SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 15, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED NOVEMBER 15, 2024

_____	336	KA 22 01947	PEOPLE V LYNN SEELEY
_____	353	KA 23 00182	PEOPLE V ANTONIO GRZEGORZEWSKI
_____	542	KA 23 01583	PEOPLE V JACOB COHEN
_____	545	KA 23 01573	PEOPLE V JACOB COHEN
_____	564	CA 23 01563	MICHAEL DINIERI V NICHOLAS D. SCHIMMELPENNICK
_____	569	CA 23 01123	TYLER PAUL V KELSEY LYONS
_____	576	KA 23 01447	PEOPLE V CHASE WALKER
_____	600	CAF 23 01241	THOMAS I. HARTUNG, JR. V AMANDA C. LONG
_____	601	CAF 23 01242	AMANDA C. LONG V THOMAS I. HARTUNG, JR.
_____	607	CAF 22 01876	Mtr of DANIEL D.
_____	608	CA 23 01420	DEUTSCHE BANK TRUST COMPANY AMERICA V FREDONIA TEMPLE/BRIGHAM APARTMENTS
_____	609	CA 23 02045	DEUTSCHE BANK TRUST COMPANY AMERICA V FREDONIA TEMPLE/BRIGHAM APARTMENTS
_____	610	CA 24 00216	DEUTSCHE BANK TRUST COMPANY AMERICA V FREDONIA TEMPLE/BRIGHAM APARTMENTS
_____	617	CA 23 00390	MELISSA A. LASHER V DONALD J. LASHER
_____	617.1	CA 23 00389	MELISSA A. LASHER V DONALD J. LASHER
_____	623	KA 24 00395	PEOPLE V LUKE J. GAFFNEY
_____	624	KA 23 01105	PEOPLE V ANDREW M. WILSON
_____	628	OP 24 00449	TRANSFORM SALECO, LLC V ONONDAGA COUNTY INDUSTRIA
_____	628.1	OP 24 00426	3649 ERIE, LLC V ONONDAGA COUNTY INDUSTRIAL DEVEL
_____	633	CA 23 01661	DAVONTAE BROWN V ANTHONY J. ANNUCCI
_____	637	KA 24 00474	PEOPLE V DAMIEN MORRIS
_____	638	KA 23 01199	PEOPLE V CHRISTOPHER MORIN
_____	656	KA 23 00553	PEOPLE V TERELL E. ROLFE
_____	660	CAF 23 00920	Mtr of PARKER J.

_____	673	CA 23 01174	FIRST NATIONAL CREDIT, INC. V CHRISTIE'S CLEANING, INC.
_____	686	CA 23 01564	ASHLEY C. PUTNAM V JASON D. KIBLER
_____	687	CA 23 01727	ROCHESTER POLICE DEPARTMENT V JARVIS DUVAL
_____	695	TP 24 00675	DACIA HIRSCH V NEW YORK STATE DIVISION OF HUMAN
_____	696	KA 17 01714	PEOPLE V TIFFANIE IRWIN
_____	697	KA 20 00995	PEOPLE V FREDERICK K. BOHN
_____	698	KA 24 00626	PEOPLE V GREGORY JORDAN
_____	699	KA 18 01027	PEOPLE V JAMES VICKS
_____	700	KA 23 00539	PEOPLE V PAUL R. ALLEN
_____	701	CAF 23 01401	Mtr of JULIET A. W.
_____	702	CAF 23 01402	Mtr of JULIET W.
_____	704	OP 24 00740	SALEM NAGI V HON. MELISSA L. BARRETT
_____	706	CA 23 01390	THOMAS TRATHEN V AMERICAN ROCK SALT CO., LLC
_____	710	CA 23 01745	RHIANNON WHITE V ROBERT DRACKER, M.D.
_____	711	CA 24 00188	RHIANNON WHITE V ROBERT DRACKER, M.D.
_____	712	TP 24 00718	K AND M MOTORS, INC. V STATE OF NEW YORK DEPARTME
_____	713	KA 21 01720	PEOPLE V DESMEN SIMPSON
_____	714	KA 22 00123	PEOPLE V GAIL BARNWELL
_____	715	KA 22 00597	PEOPLE V JEREMY MILLS
_____	717	KA 20 00656	PEOPLE V MONTEK MASTIN
_____	718	KA 20 01381	PEOPLE V MONTEK MASTIN
_____	719	KA 23 01279	PEOPLE V CHANCHHAYAVAN T. CHOURB
_____	721	KA 23 00692	PEOPLE V JASON EKIERT
_____	723	CAF 23 00663	GRETEL L. KEDLEY V TERRENCE P. KEDLEY
_____	724	CAF 23 00118	Mtr of KAL-EL F.
_____	725	CAF 22 01877	SAMANTHA RODRIGUEZ V DARINELL YOUNG, JR.
_____	729	CA 23 01330	PEARL STREET PARKING ASSOCIATES LLC V COUNTY OF ERIE
_____	731	CA 23 01807	PAUL S. PIOTROWSKI V TOWN OF CHEEKTOWAGA
_____	732	CA 23 01926	DANIELLE DILL V BRIAN S.

_____	734	KA 22 00596	PEOPLE V JOSHUA JACOBY
_____	737	KA 23 00853	PEOPLE V HASHA OUTLEY
_____	739	KA 23 01866	PEOPLE V CHRISTIAN BUSH
_____	740	KA 22 01649	PEOPLE V MIEQUIN CHEESE
_____	745	CAF 23 01409	CHARLES E. BETZ, JR. V JULIANNA D. BETZ
_____	749	CA 24 00352	THE CINCINNATI INSURANCE COMPANY V KENNETH J. DOMINGUEZ
_____	752	CA 24 00650	ANZALONE PROPERTY ASSOCIATES, LLC V HIGHBRIDGE STREET PROPERTIES, LLC
_____	756	KA 18 02303	PEOPLE V MIZZIAH S. MURRAY
_____	757	KA 20 00697	PEOPLE V DENNIS L. PARK
_____	759	KA 21 01594	PEOPLE V THOMAS E. SCHRADER
_____	760	KA 23 00881	PEOPLE V BRUCE S. MYLES
_____	761	KA 18 00224	PEOPLE V COLIN A. RIDEOUT
_____	762	KA 23 00879	PEOPLE V ANDREW STOBY
_____	764	KA 23 00897	PEOPLE V VICTOR D. MOORE
_____	766	CA 23 00497	ERIE INSURANCE COMPANY V CHILDREN'S PALACE CHILDC
_____	767	CA 23 00498	ERIE INSURANCE COMPANY V CHILDREN'S PALACE CHILDC
_____	767.1	CA 23 00477	HARLEYSVILLE PREFERRED INSURANCE COMPANY V CHILDREN'S PALACE CHILDCARE CENTER, INC.
_____	767.2	CA 23 00476	HARLEYSVILLE PREFERRED INSURANCE COMPANY V CHILDREN'S PALACE CHILDCARE CENTER, INC.
_____	768	CA 24 00615	JAMES DONEGAN V JONATHAN L. PARRY
_____	774	KA 22 01417	PEOPLE V RONDALE L. COOPER
_____	775	KA 23 00834	PEOPLE V STEVEN J. ADAMS
_____	777	KA 21 00807	PEOPLE V TRISHA A. CASTELLANO
_____	779	KA 20 00786	PEOPLE V WILLIE J. GOINS, III
_____	780	KA 20 00327	PEOPLE V JOHN C. HOWARD, JR.
_____	781	KA 20 00435	PEOPLE V JOHN C. HOWARD, JR.
_____	785	CA 23 01880	APPLIED HEALTHCARE RESEARCH MANAGEM ENT V KEMI R. IBRAHIM
_____	786	CA 23 01412	WILLIAM SOJDA V E&R GENERAL CONSTRUCTION
_____	792	KA 21 00453	PEOPLE V ROBERT C. LEWIS

_____	794	KA 22 01847	PEOPLE V SAMUEL MAXWELL
_____	795	KA 19 02356	PEOPLE V JACQUES YATES
_____	797	KA 23 01805	PEOPLE V ADAM WOLCOTT
_____	799	CAF 23 01308	BENEDICT R. ROTUNDO V KATIE A. DEPTOLA
_____	805	CA 23 01983	STATE OF NEW YORK V MAHWEE S.
_____	810	CA 23 01335	SARA NABIL FAKHRA V AOUS FAKHRA
_____	813	KA 20 00659	PEOPLE V BRYANT MOSS
_____	815	KA 20 01046	PEOPLE V DOUGLAS J. MOSHER
_____	819	CA 23 01882	ADAM BROCKWAY In the Matter of Arbitration Between COUNTY OF ONONDAGA
_____	824	CA 23 01829	EPHRAIM ATWAL V BRIAN SEMKIW

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

336

KA 22-01947

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYNN SEELEY, DEFENDANT-APPELLANT.

NATHANIEL BARONE, II, PUBLIC DEFENDER, MAYVILLE (ALEXANDRIA E. HAMANN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), entered November 28, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender.

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

Memorandum: We are advised that, by order dated October 3, 2024, upon a redesignation hearing, County Court determined that defendant is a level one risk and did not designate him a sexually violent offender under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We conclude that defendant's appeal, taken from the original order insofar as it designated him a sexually violent offender, must be dismissed (*see generally Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]).

Ann Dillon Flynn

Entered: November 15, 2024

Clerk of the Court

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

353

KA 23-00182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO GRZEGORZEWSKI, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Chautauqua County Court (David W. Foley, J.), dated December 21, 2022. The order, insofar as appealed from, designated defendant a sexually violent offender.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order insofar as it designated him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Due to the designation, which is based on a felony conviction in California requiring defendant to register as a sex offender in that state, defendant is subject to lifetime registration as a sex offender in New York even though County Court determined that he is only a level one risk. The designation was made pursuant to Correction Law § 168-a (3) (b) insofar as it defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." Although defendant concedes that he qualifies as a sexually violent offender under the foreign registration clause of § 168-a (3) (b), he contends that the provision is unconstitutional on its face and as applied to him under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (US Const, 14th Amend, § 1), inasmuch as his out-of-state felony conviction was for a nonviolent offense. Defendant further contends that the foreign registration clause violates the Privileges and Immunities Clause of the Federal Constitution (US Const, art IV, § 2).

In January 2005, defendant was convicted in California by a nolo contendere plea of lewd or lascivious acts committed on a child under the age of 14 (Cal Penal Code § 288 [a]). At the time of the crime, the statute provided that "[a]ny person who willfully and lewdly

commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in [California Penal Code] Part 1, upon or with the body, or any part or member thereof, of a child who is *under the age of 14 years*, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony" (*id.* [emphasis added]; *see* 1998 Cal Legis Serv ch 925, § 2).

Among the applicable "lewd or lascivious act[s]" (Cal Penal Code § 288 [a]) provided for in California Penal Code Part 1 was oral copulation (Cal Penal Code former § 288a [subsequently renumbered Cal Penal Code § 287] [a]; [b] [1]; *see* 2002 Cal Legis Serv ch 302, § 4; 2018 Cal Legis Serv ch 423, § 49), as limited by the age provision of section 288 (a), and, under California law, California Penal Code § 288 (a) also encompassed "any touching of an underage child committed with the intent to sexually arouse either the defendant or the child" (*People v Martinez*, 11 Cal 4th 434, 442 [1995] [internal quotation marks omitted]; *see also People v Myers*, 2003 WL 195007, *2 [Cal Ct App, 2d Dist, Div 2, 2003]).

