002]). We reject plaintiff's contention that she raised a triable issue of fact in opposition by submitting the affidavit of an expert stating that the area where she fell presented a hazard (*see Corbett*, 45 AD3d at 1294; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff's expert affidavit was conclusory and speculative and, therefore, insufficient to raise a triable issue of fact whether a dangerous condition existed (*see DiStefano v Ulta Salon*, 95 AD3d 932, 933 [2d Dept 2012]; *see generally Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277 [4th Dept 2005]). In any event, "[e]ven if an expert alludes to potential defects . . . , the plaintiff still must establish that the . . . fall was connected to

the supposed defect, absent which summary judgment is appropriate" (*Corbett*, 45 AD3d at 1294 [internal quotation marks omitted]). Here, plaintiff failed to establish that any of the alleged defects caused her to fall (*see id.* at 1295; *see also Mann*, 148 AD3d at 1646). Indeed, plaintiff submitted her deposition testimony, wherein she stated that she was caused to step off of the stoop as a result of the front door opening: in other words, not as a result of any dangerous or defective condition on the property.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

29

CAF 21-00502

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

IN THE MATTER OF RYANNA H. AND SERON M.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MONIQUE H., RESPONDENT-APPELLANT.

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

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), dated March 10, 2021 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding determining that she neglected her oldest child and derivatively neglected her younger child. We affirm.

As relevant here, a neglected child is 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 various areas (Family Ct Act § 1012 [f] [i]). "[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]; *Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1394-1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]).

Here, the mother was alleged to have struck her older child on multiple occasions with an electrical cord and a broomstick handle. Some of the incidents followed misbehavior by the older child. "Although a parent may use reasonable force to discipline his or her

child and to promote the child's welfare . . . , the infliction of excessive corporal punishment constitutes neglect (*see* Family Ct Act § 1012 [f] [i] [B]). A single incident of excessive corporal punishment can be sufficient to support a finding of neglect" (*Balle S.*, 194 AD3d at 1395; *see Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1413 [4th Dept 2022]; *Matter of Justin M.F. [Randall L.F.]*, 170 AD3d 1514, 1515 [4th Dept 2019]).

In addition, a finding of derivative neglect may be made "where the evidence with respect to the child found to be . . . neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care" (*Matter of Sean P. [Sean P.]*, 162 AD3d 1520, 1520 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]; *see Balle S.*, 194 AD3d at 1396).

We conclude that there is a sound and substantial basis in the record for Family Court's finding that the older child was neglected and that the younger child was derivatively neglected (*see generally* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [a] [i]; [b] [i]; *Nicholson*, 3 NY3d at 368, 371; *Balle S.*, 194 AD3d at 1395-1396). The record establishes that "each child's out-of-court statements were sufficiently corroborated, and cross-corroborated," by the photographs and witnesses' observations of the older child's injuries (*Matter of Dixon v Crow*, 192 AD3d 1467, 1468 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *see Matter of Rashawn J. [Veronica H.-B.]*, 159 AD3d 1436, 1436 [4th Dept 2018]; *Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]). The fact that the older child's injuries "did not require medical attention does not preclude a finding of neglect based on the infliction of excessive corporal punishment" (*Balle S.*, 194 AD3d at 1395).

With respect to the finding of derivative neglect, we conclude that the mother's "use of excessive corporal punishment on the [older] child, visibly demonstrated by the photographs of her injuries, showed that [the mother] had a fundamental defect in [her] understanding of [her] duties as a parent and an impaired level of parental judgment sufficient to support a determination that the younger child[ ] had been derivatively neglected" (*Balle S.*, 194 AD3d at 1396). Moreover, the mother's neglect of the older child was "so closely connected with the care of [the younger child] as to indicate that [he is] equally at risk" (*Matter of Marino S.*, 100 NY2d 361, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Rashawn J.*, 159 AD3d at 1437).

The mother's only defense was that the children were lying, which presented the court with credibility determinations to make. The court rejected the mother's testimony, and we see no basis to disturb the court's assessment and resolution of those credibility issues (*see Dixon*, 192 AD3d at 1469; *Bryan O.*, 153 AD3d at 1642).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

36

CA 22-00603

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

JEANNIE-MARIE MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC;

KATHLEEN MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC; AND

MICHAEL MCGUIRE, INDIVIDUALLY AND SUING IN THE RIGHT OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, AND SHAMROCK SEVEN ACP, LLC,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, SHAMROCK SEVEN ACP, LLC, DEFENDANT-RESPONDENT,

MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC,
DEFENDANTS-RESPONDENTS.

UNDERBERG & KESSLER LLP, ROCHESTER (AARON M. GRIFFIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR DEFENDANT-RESPONDENT F. JAMES MCGUIRE, INDIVIDUALLY AND AS GENERAL MANAGER OF MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC,

AND SHAMROCK SEVEN ACP, LLC.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MCGUIRE DEVELOPMENT COMPANY, LLC, DELAWARE AVENUE INVESTORS, LLC, GENESEE STREET INVESTORS, LLC, MCG REAL ESTATE HOLDINGS, LLC, MCGUIRE ACQUISITIONS LLC, MCGUIRE CAPITAL, LLC, MCGUIRE PV HOLDING L.P., AND SHAMROCK SEVEN ACP, LLC.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 11, 2022. The order, inter alia, denied that part of the motion of plaintiffs seeking relief from a stipulated standstill order.

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

Memorandum: In this dispute over the ownership and operation of certain family businesses, plaintiffs appeal from an order that, inter alia, denied that part of their motion seeking relief from a stipulated standstill order, pursuant to which defendants were prohibited from engaging in "any transactions and conduct outside the ordinary course of business." In particular, plaintiffs sought leave to conduct a vote to remove and replace the general manager of defendants McGuire Development Company, LLC, MCG Real Estate Holdings, LLC, and McGuire Acquisitions LLC (company defendants). Plaintiffs' sole contention on appeal is that, properly interpreted, the stipulated standstill order did not prohibit them from conducting such a vote, and thus Supreme Court erred in interpreting the stipulated standstill order as restricting their ability to act as members of the company defendants. That contention is unpreserved for appellate review inasmuch as plaintiffs failed to raise that issue before the motion court (*see* CPLR 5501 [a]; *Panaro v Athenex, Inc.*, 207 AD3d 1069, 1070 [4th Dept 2022]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). Indeed, we note that, before the motion court, plaintiffs expressly conceded that the stipulated standstill order applied to them, and thus they merely sought relief from that order in the form of leave to conduct the aforementioned vote. We therefore affirm.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

56

KA 18-01755

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH A.B., JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an adjudication of the Monroe County Court (Douglas A. Randall, J.), rendered August 21, 2018. Defendant was adjudicated a youthful offender upon a nonjury verdict finding defendant guilty of robbery in the second degree.

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

Memorandum: Defendant appeals from a youthful offender adjudication based upon a nonjury verdict finding him guilty of robbery in the second degree (Penal Law § 160.10 [1]). We affirm.

Defendant's contention regarding the legal sufficiency of the evidence is preserved only with respect to the issue of identity (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, his contention is without merit inasmuch as a rational trier of fact could have found that the victim's testimony and other evidence established each element of the crime, including defendant's identity as the perpetrator of the robbery, beyond a reasonable doubt (*see People v Withrow*, 170 AD3d 1578, 1578-1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]; *People v Maxwell*, 103 AD3d 1239, 1240 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013]; *see generally People v Delamota*, 18 NY3d 107, 113 [2011]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Maxwell*, 103 AD3d at 1240; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim "never wavered in [his] testimony regarding the events or [his] identification of defendant" as the person who forcibly stole from him (*People v Cooper*, 134 AD3d 1583, 1585 [4th

Dept 2015] [internal quotation marks omitted]; *see People v Freeman*, 206 AD3d 1694, 1695-1696 [4th Dept 2022]). Moreover, "several aspects of the victim's account were corroborated by the testimony of other witnesses" and other evidence (*Maxwell*, 103 AD3d at 1241), including soundless video footage of the incident captured by an exterior surveillance system. The video footage also corroborates the victim's testimony that a second individual was "[k]eeping watch" during the robbery. Contrary to defendant's contention, the People were not required to establish that the second person actually prevented the victim from leaving the scene, or that the person interfered with anyone else who might have come to the victim's aid, in order to establish that defendant was "aided by another person actually present" for purposes of Penal Law § 160.10 (1) (*see People v McIntosh*, 158 AD3d 1289, 1290 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). Here, the victim's testimony and the second individual's body language, as can be seen on the video, suggests that the second individual was well aware of defendant's plans, that he was indeed on the lookout, and that he would be available to render assistance if defendant needed it (*see People v White*, 179 AD3d 1444, 1444 [4th Dept 2020], *lv denied* 35 NY3d 945 [2020]; *see also McIntosh*, 158 AD3d at 1290; *see generally Bleakley*, 69 NY2d at 495).

Finally, we reject defendant's contention that he was denied effective assistance of counsel due to defense counsel's failure to pursue a suppression hearing with respect to certain physical evidence recovered from a search of an unrelated party's apartment. "To prevail on his claim of ineffective assistance of counsel, defendant 'must demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to pursue colorable claims,' and '[o]nly in the rare case will it be possible, based on the trial record alone, to deem [defense] counsel ineffective for failure to pursue a suppression [hearing]' " (*People v Roots*, 210 AD3d 1532, 1533-1534 [4th Dept 2022], quoting *People v Carver*, 27 NY3d 418, 420 [2016]). Here, we conclude that defendant failed to meet his burden, particularly inasmuch as the record indicates that defendant "had relatively tenuous ties to the apartment" in which the evidence was recovered (*People v Ortiz*, 83 NY2d 840, 842 [1994]) and the resident of the apartment consented to the search (*see People v Plumley*, 111 AD3d 1418, 1419 [4th Dept 2013], *lv denied* 22 NY3d 1140 [2014]; *People v Loomis*, 17 AD3d 1019, 1020 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

62

CA 22-00315

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

FORRESTAL GRAY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SUMMIT ASSETS, LLC, DEFENDANT-APPELLANT.

PENINO & MOYNIHAN, LLP, WHITE PLAINS (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBERT D. BERKUN, BUFFALO (PHILIP A. MILCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered February 7, 2022. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he slipped and fell while stepping off the stairs and onto a concrete pad on property owned by defendant. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint. We affirm. Defendant failed to meet its initial burden on the motion of establishing as a matter of law that it did not create or have actual or constructive notice of the defective condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Salim v Western Regional Off-Track Betting Corp., Batavia Downs*, 100 AD3d 1370, 1372 [4th Dept 2012]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

68

KA 21-01030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUENTIN SUTTLES, DEFENDANT-APPELLANT.

JONATHAN ROSENBERG, PLLC, BROOKLYN (JONATHAN ROSENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 28, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress physical evidence recovered after the vehicle in which he was a passenger was stopped by the police. We agree.