In other words, at the time that defendant violated the statute, oral copulation with or any touching of a child under the age of 14 with the required sexual intent violated the statute. There is no dispute that, at the time of the crime, the victim was under the age of 14.

According to the case summary prepared by the Board of Examiners of Sex Offenders in New York, the factual allegations underlying the California conviction were that defendant, at the age of 18 or older, engaged in oral and other sexual conduct with a developmentally challenged boy who was 12 and 13 years of age, on multiple occasions from August 2002 to October 2003. The case summary further stated that defendant had no other reported convictions.

The merits of defendant's as-applied substantive due process claim turn on whether the felony sex offense of which defendant was convicted in California was violent in nature (*see People v Malloy*, 228 AD3d 1284, 1290-1291 [4th Dept 2024]). If the felony of conviction, by virtue of its statutory elements (*see id.* at 1291), involved sexually violent conduct, then the foreign registration clause of Correction Law § 168-a (3) (b) is not unconstitutional as applied to defendant inasmuch as he committed a violent sex offense even if it does not include all of the essential elements of one of the sexually violent offenses in New York enumerated in Correction Law § 168-a (3) (a). If, however, defendant was convicted of an out-of-state felony that is nonviolent in nature, we would conclude that the statute is unconstitutional as applied to defendant for the reasons set forth in *People v Malloy* (228 AD3d at 1287-1291; *see People v Zellefrow*, 229 AD3d 1069, 1070 [4th Dept 2024]; *People v Cromwell*, 229 AD3d 1176, 1177-1178 [4th Dept 2024]).

Assuming, arguendo, that the applicable underlying California criminal statute was California Penal Code former § 288a, we cannot determine whether the crime of which defendant was convicted is

violent in nature. It is unclear from the limited record before us whether the crime of conviction is comparable to the former New York felony of criminal sexual act in the first degree (Penal Law former § 130.50 [4]), which New York law considers a sexually violent offense (*see* Correction Law § 168-a [3] [a] [i]), or whether the California crime is comparable to the former New York felony of criminal sexual act in the second degree (Penal Law former § 130.45 [1]), which New York law does not consider a sexually violent offense (*see* Correction Law § 168-a [3] [a] [i]).

Alternatively, assuming arguendo that the underlying "lewd or lascivious act" was touching, we note that, under California law, California Penal Code § 288 (a) was violated by any touching of an underage child with the applicable intent, regardless of whether it occurred underneath or on top of the child's clothing (*see Martinez*, 11 Cal 4th at 444). It follows that the crime of which defendant was convicted may be comparable to lesser New York offenses, such as the misdemeanor of forcible touching (*see* Penal Law § 130.52), which is not a sexually violent offense (*see* Correction Law § 168-a [3] [a] [i]).

Based on the record and briefing before us, we cannot determine whether the crime of conviction in California was violent in nature. Under the circumstances, we are similarly unable to determine whether the foreign registration clause of Correction Law § 168-a (3) (b) is constitutional, under the Due Process Clause, as applied to defendant. We therefore hold the case, reserve decision, and remit the matter to County Court to decide whether the foreign registration clause is constitutional as applied to defendant.

Additionally, the People have never argued that the essential elements of the California felony were the statutory equivalent of a sexually violent offense in New York under the essential elements test set out in the first disjunctive clause of Correction Law § 168-a (3) (b). We decline to consider that alternative basis for affirmance, sua sponte, for the first time on appeal (*see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). Therefore, we also remit to County Court to consider whether the California felony includes all of the essential elements of a sexually violent offense set forth in Correction Law § 168-a (3) (a) (*see People v Weber*, 40 NY3d 206, 211-212 [2023]).

We have considered defendant's remaining constitutional challenges to his designation as a sexually violent offender under the foreign registration clause and conclude that they lack merit (*see Malloy*, 228 AD3d at 1291-1292).

LINDLEY, J.P., KEANE, and HANNAH, JJ., concur; CURRAN, J., concurs in the following memorandum: I respectfully concur with the majority insofar as it concludes that the matter must be remitted to County Court for consideration of whether defendant is a sexually violent offender under the essential elements test found in the first disjunctive clause of Correction Law § 168-a (3) (b) (*see generally* CPLR 5522 [a]; *People v Weber*, 40 NY3d 206, 211-212 [2023])—an issue

the majority properly declines to consider as an alternative basis for affirmance, sua sponte, for the first time on appeal (*see generally Misicki v Caradonna*, 12 NY3d 511, 519 [2009]). However, I would not remit the matter for consideration of whether defendant's out-of-state felony conviction was violent in nature, because I conclude that defendant met his burden, on his as-applied due process challenge to the second disjunctive clause of Correction Law § 168-a (b) (3), of showing that there is no rational basis for designating him a sexually violent offender solely on the ground of an out-of-state felony conviction requiring him to register as a sex offender in that jurisdiction (*see People v Brightman*, 230 AD3d 1527, 1529-1530 [4th Dept 2024]; *People v Cromwell*, 229 AD3d 1176, 1177-1178 [4th Dept 2024]).

OGDEN, J., concurs in the result in the following memorandum: I concur in the result reached by the majority insofar as the majority concludes that the matter must be remitted to County Court for consideration of whether defendant is a sexually violent offender under the essential elements test. For the reasons stated in my concurring memorandum in *People v Malloy* (228 AD3d 1284, 1292-1294 [4th Dept 2024] [Ogden, J., concurring]), however, I disagree with the majority's reasoning as it relates to the second disjunctive clause of Correction Law § 168-a (3) (b). In my view, the second disjunctive clause of Correction Law § 168-a (3) (b) is unconstitutional on its face.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

542

KA 23-01583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB COHEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Theodore H. Limpert, J.), dated March 9, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is modified on the law by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, defendant appeals from an order determining, inter alia, that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). In appeal No. 2, defendant appeals from an order denying his motion for leave to renew and reargue County Court's SORA determination. We conclude in appeal No. 1 that the court erred in granting the People's request for an upward departure from risk level two to risk level three, and we therefore modify the order accordingly. Insofar as the order in appeal No. 2 denied that part of defendant's motion seeking leave to reargue, no appeal lies from that part of the order (*see Kelsey v Hourigan*, 175 AD3d 918, 919-920 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]; *JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1624 [4th Dept 2016]). Insofar as the order in appeal No. 2 denied that part of defendant's motion seeking leave to renew, we dismiss the appeal as moot in light of our determination in appeal No. 1 (*see Kelsey*, 175 AD3d at 920; *JPMorgan Chase Bank, N.A.*, 140 AD3d at 1624).

Prior to the SORA hearing, the People prepared a risk assessment instrument recommending that 100 points be assessed against defendant, who had been sentenced to shock probation on the qualifying sex offenses, making him a presumptive level two risk. Relying on an

evaluation of defendant completed by a psychiatrist retained by the defense during the criminal proceeding, however, the People sought an override to risk level three based on "a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed.]; *see People v Grief*, 223 AD3d 917, 919 [2d Dept 2024]; *People v Miller*, 186 AD3d 1095, 1097 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020]). The psychiatrist, who evaluated defendant following his arrest, concluded that he suffers from bipolar 1 disorder, which can result in impaired judgment and impulsiveness. The psychiatrist opined that, although defendant had received psychiatric treatment for almost a decade, he had been misdiagnosed and was never treated for bipolar disorder.

In the alternative, the People requested an upward departure based on defendant's post-offense conduct and attitude, which, according to the People, demonstrated that he "struggle[d] to accept responsibility" for his crimes and presented a high rate of recidivism. Notably, the People did not seek an upward departure due to defendant's bipolar disorder diagnosis and its effect on his judgment and impulsivity. Defendant opposed the People's requests and sought a downward departure to risk level one based on the same psychiatric report relied on by the People for their override request.

The court assessed 95 points against defendant, making him a presumptive level two risk, and denied the People's request for an override to risk level three, concluding that bipolar 1 disorder, unlike pedophilia or sexual sadism, did not constitute a psychological abnormality that decreased defendant's ability to control impulsive sexual behavior within the meaning of SORA. The court nevertheless granted the People's request for an upward departure to risk level three based on defendant's bipolar diagnosis and his post-offense conduct. The only post-offense conduct referenced by the court was a statement that defendant made to one of the victims the morning after the sexual assaults when the victim accused defendant of having abused her. Defendant said in response, "honestly, it's just your word against mine." As noted, the People argued that defendant's statement demonstrated that he refused to accept responsibility. We agree with defendant that the court erred in granting the People's request for an upward departure.

When the People establish by clear and convincing evidence the existence of aggravating factors that are, "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines," a SORA court "must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure" from the sex offender's presumptive risk level (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Havlen*, 167 AD3d 1579, 1579 [4th Dept 2018]). An aggravating factor is one that tends to "establish a higher likelihood of reoffense or danger to the community" (*People v Thomas*, 186 AD3d 1067, 1068 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020] [internal quotation marks omitted]).

Here, we conclude that the People failed to prove by clear and convincing evidence that defendant is more likely to reoffend based on his bipolar diagnosis. The only evidence offered by the People at the SORA hearing was the report prepared by defendant's expert, who opined that "impaired judgment is a common disability in Bipolar Disorder, as is impulsiveness." The expert further opined that defendant's "judgment was impaired by his disorder" when he committed the crimes, and that he "acted impulsively because of his then undiagnosed (and inadequately treated) illness." The fact that defendant's bipolar condition may have impaired his judgment and decreased his ability to control impulsive sexual behavior when he committed the qualifying offenses does not mean, ipso facto, that he is at a greater risk of reoffending in the future as a result of his bipolar condition. Defendant's mental illness was undiagnosed and untreated when he committed the qualifying offenses, and there is no evidence in the record indicating a reluctance or inability on defendant's part to follow treatment recommendations and take prescribed medications now that he has been properly diagnosed.

We further conclude that an upward departure was not warranted based on defendant's post-offense statement to one of the victims. Although the statement in question may show, as the People asserted, that defendant failed to accept responsibility for his crimes, an offender's failure to accept responsibility is taken into account under risk factor 12 on the risk assessment instrument. Thus, an upward departure cannot be granted based on defendant's statement (*see generally Gillotti*, 23 NY3d at 861; *People v Torres-Acevedo*, 213 AD3d 1266, 1266 [4th Dept 2023]).

Finally, we reject defendant's contention that the court erred in denying his request for a downward departure to risk level one. Even assuming, arguendo, that the psychiatric report constitutes a mitigating factor not taken into consideration by the SORA guidelines, we cannot say that the court, after weighing the aggravating and mitigating factors, abused its discretion in determining that the totality of the circumstances does not warrant a departure to avoid an over-assessment of the defendant's "dangerousness and risk of sexual recidivism" (*Gillotti*, 23 NY3d at 861; *see People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]).

All concur except BANNISTER, and KEANE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. At the time of the Sex Offender Registration Act determination, it was not the position of the People that defendant was more likely to reoffend simply because of his bipolar diagnosis. Rather, the People contended that it was defendant's overall clinical assessment, particularly his manic and hypomanic behavior—a symptom common to, but also occurring in the absence of, a diagnosis of bipolar disorder—that evidenced his "difficulty controlling his impulses" and warranted an upward departure (*see People v Mallaber*, 59 AD3d 989, 990 [4th Dept 2009], *lv denied* 12 NY3d 710 [2009]).

We also respectfully disagree with the majority's conclusion that an offender's failure to accept responsibility is adequately taken

into account under risk factor 12 on the risk assessment instrument and that an upward departure thus cannot be based on defendant's statement (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Here, the court relied on a series of actions taken by defendant—including returning to the scene of the crime the following morning and telling one of the victims "honestly, its just your word against mine"—as aggravating factors that warranted an upward departure to risk level three.

"A court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[,] . . . [the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007] [internal quotation marks omitted]; *see generally Gillotti*, 23 NY3d at 861). We conclude, contrary to defendant's contention, that the People satisfied their burden of demonstrating the existence of such an aggravating factor, and we would therefore affirm.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

545

KA 23-01573

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB COHEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Theodore H. Limpert, J.), dated May 1, 2023. The order denied the motion of defendant for leave to renew and reargue the determination that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Same memorandum as in *People v Cohen* ([appeal No. 1] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

564

CA 23-01563

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

MICHAEL DINIERI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NICHOLAS D. SCHIMMELPENNICK, MEGHAN R. SCHIMMELPENNICK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

DIFILIPPO, FLAHERTY & STEINHAUS, PLLC, EAST AURORA (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (DANIEL T. HUNTER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Edward Pace, J.), dated August 21, 2023. The order granted the motion of defendants Nicholas D. Schimmelpennick and Meghan R. Schimmelpennick for summary judgment dismissing the amended complaint against them.

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

Memorandum: Plaintiff commenced this common-law negligence and Labor Law action seeking damages for injuries he sustained when the scaffolding on which he was standing collapsed while he was working on the construction of an addition to a single-family home owned and occupied by Nicholas D. Schimmelpennick and Meghan R. Schimmelpennick (collectively, defendants). Defendants moved for summary judgment dismissing the amended complaint against them. Supreme Court granted the motion, and plaintiff appeals. We affirm.

Plaintiff contends that the court erred in granting that part of the motion with respect to his claims under Labor Law §§ 240 (1) and 241 (6). In particular, plaintiff contends that defendants failed to meet their initial burden on the motion of demonstrating that the homeowner exemption applies to them and that, even if they did, he raised a triable issue of fact whether the exemption applies. We reject that contention.

Labor Law §§ 240 (1) and 241 (6) exempt from liability owners of one- and two-family dwellings who contract for but do not direct or control the work (*see Fawcett v Stearns*, 142 AD3d 1377, 1377 [4th Dept 2016]). " 'Whether an owner's conduct amounts to directing or controlling depends upon the degree of supervision exercised over the

method and manner in which the work is performed' " (*Gambee v Dunford*, 270 AD2d 809, 810 [4th Dept 2000]; *see Ennis v Hayes*, 152 AD2d 914, 915 [4th Dept 1989]). The existence of both residential and commercial uses on a property does not automatically disqualify a dwelling owner from invoking the exemption (*see Fawcett*, 142 AD3d at 1378). Here, we conclude that defendants met their initial burden of establishing the applicability of the homeowner exemption. Defendants' submissions in support of their motion established that they are the owners of the one-family dwelling where plaintiff was working, that they neither directed nor controlled plaintiff's work, and that the home had no commercial purpose (*see id.*; *Kostyj v Babiarz*, 212 AD2d 1010, 1011 [4th Dept 1995]). In opposition, plaintiff failed to raise a triable issue of fact whether defendants directed or controlled his work or whether the premises was being operated exclusively for commercial purposes (*see Fawcett*, 142 AD3d at 1379; *Samuel v Khalid*, 246 AD2d 523, 523-524 [2d Dept 1998]).

To the extent that plaintiff contends that the court erred in granting that part of the motion with respect to his common-law negligence cause of action and his Labor Law § 200 claim, we reject that contention. Defendants met their initial burden of demonstrating that they exercised no supervisory control over the injury-producing work and that the accident arose from plaintiff's methods and manner of work (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Gillis v Brown*, 133 AD3d 1374, 1376 [4th Dept 2015]), and plaintiff failed to raise a triable issue of fact in opposition.

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

569

CA 23-01123

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

TYLER PAUL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KELSEY LYONS, DEFENDANT-RESPONDENT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 10, 2023. The order granted the motion of defendant to dismiss the complaint and dismissed 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: Plaintiff commenced this action seeking to recover damages for injuries he allegedly sustained when his vehicle was struck by a vehicle operated by defendant. Defendant thereafter moved pursuant to CPLR 3211 (a) (5) to dismiss the complaint as time-barred. Plaintiff appeals from the order granting that motion, and we reverse.

"On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). Once a defendant meets that initial burden, the burden shifts "to plaintiff to aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*id.* at 1562 [internal quotation marks omitted]).

Here, defendant met her initial burden on the motion of establishing that the limitations period had expired. Pursuant to CPLR 214 (5), a three-year statute of limitations applies to an action to recover damages for personal injury. Plaintiff's cause of action accrued on June 27, 2019, the date of the accident (*see Torres v Greyhound Bus Lines, Inc.*, 48 AD3d 1264, 1264-1265 [4th Dept 2008]), and plaintiff did not commence this action until June 29, 2022.

However, in response, plaintiff established that the statute of limitations was tolled. On March 20, 2020, then-Governor Andrew Cuomo issued Executive Order (A. Cuomo) No. 202.8, which tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules" (9 NYCRR 8.202.8). Then-Governor Cuomo issued a series of nine subsequent executive orders that extended the tolling period, eventually through November 3, 2020 (*see* Executive Order [A. Cuomo] Nos. 202.14 [9 NYCRR 8.202.14], 202.28 [9 NYCRR 8.202.28], 202.38 [9 NYCRR 8.202.38], 202.48 [9 NYCRR 8.202.48], 202.55 [9 NYCRR 8.202.55], 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]). "A toll does not extend the statute of limitations indefinitely but merely suspends the running of the applicable statute of limitations for a finite and, in this instance, readily identifiable time period" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020], *rearg denied* 36 NY3d 962 [2021]). "[T]he period of the toll is excluded from the calculation of the time in which the plaintiff can commence an action" (*id.*).

In this case, 267 days of the 1,095-day limitation period had elapsed by the time the toll began on March 20, 2020. Upon the expiration of the toll on November 3, 2020, the remaining 828 days of the limitation period began to run again, expiring on February 10, 2023 (*see Matter of New York City Tr. Auth. v American Tr. Ins. Co.*, 211 AD3d 643, 643 [1st Dept 2022]). Thus, the action was timely commenced on June 29, 2022 (*see Harden v Weinraub*, 221 AD3d 1460, 1462 [4th Dept 2023]).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

576

KA 23-01447

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHASE WALKER, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), dated June 16, 2023. The order granted the motion of defendant to dismiss the indictment and dismissed the indictment.

It is hereby ORDERED that the order so appealed from is reversed on the law, the motion dated March 13, 2023, is denied, the indictment is reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings on the indictment.

Memorandum: In this prosecution arising from defendant's alleged assault of his parole officer, Supreme Court, by decision and order dated June 16, 2023 (original order), granted defendant's motion dated March 13, 2023, seeking, in effect, dismissal of the indictment on the ground that the People failed to provide all discovery required by CPL 245.20, which rendered any certificate of compliance improper, and thereby rendered any statement of trial readiness pursuant to CPL 30.30 illusory and resulted in a violation of defendant's statutory right to a speedy trial. The court subsequently issued an amended decision and order dated August 31, 2023 (amended order), which merely corrected a typographical error in the indictment number and added another tracking number, but was otherwise identical to the original order. While expressly noting in their notice of appeal, filed September 1, 2023, that the amended order made only typographical corrections to the original order, the People now purport to appeal from the amended order.

We reject defendant's assertion that the People's appeal is untimely. The appeal properly lies from the original order because the amended order made only typographical corrections and thus "did not effect a 'material or substantial change' to the [original] order" (*People v Perez*, 130 AD3d 1496, 1496 [4th Dept 2015], quoting *Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]; *see People v*

Nellons, 133 AD3d 1259, 1260 [4th Dept 2015]). Under the circumstances of this case, we exercise our discretion in the interest of justice to treat the appeal as validly taken from the original order (*see* CPL 460.10 [6]; *People v Collins*, 197 AD3d 904, 905 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021]; *People v McDowell*, 255 AD2d 976, 976-977 [4th Dept 1998], *lv denied* 93 NY2d 855 [1999]). CPL 460.10 (1) (a) provides, in relevant part, that "[a] party seeking to appeal . . . from an order of a criminal court not included in a judgment . . . must, . . . within [30] days after service upon such party of a copy of an order not included in a judgment, file with the clerk of the criminal court . . . in which such order was entered a written notice of appeal, in duplicate, stating that such party appeals therefrom to a designated appellate court." The Court of Appeals has "interpreted CPL 460.10 (1) (a) 'to require prevailing party service'—not just the handing out of an order by the court—'to commence the time for filing a notice of appeal' " (*People v Jones*, 22 NY3d 53, 57 [2013], quoting *People v Washington*, 86 NY2d 853, 854 [1995]). Here, the record establishes that the People received a copy of the original order, but there is "no evidence that [defendant] ever served the order as required by CPL 460.10 (1) (a)" (*People v Spencer*, 145 AD3d 1508, 1509 [4th Dept 2016], *lv denied* 29 NY3d 1037 [2017]). Inasmuch as the record fails to establish that defendant ever served the People with a copy of the original order, the People's 30-day period to appeal never began to run and the People's appeal is therefore timely (*see Jones*, 22 NY3d at 56-57; *Washington*, 86 NY2d at 854-855; *Spencer*, 145 AD3d at 1509).

On the merits, the People contend that the court erred in determining that they violated their initial discovery obligations by failing to disclose the disciplinary records for the parole officer possessed by the Department of Corrections and Community Supervision (DOCCS). We agree.

CPL article 245 initially requires the prosecution to automatically disclose to the defendant—i.e., without obligating the defendant to demand such discovery—"all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20 [1]; *see People v Bay*, 41 NY3d 200, 208 [2023]; William C. Donnino, Prac Commentaries, McKinney's Cons Laws of NY, CPL 245.10). The prosecution's initial discovery obligations are thus defined by a relevancy prong and a possessory prong (*see* CPL 245.20 [1]). To meet the relevancy prong, the items and information must "relate to the subject matter of the case" (*id.*). To meet the possessory prong, the items and information must be (A) "in the possession, custody or control of the prosecution" or (B) "in the possession, custody or control of . . . persons under the prosecution's direction or control" (*id.*). For purposes of the possessory prong, "all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution" (CPL 245.20 [2]). As relevant here, the categories of material subject to disclosure include "[a]ll evidence and information, including that which is known to police or

other law enforcement agencies acting on the government's behalf in the case, that tends to . . . impeach the credibility of a testifying prosecution witness" (CPL 245.20 [1] [k] [iv]). Subject to certain delineated caveats, "the prosecution shall perform its initial discovery obligations under [CPL 245.20 (1)] as soon as practicable but not later than the time periods specified" in the statute (CPL 245.10 [1] [a]; *see Bay*, 41 NY3d at 209).

"CPL 245.50 (1) creates a . . . compliance mechanism" (*Bay*, 41 NY3d at 209). That provision directs the prosecution to "serve upon the defendant and file with the court a certificate of compliance" when the prosecution, with several narrow exceptions, "has provided the discovery required by [CPL 245.20 (1)]" (CPL 245.50 [1]; *see Bay*, 41 NY3d at 209). "The certificate of compliance shall 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" (CPL 245.50 [1]). "CPL 245.60 imposes a continuing duty to disclose, and when the [prosecution] provide[s] discovery after a [certificate of compliance] has been filed, [it] must file a supplemental [certificate of compliance]" (*Bay*, 41 NY3d at 209; *see* CPL 245.50 [1]).