Specifically, defendant contends that the stop of the vehicle was unlawful because the evidence before the suppression court is insufficient to establish that the two police officers who conducted the stop had probable cause to believe that the driver of the vehicle had committed a traffic violation. At the suppression hearing, the officers testified that they first observed the vehicle in which defendant was a passenger when it passed in front of their patrol car, which was stopped or coming to a stop on a side street. One of the officers testified that he visually estimated the vehicle, which was in a 30 mph zone, to be traveling at approximately 40 miles per hour; the other testified that he visually estimated the speed to be approximately 40-45 miles per hour. Based on these visual estimates, the officers initiated a vehicle stop. It is undisputed that the officers did not use radar at any point, nor did they pace the vehicle—i.e., follow it at a consistent distance—to confirm their

visual estimates before initiating the stop. When questioned regarding their training to visually estimate a vehicle's speed without pacing, one officer stated that he did not recall receiving such training, and the other testified that he did not believe such training existed. On further questioning, one of the officers testified that he had experience visually estimating speed due to the amount of time he spent on the road as a patrol officer, but failed to provide a reasoned explanation of how the time he spent driving on city streets enabled him to acquire the ability to visually estimate speed.

While it is well settled that a qualified police officer's testimony that he or she visually estimated the speed of a defendant's vehicle may be sufficient to establish that the defendant exceeded the speed limit (*see People v Olsen*, 22 NY2d 230, 232 [1968]), here, the People failed to establish the officers' training and qualifications to support their visual estimates of the speed of the vehicle in which defendant was a passenger (*see People v Reedy*, 211 AD3d 1629, 1630 [4th Dept 2022]; *cf. People v Scott*, 189 AD3d 2110-2111 [4th Dept 2020], *lv denied* 36 NY3d 1123 [2021]; *see generally People v Smith*, 162 AD2d 999, 999 [4th Dept 1990], *lv denied* 76 NY2d 896 [1990]). Thus, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping the vehicle in which defendant was a passenger in the first instance, we conclude that the court erred in refusing to suppress the physical evidence seized as a result of the traffic stop. Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see People v Dortch*, 186 AD3d 1114, 1116 [4th Dept 2020]).

In light of our determination, we need not reach defendant's remaining contention.

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and vote to affirm because I conclude that Supreme Court properly refused to suppress physical evidence inasmuch as the weight of the evidence at the suppression hearing supports the court's determination that the police had probable cause to stop the vehicle in which defendant was a passenger and which they observed traveling at an excessive rate of speed in violation of Vehicle and Traffic Law § 1180 (d) (1) (*see generally People v Hinshaw*, 35 NY3d 427, 430 [2020]). Ultimately, the court's determination that the two testifying police officers credibly testified to observing the vehicle travel in excess of the posted speed limit is entitled to great deference, and I perceive no reason to disturb that credibility determination (*see People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]). In my view, the majority's conclusion that "the People failed to establish the officers' training and qualifications to support their visual estimates of the speed of the vehicle in which defendant was a passenger" and its principal reliance upon, inter alia, *People v Reedy* (211 AD3d 1629, 1630 [4th Dept 2022]) and *People v Smith* (162 AD2d 999, 999 [4th Dept 1990], *lv denied* 76 NY2d 896 [1990]), conflate the

standard by which we weigh evidence received without objection with the sufficiency of admitted evidence to prove a fact beyond a reasonable doubt.

In reviewing the court's suppression determination, we consider whether the People met their "burden of going forward to show the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361, 367 [1971] [internal quotation marks and emphasis omitted]; *see People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]; *People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). Specifically, the People were required to demonstrate that the police had probable cause to stop the vehicle for speeding (*see generally Hinshaw*, 35 NY3d at 430). It is well settled that probable cause "does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a *reasonable belief* that an offense has been or is being committed" (*People v Guthrie*, 25 NY3d 130, 133 [2015], *rearg denied* 25 NY3d 1191 [2015] [internal quotation marks omitted]; *see generally* CPL 70.10 [2]). Additionally, "[a] police officer who can articulate credible facts establishing reasonable cause to believe that someone has violated a law has established a reasonable basis to effectuate a [traffic] stop" (*Guthrie*, 25 NY3d at 133 [internal quotation marks omitted]).

In reversing and suppressing the physical evidence, the majority's essential position is that the People's evidence at the hearing was *insufficient* to establish that the police had probable cause to stop the vehicle because the two officers' testimony about the vehicle's excessive speed was inadmissible due to an inadequate foundation. Crucially, however, the officers' testimony about the vehicle's excessive rate of speed came into evidence without *any* objection from defense counsel challenging its admissibility on that ground (*see generally* CPL 470.05 [2]; *People v Guzman*, 226 AD2d 218, 219 [1st Dept 1996], *lv denied* 88 NY2d 986 [1996]; *People v Arefaine*, 221 AD2d 979, 979-980 [4th Dept 1995], *lv denied* 87 NY2d 919 [1996]). It is well settled that "[e]vidence, though not competent, received without objection may be relied upon to establish a fact in controversy" (*Ford v Snook*, 205 App Div 194, 198 [4th Dept 1923], *affd* 240 NY 624 [1925]; *see People v Lawrence*, 64 NY2d 200, 206 [1984]; *Matter of Kellogg v Kellogg*, 300 AD2d 996, 996-997 [4th Dept 2002]). Because the officers' testimony about the vehicle's speed was properly in the record before the suppression court, I conclude that we cannot deem the evidence to be legally insufficient to support the court's determination—rather, the question pertains to the weight that the testimony is to be accorded.

Here, defendant does not contend that the officers' testimony that the vehicle was speeding was insufficient because it was unreasonable under the circumstances, and neither I nor the majority reach such a conclusion. In my view, evaluating the credibility of a witness's testimony for purposes of establishing probable cause—once the underlying testimony is admitted into evidence—solely involves a review of the *weight* accorded such testimony, not its sufficiency.

Thus, by requiring that the People—in the first instance and absent any objection by defendant—provide a detailed foundation during the suppression hearing for a visual estimate of speed based on an officer's "training and qualifications," the majority imposes a threshold *sufficiency* requirement on that testimony. In my view, such a requirement is not founded on any statute and is contrary to longstanding common law regarding evidence of visual estimates of the speed of motor vehicles.

Indeed, in concluding that the evidence here is legally insufficient to support the court's suppression determination, the majority's principal error is its reliance on *Reedy* (*see* 211 AD3d at 1630) and *Smith* (*see* 162 AD2d at 999), as well as on *People v Olsen* (22 NY2d 230 [1968])—the Court of Appeals case upon which *Reedy* and *Smith* were largely predicated (*see Olsen*, 22 NY2d at 231-232). In *Olsen* and *Smith*, each court considered whether there was legally sufficient evidence to *convict* the defendant beyond a reasonable doubt of violating the Vehicle and Traffic Law. Here, in contrast, the underlying evidence of speeding at the suppression hearing was not admitted to establish defendant's guilt beyond a reasonable doubt and, in any event, its admissibility was uncontested on foundational grounds. In short, I see no reason, given the different applicable standards, to import the sufficiency requirements of *Olsen* and *Smith*—needed to establish a defendant's *guilt*—into the suppression context, where all that is necessary is probable cause.

To be sure, one of the cases relied on by the majority, *Reedy*, supports its bottom-line resolution of this case, particularly inasmuch as it too arises out of the context of a suppression decision (*see* 211 AD3d at 1630). However, for the reasons elucidated above, *Reedy*'s central rationale that the People are required in the first instance, and absent any objection by the defendant, to provide a detailed foundation during the suppression hearing for a visual estimate of speed, and its reliance on *Smith* and *Olsen*, suffer from the same central deficiencies as the majority's reasoning in this case—particularly its imposition of a stringent sufficiency requirement to establish a witness's qualifications to estimate the speed of a vehicle. Thus, it is my view that *Reedy* also was an errant diversion from well-settled precedent on the issue of what evidence is required to demonstrate a visual estimate of the speed of a vehicle.

Regardless, even met on the majority's own terms, I conclude that the officers' testimony did not lack an adequate foundation with respect to the evidence that the vehicle was speeding. "It has long been the rule that '[a]n estimate of the speed at which an automobile is moving at a given time is generally viewed as a matter of common observation rather than expert opinion, and it is well settled that any person of ordinary ability and intelligence having the means or opportunity of observation is competent to testify as to the rate of speed of such a vehicle' " (*Guzek v B & L Wholesale Supply, Inc.*, 151 AD3d 1662, 1663-1664 [4th Dept 2017]). Similarly, "a lay witness will ordinarily be permitted to testify as to the estimated speed of an automobile, based upon the prevalence of automobiles in our society, [and] the frequency with which most people view them at various

speeds" (*Guthrie v Overmyer*, 19 AD3d 1169, 1170 [4th Dept 2005] [internal quotation marks omitted]). This Court also has held that even when a police officer does "not testify in detail about his [or her] training, the court [is] entitled to assume, for purposes of [a suppression] hearing, that a police officer with over a year's experience can visually estimate the speed of a moving vehicle" (*People v Saylor*, 166 AD2d 899, 899 [4th Dept 1990], *lv denied* 77 NY2d 966 [1991]). We also have held that, for purposes of a conviction, it was not error for a court to admit "the opinion of [a] lay witness that defendant's automobile was traveling 'fast' " (*People v Williams*, 182 AD2d 1084, 1084 [4th Dept 1992], *lv denied* 80 NY2d 840 [1992]).

Here, under the above-articulated standard, the court properly concluded that the testimony of the two officers met the People's "burden of going forward to show the legality of the police conduct in the first instance" (*Berrios*, 28 NY2d at 367 [internal quotation marks and emphasis omitted]). Specifically, the officers testified that they each had about four years' experience in their jobs, and that their conclusions were based on their experience, irrespective of any formal training pertaining to visual speed estimates. To that end, one officer testified that he had made "numerous stops regarding traffic," and the other officer indicated that he spent a significant amount of time on the road and made determinations about the speeds of vehicles, establishing his experience in visually estimating those speeds. Thus, even if we were required to sua sponte analyze the foundation of the evidence in this context, the evidentiary threshold for a visual estimate of speed in New York is so minimal that the evidence proffered by the People here is clearly sufficient to support the court's determination—i.e., that the officers' testimony established that they had probable cause to believe that the vehicle had been speeding at the time of the traffic stop (*see generally Williams*, 182 AD2d at 1084; *Saylor*, 166 AD2d at 899).

Nevertheless, with respect to the officers' testimony, "[t]he question as to the opportunity of a witness to judge, under the particular circumstances, the speed of an automobile, has been held, as a general rule, to go to the weight of his testimony rather than to its admissibility" (*Marcucci v Bird*, 275 App Div 127, 129 [3d Dept 1949]). Indeed, "[i]t is well settled that great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*Layou*, 134 AD3d at 1511). Here, the suppression court was in the best position to observe the credibility of the testifying officers, who essentially cross-corroborated each other's testimony about the speed of the vehicle. Further supporting the court's credibility determinations, and corroborating the testimony of the officers, I note that the court also received evidence, without objection and which in any event would have been admissible (*see* CPL 710.60 [4]; *People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]), that the vehicle's driver admitted that she was traveling in excess of the speed limit. Consequently, I conclude that the court's determination is supported by the weight of the credible evidence in the record, and I would

therefore affirm.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

71

KA 19-01426

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEEN ROSS, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 13, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]). The charges arose from an incident in which defendant allegedly dropped a handgun on the ground while he was being pursued by the police on foot following their attempt to initiate a traffic stop.

Initially, defendant contends that the statutes under which he was convicted are unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Defendant failed to raise a constitutional challenge before Supreme Court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, — AD3d —, 2023 NY Slip Op 00785, *1 [4th Dept 2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]). Contrary to defendant's contention, his "challenge to the constitutionality of [the statutes] must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent there is conflicting testimony about whether defendant was the one who possessed the handgun recovered by the police on the night in question, we conclude that it merely "presented an issue of credibility for the jury to resolve" (*People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018] [internal quotation marks omitted]).