The statutory scheme "tether[s] the [prosecution's] CPL article 245 discovery obligations to CPL 30.30's speedy trial requirements" (*Bay*, 41 NY3d at 209). With respect to trial readiness, the statute provides that, "[n]otwithstanding the provisions of any other law" and "absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of [CPL 30.30] until it has filed a proper certificate pursuant to [CPL 245.50 (1)]" (CPL 245.50 [3]; *see* CPL 30.30 [5]; *Bay*, 41 NY3d at 210). "Under the terms of the statute, the key question in determining if a proper [certificate of compliance] has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information *subject to discovery*' " (*Bay*, 41 NY3d at 211, quoting CPL 245.50 [1] [emphasis added]; *see also* CPL 245.20 [2]).

Here, even assuming, arguendo, that the parole officer's disciplinary records from DOCCS met the relevancy prong as being related to the subject matter of the case, we conclude that the People established that those records did not meet the possessory prong required to prompt their initial discovery obligation with respect thereto (*see* CPL 245.20 [1]; *People v Walker*, 228 AD3d 1318, 1320 [4th Dept 2024]). "[F]or the purposes of discovery, DOCCS is not a 'law enforcement' agency" and is " 'outside of the legal or practical control of local prosecutors' and, therefore, the People cannot be deemed to be in constructive possession of that which DOCCS possesses" (*People v Jenne*, 224 AD3d 953, 957 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024], quoting *People v Kelly*, 88 NY2d 248, 253 [1996]; *see People v Howard*, 87 NY2d 940, 941 [1996]). Inasmuch as the records were neither "in the possession, custody or control of the prosecution," nor "in the possession, custody or control of . . .

persons under the prosecution's direction or control" (CPL 245.20 [1]), nor "deemed to be in the possession of the prosecution" as "items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency" (CPL 245.20 [2]), the records were not part of the "discovery required by [CPL 245.20 (1)]" to be provided by the People as a predicate for filing a proper certificate of compliance (CPL 245.50 [1]). Consequently, the People's failure to provide the records at the time they served and filed their original and supplemental certificates of compliance does not render those certificates of compliance improper, and thus the People's statement of trial readiness pursuant to CPL 30.30 was not illusory and defendant's statutory right to a speedy trial was not violated on that ground. We note that, in resolving this appeal, we express no opinion regarding the concurrence's interpretation of the relevant statutory provisions regarding the availability or unavailability of the speedy trial remedy in any other context than the one presented in the case before us.

Finally, defendant failed to preserve for our review his alternative ground for affirmance (*see* CPL 470.05 [2]) and, in any event, we are precluded from reviewing it on the People's appeal inasmuch as the court did not make a finding adverse to the People on that distinct issue (*see* CPL 470.15 [1]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]; *People v Rafferty*, 155 AD3d 1520, 1522 [4th Dept 2017]).

SMITH, J.P., MONTOUR, NOWAK, and DELCONTE, JJ., concur; CURRAN, J., concurs in the following memorandum: I concur with the majority's memorandum in its entirety. I write separately to emphasize my view that, based on the structure of the relevant statutory provisions, and their cross-references to one another (*see e.g.* CPL 245.20 [1]; 245.50 [1], [3]), the remedy of dismissal of the indictment under CPL 30.30 for the violation of a defendant's statutory right to a speedy trial—which is available when, inter alia, the People are deemed not ready for trial due to an invalid certificate of compliance and have exceeded the applicable statutory speedy trial time (*see* CPL 245.50 [3])—is directly tied, and only directly tied, to the People's failure to comply with their "[i]nitial discovery" obligations as set forth in CPL 245.20 (1), which include any attendant due diligence obligations with respect to the items and information discoverable under that provision (*see* CPL 245.20 [2]). Thus, inasmuch as the majority and I agree that the records at issue on appeal do not fall within the possessory prong of CPL 245.20 (1), I likewise agree that the remedy of dismissal under CPL 30.30 and 245.50 (3) is simply unavailable to defendant under the circumstances here.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

600

CAF 23-01241

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

IN THE MATTER OF THOMAS I. HARTUNG, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AMANDA C. LONG, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

LYDIA V. EVANS, FREDONIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered February 22, 2023, in a proceeding pursuant to Family Court Act article 8. The order, among other things, ordered respondent to stay away from petitioner and the subject child.

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

Same memorandum as in *Matter of Long v Hartung* ([appeal No. 2] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

601

CAF 23-01242

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

IN THE MATTER OF AMANDA C. LONG,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS J. HARTUNG, JR., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

LYDIA V. EVANS, FREDONIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered March 20, 2023, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner-respondent father and respondent-petitioner mother previously shared joint custody of the subject child, with the father having primary residence. The father filed a petition to modify the parties' order of custody and visitation and subsequently filed a family offense petition pursuant to Family Court Act article 8. The mother failed to appear at the hearing on those petitions and, upon her default, Family Court granted the father's petitions and issued an order of protection, which directed her to stay away from the subject child and the father, as well as an order (default custody order) awarding the father sole custody of the child. The mother thereafter filed a petition seeking to modify the default custody order. In appeal No. 1, the mother appeals from the order of protection entered upon her default. In appeal No. 2, the mother appeals from an order dismissing her petition for modification of the default custody order.

The appeal from the order in appeal No. 1 must be dismissed inasmuch as no appeal lies from an order entered upon the default of the appealing party (*see* CPLR 5511; *Matter of Rottenberg v Clarke*, 144 AD3d 1627, 1627 [4th Dept 2016]).

With respect to the order in appeal No. 2, we conclude that the court did not err in sua sponte dismissing the mother's petition without conducting a hearing inasmuch as the petition failed to make a sufficient evidentiary showing of a change in circumstances (*see Matter of Belrose v Belrose*, 141 AD3d 780, 781 [3d Dept 2016]; *Matter of Strachan v Gilliam* [appeal No. 1], 129 AD3d 1679, 1679 [4th Dept 2015], *lv dismissed* 26 NY3d 994 [2015]; *Matter of Sierak v Staring*, 124 AD3d 1397, 1397 [4th Dept 2015]).

The mother further contends that her petition should be treated as a de facto motion to vacate the default orders. Even assuming, arguendo, that we read the mother's petition as seeking to vacate the default custody order and treat it as such, we conclude that she did not meet her burden of demonstrating entitlement to that relief.

"[A] court may vacate a judgment or order entered upon default if it determines that there is a reasonable excuse for the default and a meritorious defense" (*Matter of Delgado v Vega*, 171 AD3d 1457, 1457 [4th Dept 2019] [internal quotation marks omitted]; *see* CPLR 5015 [a] [1]). Although "default orders are disfavored in cases involving the custody or support of children, and . . . the rules with respect to vacating default judgments are not to be applied as rigorously in those cases" (*Delgado*, 171 AD3d at 1458 [internal quotation marks omitted]; *see Matter of Strumpf v Avery*, 134 AD3d 1465, 1465-1466 [4th Dept 2015]), that does not "relieve the defaulting party of the burden of establishing a reasonable excuse for the default or a meritorious defense" (*Strumpf*, 134 AD3d at 1466 [internal quotation marks omitted]). Even assuming, arguendo, that the mother established a reasonable excuse for her failure to appear, we conclude that she did not "set forth sufficient facts [or legal arguments] to demonstrate, on a prima facie basis, that a defense existed" (*id.* [internal quotation marks omitted]; *see Matter of Susan UU. v Scott VV.*, 119 AD3d 1117, 1118 [3d Dept 2014]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

607

CAF 22-01876

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

IN THE MATTER OF DANIEL D.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TARA D., RESPONDENT-APPELLANT,
AND ADAM D., RESPONDENT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents abused the subject child.

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

Memorandum: Respondent mother appeals from an order adjudging that respondents abused their four-month-old son, Daniel, who was found to have nondisplaced fractures in six ribs and both legs. Following an evidentiary hearing, Family Court determined that petitioner established by a preponderance of the evidence that respondents caused the injuries and thereby abused Daniel within the meaning of Family Court Act § 1012 (e) (i). Although respondent father also filed a notice of appeal, he failed to perfect his appeal. The mother contends that the evidence is legally insufficient to support the court's finding of abuse and that there is no sound and substantial basis in the record for the court's finding of parental culpability. We reject both of those contentions.

Petitioner presented evidence that, once Daniel was discharged from the neonatal intensive care unit, respondents were the sole caretakers of Daniel, with the exception of two nights in July and August when other relatives cared for him. On September 11, 2021, when Daniel was four months old, the mother took him to the doctor because Daniel had been exhibiting "extreme fussiness" for three days and appeared unable to put any weight on his legs. Imaging conducted

at the hospital established that Daniel had a fracture of his right distal femur, which is the thigh bone near the knee, and another fracture of the left proximal tibia, which is the shin bone. He also had fractures in two ribs on the left side as well as several older fractures of ribs on the right side.

While at the hospital, Daniel was examined by a doctor who was board certified in child abuse pediatrics. She determined that the fractures were of the hairline variety and that the rib fractures had "callus around them," suggesting that they were at least 7 to 14 days old. There was no callus forming in the legs and, as a result, the doctor could not provide a timeline for those injuries. Blood tests showed that Daniel had a normal level of calcium, magnesium, phosphorous, parathyroid hormone, and vitamin D, indicating that there was nothing wrong with his bones. The tests also showed mildly elevated liver enzymes. Because respondents offered no explanation for how the injuries occurred, the doctor suspected child abuse and reported respondents. Petitioner thereafter filed a petition against respondents alleging abuse and neglect.

At the evidentiary hearing, the doctor testified regarding her findings, and petitioner's investigator also testified regarding petitioner's investigation into the case, i.e., that there was no evidence of any accidental cause for the injuries and no evidence of any bone disorder that could have been a cause of the injuries.

Respondents, testifying on their own behalf, provided hypothetical explanations for the injuries, such as that they were caused by visits to a chiropractor, and admitted that they were Daniel's only caretakers, except for two days, one of which did not coincide with the onset of most of the injuries. Neither respondent sought to blame the other for the injuries. Respondents also called an out-of-state pediatrician as an expert witness. The expert witness opined that Daniel's injuries were more likely caused by a metabolic bone disease, the fact that the mother had diabetes during her pregnancy and took magnesium for her preeclampsia, or the fact that Daniel was born several weeks premature and was taking Pepcid. According to the expert, any or all of those issues would explain why Daniel was likely born with lower bone density and therefore lower bone strength, which could have resulted in injury due to minimal force. He thus opined that the fractures were the result of Daniel having fragile bones. Notably, however, Daniel did not sustain any additional fractures after he was placed with a relative, and respondents stated that Daniel had not exhibited any symptoms of pain until the days before the mother took him to the doctor.

The primary issue at the evidentiary hearing was causation, i.e., whether respondents caused Daniel's injuries or whether there was some innocent explanation for the fractures. The court credited petitioner's expert inasmuch as there was no evidence that Daniel did, in fact, have a bone disorder and there was no evidence of additional injuries after Daniel was removed from respondents' home, as one would have expected if he had a bone disorder or other basis for fragile bones.