We agree with defendant, however, that reversal is required on the ground that the court erred in granting the People's request to charge the jury on the issue of constructive possession. Defendant preserved his contention by objecting to the instruction on constructive possession (*see generally* CPL 470.05 [2]; *People v Burke*, 197 AD3d 967, 968 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *cf. People v Linares*, 167 AD3d 1067, 1070 [3d Dept 2018], *lv denied* 33 NY3d 950 [2019]). On the merits, and as the People effectively concede, we agree with defendant that the court erred in instructing the jury on constructive possession because there is no view of the evidence from which a jury could have concluded that defendant constructively possessed the handgun on the night in question—i.e., that he exercised dominion or control over the handgun by a sufficient level of control over the area where it was recovered (*see People v Diallo*, 137 AD3d 1681, 1682 [4th Dept 2016]; *People v Nevins*, 16 AD3d 1046, 1047 [4th Dept 2005], *lv denied* 4 NY3d 889 [2005], *cert denied* 548 US 911 [2006]; *see generally People v Solomon*, 96 AD3d 1396, 1397 [4th Dept 2012]). We further conclude that the error is not harmless inasmuch as we cannot determine whether the jury's general verdict was based upon defendant's actual possession of the handgun or his constructive possession of it (*see Diallo*, 137 AD3d at 1682-1683; *see also People v Kims*, 24 NY3d 422, 438 [2014]; *People v Martinez*, 83 NY2d 26, 35 [1993], *cert denied* 511 US 1137 [1994]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

72

KA 20-00393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON F. GILIFORTE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 15, 2019. The judgment convicted defendant upon a plea of guilty of aggravated family offense (two counts) and stalking in the fourth degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of aggravated family offense (Penal Law § 240.75) and two counts of stalking in the fourth degree (§ 120.45 [1]). In appeal No. 2, he appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted burglary in the second degree (§§ 110.00, 140.25 [2]) and imposing a sentence of imprisonment. We reject defendant's contention in each appeal that the sentence imposed is unduly harsh and severe.

With respect to appeal No. 1, we note that the certificate of conviction and uniform sentence and commitment form incorrectly indicate that defendant was sentenced as a second violent felony offender, and they must be amended to reflect that he was sentenced as a second felony offender (*see generally People v Fox*, 204 AD3d 1452, 1454 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]); *People v Bradley*, 196 AD3d 1168, 1170-1171 [4th Dept 2021]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

73

KA 20-00394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON F. GILIFORTE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 15, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same memorandum as in *People v Giliforte* ([appeal No. 1] — AD3d — [Mar. 17, 2023] [4th Dept 2023]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

74

KA 19-01038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES BYRD, DEFENDANT-APPELLANT.

ANGELA KELLEY, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 14, 2019. The judgment convicted defendant upon a jury verdict of burglary in the second degree and criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and criminal mischief in the third degree (§ 145.05 [2]). The conviction arises from an indictment based upon allegations that defendant broke into and vandalized the home of his girlfriend's mother. Defendant was also charged, in a separate indictment, with assault in the second degree (§ 120.05 [2]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]), based upon allegations that he assaulted the girlfriend's brother approximately three months later.

Before trial, the People moved to consolidate the indictments for trial, based on the theory that the crimes charged in both indictments were motivated by an ongoing feud between defendant and his girlfriend's family. We reject defendant's contention that County Court abused its discretion in granting that motion (*see People v Bankston*, 63 AD3d 1616, 1616 [4th Dept 2009], *lv denied* 14 NY3d 885 [2010]; *see generally People v Lane*, 56 NY2d 1, 8 [1982]). Evidence related to the burglary charge was relevant and admissible to show defendant's motive with respect to the charges arising from the assault, and the offenses therefore were joinable under CPL 200.20 (2) (b) (*see People v Davey*, 134 AD3d 1448, 1451 [4th Dept 2015]; *People v Rodriguez*, 68 AD3d 1351, 1353 [3d Dept 2009], *lv denied* 14 NY3d 804 [2010]; *People v Burroughs*, 191 AD2d 956, 956-957 [4th Dept 1993], *lv denied* 82 NY2d 715 [1993]). Defendant did not show that he would be

prejudiced by the consolidation (*see People v Torra*, 309 AD2d 1074, 1075 [3d Dept 2003], *lv denied* 1 NY3d 581 [2003]; *see generally People v Ward*, 104 AD3d 1323, 1323 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]). Indeed, the fact that the jury acquitted defendant of the charges arising from the assault allegations is strong evidence that he was not prejudiced by the consolidation (*see Ward*, 104 AD3d at 1323-1324; *Rodriguez*, 68 AD3d at 1353).

Defendant's contention that screenshots of text messages between him and the girlfriend's mother were admitted without proper foundation is unpreserved for our review because defendant failed to object to the admission of that evidence at trial (*see People v Richardson*, 162 AD3d 1328, 1330 [3d Dept 2018], *lv denied* 32 NY3d 1128 [2018]). In any event, defendant's contention lacks merit. We conclude that the People laid a proper foundation for the admission of the evidence, inasmuch as the girlfriend's mother testified that "all of the screenshots offered by the People fairly and accurately represented text messages sent to and from defendant's phone" (*People v Rodriguez*, 38 NY3d 151, 155 [2022]).

We further conclude that the evidence is legally sufficient to support the conviction and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant contends that the testimony of the girlfriend's mother was incredible as a matter of law, we note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022] [internal quotation marks omitted]), and we see no reason to disturb the jury's resolution of those issues.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

76

KA 21-01400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL S. SAWYER, DEFENDANT-APPELLANT.

STEVEN A. FELDMAN, MANHASSET, FOR DEFENDANT-APPELLANT.

MACKENZIE STUTZMAN, SPECIAL DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered October 29, 2019. The judgment convicted defendant upon his plea of guilty of attempted kidnapping in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of attempted kidnapping in the first degree (Penal Law §§ 110.00, 135.25 [2] [a]), defendant contends that his waiver of the right to appeal is not valid and that his felony guilty plea was not knowingly, voluntarily, and intelligently entered because County Court failed to advise him of the potential deportation consequences of such a plea, as required by *People v Peque* (22 NY3d 168 [2013], *cert denied* 574 US 840 [2014]). We affirm.

Initially, defendant's contention regarding the voluntariness of his plea survives his purported waiver of the right to appeal (*see People v Roman*, 160 AD3d 1492, 1492 [4th Dept 2018]; *see generally People v Burtes*, 151 AD3d 1806, 1807 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]). Furthermore, "preservation was not required inasmuch as the record bears no indication that defendant knew about the possibility of deportation" (*Roman*, 160 AD3d at 1492; *see Peque*, 22 NY3d at 183). Nevertheless, we reject defendant's contention on the merits inasmuch as "nothing in the record contradicts the . . . information in the Department of Probation Presentence Investigation Report indicating that defendant was a United States citizen" (*People v Brooks,* 187 AD3d 931, 932 [2d Dept 2020], *lv denied* 36 NY3d 970 [2020]; *see People v Rolling*, 186 AD3d 1264, 1265 [2d Dept 2020], *lv denied* 36 NY3d 931 [2020]; *People v Tull*, 159 AD3d 1387, 1387-1388 [4th Dept 2018]; *see generally Peque*, 22 NY3d at 176).

Defendant further contends that the court erred in calculating the expiration date of the order of protection issued against him. Defendant's contention regarding the order of protection also would survive a valid waiver of the right to appeal (*see People v Austin*, 199 AD3d 1383, 1384 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]), but that contention is unpreserved (*see id.*; *People v Tidd*, 81 AD3d 1405, 1406 [4th Dept 2011]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant additionally contends that his sentence is unduly harsh and severe and constitutes cruel and unusual punishment. With regard to defendant's contention that his sentence constitutes cruel and unusual punishment, even assuming, arguendo, that the waiver of the right to appeal is invalid and therefore does not foreclose our review of that contention (*cf. People v Warner*, 167 AD3d 1492, 1493 [4th Dept 2018], *lv denied* 33 NY3d 955 [2019]; *People v Marshall*, 144 AD3d 1544, 1545 [4th Dept 2016]), defendant failed to preserve his contention for our review (*see People v Thompson*, 206 AD3d 1708, 1710 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022], citing *People v Pena*, 28 NY3d 727, 730 [2017]; *People v Pruitt*, 169 AD3d 1367, 1368 [4th Dept 2019]). We decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Congdon*, 204 AD3d 1516, 1517 [4th Dept 2022], *lv denied* 38 NY3d 1070 [2022]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

83

CA 22-00216

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

ACCADIA SITE CONTRACTING, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF PENDLETON, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (SAMUEL L. YELLEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered January 27, 2022. The order denied the motion of defendant to dismiss the complaint and granted the cross motion of plaintiff for leave to file a late notice of claim.

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

Memorandum: Plaintiff commenced this action to recover payment for highway repair work it performed for defendant, asserting causes of action for breach of contract, unjust enrichment, and quantum meruit. Defendant moved to dismiss the complaint on the ground, inter alia, that plaintiff failed to comply with the notice of claim provision under Town Law § 65 (3) and plaintiff cross-moved for leave to file a late notice of claim. Supreme Court denied the motion and granted the cross motion, concluding that, although plaintiff failed to comply with section 65 (3), it should be permitted to file a late notice of claim inasmuch as defendant had actual notice of the essential facts of the claim and did not demonstrate any prejudice that would arise from the late filing of the claim. Defendant appeals.

We agree with defendant that the court erred in denying the motion and in granting the cross motion. Town Law § 65 (3) requires that a written verified claim be filed with the town clerk "within six months after the cause of action shall have accrued." "[I]n contrast to other notice statutes, Town Law § 65 (3) contains no provision allowing the court to excuse noncompliance with its requirements" (*Mohl v Town of Riverhead*, 62 AD3d 969, 970 [2d Dept 2009] [internal quotation marks omitted]; *see generally Putrelo Constr. Co. v Town of*

Marcy, 105 AD3d 1406, 1407 [4th Dept 2013]).

We reject plaintiff's assertion, raised as an alternative ground for affirmance, that defendant is estopped from relying on Town Law § 65 (3) (*see Putrelo*, 105 AD3d at 1408; *Mohl*, 62 AD3d at 970). "A municipality may be estopped from asserting that a claim was filed untimely when its improper conduct induces reliance by a party who changes his position to his detriment or prejudice" (*Putrelo*, 105 AD3d at 1408 [internal quotation marks omitted]). Here, the record does not support any claim that defendant engaged in improper conduct dissuading plaintiff from serving a timely notice of claim (*see id.*).

Finally, we reject plaintiff's assertion, also raised as an alternative ground for affirmance, that the court erred in determining the accrual date for the claim. A cause of action seeking to compel payment ordinarily accrues when the claim is actually or constructively rejected (*see Micro-Link, LLC v Town of Amherst*, 73 AD3d 1426, 1427 [4th Dept 2010]). Here, the record established that defendant's representative sent a letter on January 4, 2020, rejecting plaintiff's claim for unpaid work, and the court thus properly concluded such date was the accrual date for purposes of filing the notice of claim pursuant to Town Law § 65 (3).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

93

KA 19-00525

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SCOTT, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered January 16, 2019. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, the waiver of the right to appeal is invalid because County Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal . . . , and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Shanks*, 37 NY3d 244, 252-253 [2021]; *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we perceive no basis in the record for us to exercise our power to modify defendant's negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

96

KA 17-00562

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEVI WRIGHT, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered December 2, 2016. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), assault in the second degree and criminal use of a firearm 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 two counts each of burglary in the first degree (Penal Law § 140.30 [1], [2]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), and one count each of assault in the second degree (§ 120.05 [2]) and criminal use of a firearm in the first degree (§ 265.09 [1]). Defendant's challenge to the legal sufficiency of the evidence supporting his conviction of the burglary in the first degree counts is unpreserved for our review because "his motion for a trial order of dismissal was not specifically directed at th[e] alleged shortcoming[s] in the evidence" (*People v Vail*, 174 AD3d 1365, 1366 [4th Dept 2019] [internal quotation marks omitted]; *see People v Lasher*, 163 AD3d 1424, 1425 [4th Dept 2018], *lv denied* 32 NY3d 1005 [2018]). Viewing the evidence in light of the elements of the crime of burglary in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, an acquittal would have been unreasonable on this record (*see generally People v Bradley*, 204 AD3d 1420, 1420 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]).

Defendant expressly consented to County Court's *Sandoval* compromise, and thus he waived his contention that the *Sandoval* ruling constitutes an abuse of discretion (*see People v Henry*, 74 AD3d 1860, 1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]; *see generally People v Hansen*, 95 NY2d 227, 230 n 1 [2000]). Contrary to defendant's contention, his sentence is not unduly harsh or severe.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

98

KA 20-00059

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINTIN J. MCWILLIAMS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), entered October 9, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Defendant contends that he is entitled to reversal of the judgment of conviction and dismissal of the indictment because the single statutory offense under which he was charged and convicted (*see id.*) is facially unconstitutional under the Second Amendment of the United States Constitution as interpreted by the United States Supreme Court in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022] [*Bruen*]). Although defendant "d[id] not forfeit the right on appeal from the conviction to challenge the constitutionality of the statute under which he was convicted" by pleading guilty (*People v Lee*, 58 NY2d 491, 493 [1983]) and he has notified the Attorney General of the State of New York pursuant to Executive Law § 71 that he is challenging the constitutionality of the statute on appeal (*see People v Tucker*, 181 AD3d 103, 105 [4th Dept 2020], *cert denied* — US —, 141 S Ct 566 [2020]), defendant correctly concedes that his challenge to the constitutionality of the statute is not preserved for our review inasmuch as he failed to raise any such challenge before the trial court (*see People v Jacque-Crews*, — AD3d —, —, 2023 NY Slip Op 00785 [4th Dept 2023]; *People v Gerow*, 85 AD3d 1319, 1320 [3d Dept 2011]; *cf. People v Hughes*, 22 NY3d 44, 48-49 [2013]; *see generally People v Reinard*, 134 AD3d 1407, 1409 [4th Dept

2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]).

Defendant nonetheless contends that his constitutional challenge to Penal Law § 265.03 (3) should be exempt from the preservation requirement because, among other things, other states allow facial constitutional challenges to be raised for the first time on appeal. That, however, is not the law in New York. "The unconstitutionality of a statute is not exempt from the requirement of preservation" (*People v Scott*, 126 AD3d 645, 646 [1st Dept 2015], *lv denied* 25 NY3d 1171 [2015]; *see People v Iannelli*, 69 NY2d 684, 685 [1986], *cert denied* 482 US 914 [1987]; *People v Dozier*, 52 NY2d 781, 783 [1980]; *People v Thomas*, 50 NY2d 467, 473 [1980]).

Defendant's attempts to invoke exceptions to the preservation rule are unavailing inasmuch as the United States Supreme Court's intervening decision in *Bruen* neither held any criminal statute unconstitutional (*cf. People v Tannenbaum*, 23 NY2d 753, 753 [1968]) nor called into doubt New York's criminal prohibitions on unlicensed possession of firearms (*cf. People v Patterson*, 39 NY2d 288, 296 [1976], *affd* 432 US 197 [1977]; *see generally Thomas*, 50 NY2d at 472-473).

Defendant nonetheless asserts that preservation should not be required because it would have been futile to raise his constitutional argument before Supreme Court. We reject that assertion and conclude that defendant "should not be permitted to avoid the consequences of the lack of preservation" on the basis that a constitutional challenge to the Penal Law statute would ostensibly have been futile (*People v Crum*, 184 AD3d 454, 455 [1st Dept 2020], *lv denied* 35 NY3d 1065 [2020]; *see People v White*, 189 AD3d 634, 635 [1st Dept 2020], *lv denied* 36 NY3d 1101 [2021]; *see also People v Cunningham*, 194 AD3d 954, 956 [2d Dept 2021], *lv denied* 37 NY3d 991 [2021]; *People v Colon*, 187 AD3d 647, 648 [1st Dept 2020], *lv denied* 36 NY3d 1096 [2021]). Here, "[a]lthough [*Bruen*] had not yet been decided, and trial counsel may have reasonably declined to challenge the [constitutionality of Penal Law § 265.03 (3)], defendant had the same opportunity to advocate for a change in the law as [any other] litigant" (*Crum*, 184 AD3d at 455; *see generally People v Stewart*, 67 AD3d 553, 554 [1st Dept 2009], *affd* 16 NY3d 839 [2011]).

We decline to exercise our power to review defendant's constitutional challenge to the statute under which he was convicted as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, defendant failed to preserve for our review his 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]; *People v Archibald*, 148 AD3d 1794, 1795 [4th Dept 2017], *lv denied* 29 NY3d 1075 [2017]), and we decline to exercise our power to review that contention as a matter of

discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

100

KA 19-00110

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLIN JOSEPH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered November 16, 2018. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal. Supreme Court's oral colloquy mischaracterized the waiver as absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Davis*, 188 AD3d 1731, 1731 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]). Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver did not cure the deficient oral colloquy (*see Davis*, 188 AD3d at 1732).

Nevertheless, defendant's contention that the statute pursuant to which he was convicted is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]) is not preserved for our review (*see People v Jacque-Crews*, — AD3d —, —, 2023 NY Slip Op 00785 [4th Dept 2023]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]).

Contrary to defendant's further contention, the sentence is not

unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

107

CA 22-00184

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

ADVANCED PHYSICAL MEDICINE REHABILITATION PLLC, TOTAL REHAB, LLC, AND GASNAR CORPORATION, INC., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

UTICA NATIONAL INSURANCE COMPANY OF OHIO, DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-APPELLANTS.

RIVKIN RADLER, LLP, UNIONDALE (CHERYL F. KORMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered January 28, 2022. The order denied the motion of plaintiffs for summary judgment and granted the cross motion of defendant for summary judgment.

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

Memorandum: In this action arising from a dispute over insurance coverage, plaintiffs appeal from an order that, inter alia, granted the cross motion of defendant insurer for summary judgment dismissing the amended complaint. We affirm.

Plaintiffs commenced this action to recover sums unpaid by defendant after an incident caused damage to, inter alia, the basement of a building covered by a policy of insurance issued by defendant. The policy in question contains a "water exclusion endorsement" that excludes coverage for damage caused by, inter alia, "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces; [or] . . . [b]asements, whether paved or not." Under the terms of the endorsement, the exclusion applies "regardless of whether [the loss] is caused by an act of nature or is otherwise caused." While the policy was in effect, the covered premises sustained damage when an underground water supply line, which supplied the building's sprinkler system, ruptured. The resulting water entered underground into the building's basement, causing the subject loss.

Contrary to plaintiffs' contention, Supreme Court properly determined that coverage for the loss is excluded under the policy

(*see Harleysville Ins. Co. of N.Y. v Potamianos Props., LLC,* 108 AD3d 1110, 1111-1112 [4th Dept 2013]). Specifically, "because the loss arose when water from 'under the ground' pressed on and flowed through the building's foundation walls into the basement, coverage is precluded under the endorsement" (*id.*).

We reject plaintiffs' contention that this Court's decision in *Smith v Safeco Ins. Co. of Am.* (159 AD3d 1536, 1537-1538 [4th Dept 2018], *lv denied* 32 NY3d 913 [2019]) is controlling inasmuch as *Smith* related to "surface water," which is not at issue here (*id*. at 1538).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

110

CA 22-00430

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
NIAGARA FALLS CAPTAINS AND LIEUTENANTS
ASSOCIATION, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, RESPONDENT-RESPONDENT.

THE TUTTLE LAW FIRM, CLIFTON PARK (JAMES B. TUTTLE OF COUNSEL), FOR PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MICHAEL E. HICKEY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 15, 2022. The order denied the petition to vacate an arbitration award and confirmed the award.

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

Memorandum: Petitioner, Niagara Falls Captains and Lieutenants Association, appeals from an order that denied petitioner's petition seeking to vacate an arbitration award denying petitioner's grievances and confirmed the award. Petitioner contends that the award should be vacated because it fails to meet the standards of finality and definiteness required by CPLR 7511 (b) (1) (iii). We reject that contention and affirm the order.

It is well settled that "judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]). Nevertheless, "a court may vacate an arbitrator's award where it finds that the rights of a party were prejudiced when 'an arbitrator . . . exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made' " (*Barone v Haskins*, 193 AD3d 1388, 1390 [4th Dept 2021], *appeal dismissed* 37 NY3d 1032 [2021], *lv denied* 37 NY3d 919 [2022], quoting CPLR 7511 [b] [1] [iii]). "An award is indefinite or nonfinal within the meaning of the statute 'only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy' " (*Yoonessi v Givens*, 78 AD3d 1622, 1622-1623 [4th Dept 2010], *lv denied* 17 NY3d 718 [2011], quoting *Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]; *see Matter*

of Professional, Clerical, Tech. Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.], 162 AD3d 1479, 1480 [4th Dept 2018]).

Here, contrary to petitioner's contention, we conclude that the award sufficiently defined the parties' rights and obligations with respect to the controversy at issue, i.e., whether respondent, City of Niagara Falls, violated the parties' collective bargaining agreement (CBA) or past practice when it failed to immediately fill six specific vacancies (*see Matter of Franco v Dweck*, 165 AD3d 551, 552 [1st Dept 2018], *lv denied* 33 NY3d 903 [2019]; *cf. Matter of Buffalo Teachers Fedn., Inc. [Board of Educ. of the Buffalo Pub. Schs.]*, 179 AD3d 1553, 1555 [4th Dept 2020]; *Professional, Clerical, Tech. Empls. Assn.*, 162 AD3d at 1480; *see generally Meisels*, 79 NY2d at 536). Moreover, the "award did not leave any matter submitted by the parties open for future contention, and thus, it was definite and final" (*Matter of Transport Workers Union of Greater N.Y., Local 100, AFL-CIO v New York City Tr. Auth.*, 151 AD3d 1067, 1068 [2d Dept 2017]; *see Yoonessi*, 78 AD3d at 1623; *cf. Matter of Andrews v County of Rockland*, 120 AD3d 1227, 1228-1229 [2d Dept 2014], *lv dismissed* 24 NY3d 1090 [2015]). The matter submitted by the parties concerned six specific alleged violations of the CBA or past practice, and the award finally and definitely resolved that matter, determining that respondent did not violate either the CBA or past practice when it filled the vacancies as soon as was reasonably possible (*cf. Buffalo Teachers Fedn., Inc.*, 179 AD3d at 1555).