Family Court Act § 1012 (e) (i) provides that a child is abused when the parent or other legally responsible adult "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or *creates* a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (emphasis added). The mother contends that, inasmuch as Daniel recovered quickly, the injuries that were inflicted did not constitute the requisite serious physical injuries. The mother, however, failed to preserve that contention for our review inasmuch as she failed to raise that contention before the court (*see Matter of Adonnis M. [Kenyetta M.]*, 194 AD3d 1048, 1052 [2d Dept 2021], *appeal dismissed* 37 NY3d 1128 [2021]; *Matter of Lea E.P. [Jason J.P.]*, 176 AD3d 715, 716 [2d Dept 2019]; *Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

In any event, we conclude that the contention lacks merit inasmuch as the "injuries were 'clearly inflicted and not accidental' " (*Matter of Jonah B. [Ferida B.]*, 165 AD3d 787, 789 [2d Dept 2018]), and those injuries "*create[d] a substantial risk*" of much more serious injuries (Family Ct Act § 1012 (e) (i) [emphasis added]; *see Matter of Addison M. [Bridgette M.]*, 173 AD3d 1735, 1736-1737 [4th Dept 2019]; *Jonah B.*, 165 AD3d at 789). "[U]nder the Family Court Act, a 'child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury' " (*Jonah B.*, 165 AD3d at 789).

The mother further contends that the evidence is legally insufficient to establish that she inflicted or allowed to be inflicted those injuries to Daniel. We have repeatedly upheld abuse findings in similar situations (*see e.g. Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]). Where, as here, petitioner submits " 'proof of injuries sustained by [the] child . . . of such nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent,' i.e., multiple fractured ribs [and legs] in various stages of healing," that constitutes a prima facie case of abuse (*Avianna M.-G.*, 167 AD3d at 1523, quoting Family Ct Act § 1046 [a] [ii]). The " 'presumption of culpability [created by section 1046 (a) (ii)] extends to all of a child's caregivers, especially when they are few and well defined, as in the instant case' " (*id.* at 1524). We agree with the court that the mother failed to rebut the presumption that she and the father, as Daniel's parents and sole caregivers, were responsible for his injuries (*see id.*).

For the same reasons, we reject the mother's contention that the finding that she caused the injuries is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]). With respect to that

issue, the court was presented with a battle of medical experts, one called by each side. Petitioner's expert testified that Daniel's numerous bone fractures could have been caused only by non-accidental trauma, while the mother's expert testified that the fractures were more likely caused by metabolic bone disease. Based on our review of the record, it cannot be said that the court erred in crediting the testimony of petitioner's expert, especially considering the fact that Daniel did not sustain any more fractures after he was removed from respondents' home and placed with a relative pending trial, which commenced more than nine months following removal.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

608

CA 23-01420

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

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2011-C4, ACTING BY AND THROUGH RIALTO CAPITAL ADVISORS, LLC, AS SPECIAL SERVICER UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF AUGUST 1, 2011, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC, BRETT J. FITZPATRICK, DAVID A. HUCK, LORETTA FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK, DECEASED, GERALD E. KELLY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), AND HOLLAND & KNIGHT LLP, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR DEFENDANT-RESPONDENT FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (MATTHEW J. BECK OF COUNSEL), FOR DEFENDANT-RESPONDENT BRETT J. FITZPATRICK.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID A. HUCK.

BENGART & DEMARCO, LLP, TONAWANDA, LAW OFFICE OF PHILIP MILCH, AMHERST (PHILIP A. MILCH OF COUNSEL), FOR DEFENDANT-RESPONDENT LORETTA FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK, DECEASED.

Appeal from an order of the Supreme Court, Chautauqua County (Emilio Colaiacovo, J.), entered July 17, 2023. The order, among other things, denied the motion of plaintiff insofar as it sought to sever the fifth cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking to sever the fifth cause of action, and by severing that part

of the first cause of action asserting claims against defendants Brett J. Fitzpatrick, David A. Huck, Loretta Fitzpatrick, as executrix of the estate of J. Michael Fitzpatrick, deceased, and Gerald E. Kelly, and as modified the order is affirmed without costs.

Memorandum: These appeals arise out of a commercial loan made by plaintiff's predecessor-in-interest, non-party General Electric Capital Corporation, to defendant Fredonia Temple/Brigham Apartments LLC (Fredonia Temple) for the construction of student housing near the State University of New York at Fredonia. The loan, secured by a mortgage on the property, matured in 2021 and obligated Fredonia Temple to make a balloon payment at that time. Concurrently with the execution of the loan agreement, defendants Brett J. Fitzpatrick, David A. Huck, Loretta Fitzpatrick, as executrix of the estate of J. Michael Fitzpatrick, deceased, and Gerald E. Kelly (collectively, individual defendants) executed a joinder agreement whereby each guaranteed the payment and performance of Fredonia Temple's obligations in limited circumstances. Plaintiff commenced this action for, inter alia, foreclosure on the property based on Fredonia Temple's default in failing to make the balloon payment, as well as other alleged non-monetary defaults. In appeal No. 1, plaintiff appeals from an order of Supreme Court that, inter alia, denied plaintiff's motion insofar as it sought summary judgment on its claims of non-monetary defaults and severance of the fifth cause of action alleging breach of the joinder agreement by the individual defendants. In appeal No. 2, plaintiff appeals from an order that denied plaintiff's motion seeking, inter alia, leave to amend the complaint. In appeal No. 3, plaintiff appeals from a supplemental order that granted the motion of the court-appointed receiver seeking to expand his powers and authority to, inter alia, market and sell the property.

In appeal No. 1, plaintiff contends that the court erred in denying its motion with respect to the issue of severance. "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). "The determination of a severance motion under CPLR 603 is a matter of judicial discretion which will not be disturbed on appeal absent an abuse of discretion or prejudice to a substantial right of the party seeking severance" (*Utica Mut. Ins. Co. v American Re-Insurance Co.*, 132 AD3d 1405, 1405 [4th Dept 2015] [internal quotation marks omitted]; *see Finning v Niagara Mohawk Power Corp.*, 281 AD2d 844, 844 [3d Dept 2001]). Here, the individual defendants are not necessary parties to this action insofar as the relief sought is the sale of the premises (*see generally Marine Midland Bank v Berley*, 90 AD2d 646, 646 [3d Dept 1982]). Additionally, any undue delay of the foreclosure sale of the premises can be avoided by the severance (*see* CPLR 603; *see generally Marine Midland Bank*, 90 AD2d at 646-647). Therefore, we conclude that the claims against the individual defendants in the first and fifth causes of action should be severed and subject to later determination by the court after the sale of the property. We thus modify the order in appeal No. 1 accordingly.

Plaintiff also contends in appeal No. 1 that the court erred in

refusing to apply the loan agreement's default interest rate to the non-monetary defaults. In light of the court's determination that plaintiff failed to meet its burden on the motion insofar as it sought summary judgment on the alleged non-monetary defaults, which determination is not challenged on appeal by plaintiff, we conclude that the court did not make a finding as to the issue whether the default interest rate applies and, thus, the issue is not properly before us (*see generally Matter of Monroe Sq. Assoc., L.P. v Board of Assessors*, 23 AD3d 985, 986 [4th Dept 2005]).

Addressing appeal No. 2, we agree with plaintiff that the court erred in denying its motion insofar as it sought leave to amend the complaint to add allegations of intentional misrepresentations and unauthorized debt incurred by Fredonia Temple. It is well settled that permission to amend pleadings should be "freely given . . . , unless prejudice would result to the nonmoving party or the proposed amendment is plainly lacking in merit" (*Haga v Pyke*, 19 AD3d 1053, 1054 [4th Dept 2005] [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Manufacturers & Traders Trust Co. v Reliance Ins. Co.*, 8 AD3d 1000, 1001 [4th Dept 2004]). Here, the proposed amendments are based on allegations similar to those contained in the original complaint, are consistent with plaintiff's existing theories, are not patently devoid of merit, and will not result in significant prejudice or surprise (*see Haga*, 19 AD3d at 1055). The proposed amended complaint does not allege any additional causes of action; it sets forth new factual allegations that relate back to the date on which the causes of action in the original complaint were interposed (*see id.*). We therefore modify the order in appeal No. 2 accordingly.

Finally, we agree with plaintiff in appeal No. 3 that the court erred insofar as it granted the motion of the court-appointed receiver by expanding his authority and powers to market the property for sale "in a commercially reasonable and transparent manner." RPAPL 231 (1) provides that "[a] sale of real property made in pursuance of a judgment affecting the title to, or the possession, enjoyment or use of, real property, shall be at public auction to the highest bidder." Thus, the sale of the subject property must be at public auction (*see Lauriello v Gallotta*, 70 AD3d 1009, 1010 [2d Dept 2010]). We therefore modify the supplemental order in appeal No. 3 accordingly.

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

609

CA 23-02045

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

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2011-C4, ACTING BY AND THROUGH RIALTO CAPITAL ADVISORS, LLC, AS SPECIAL SERVICER UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF AUGUST 1, 2011, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC, BRETT J. FITZPATRICK, DAVID A. HUCK, LORETTA FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK, DECEASED, GERALD E. KELLY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), AND HOLLAND & KNIGHT LLP, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR DEFENDANT-RESPONDENT FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (MATTHEW J. BECK OF COUNSEL), FOR DEFENDANT-RESPONDENT BRETT J. FITZPATRICK.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID A. HUCK.

BENGART & DEMARCO, LLP, TONAWANDA, LAW OFFICE OF PHILIP MILCH, AMHERST (PHILIP A. MILCH OF COUNSEL), FOR DEFENDANT-RESPONDENT LORETTA FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK, DECEASED.

Appeal from an order of the Supreme Court, Chautauqua County (Emilio Colaiacovo, J.), entered November 28, 2023. The order denied the motion of plaintiff seeking, inter alia, leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it seeks leave to amend the complaint upon condition that plaintiff shall

serve the proposed amended complaint within 30 days of the date of entry of the order of this Court and as modified the order is affirmed without costs.

Same memorandum as in *Deutsche Bank Trust Co. Ams. v Fredonia Temple/Brigham Apts. LLC* ([appeal No. 1] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

610

CA 24-00216

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

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR THE REGISTERED HOLDERS OF WELLS FARGO COMMERCIAL MORTGAGE SECURITIES, INC., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2011-C4, ACTING BY AND THROUGH RIALTO CAPITAL ADVISORS, LLC, AS SPECIAL SERVICER UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF AUGUST 1, 2011, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC, BRETT J. FITZPATRICK, DAVID A. HUCK, LORETTA FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK, DECEASED, GERALD E. KELLY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 3.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), AND HOLLAND & KNIGHT LLP, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

KAVINOKY COOK LLP, BUFFALO (SCOTT C. BECKER OF COUNSEL), FOR DEFENDANT-RESPONDENT FREDONIA TEMPLE/BRIGHAM APARTMENTS LLC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (MATTHEW J. BECK OF COUNSEL), FOR DEFENDANT-RESPONDENT BRETT J. FITZPATRICK.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID A. HUCK.

BENGART & DEMARCO, LLP, TONAWANDA, LAW OFFICE OF PHILIP MILCH, AMHERST (PHILIP A. MILCH OF COUNSEL), FOR DEFENDANT-RESPONDENT LORETTA FITZPATRICK, AS EXECUTRIX OF THE ESTATE OF J. MICHAEL FITZPATRICK, DECEASED.

Appeal from a supplemental order of the Supreme Court, Chautauqua County (Emilio Colaiacovo, J.), entered January 22, 2024. The supplemental order expanded the powers and authority of the receiver to market and sell the property.

It is hereby ORDERED that the supplemental order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and substituting therefor an ordering paragraph authorizing

the receiver to sell the real property at public auction to the highest bidder and as modified the order is affirmed without costs.