Petitioner contends that the determination that past practice required positions to be filled as soon as reasonably possible will create *new* controversies between the parties in the future inasmuch as there is no definition of what is reasonable. We reject that contention inasmuch as the award completely " 'dispose[d] of the controversy submitted' " (*Yoonessi*, 78 AD3d at 1623; *cf. Buffalo Teachers Fedn., Inc.*, 179 AD3d at 1555), which was limited to three specific grievances involving six specific actions taken by respondent. The award fully resolved that controversy, denying the grievances and determining that the vacancies were filled in accordance with the past practice of filling vacancies as soon as reasonably possible. As noted, there was nothing "open for future contention" with respect to those three grievances (*Transport Workers Union of Greater N.Y., Local 100, AFL-CIO*, 151 AD3d at 1068) and, as a result, the award did not create any new controversy with respect to those specific grievances.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

118

KA 19-00251

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS L. DAVIS, JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 4, 2019. The judgment convicted defendant upon a jury verdict of burglary in the second degree, assault in the third degree (two counts) and criminal obstruction of breathing or blood circulation.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), criminal obstruction of breathing or blood circulation (§ 121.11 [a]), and two counts of assault in the third degree (§ 120.00 [1]), defendant contends that Supreme Court erred in refusing to suppress a statement that defendant made to law enforcement officers subsequent to earlier statements that were suppressed by the court. He also contends that the verdict is against the weight of the evidence.

We reject defendant's contention that the court erred in refusing to suppress the challenged statement, which was made during booking and occurred hours after defendant had invoked his right to counsel. The court properly determined that defendant's statement was "spontaneous and 'not the result of inducement, provocation, encouragement or acquiescence' " by law enforcement (*People v Bumpars*, 178 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 36 NY3d 1055 [2021], quoting *People v Maerling*, 46 NY2d 289, 302-303 [1978]; *see People v Watson*, 90 AD3d 1666, 1666-1667 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]; *People v Fuller*, 70 AD3d 1391, 1391-1392 [4th Dept 2010], *lv*

denied 14 NY3d 840 [2010]).

With respect to defendant's contention regarding the weight of the evidence, viewing the evidence in light of the elements of the crimes of which defendant was convicted as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to counts two, three, and five of the indictment is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We agree with defendant, however, that the verdict with respect to count four, charging defendant with assault in the third degree, is against the weight of the evidence. In count four, which arose from the same incident as the other counts, defendant was alleged to have caused physical injury to the victim's face or chin. We conclude that the People failed to present evidence establishing beyond a reasonable doubt that the victim sustained such a physical injury (*see People v Smith* [appeal No. 1], 186 AD3d 1106, 1108 [4th Dept 2020]; *People v Gibson*, 134 AD3d 1512, 1513-1514 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]; *see generally* Penal Law § 120.00 [1]). We thus modify the judgment by reversing that part convicting defendant of assault in the third degree under count four of the indictment and dismissing that count of the indictment.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

123

CAF 20-01344

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

IN THE MATTER OF VASHTI M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CAROLETTE M., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 11, 2020 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order determining, inter alia, that she neglected the subject child. Initially, we note that the appeal insofar as it concerns the disposition must be dismissed because the mother consented to the disposition (*see* CPLR 5511; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]). Nevertheless, we agree with the mother that her challenge to the finding of neglect is properly before us. The mother is aggrieved by that finding despite her consent to the disposition (*see Noah C.*, 192 AD3d at 1676-1677), and the fact that the child has attained the age of majority does not render this appeal academic inasmuch as "[a] determination of neglect creates a permanent and significant stigma which is capable of affecting a parent's status in potential future proceedings" (*Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014] [internal quotation marks omitted]; *see Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 773 [2d Dept 2017]).

With respect to the merits, however, we reject the mother's contention that Family Court erred in determining that petitioner established, by a preponderance of the evidence, that she neglected the child by inflicting excessive corporal punishment on her. " 'A

single incident of excessive corporal punishment can be sufficient to support a finding of neglect' " (*Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1313 [4th Dept 2022]). Here, the child's statements to petitioner's caseworker, which were corroborated by the caseworker's observations of the child's injuries and by the mother's admissions (*see Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]), established that the mother inflicted excessive corporal punishment by instigating a confrontation with the child in which she struck the child in the face with an open hand, pushed her and caused her to fall into a bathtub and sustain visible swelling to her leg, and threatened her with a knife (*see Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1413 [4th Dept 2022]; *Matter of Deandre C. [Luis D.]*, 169 AD3d 609, 610 [1st Dept 2019]; *Matter of Christine BB.*, 305 AD2d 735, 736 [3d Dept 2003]; *cf. Grayson S.*, 209 AD3d at 1313). The hearing evidence also established that the child's physical condition and emotional condition were impaired as a result of the incident (*see* Family Ct Act § 1012 [f] [i] [B]; *Balle S.*, 194 AD3d at 1395; *Matter of DeShawn D.O. [Maria T.O.]*, 81 AD3d 961, 962 [2d Dept 2011], *lv dismissed* 17 NY3d 773 [2011]). The court's determination that the mother's account of the incident was not credible is entitled to deference (*see Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1345-1346 [4th Dept 2017]; *see generally Noah C.*, 192 AD3d at 1678), and we conclude that the court's determination that the mother neglected the child by inflicting excessive corporal punishment is supported by a sound and substantial basis in the record (*see Kayla K.*, 204 AD3d at 1413; *Balle S.*, 194 AD3d at 1395).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

134

KA 21-01613

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE FINSTER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Ontario County Court (Brian D. Dennis, J.), entered October 14, 2021. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order designating him a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court did not abuse its discretion in denying defendant's request for a downward departure from the presumptive risk level (*see People v Ricks*, 124 AD3d 1352, 1352 [4th Dept 2015]; *see generally People v Howard*, 27 NY3d 337, 341 [2016]; *People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant preserved his contention for our review with respect to only two of the multiple alleged mitigating factors or circumstances he now asserts (*see People v Reber*, 145 AD3d 1627, 1627-1628 [4th Dept 2016]; *People v Uphael*, 140 AD3d 1143, 1144-1145 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]), and we decline to exercise our power to review the unpreserved factors or circumstances as a matter of discretion in the interest of justice (*see generally People v Roman*, 179 AD3d 1455, 1455-1456 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]).

With respect to the first preserved factor, defendant's strong family support network is adequately taken into account by the guidelines and thus improperly asserted as a mitigating factor (*see generally Gillotti*, 23 NY3d at 861; *People v Hawthorne*, 158 AD3d 651, 654 [2d Dept 2018], *lv denied* 31 NY3d 909 [2018]; *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]). With respect to the second, although defendant contends that acceptance of responsibility "would

have required him to make admissions against his interest" in light of a pending direct appeal from the underlying judgment of conviction, a factor that we have previously determined to be a "mitigating factor[] of a kind or to a degree, not otherwise adequately taken into account by the guidelines" (*People v Kearns*, 68 AD3d 1713, 1714 [4th Dept 2009] [internal quotation marks omitted]), we nevertheless conclude, based upon "the totality of the circumstances," that a downward departure is not warranted (*Howard*, 27 NY3d at 341).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

135

KA 17-00893

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FITZALBERT FULLER, JR., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM 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 March 20, 2017. The judgment convicted defendant upon a jury verdict of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of burglary in the third degree (Penal Law § 140.20), defendant contends that he was deprived of a fair trial by Supreme Court's *Sandoval* ruling, which permitted the People to impeach him with his prior convictions for three theft-related misdemeanors and one felony (*see People v Sandoval*, 34 NY2d 371, 374 [1974]). We reject defendant's contention. We conclude that the convictions in question "involved acts of dishonesty and thus were probative with respect to the issue of defendant's credibility" (*People v Thomas*, 165 AD3d 1636, 1637 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert denied* — US —, 140 S Ct 257 [2019] [internal quotation marks omitted]). We further conclude on this record that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of the prior convictions] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*Sandoval*, 34 NY2d at 378; *see Thomas*, 165 AD3d at 1638).

Defendant further contends that the evidence is legally insufficient to establish that he committed burglary in the third degree and that the verdict is against the weight of the evidence. There is no dispute that defendant stole items from a store from which he had previously been banned. Defendant nevertheless contends that the People failed to prove that he intended to commit a crime when he

entered the store, as opposed to after he entered. Contrary to defendant's contention, we conclude that, viewing the evidence in the light most favorable to the People, " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found . . . beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]) that defendant intended to commit a crime when he entered the store. Defendant failed to preserve for our review his additional contention that the evidence is legally insufficient to establish that he knew that he had been banned from the store and that his entry was therefore unlawful (*see* CPL 470.05 [2]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]).

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

137

KA 20-01526

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD L. SMITH, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 4, 2018. The judgment convicted defendant upon his plea of guilty of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his plea was involuntary. As a preliminary matter, we note that, even assuming, arguendo, that defendant's waiver of the right to appeal is valid, defendant's contention survives that waiver (*see People v Tchiyuka*, 169 AD3d 1398, 1398 [4th Dept 2019]). Nonetheless, defendant's contention relies on matters outside the record and thus is not properly before us on his direct appeal and must be pursued by way of a motion pursuant to CPL article 440 (*see generally People v Jackson*, 153 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

139

KA 22-00565

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDALL K. MCGOVERN, 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 (Suzanne Maxwell Barnes, J.), rendered November 12, 2019. The judgment convicted defendant upon a jury verdict of grand larceny in the third degree, forgery in the second degree, petit larceny, attempted grand larceny in the third degree and scheme to defraud in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, grand larceny in the third degree (Penal Law § 155.35 [1]) and attempted grand larceny in the third degree (§§ 110.00, 155.35 [1]). Defendant contends that the conviction of attempted grand larceny in the third degree is not based on legally sufficient evidence, and that the verdict with respect to that count is against the weight of the evidence. Assuming, arguendo, that defendant preserved for our review his challenge to the legal sufficiency of the evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude, after viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), that the evidence is legally sufficient to support the conviction of attempted grand larceny in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude, after viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction and the uniform sentence and commitment form incorrectly indicate that defendant was sentenced as a persistent felony offender, and they must be amended to reflect that he was sentenced as a second felony offender. We have reviewed

defendant’s remaining contention and conclude that it is without merit.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

140

KA 19-02143

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN C. JONES, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN 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 (Alex R. Renzi, J.), rendered September 18, 2019. The judgment convicted defendant upon a jury verdict of robbery in the third degree and resisting arrest.

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 robbery in the third degree (Penal Law § 160.05) and resisting arrest (§ 205.30), defendant contends that the verdict is against the weight of the evidence with respect to robbery in the third degree because the People failed to prove beyond a reasonable doubt that he threatened the victim, a restaurant owner, with the immediate use of physical force to compel her to give him money. We reject that contention. The evidence at trial established that defendant entered the restaurant as it was opening for business in the morning and asked the victim for change for a $20 bill. When the victim refused his request, defendant put his hand in his pocket and, according to the victim, "made it look like a gun." Defendant demanded that the victim open the cash register and give him money. Fearing that defendant was armed, the victim opened the register. As defendant reached for the money, the victim's husband emerged from the kitchen with a knife, and a struggle between the two men ensued in which defendant threw the register at the victim's husband. Defendant then grabbed some money that had spilled out of the register and ran out of the restaurant. The police tracked footprints in the snow to defendant's nearby residence, where he was eventually taken into custody after a standoff.

"The applicable statutes do not require the use or display of a weapon nor actual injury or contact with a victim [for a person to be

guilty of robbery] . . . All that is necessary is that there be a threatened use of force . . . , which may be implicit from the defendant's conduct or gleaned from a view of the totality of the circumstances" (*People v Snow*, 185 AD3d 1400, 1401 [4th Dept 2020] [internal quotation marks omitted], *lv denied* 35 NY3d 1115 [2020]; *see* Penal Law §§ 160.00, 160.05; *People v Mosley*, 59 AD3d 961, 961 [4th Dept 2009], *lv denied* 12 NY3d 918 [2009], *reconsideration denied* 13 NY3d 861 [2009]). Further, the statutes do "not require the use of any words whatsoever, but merely that there be a threat, whatever its nature, of the immediate use of physical force" (*People v Woods*, 41 NY2d 279, 283 [1977]).

Here, the victim's testimony that defendant made his hand look like a gun inside his pocket was uncontradicted at trial and is consistent with her conduct during the encounter. Although the victim initially refused to make change for defendant, she immediately opened the cash register after he put his hand in his pocket, whereupon defendant reached for the money. Based on our independent review of the evidence, and viewing the evidence in light of the elements of the crime of robbery in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2009]), we conclude that the People proved beyond a reasonable doubt that defendant implicitly threatened the victim with the immediate use of physical force for the purpose of compelling her to give him money, and that the verdict is not against the weight of the evidence with respect to robbery in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, based on our review of the body camera video footage from the arresting police officers, and viewing the evidence in light of the elements of the crime of resisting arrest as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict on that count is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

141

CAF 21-01809

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF TYASIA T.S., ALSO KNOWN AS TYRENEE S.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

RUTHANNE J., RESPONDENT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (AMANDA L. OREN OF COUNSEL), FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered November 23, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

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

The mother contends that petitioner failed to establish by clear and convincing evidence that she permanently neglected the child because she "failed to plan appropriately for the child's future" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). We reject that contention. "It is well settled that, to plan substantially for a child's future, 'the parent must take meaningful steps to correct the conditions that led to the child's removal' " within a reasonable period of time (*id.*; *see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]; *Matter of Faith K. [Jamie K.]*, 203 AD3d 1568, 1569 [4th Dept 2022]; *see generally* Social Services Law § 384-b [7] [c]). Here, although the mother, inter alia, obtained stable housing, regularly attended visitation, and complied with substance abuse evaluations, we nonetheless conclude that the

record establishes that the mother "did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018] [internal quotation marks omitted]; *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1501 [4th Dept 2015]). Specifically, the record establishes that, despite her participation in certain recommended programs and services, the mother continued struggling to put into practice the parenting skills she had learned, which manifested in her failure to act appropriately during visits with the child. We note that the mother still had only supervised visits with the child although she participated in the recommended services and programs during a fairly extensive time span (*see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1668-1669 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]).

Further, Family Court's decision to credit the testimony of a caseworker over that of the mother is entitled to great deference where, as here, the credibility determination is supported by the record, and we perceive no reason to disturb the court's determination (*see Matter of D'Angel M.-B. [Donnell M.-B.]*, 173 AD3d 1764, 1765 [4th Dept 2019], *lv denied* 34 NY3d 911 [2020]; *Matter of Terry L.G.*, 6 AD3d 1144, 1145 [4th Dept 2004]). In any event, aspects of the mother's testimony also support the court's determination. Of particular salience is the mother's testimony that she did not need mental health treatment any longer because she had completed one program, thereby demonstrating a lack of insight into one of the issues that led to the child's removal.

Contrary to the mother's further contention, the court did not abuse its discretion in refusing to issue a suspended judgment. "A suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1663 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019] [internal quotation marks omitted]; *see* Family Ct Act § 633; *Matter of Michael B.*, 80 NY2d 299, 310-311 [1992]) and "may be warranted where the parent has made sufficient progress in addressing the issues that led to the child's removal from custody" (*Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1311 [4th Dept 2021], *lv denied* 38 NY3d 901 [2022]). Here, at the time of the dispositional hearing, the child had been in foster care for five years—effectively since birth—and during that time the mother failed to make substantial progress in addressing many of the issues that led to the removal of the child and had only supervised visits with her. We therefore conclude that the court properly determined that a suspended judgment was unwarranted (*see Nathan N.*, 203 AD3d at 1669; *Brandon I.J.*, 198 AD3d at 1311; *Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1520-1521 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]).

Even assuming, arguendo, that the court erred in refusing to qualify one of the mother's witnesses as an expert during the fact-finding hearing, we conclude that the error is harmless because, given the circumstances of the case, the outcome would have been the same

had the witness been qualified as an expert (*see Matter of Steven D., Jr. [Steven D., Sr.]*, 188 AD3d 1770, 1772 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]; *see generally Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Similarly, we conclude that any error by the court in precluding the mother from introducing testimony at the dispositional hearing concerning the assistance she would receive if the child were returned to her (*see Matter of Natasha RR.*, 42 AD3d 769, 773 [3d Dept 2007], *lv denied* 9 NY3d 812 [2007]) is harmless in light of other evidence at that hearing that provided extensive support for the court's determination (*see Matter of Kyle K. [Harry K.]*, 72 AD3d 1592, 1593 [4th Dept 2010], *lv denied* 15 NY3d 705 [2010]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

142

CA 22-00445

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF JOSE ORTIZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 7, 2022 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the Parole Board's determination denying his request for release to parole supervision. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Parole Board in January 2023 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; *Matter of Hill v Annucci*, 149 AD3d 1540, 1541 [4th Dept 2017]). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see Colon*, 177 AD3d at 1394; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

148

CA 22-00928

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

DMT MANAGEMENT, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD J. HAIGHT, ET AL., DEFENDANTS,
GEORGE CHURAKOS AND STEPHANIE CHURAKOS,
DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 24, 2021. The order, among other things, directed defendants George Churakos and Stephanie Churakos to pay plaintiff the sum of $9,600 for the land in dispute.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a judgment directing defendants George Churakos and Stephanie Churakos (Churakos defendants) to remove certain improvements made upon plaintiff's property and permanently enjoining the Churakos defendants from further trespassing upon plaintiff's property. Plaintiff appeals from an order that, inter alia, directed the Churakos defendants to pay plaintiff the sum of $9,600 for the land in dispute. We affirm.

Plaintiff contends that Supreme Court abused its discretion in refusing to issue an injunction directing the Churakos defendants to remove the improvements. We reject plaintiff's contention. In order to obtain injunctive relief directing the removal of an encroachment upon its land, a property owner must "demonstrate not only the existence of the encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to the defendants from granting such relief" (*Marsh v Hogan*, 81 AD3d 1241, 1242 [3d Dept 2011] [internal quotation marks omitted]; *see Town of Fishkill v Turner*, 60 AD3d 932, 933 [2d Dept 2009]). "Whether an injunction [directing the removal of improvements] should issue depends on all the equities between the parties" (*Hullar v Glider Oil Co.*, 219 AD2d 825, 826 [4th Dept 1995]), "with consideration given to factors such as the extent of impairment created by the encroachment,

the defendant[s'] hardship in removing the encroachment, whether any alternatives would afford more equitable relief, or whether money damages would have been a just and adequate remedy" (*Marsh*, 81 AD3d at 1243). "Furthermore, equitable relief may be denied based on the plaintiff's delay in vindicating his or her rights . . . , and based on the defendants' lack of willfulness in creating the encroachment" (*id.*). "A permanent injunction is an extraordinary remedy to be granted or withheld by a court of equity in the exercise of its discretion . . . Not every apprehension of injury will move a court of equity to the exercise of its discretionary powers. Indeed, [e]quity . . . interferes in the transactions of [persons] by preventive measures only when irreparable injury is threatened, and the law does not afford an adequate remedy for the contemplated wrong" (*DiMarzo v Fast Trak Structures*, 298 AD2d 909, 910-911 [4th Dept 2002] [internal quotation marks omitted]; *see generally Halaby v Denzak*, 211 AD3d 1533, 1536 [4th Dept 2022]). Here, plaintiff failed to establish irreparable injury, an inadequate remedy at law, or a balancing of the equities in its favor (*see Parry v Murphy*, 79 AD3d 713, 715-716 [2d Dept 2010]; *Christopher v Rosse*, 91 AD2d 768, 769 [3d Dept 1982]; *Lawrence v Mullen*, 40 AD2d 871, 871-872 [2d Dept 1972]; *see generally EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr.*, 212 AD2d 569, 570 [2d Dept 1995]).

Plaintiff contends in the alternative that the court erred in directing the Churakos defendants to pay plaintiff the sum of $9,600 for the property in question, and that the damages must be set at $100,000. "The appropriate measure of damages is the difference between the value of the plaintiff's property with and without the encroachment" (*Generalow v Steinberger*, 131 AD2d 634, 635 [2d Dept 1987], *appeal dismissed* 70 NY2d 928 [1987], *lv denied* 70 NY2d 616 [1988]; *see Parry*, 79 AD3d at 716). Although plaintiff and defendant George Churakos entered into an option agreement that gave George Churakos the right to purchase the land in dispute for $100,000, plaintiff offered no evidence at trial that the land was worth that price. We conclude that the court did not err in setting the value of the land at $9,600.

Finally, plaintiff's request for punitive damages is raised for the first time on appeal and is thus not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

152

CA 22-01112

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

JOYCE R. INGRASSIO, PLAINTIFF-RESPONDENT,

V ORDER

BEST TILE REALTY, LLC, EAST COAST TILE IMPORTS, INC., AND EAST COAST TILE IMPORTS OF SYRACUSE, INC., DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, ROCHESTER (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered February 2, 2022. The order denied the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 13 and February 27, 2023,

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

153

KA 19-01442

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON J. VICKERS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 31, 2019. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). Although we agree with defendant that, as the People correctly concede, he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

159

CAF 21-01326

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF TOURE HENDERSON JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

FLOR FORTY (ALSO KNOWN AS FLOR FORTY CRUZ
AND FLOR EASTON), AND GLORIA D. HENDERSON,
RESPONDENTS-RESPONDENTS.

IN THE MATTER OF FLOR FORTY (ALSO KNOWN AS
FLOR FORTY CRUZ AND FLOR EASTON),
PETITIONER-RESPONDENT,

V

TOURE HENDERSON JOHNSON, RESPONDENT-APPELLANT,
AND GLORIA D. HENDERSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF FLOR FORTY (ALSO KNOWN AS
FLOR FORTY CRUZ AND FLOR EASTON),
PETITIONER-RESPONDENT,

V

TOURE HENDERSON JOHNSON, RESPONDENT-APPELLANT.

IN THE MATTER OF TOURE HENDERSON JOHNSON,
PETITIONER-APPELLANT,

V

FLOR FORTY (ALSO KNOWN AS FLOR FORTY CRUZ AND
FLOR EASTON), RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

FITZSIMMONS NUNN & PLUKAS, LLP, ROCHESTER (JOSEPH PLUKAS OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered August 27, 2021 in a proceeding pursuant to

Family Court Act article 6. The order, inter alia, granted sole custody and primary physical residence of the subject child to respondent-petitioner Flor Forty (also known as Flor Forty Cruz and Flor Easton).