Same memorandum as in *Deutsche Bank Trust Co. Ams. v Fredonia Temple/Brigham Apts. LLC* ([appeal No. 1] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

617.1

CA 23-00389

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

MELISSA A. LASHER, PLAINTIFF-APPELLANT,

V ORDER

DONALD J. LASHER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

ELIZABETH C. FRANI, SYRACUSE, FOR PLAINTIFF-APPELLANT.

BRIAN J. BARNEY, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered August 19, 2022. The order, inter alia, ordered disclosure and discovery closed except with respect to the production of certain tax returns.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Maniscalco v Maniscalco* [appeal No. 2], 109 AD3d 1129, 1129-1130 [4th Dept 2013]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

617

CA 23-00390

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

MELISSA A. LASHER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DONALD J. LASHER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

ELIZABETH C. FRANI, SYRACUSE, FOR PLAINTIFF-APPELLANT.

BRIAN J. BARNEY, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered January 3, 2023, in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the exercise of discretion by increasing the duration of maintenance from 8 years and 5 months to 11 years and 15 days, vacating that part of the judgment awarding defendant a credit for his payment of the pro rata share of the room and board expenses of the parties' older son, and awarding plaintiff an additional $10,000 in expert fees, and as modified the judgment is affirmed without costs.

Memorandum: In this divorce action, plaintiff appeals from a judgment of divorce that, inter alia, equitably distributed the parties' marital property, awarded plaintiff spousal maintenance and child support, and awarded plaintiff a portion of her legal and expert fees. We perceive no abuse of discretion by Supreme Court, and we affirm the judgment in all but three aspects. First, in light of our broad authority in determining questions of maintenance, we modify the judgment in the exercise of our discretion by increasing the duration of maintenance from 8 years and 5 months to 11 years and 15 days (*see Burroughs v Burroughs*, 269 AD2d 765, 765 [4th Dept 2000]; *see generally Smith v Smith*, 79 AD3d 1643, 1644 [4th Dept 2010]). Second, we modify the judgment in the exercise of our discretion by vacating that part awarding defendant a credit for his payment of his pro rata share of the college room and board expenses of the parties' older son (*see generally Burns v Burns*, 233 AD2d 852, 853 [4th Dept 1996], *lv denied* 89 NY2d 810 [1997]). Finally, we further modify the judgment

in the exercise of our discretion by awarding plaintiff an additional $10,000 in expert fees (*see O'Brien v O'Brien*, 66 NY2d 576, 590 [1985]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

623

KA 24-00395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUKE J. GAFFNEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 12, 2023. The judgment convicted defendant, upon a jury verdict, of aggravated assault upon a police officer or a peace officer.

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 aggravated assault upon a police officer or a peace officer (Penal Law § 120.11). The conviction arises out of an incident in which defendant stabbed a police officer in the leg near the femoral artery. We affirm.

By failing to object to the verdict prior to the jury's discharge, defendant failed to preserve his contention that the verdict is repugnant because the jury acquitted him of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and the lesser included offense of attempted assault in the second degree (§ 120.05 [2]), but found him guilty of aggravated assault upon a police officer or a peace officer (§ 120.11; *see People v Franco*, 225 AD3d 1284, 1284 [4th Dept 2024], *lv denied* 41 NY3d 1002 [2024]; *People v Pearson*, 192 AD3d 1555, 1556 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]). Contrary to defendant's further contention, he "failed to establish the lack of a strategic decision on the part of defense counsel [in failing to object to the verdict] inasmuch as a resubmission of the matter to the jury could have resulted in a guilty verdict" on the other counts (*People v Bartlett*, 89 AD3d 1453, 1454 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012]; *see generally* CPL 310.50 [2]).

Even assuming, arguendo, that defendant preserved his contention

that County Court erred in refusing to provide a justification charge, we conclude that there is no reasonable view of the evidence that would support such a defense (*see People v Watts*, 57 NY2d 299, 301 [1982]). "[A] defendant is justified in using 'deadly physical force' upon another only if that defendant 'reasonably believes that such other person is using or about to use deadly physical force' " (*People v Brown*, 33 NY3d 316, 320 [2019], *rearg denied* 33 NY3d 1136 [2019], quoting Penal Law § 35.15 [2] [a]). Stated another way, the defendant must, as relevant here, establish that they subjectively "believed deadly force was necessary to avert the imminent use of deadly force" and that, "in light of all the circumstances" and objectively, "a reasonable person could have had th[at] belief[ ]" (*People v Goetz*, 68 NY2d 96, 115 [1986] [internal quotation marks omitted]). Here, defendant demonstrated neither.

Defendant also contends that the People failed to establish that the victim suffered a serious physical injury and thus that his conviction for aggravated assault upon a police officer or a peace officer is legally insufficient and that the verdict is against the weight of the evidence. We reject those contentions. Here, "[t]he wound inflicted by defendant . . . created a substantial risk of death due to its proximity to the victim's [femoral] artery . . . even though [it] was [not] in fact severed" (*People v Gonzalez*, 198 AD3d 543, 543 [1st Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *see People v McKenzie*, 161 AD3d 703, 703-704 [1st Dept 2018], *lv denied* 32 NY3d 1113 [2018]). Viewing the facts "in a light most favorable to the People," we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found' " that the victim suffered a serious physical injury (*People v Danielson*, 9 NY3d 342, 349 [2007]). Similarly, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant argues that the court improperly permitted the People to introduce two videos. Assuming, arguendo, that defendant preserved his objection to the video evidence and that the court erred in admitting it, we conclude that any error was harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Bryant*, 144 AD3d 1523, 1525 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation is, for the most part, unpreserved for our review inasmuch as defendant failed to object to all but one of the statements he now challenges on appeal (*see People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). With respect to his preserved challenge, the court sustained defendant's objection and gave a curative instruction. Inasmuch as defendant did not object further or move for a mistrial, "the curative instruction must be deemed to have corrected the error to . . . defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]).

Defendant argues that the court improperly discharged a juror with attention deficit/hyperactivity disorder for cause. Inasmuch as the People did not exhaust their peremptory challenges when the juror was dismissed or by the end of jury selection, the court's dismissal of the juror for cause does not constitute a basis for reversal (*see* CPL 270.20 [2]; *People v Stone*, 239 AD2d 872, 873 [4th Dept 1997], *lv denied* 90 NY2d 943 [1997]).

We reject defendant's contention that his sentence is unduly harsh and severe. Finally, we have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

624

KA 23-01105

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW M. WILSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 1, 2023. The judgment convicted defendant upon a guilty plea of aggravated family offense.

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 aggravated family offense (Penal Law § 240.75), defendant contends that County Court erred in imposing an enhanced sentence based upon defendant's postplea conduct. Because defendant did not object to the enhanced sentence or move to withdraw his guilty plea or to vacate the judgment of conviction, he failed to preserve that contention for our review (*see People v Roberto*, 224 AD3d 1367, 1368 [4th Dept 2024]; *People v Bishop*, 198 AD3d 1381, 1382 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]). We reject defendant's contention that the enhanced sentence is unduly harsh and severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

628.1

OP 24-00426

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

IN THE MATTER OF 3649 ERIE, LLC, PETITIONER,

V MEMORANDUM AND ORDER

ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
AND OHB REDEV, LLC, RESPONDENTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER M. MCDONALD OF COUNSEL), FOR PETITIONER.

BARCLAY DAMON LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR RESPONDENT ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRODY D. SMITH OF COUNSEL), FOR RESPONDENT OHB REDEV, LLC.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review a certain condemnation by eminent domain.

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

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent Onondaga County Industrial Development Agency (OCIDA), authorizing the condemnation of one parcel of real property owned by petitioner that was part of the former Shoppingtown Mall. We confirm the determination and dismiss the petition.

Contrary to petitioner's contentions, OCIDA's determination and findings comport with EDPL article 2 and do not violate petitioner's federal and state constitutional rights. Preliminarily, we note that this Court's review power is limited by statute (*see* EDPL 207 [C] [1]-[4]; *Matter of Niagara Falls Redevelopment, LLC v City of Niagara Falls*, 218 AD3d 1306, 1307-1308 [4th Dept 2023], *appeal dismissed* 40 NY3d 1059 [2023], *lv denied* 42 NY3d 904 [2024]). Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to " 'whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with[, inter alia,] EDPL article 2; and (4) the acquisition will serve a public use' " (*Niagara Falls Redevelopment, LLC*, 218 AD3d at 1307; *see* EDPL 207 [C]).

"[T]he party challenging the condemnation has the burden of establishing that the determination was without foundation and baseless . . . Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the condemnor's determination should be confirmed" (*Matter of HBC Victor LLC v Town of Victor*, 225 AD3d 1254, 1255 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024] [internal quotation marks omitted]; *see Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]).

Petitioner contends that the determination should be annulled because OCIDA is not authorized by General Municipal Law §§ 858 and 862 to pursue a project that is predominantly residential and retail in nature. We reject that contention. Under EDPL 207 (C) (2), this Court's analysis is limited to, inter alia, whether the "proposed acquisition" is within the condemnor's statutory jurisdiction and, here, the intended use of the parcel OCIDA proposes to acquire from petitioner is not residential or retail in nature. Although the developer, respondent OHB Redev, LLC (OHB), intends to develop a portion of the larger project into residential housing and retail establishments, the property upon which it proposes to construct the residential housing and retail establishments is currently owned by Onondaga County and thus not part of the "proposed acquisition" authorized by the determination at issue in this proceeding (EDPL 207 [C] [2]). To the extent that petitioner attempts to challenge the authority of OCIDA to finance a project that contains a residential component, that contention is properly raised in a CPLR article 78 proceeding (*see e.g. Matter of Nearpass v Seneca County Indus. Dev. Agency*, 152 AD3d 1192, 1193 [4th Dept 2017]).

Petitioner contends that the condemnation of the property is unconstitutional because OCIDA failed to establish that it has sufficient funds to pay petitioner sure and adequate compensation for its parcel. Assuming, arguendo, that the federal or New York Constitution require OCIDA to establish the source of just compensation in this EDPL article 2 proceeding (*see Matter of New York State Urban Dev. Corp. [TOH Realty Corp.]*, 165 AD2d 733, 735 [1st Dept 1990], *appeal dismissed* 76 NY2d 982 [1990], *lv denied* 77 NY2d 810 [1991]), we conclude that petitioner's contention is without merit. OHB and OCIDA executed a cost reimbursement agreement and memorandum of understanding in which OHB agreed to bear the full cost of acquiring the property, and "[t]here is no prohibition against private funding of a public condemnation" (*Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 41 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995]). Further, the OCIDA resolution adopting and incorporating the determination and findings condemning the property authorizes OCIDA to offer to post a bond or undertaking prior to seeking the vesting of title in any EDPL article 4 proceeding in order to ensure that there is a certain and adequate source of payment. The cost reimbursement agreement and memorandum of understanding between OCIDA and OHB also provides that OHB will post a bond that may be required as part of any EDPL article 4 vesting proceeding in order to ensure a certain and adequate source of payment (*see generally Mobil Oil Corp.*

v City of Syracuse Indus. Dev. Agency, 224 AD2d 15, 19-20 [4th Dept 1996], *appeal dismissed* 89 NY2d 860 [1996], *lv denied* 89 NY2d 811 [1997]).

Petitioner further contends that OCIDA failed to satisfy the requirements of the State Environmental Quality Review Act (SEQRA) (*see* ECL art 8). Our review of OCIDA's SEQRA determination "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (*Akpan v Koch*, 75 NY2d 561, 570 [1990]). We reject petitioner's contention that OCIDA improperly deferred or segmented from its review, inter alia, lighting, noise, and surface water quality. "Segmentation occurs when the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated, which is prohibited in order to prevent a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review" (*Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1603 [4th Dept 2020] [internal quotation marks omitted]). Inasmuch as respondents concede that the project is subject to further design changes and further SEQRA review, we conclude that OCIDA's storm water, lighting and noise mitigation plans have been developed "to the fullest extent possible" (*see* ECL § 8-0103 [6]; *see generally Matter of Long Is. Pine Barrens Socy. v Planning Bd. of Town of Brookhaven*, 78 NY2d 608, 615 [1991]).

Contrary to petitioner's contention, the redevelopment of the blighted former mall constitutes a legitimate public use. What constitutes a public purpose or use " 'is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage' " (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010]; *see generally Kelo v City of New London*, 545 US 469, 480 [2005]). Here, OCIDA's condemnation of the property serves the public uses of, among other things, remediating blight (*see Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 524 [2009], *rearg denied* 14 NY3d 756 [2010]), returning land to productive use (*see generally Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 411 [1986]), making use of underutilized property (*see Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, 913 [4th Dept 1994], *lv denied* 84 NY2d 809 [1994]), and fostering economic growth (*see Matter of Penney Prop. Sub Holdings LLC v Town of Amherst*, 220 AD3d 1169, 1171 [4th Dept 2023]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

628

OP 24-00449

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

IN THE MATTER OF TRANSFORM SALECO, LLC,
PETITIONER,

V MEMORANDUM AND ORDER

ONONDAGA COUNTY INDUSTRIAL DEVELOPMENT AGENCY,
RESPONDENT.

HACKER MURPHY LLP, SCHENECTADY (PATRICK L. SEELY, JR., OF COUNSEL), FOR PETITIONER.

BARCLAY DAMON LLP, ROCHESTER (MARK R. MCNAMARA OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review a certain condemnation by eminent domain.

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

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, Onondaga County Industrial Development Agency (OCIDA), authorizing the condemnation of two parcels of real property owned by petitioner that were part of the former Shoppingtown Mall. We confirm the determination and dismiss the petition.

Contrary to petitioner's contentions, OCIDA's determination and findings comport with EDPL article 2 and do not violate petitioner's federal and state constitutional rights. Preliminarily, we note that this Court's review power is limited by statute (*see* EDPL 207 [C] [1]-[4]; *Matter of Niagara Falls Redevelopment, LLC v City of Niagara Falls*, 218 AD3d 1306, 1307-1308 [4th Dept 2023], *appeal dismissed* 40 NY3d 1059 [2023], *lv denied* 42 NY3d 904 [2024]). Pursuant to EDPL 207 (C), this Court "shall either confirm or reject the condemnor's determination and findings." Our scope of review is limited to " 'whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with[, inter alia,] EDPL article 2; and (4) the acquisition will serve a public use' " (*Niagara Falls Redevelopment, LLC*, 218 AD3d at 1307; *see* EDPL 207 [C]).

"[T]he party challenging the condemnation has the burden of

establishing that the determination was without foundation and baseless . . . Thus, [i]f an adequate basis for a determination is shown and the objector cannot show that the determination was without foundation, the condemnor's determination should be confirmed" (*Matter of HBC Victor LLC v Town of Victor*, 225 AD3d 1254, 1255 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024] [internal quotation marks omitted]; *see Matter of GM Components Holdings, LLC v Town of Lockport Indus. Dev. Agency*, 112 AD3d 1351, 1352 [4th Dept 2013], *appeal dismissed* 22 NY3d 1165 [2014], *lv denied* 23 NY3d 905 [2014]).

Petitioner contends that the determination should be annulled because OCIDA is not authorized by General Municipal Law §§ 858 and 862 to pursue a project that is predominantly residential and retail in nature. We reject that contention. Under EDPL 207 (C) (2), this Court's analysis is limited to, inter alia, whether the "proposed acquisition" is within the condemnor's statutory jurisdiction and, here, the intended use of the two parcels that OCIDA proposes to acquire from petitioner is not residential or retail in nature. Although a developer intends to develop a portion of the larger project into residential housing and retail establishments, the property upon which it proposes to construct the residential housing and retail establishments is currently owned by Onondaga County and thus is not part of the "proposed acquisition" authorized by the determination at issue in this proceeding (EDPL 207 [C] [2]). To the extent that petitioner attempts to challenge the authority of OCIDA to finance a project that contains a residential component, that contention is properly raised in a CPLR article 78 proceeding (*see e.g. Matter of Nearpass v Seneca County Indus. Dev. Agency*, 152 AD3d 1192, 1193 [4th Dept 2017]).

Contrary to petitioner's contention, the redevelopment of the blighted former mall constitutes a legitimate public use. What constitutes a public purpose or use " 'is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage' " (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010]; *see generally Kelo v City of New London*, 545 US 469, 480 [2005]). Here, OCIDA's condemnation of the property serves the public uses of, among other things, remediating blight (*see Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 524 [2009], *rearg denied* 14 NY3d 756 [2010]), returning land to productive use (*see generally Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 411 [1986]), making use of underutilized property (*see Sunrise Props. v Jamestown Urban Renewal Agency*, 206 AD2d 913, 913 [4th Dept 1994], *lv denied* 84 NY2d 809 [1994]), and fostering economic growth (*see Matter of Penney Prop. Sub Holdings LLC v Town of Amherst*, 220 AD3d 1169, 1171 [4th Dept 2023]).

Petitioner further contends that respondent failed to satisfy the requirements of the State Environmental Quality Review Act (*see* EDPL 207 [C] [3]). We reject that contention. Here, the record establishes that OCIDA "took the requisite hard look and provided a

reasoned elaboration of the basis for [its] determination regarding the potential impacts of the [p]roject on traffic" (*Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1432 [4th Dept 2021]).

We have reviewed petitioner's remaining contentions and conclude that none warrants annulment of the determination.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

633

CA 23-01661

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

IN THE MATTER OF DAVONTAE BROWN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ROSSANA ROSADO, AS COMMISSIONER OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, AND DIANE H. HOLFORD, AS SENTENCING REVIEW COORDINATOR, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION OFFICE OF SENTENCING REVIEW,
RESPONDENTS-RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 31, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the petition is granted.

Memorandum: Petitioner appeals from a judgment that dismissed his petition in a proceeding pursuant to CPLR article 78 to compel respondent New York State Department of Corrections and Community Supervision (DOCCS) to recalculate certain sentences to run concurrently. We reverse.

Petitioner was previously convicted under indictment No. 2015-0584S (indictment) of robbery in the first degree (Penal Law § 160.15 [4] [count 1]), criminal possession of a weapon in the second degree (§ 265.03 [3] [count 2]), assault in the first degree (§ 120.10 [4] [count 3]), and assault in the second degree (§ 120.05 [6] [count 4]). Supreme Court (Boller, A.J.) sentenced petitioner, as relevant, to 12 years' imprisonment on count 1, 12 years' imprisonment on count 2, 10 years' imprisonment on count 3, and 7 years' imprisonment on count 4.

The court directed that the sentences imposed on counts 1, 2, and 4 would run concurrently with each other and that the sentence imposed on count 3 would run consecutively to the sentences imposed on counts 1, 2, and 4, for an aggregate sentence of 22 years' incarceration. On direct appeal, petitioner raised multiple legal challenges to the consecutive sentencing. This Court rejected petitioner's arguments that the sentence on count 3 could not legally run consecutively to the sentence on count 2 or the sentence on count 4 (*People v Brown*, 204 AD3d 1390, 1394 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]). We agreed with petitioner, however, that the sentence on count 3 could not legally run consecutively to the sentence on count 1 (*id.* at 1394-1395). We thus concluded that "the sentence imposed on the count of assault in the first degree must run concurrently with the sentence imposed on the count of robbery in the first degree," and "[w]e therefore modif[ied] the judgment [of conviction] accordingly" (*id.*). We further concluded that "the sentence as modified is not unduly harsh or severe" (*id.* at 1395). In light of our conclusion, we modified the judgment "by directing that the sentence imposed on count three of the indictment shall run concurrently with the sentence imposed on count one of the indictment," and as modified we affirmed the judgment (*id.* at 1391).

Petitioner submitted a copy of our decision to DOCCS with a request to recalculate his aggregate sentence in accordance with our directive to run "the sentence imposed on count three of the indictment . . . concurrently with the sentence imposed on count one of the indictment" (*id.*). According to petitioner's submissions, DOCCS initially recalculated petitioner's sentences to reflect that the sentences on counts 1 through 4 were to run concurrently with each other. DOCCS subsequently recalculated petitioner's sentences to reflect that the sentence on count 3 would run consecutively to the sentences on counts 2 and 4. Petitioner administratively challenged that recalculation; however, DOCCS adhered to the determination that the consecutive sentencing was appropriate. Petitioner then commenced this proceeding seeking to compel DOCCS to recalculate his aggregate sentence so that the sentence imposed on count 3 of the indictment runs concurrently with all other sentences imposed on the indictment (*see generally Matter of Murray v Goord*, 1 NY3d 29, 32 [2003]). Supreme Court (Mohun, A.J.) dismissed the petition.

We agree with petitioner that our prior order obligated DOCCS to run the sentences on all four counts of the indictment concurrently with each other and that petitioner therefore has a clear legal right to the recalculation of those sentences (*cf. Matter of Wisniewski v Michalski*, 114 AD3d 1188, 1189 [4th Dept 2014]; *see generally Matter of Dinsio v Supreme Ct., Appellate Div., Third Jud. Dept.*, 125 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 25 NY3d 908 [2015], *rearg denied* 26 NY3d 1134 [2016]). Specifically, we modified petitioner's judgment of conviction by directing that the sentence imposed on count 3 run concurrently with the sentence imposed on count 1 (*Brown*, 204 AD3d at 1391), thereby effectively directing that the 10-year sentence on count 3 "merge in and be satisfied by discharge of the term which has the longest unexpired time to run" (Penal Law § 70.30 [1] [a]), i.e.,

the concurrent 12-year sentence on count 1. In support of affirmance, respondents contend that our prior order should be read as directing the sentence on count 3 to run concurrently with the sentence on count 1, but consecutively to the sentences on counts 2 and 4 (*see generally People v Jeanty*, 268 AD2d 675, 680-681 [3d Dept 2000], *lv denied* 94 NY2d 949 [2000]). Although such a sentence would have been permissible (*see People v Griner*, 178 AD3d 1436, 1437 [4th Dept 2019], *lv denied* 35 NY3d 941 [2020]), here our prior order contained no express language limiting our directive to only a partial modification of the sentence on count 3 (*see Brown*, 204 AD3d at 1391; *cf. People v Lopez*, 15 AD3d 232, 232 [1st Dept 2005], *lv denied* 4 NY3d 888 [2005]; *Jeanty*, 268 AD2d at 680-681). Further, to the extent, if any, that our prior order was ambiguous, DOCCS lacked the authority to resolve such ambiguity inasmuch as "sentencing is a judicial function and, as such, lies beyond [DOCCS's] limited jurisdiction over inmates and correctional institutions" (*Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 362 [2008]; *see Murray*, 1 NY3d at 32). We therefore reverse the judgment in this proceeding, reinstate the petition, and grant the petition.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

637

KA 24-00474

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIEN MORRIS, DEFENDANT-APPELLANT.

PAUL G. DELL, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered May 1, 2023. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon 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 criminal possession of a weapon in the second degree and dismissing count 2 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]).