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father appeals from an order that modified a prior order of custody and visitation by, inter alia, granting respondent-petitioner mother sole custody and primary physical residence of the subject child, with visitation to the father. We affirm for reasons stated in the "decision and order" at Family Court. We write only to address two issues. First, contrary to the mother's contention, the appeal, in which the father challenges only the court's custody determination, has not been rendered moot by a subsequent order entered upon the consent of the parties inasmuch as the mother's petition prompting the subsequent order sought to modify the visitation provisions only and the transcript of the subsequent proceeding establishes that the father "consented only to that part of [the] subsequent order concerning [the modification of] his visitation rights" (*Matter of Foster v Bartlett*, 59 AD3d 976, 977 [4th Dept 2009], *lv denied* 12 NY3d 710 [2009]; *see Matter of Wayman v Ramos*, 88 AD3d 1237, 1238-1239 [3d Dept 2011], *lv dismissed* 18 NY3d 868 [2012]; *Matter of Deuel v Dalton*, 33 AD3d 1158, 1159 [3d Dept 2006]; *cf. Matter of Gorski v Phalen* [appeal No. 2], 187 AD3d 1670, 1671 [4th Dept 2020]; *Matter of Wallace v Eure*, 181 AD3d 1329, 1329 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]). Second, inasmuch as the father expressly sought to modify the prior order and agreed at the hearing that such prior order was the last order to determine custody, he waived his contention now raised on appeal that the court should have conducted its threshold inquiry whether there had been a sufficient change in circumstances from the date of a different order (*see generally Panaro v Panaro*, 133 AD3d 1306, 1307 [4th Dept 2015]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

170

KA 19-02026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CONSTANTINE D. MURRELL, ALSO KNOWN AS
CONSTANTINE MURRELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered July 16, 2019. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree, assault in the second degree, reckless driving and unlawful fleeing a police officer in a motor vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of, inter alia, robbery in the second degree (Penal Law § 160.10 [3]) and assault in the second degree (§ 120.05 [6]). We agree with defendant, and the People correctly concede, that defendant's waiver of the right to appeal is invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

171

KA 20-01308

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID STREBER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered September 24, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on December 24, 2022, and by the attorneys for the parties on January 5 and 31, 2023,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

172

KA 20-00290

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT D. MEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered August 23, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the second degree and grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and grand larceny in the fourth degree (§ 155.30 [1]), defendant contends that his waiver of the right to appeal is invalid and thus does not foreclose his challenge to the severity of the negotiated sentence. The People correctly concede that the waiver of the right to appeal is invalid because County Court provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Harrison*, 195 AD3d 1452, 1452 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

177

KA 20-01309

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID STREBER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered September 24, 2020. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on February 20, 2023, and by the attorneys for the parties on February 20 and 24, 2023,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

179

CAF 22-00266

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

IN THE MATTER OF MILO C.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIELLA C., RESPONDENT-APPELLANT, AND JOSHUA C., RESPONDENT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELIZABETH SCHENCK, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered January 11, 2022 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that the subject child had been derivatively neglected.

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

Memorandum: Respondent mother appeals from an order entered after a fact-finding hearing that found that the subject child, her youngest, had been derivatively neglected. Contrary to the mother's contention, Family Court's finding of derivative neglect has a sound and substantial basis in the record (*see Matter of Nino H. [Danielle F.]*, 191 AD3d 1407, 1408 [4th Dept 2021], *lv denied* 37 NY3d 903 [2021]; *Matter of Carmela H. [Danielle F.]*, 164 AD3d 1607, 1607 [4th Dept 2018], *lv dismissed in part and denied in part* 32 NY3d 1190 [2019]). Here, petitioner established that the neglect of the subject child's two oldest siblings and subsequent guardianship order entered for those children as well as another sibling " 'was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed' " (*Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568 [4th Dept 2014]; *see Matter of Sasha M.*, 43 AD3d 1401, 1402 [4th Dept 2007]). Although the mother showed, inter alia, that she attended some parenting classes and therapy sessions, she failed to meet her burden of demonstrating that the circumstances leading to the prior neglect "cannot reasonably be expected to exist currently or in the foreseeable future" (*Matter of Lamairik S. [Jonas S.]*, 192 AD3d 1483, 1484 [4th Dept 2021], *lv denied* 37 NY3d 905

[2021]).

The mother further contends that the court erred in admitting in evidence the entire case file from the Ontario County Department of Social Services because the case file contained some hearsay. We reject that contention. Here, the court admitted the case file in evidence conditionally, subject to the mother's hearsay objections (*see Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]), and "[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*id.*). Regardless, we conclude that " 'any error in [the] admission [of the case file] is harmless because the result reached herein would have been the same even had such record[s], or portions thereof, been excluded' " (*Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1478 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

198

KA 18-02180

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDY J. LOVE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered August 27, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

199

KA 18-02179

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDY LOVE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered August 27, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and resisting arrest.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

219

KA 18-01293

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALCOM FRAZIER, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered April 24, 2018. The judgment convicted defendant upon his plea of guilty of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]). Defendant correctly contends and the People correctly concede that defendant's waiver of the right to appeal is invalid because County Court "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues" (*People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

220

KA 20-01634

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT BLASZYK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (James A.W. McLeod, A.J.), rendered May 28, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [2]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe. Contrary to defendant's further contention, we conclude that there is no basis on which to modify the duration of the order of protection issued by County Court on behalf of the victim.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

221

KA 22-01462

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN GASKIN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 25, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree (two counts), criminal possession of a controlled substance in the third degree, and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b], [3]), one count of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and one count of criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). We conclude that the court applied the wrong standard in determining defendant's motion.

Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]). There are two elements to the People's readiness for trial: (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 Hill*, 209 AD3d 1262, 1264 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]). As applicable here, "[w]henever . . . a prosecutor states or otherwise provides notice that the people are ready for trial, the court shall make inquiry on the record as to their actual readiness. If, after conducting its inquiry, the court determines that the people are not ready to proceed to trial, the prosecutor's statement or notice of readiness shall not be valid" (CPL 30.30 [5]). "A statement of readiness [made] at a time when the People are not actually ready is illusory and [is] insufficient to stop the running of the speedy trial clock" (*England*, 84 NY2d at 4).

As relevant here, "[a]ny statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL] 245.20" (CPL 30.30 [5]; *see* CPL 245.50 [1]). A certificate of compliance must state that, "after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" and must also "identify the items provided" (CPL 245.50 [1]; *see generally People ex rel. Ferro v Brann*, 197 AD3d 787, 788 [2d Dept 2021], *lv denied* 38 NY3d 909 [2022]). Notwithstanding the provisions of any other law, absent an individualized finding of special circumstances by the court before which the charge is pending, the prosecution will not be deemed ready for trial for purposes of CPL 30.30 until it has filed a "proper certificate" of compliance pursuant to CPL 245.50 (1) (CPL 245.50 [3]). However, "[n]o adverse consequence to the prosecution or the prosecutor shall result from the filing of a certificate of compliance in good faith and reasonable under the circumstances," although "the court may grant a remedy or sanction for a discovery violation" under CPL 245.80 (CPL 245.50 [1]).

Here, the criminal action was commenced on June 9, 2021 (*see* CPL 1.20 [17]). The People filed their certificate of compliance and statement of readiness on August 6, 2021. On February 12, 2022, defendant moved to dismiss the indictment on speedy trial grounds, arguing that the People's failure to provide all of the discovery required by CPL 245.20 rendered the certificate of compliance improper and the statement of readiness illusory. Defendant argued that the People should be charged with the entire eight month period and that the indictment should be dismissed (*see* CPL 30.30 [1] [a]). The court denied defendant's motion, concluding that the People's certificate of compliance was proper because defendant had not been prejudiced by the People's belated disclosure of certain required discovery and that the statement of readiness therefore was not illusory.

We agree with defendant that the court's use of a prejudice-only standard for evaluating the propriety of the certificate of compliance was error because the clear and unambiguous terms of CPL 245.50 establish that a certificate of compliance is proper where its filing

is “in good faith and reasonable under the circumstances” (CPL 245.50 [1]; *see generally People v Rodriguez*, 77 Misc 3d 23, 25 [App Term, 1st Dept 2022]). On a CPL 30.30 motion, the question is not whether defendant was prejudiced by an improper certificate of compliance (*see People v Trotman*, 77 Misc 3d 1210[A], *2 [Crim Ct, Queens County 2022]; *People v Adrovic*, 69 Misc 3d 563, 574 [Crim Ct, Kings County 2020]). Indeed, it appears that the court, in evaluating whether defendant was prejudiced by the People’s failure to disclose certain items, conflated the standard applicable to requests for sanctions under CPL 245.80—which does involve a prejudice analysis—with the standard for evaluating the propriety of a certificate of compliance for purposes of determining whether the People’s statement of readiness was valid (*see* CPL 30.30 [5]; 245.50). In light of the court’s failure to consider whether the People’s certificate of compliance was filed in “good faith and reasonable under the circumstances” despite the belated discovery, we hold the case, reserve decision, and remit the matter to Supreme Court to determine whether the People’s certificate of compliance was proper under the terms of CPL 245.50 and thus whether the statement of readiness was valid.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

225

CAF 19-02315

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF CAMERON J.S., EMILEY S.
AND RAYNESKYE L.S.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ZACHARIAS C., RESPONDENT,
AND ELIZABETH F., RESPONDENT-APPELLANT.

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

WILLIAM D. BRODERICK, NIAGARA FALLS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 27, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Elizabeth F. had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding and disposition that adjudged that she neglected the subject children by, among other things, failing to provide a safe environment for them. We now affirm.

As a preliminary matter, we note that two of the subject children reached the age of majority during the pendency of this appeal. Nevertheless, due to "the consequences that could flow [from the finding of neglect], the mother's challenge to the adjudication of neglect as to th[ose] child[ren] remains properly before us" (*Matter of Lillian SS. [Brian SS.]*, 146 AD3d 1088, 1090 n 4 [3d Dept 2017], *lv denied* 29 NY3d 919, 992 [2017]; *see Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 773 [2d Dept 2017]; *see also Matter of Gada B. [Vianez V.]*, 112 AD3d 1368, 1368 [4th Dept 2013]).

Contrary to the mother's contention, there is a sound and substantial basis in the record to support Family Court's determination that the mother neglected the subject children (*see generally Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). A neglected child is defined,

in relevant part, 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 . . . or by any other acts of a similarly serious nature requiring the aid of the court" (Family Ct Act § 1012 [f] [i] [B]).

"The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . 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] [internal quotation marks omitted]; *see* Family Ct Act § 1012 [f] [i] [B]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *Matter of Gina R. [Christina R.]*, 211 AD3d 1483, 1484 [4th Dept 2022]).

Here, the evidence presented by petitioner established that one of the mother's adult children had previously sexually abused one of the subject children over the course of several years. That adult child was also mentally unstable, volatile, and violent, having physically fought with others in the home, punched holes in walls, and destroyed other property in the home. Contrary to the mother's contention, the evidence further established that the subject children witnessed those events and were, at times, the victims of those events. The police were repeatedly called to the residence to address issues involving the adult child, and his mere presence at the house left the subject children "uncomfortable" and "terrified." Despite petitioner's requests that the mother adhere to a safety plan and ask the adult child to move from the residence, the evidence established that the adult child remained a constant presence in the home and that the mother refused to cooperate with petitioner.

We thus conclude that the evidence supports the determination that the mother failed to provide adequate supervision of the children (*see Matter of Airionna C. [Shernell E.]*, 118 AD3d 1430, 1431-1432 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014], *lv dismissed* 24 NY3d 951 [2014]; *Matter of Benjamin K.*, 28 AD3d 810, 812 [3d Dept 2006]). The mother's actions in continuing to allow the adult child to reside in or visit the home placed the children "at substantial risk of harm" (*Matter of Jose E. [Jose M.]*, 176 AD3d 1201, 1203 [2d Dept 2019]; *see Matter of Justine R. [Cara T.]*, 158 AD3d 701, 703 [2d Dept 2018]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

226

CAF 22-00463

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF DEREK W. BUSH,
PETITIONER-APPELLANT,

V ORDER

SHELBY K. PIERSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF ANTHONY L. WOOD,
PETITIONER-RESPONDENT,

V

SHELBY K. PIERSON, RESPONDENT-RESPONDENT,
AND DEREK W. BUSH, RESPONDENT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered February 15, 2022 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted Anthony L. Wood sole legal and physical custody of the subject child.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

233

CA 22-00688

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF GANNETT CO., INC., DOING
BUSINESS AS DEMOCRAT & CHRONICLE,
PETITIONER-APPELLANT,

V ORDER

HERKIMER POLICE DEPARTMENT, MICHAEL J. JORY,
IN HIS OFFICIAL CAPACITY AS CHIEF OF HERKIMER
POLICE DEPARTMENT, VILLAGE OF HERKIMER AND
COLLEEN D. GROSS, IN HER OFFICIAL CAPACITY AS
VILLAGE CLERK TREASURER, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), FOR PETITIONER-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MARTHA L. BERRY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Herkimer County (Bernadette T. Clark, J.), entered April 28, 2022 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 8, 2023,

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

234

CA 22-01059

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF GANNETT CO., INC., DOING BUSINESS AS DEMOCRAT & CHRONICLE, PETITIONER-APPELLANT,

V ORDER

HERKIMER POLICE DEPARTMENT, MICHAEL J. JORY, IN HIS OFFICIAL CAPACITY AS CHIEF OF HERKIMER POLICE DEPARTMENT, VILLAGE OF HERKIMER, AND COLLEEN D. GROSS, IN HER OFFICIAL CAPACITY AS VILLAGE CLERK TREASURER, RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.)

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), FOR PETITIONER-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MARTHA L. BERRY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Herkimer County (Bernadette T. Clark, J.), entered June 23, 2022 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 8, 2023,

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

244

KA 19-01613

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES M. BONACCI, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered June 5, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree, unauthorized use of a vehicle in the second degree, and criminal possession of stolen property in the fifth degree (two counts).

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

248

CAF 21-01267

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

IN THE MATTER OF SCOTT D. ARMSTRONG,
PETITIONER-APPELLANT,

V ORDER

HEIDI J. ARMSTRONG, RESPONDENT-RESPONDENT.

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

TULLY RINCKEY, PLLC, NEW YORK CITY (MICHAEL E. LIPTROT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SHARON ALLEN, KEUKA PARK, ATTORNEY FOR THE CHILD.

KELLY M. FORST, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 4, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint legal custody of the subject children.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

253

CA 22-00705

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

THE NEW Y-CAPP, INC., JONATHAN EUGENE COLEMAN
AND DONNA ZEMORIA PIERCE-BAYLOR,
PLAINTIFFS-APPELLANTS,

V ORDER

YELLOWSTONE CAPITAL, LLC, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

WHITE AND WILLIAMS LLP, PHILADELPHIA, PENNSYLVANIA (SHANE R. HESKIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MURRAY LEGAL, PLLC, MINEOLA (CHRISTOPHER R. MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 22, 2021. The order granted the motion of defendant to dismiss the action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3, 2023,

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

254

CA 22-00706

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

THE NEW Y-CAPP, INC., JONATHAN EUGENE COLEMAN
AND DONNA ZEMORIA PIERCE-BAYLOR,
PLAINTIFFS-APPELLANTS,

V ORDER

YELLOWSTONE CAPITAL, LLC, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

WHITE AND WILLIAMS LLP, PHILADELPHIA, PENNSYLVANIA (SHANE R. HESKIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MURRAY LEGAL, PLLC, MINEOLA (CHRISTOPHER R. MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 23, 2021. The judgment dismissed the action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 3, 2023,

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

255

CA 22-00150

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF TIMOTHY ALLEN, BEVERLEY BRITZZALARO, LOUISE MACVIE, TERRENCE WELSCH, ARTHUR WINGERTER, ALL AS TRUSTEES OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST, AND CHARLES W. CHIAMPOU, AS THE TRUST PROTECTOR OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST, PETITIONERS-RESPONDENTS-APPELLANTS,

V ORDER

MICHAEL ANNALETT AND VIRGINIA WILTBERGER, AS TRUSTEES OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST, RESPONDENTS-APPELLANTS-RESPONDENTS, AND MICHAEL J. MOLEY, RESPONDENT-RESPONDENT.

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT MICHAEL ANNALETT, AS TRUSTEE OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

LIPPES MATHIAS LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT VIRGINIA WILTBERGER, AS TRUSTEE OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

PHILLIPS LYTLE LLP, BUFFALO (JOSHUA GLASGOW OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS TIMOTHY ALLEN, BEVERLEY BRITZZALARO, LOUISE MACVIE, AND TERRENCE WELSCH, ALL AS TRUSTEES OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT ARTHUR WINGERTER, AS TRUSTEE OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (JOSEPH E. ZDARSKY OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT CHARLES W. CHIAMPOU, AS THE TRUST PROTECTOR OF THE WALTER N. WELSCH 2006 IRREVOCABLE TRUST.

HOOVER & DURLAND LLP, BUFFALO (TIMOTHY W. HOOVER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeals and cross appeals from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 22, 2021. The judgment, among other things, declared that petitioner Charles W. Chiampou, as the trust protector of the Walter

N. Welsch 2006 Irrevocable Trust, possessed the authority to remove respondent Michael Annalett as the independent trustee.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

256

TP 22-00520

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

IN THE MATTER OF MARK DUBLINO, PETITIONER,

V ORDER

STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

MARK DUBLINO, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered September 17, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

258

KA 22-00587

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHARY MARSHALL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (AUSTIN MILONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 30, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arose from an incident in which defendant, after being handed a semiautomatic handgun by a companion who was engaged in a verbal argument with another person while that person's friend (victim) attempted to quell the situation, approached from behind and fatally shot the victim six times in the back. We affirm.

As an initial matter, defendant correctly contends and the People correctly concede that defendant did not validly waive his right to appeal. County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea . . . and thus the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Murray*, 197 AD3d 1017, 1017 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021] [internal quotation marks omitted]; *see People v Jones*, 211 AD3d 1489, 1490 [4th Dept 2022]; *People v Rodriguez*, 199 AD3d 1458, 1458 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]). The court also " 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues' " (*Murray*, 197 AD3d at 1017; *see People v Thomas*, 34 NY3d 545,

565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *Jones*, 211 AD3d at 1490; *Rodriguez*, 199 AD3d at 1458).

Defendant contends that the court erred in refusing to adjudicate him a youthful offender. We reject that contention. 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]). "Factors 'directly' flowing from and relating to defendant's personal conduct while committing the crime qualify" as appropriate mitigating circumstances in this context; however, "generally, defendant's age, background, criminal history and drug habit do not pertain to defendant's direct manner in the commission of the crime" (*Garcia*, 84 NY2d at 342; *see Meridy*, 196 AD3d at 7; *Jones*, 166 AD3d at 1480).

Here, we conclude that the court did not abuse its discretion in determining that defendant was not eligible for youthful offender status inasmuch as it is undisputed that defendant's participation in the crime was not relatively minor (*see* CPL 720.10 [3] [ii]) and, contrary to defendant's contention, the record does not establish the existence of any "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]; *see People v Blackshear*, 208 AD3d 1635, 1636 [4th Dept 2022], *lv denied* 39 NY3d 961 [2022]; *People v Flores*, 134 AD3d 425, 426 [1st Dept 2015], *lv denied* 29 NY3d 948 [2017]; *People v Victor J.*, 283 AD2d 205, 206-207 [1st Dept 2001], *lv denied* 96 NY2d 942 [2001]; *cf. People v John B.*, 93 AD2d 957, 957 [3d Dept 1983]). Further, even assuming, arguendo, that there were sufficient mitigating circumstances here, based on our review of the relevant factors to consider in determining whether to afford defendant youthful offender treatment (*see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]), we conclude that the court's refusal to adjudicate him a youthful offender was not an abuse of discretion, and we decline to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see Meridy*, 196 AD3d at 7-8; *People v Agee*, 140 AD3d 1704, 1705 [4th Dept 2016], *lv denied* 28 NY3d 925 [2016]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

264

CAF 20-00349

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF KAYLA C., PETITIONER-APPELLANT,

V ORDER

STEVEN L., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 27, 2020 in a proceeding pursuant to Family Court Act article 5. The order, among other things, denied the petition to vacate the acknowledgment of paternity.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

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

265

CAF 20-00350

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF JOSHUA M.K., SR.,
PETITIONER-RESPONDENT,

V ORDER

KAYLA C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered January 27, 2020 in a proceeding pursuant to Family Court Act article 5. The order, among other things, dismissed the petition for paternity.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1385-1386 [4th Dept 2019], *lv dismissed* 38 NY3d 1167 [2022]).

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

267

CAF 22-00068

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF DARRELL J. FARNEY,
PETITIONER-APPELLANT,

V ORDER

MELISSA A. GREENWOOD, RESPONDENT-RESPONDENT.

IN THE MATTER OF MELISSA A. GREENWOOD,
PETITIONER-RESPONDENT,

V

DARRELL J. FARNEY, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered June 24, 2021 in proceedings pursuant to Family Court Act article 6. The order, among other things, granted the parties joint legal custody of the subject child with respondent-petitioner Melissa A. Greenwood having primary physical custody.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

277

CA 22-00883

PRESENT: SMITH, J.P., LINDLEY, CURRAN, OGDEN, AND GREENWOOD, JJ.

IN THE MATTER OF KEVIN T. STOCKER,
PETITIONER-PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, RESPONDENT-DEFENDANT,
AND STATE OF NEW YORK,
RESPONDENT-DEFENDANT-RESPONDENT.

KEVIN T. STOCKER, TONAWANDA, PETITIONER-PLAINTIFF-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Henry J. Nowak, J.), entered December 23, 2021 in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The judgment, among other things, granted the cross motion of respondent-defendant State of New York for a declaratory judgment.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

293

CA 22-01423

PRESENT: WHALEN, P.J., PERADOTTO, BANNISTER, MONTOUR, AND GREENWOOD, JJ.

CRESSIDA A. DIXON, MONROE COUNTY PUBLIC ADMINISTRATOR, C.T.A. OF THE ESTATE OF LENA G. ZIELINSKI, DECEASED, GENERAL PARTNER OF E-Z MINI STORAGE L.P., EDWARD J. ZIELINSKI, ERIC A. ZIELINSKI AND ELIOT S. ZIELINSKI, LIMITED PARTNERS OF E-Z MINI STORAGE, L.P., PLAINTIFFS-APPELLANTS,

V ORDER

EARL D. ZIELINSKI, INDIVIDUALLY AND AS A GENERAL PARTNER OF E-Z MINI STORAGE, L.P., DEFENDANT-RESPONDENT.

HANDELMAN, WITKOWICZ & LEVITSKY, ROCHESTER (MARTIN S HANDELMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GALLO & IACOVANGELO, LLP, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered October 25, 2021. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiffs for summary judgment.

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

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court