We reject defendant's contention that County Court erred in permitting him to proceed pro se at trial. "[A]n application to proceed pro se must be denied unless [the] defendant effectuates a knowing, voluntary and intelligent waiver of the right to counsel . . . To this end, trial courts must conduct a 'searching inquiry' to clarify that [the] defendant understands the ramifications of such a decision" (*People v Stone*, 22 NY3d 520, 525 [2014]; *see People v Abdullah*, 194 AD3d 1346, 1346 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]). "In other words, a searching inquiry is required to warn [the] defendant of the risks inherent in [proceeding pro se] and to apprise [the defendant] of the value of counsel" (*Abdullah*, 194 AD3d at 1346 [internal quotation marks omitted]). We conclude that the court conducted an adequate searching inquiry before determining that defendant's waiver of the right to counsel was knowing, voluntary, and intelligent. Defendant relatedly contends that the waiver colloquy was inadequate because the court failed to inquire whether defendant was under the influence of medication. We reject that contention. We

note that the court inquired whether defendant had "ever received any treatment for a mental illness" and whether defendant had "received any treatment for a physical condition that ha[d] affected [his] ability to understand," and defendant responded in the negative to both inquiries. It is within the trial court's discretion to determine whether its searching inquiry should include "a particularized assessment of [the] defendant's mental capacity when resolving [a] request to proceed pro se" (*Stone*, 22 NY3d at 529). In view of the whole record (*see People v Providence*, 2 NY3d 579, 583 [2004]), we conclude that the court did not abuse its discretion in declining to undertake further assessment of whether defendant suffered from any mental impairment as a result of medication.

Defendant contends that he was denied a fair trial because the prosecutor, inter alia, made improper comments during the opening statement, elicited improper testimony in regard to defendant's selective silence, and made improper comments during summation on the court's denial of a justification charge. As defendant correctly concedes, that contention is unpreserved for appellate review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Miller,* 204 AD3d 1438, 1438 [4th Dept 2022], *lv denied* 40 NY3d 935 [2023]; *see generally People v Pavone*, 26 NY3d 629, 638 [2015]).

Finally, defendant contends that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the second degree because the People presented undisputed evidence that he had a valid firearm license, and thus the People necessarily failed to disprove beyond a reasonable doubt the defense that defendant was exempt from prosecution pursuant to Penal Law § 265.20 (a) (3). Although defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *see generally People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]), under the circumstances of this case, including that the People do not oppose dismissal of the subject count, we exercise our power to address the unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Inasmuch as the evidence presented at trial established that defendant was exempt from prosecution for criminal possession of a weapon pursuant to Penal Law § 265.20 (a) (3), we modify the judgment by reversing that part convicting defendant of criminal possession of a weapon in the second degree in violation of Penal Law § 265.03 and dismissing count 2 of the indictment (*see generally People v Parker*, 52 NY2d 935, 936 [1981], *revg on dissent below* 70 AD2d 387, 391-394 [1st Dept 1979] [Birns, J., dissenting]; *People v Davis*, 193 AD2d 954, 955-956 [3d Dept 1993]).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

638

KA 23-01199

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER S. MORIN, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered May 23, 2023. 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 determining, inter alia, that he is a level two sex offender pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*).

Defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk. We reject that contention. It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862 [2014]), the existence of "an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006] [Guidelines]; *see People v Vaillancourt*, 112 AD3d 1375, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]).

Here, the evidence at the SORA hearing established that defendant used his position as a basketball and softball coach to gain access to and groom his victims. At least one minor female was identified as having been coached by defendant in sixth grade and seventh grade before defendant began sending her sexually explicit communications during the summer before she entered ninth grade. In addition, even after he was suspended from coaching, defendant continued to use his

former players to gain access to additional minors. The court did not err in concluding that defendant's use of "his position of trust as a . . . coach to gain access to underage girls" constituted an aggravating factor of a kind or to a degree not adequately taken into account by the Guidelines (*see People v Symonds*, 147 AD3d 1325, 1326 [4th Dept 2017], *lv denied* 29 NY3d 909 [2017]; *People v Botindari*, 107 AD3d 1607, 1607-1608 [4th Dept 2013]).

Nor did the court err in concluding that defendant's conduct while confined constituted an aggravating factor of a kind or to a degree not adequately taken into account by the Guidelines (*see People v Sherard*, 73 AD3d 537, 537 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]; *cf. People v Curry*, 208 AD3d 1560, 1561-1562 [3d Dept 2022], *lv denied* 39 NY3d 905 [2022]; *see generally People v Ford*, 25 NY3d 939, 941-942 [2015]). Despite the issuance of an order directing that he have no contact with anyone under the age of 18, defendant continued his attempts to communicate with a minor female by sending letters to a third party with directions on how to evade detection. Defendant explained in one such letter how the minor could go about purchasing a new phone number so that he could surreptitiously contact her while he was in custody, and how she could obtain a fake identification card that she could use to visit him. We conclude on this record that, contrary to defendant's contention, the People established, by clear and convincing evidence, an increased likelihood of recidivism based upon the presence of aggravating factors not adequately taken into consideration by the Guidelines (*see Gillotti*, 23 NY3d at 861).

In addition, contrary to defendant's contention, the court did not fail to weigh the aggravating and mitigating factors to determine whether the totality of the circumstances warranted an upward departure (*see generally id.*). Although the court did not explicitly set forth in its decision the alleged mitigating factors raised by defendant, there is "nothing in the record . . . to suggest that the . . . court did not exercise [its] discretion" in that respect (*People v Howard*, 27 NY3d 337, 342 [2016]). Indeed, the court explicitly determined that a level one risk classification was "not appropriate in this case" because it would "not accurately reflect [defendant's] risk to re-offend or threat to public safety" (*see Gillotti*, 23 NY3d at 861).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

656

KA 23-00553

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERELL E. ROLFE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Karen M. Brandt Brown, J.), rendered March 10, 2022. The judgment convicted defendant upon his plea of guilty of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [2] [a]), defendant contends that his sentence is unduly harsh and severe and that the waiver of the right to appeal does not foreclose his challenge to the severity of his sentence. Here, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Giles*, 219 AD3d 1706, 1706 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]), and we note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see generally Thomas*, 34 NY3d at 567; *Giles*, 219 AD3d at 1706; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). We thus conclude that defendant validly waived his right to appeal inasmuch as the record establishes that the court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*Giles*, 219 AD3d at 1707 [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255).

Defendant contends for the first time on appeal that the court improperly ordered him to pay restitution to the victim in the absence of proof in the record to support the amount of restitution, and thus

his contention is not preserved for our review (*see* CPL 470.05 [2]; *People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *People v Connors*, 91 AD3d 1340, 1341-1342 [4th Dept 2012], *lv denied* 18 NY3d 956 [2012]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

660

CAF 23-00920

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

IN THE MATTER OF PARKER J. AND PHOEBE J.

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

MEMORANDUM AND ORDER

BETH F., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered May 4, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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 children on the ground of permanent neglect. We affirm.

We reject the mother's contention that she received ineffective assistance of counsel. We conclude that "the record, viewed in totality, reveals that [the mother] received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]) during the time that counsel represented her.

The mother relatedly contends that she did not knowingly, intelligently, and voluntarily waive her right to counsel (*see generally Matter of Danyel J. [LeeAnn B.]*, 227 AD3d 1484, 1485 [4th Dept 2024], *lv denied* 42 NY3d 906 [2024]). We reject that contention. Here, Family Court, by asking the mother about her "age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 386 [2011]), engaged in the requisite "searching inquiry" to ensure "that the [mother] was aware of the dangers and disadvantages of proceeding without counsel"

(*Matter of Storelli v Storelli*, 101 AD3d 1787, 1788 [4th Dept 2012] [internal quotation marks omitted]).

We also reject the mother's contention that the court erred in denying her request for a suspended judgment (*see Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023]). The court's lone concern at the dispositional phase is "the best interests of the children . . . and its determination is entitled to great deference" (*id.* [internal quotation marks omitted]). It is well settled that "[a] suspended judgment is a brief grace period designed to prepare the parent to be reunited with the child . . . , 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 Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017] [internal quotation marks omitted]). Here, we conclude that the court properly determined that a suspended judgment was unwarranted (*see generally Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]).

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

673

CA 23-01174

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

FIRST NATIONAL CREDIT, INC., PLAINTIFF-APPELLANT,

V ORDER

CHRISTIE'S CLEANING, INC., AND CHRISTIE A. JOHNSON,
DEFENDANTS-RESPONDENTS.

GIOIA & NEUROHR, PLLC, WILLIAMSVILLE (ALEX M. NEUROHR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered June 13, 2023. The order granted the motion of defendants to dismiss the complaint and denied the cross-motion of plaintiff seeking leave to amend the complaint.

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

686

CA 23-01564

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

ASHLEY C. PUTNAM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JASON D. KIBLER, DEFENDANT-RESPONDENT.

DIFILIPPO, FLAHERTY & STEINHAUS, PLLC, EAST AURORA (ROBERT D. STEINHAUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ FINE P.C., BUFFALO (BRIAN M. WEBB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 29, 2023. The order granted the motion of defendant 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 damages for injuries she sustained while riding as a passenger on a snowmobile operated by defendant. As defendant was preparing to turn to the left to ascend a hill, the snowmobile was struck by an oncoming snowmobile. As a result of the accident, defendant and plaintiff each suffered serious injuries that required surgery. Defendant moved for summary judgment in his favor on the issue of negligence, and Supreme Court granted the motion. Plaintiff appeals, and we affirm.

Defendant, "as the movant for summary judgment, had the burden of establishing as a matter of law that he was not negligent" (*Pagels v Mullen*, 167 AD3d 185, 187 [4th Dept 2018]; *see Rick v TeCulver*, 211 AD3d 1542, 1543 [4th Dept 2022]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To meet that burden, defendant was required to establish that he fulfilled his "common-law duty to see that which he should have seen [as a driver] through the proper use of his senses" (*Luttrell v Vega*, 162 AD3d 1637, 1638 [4th Dept 2018] [internal quotation marks omitted]; *see Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]) "and to exercise reasonable care under the circumstances to avoid an accident" (*Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015] [internal quotation marks omitted]; *see Cupp v McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013]). Defendant also had the burden of "establishing as a matter of law that there was nothing he could do to avoid the accident" (*Pagels*, 167 AD3d at 187; *see*

Jackson v City of Buffalo, 144 AD3d 1555, 1556 [4th Dept 2016]).

We conclude that defendant met his initial burden on the motion. In support of the motion, defendant submitted his own deposition testimony, in which he stated that he saw the headlight of the approaching snowmobile and that, although he attempted to turn, he was unable to avoid the accident (*cf. Rick*, 211 AD3d at 1543; *Ebbole v Nagy*, 169 AD3d 1461, 1462 [4th Dept 2019]; *Pagels*, 167 AD3d at 189). In addition, defendant testified that he was not speeding at the time of the accident but had slowed down to make the turn that led to the hill (*cf. Rick*, 211 AD3d at 1543). Defendant also submitted the deposition testimony of plaintiff, who stated that she was looking over defendant's left shoulder when she "saw lights from another snowmobile" just before her "life went black." Plaintiff further testified that defendant was going approximately 45 or 50 miles per hour in an area with a speed limit of 55 miles per hour.

In response, plaintiff failed to raise an "issue[ ] of fact whether defendant was negligent—i.e., whether he [failed to see] what was there to be seen and had enough time to take evasive action to avoid the collision" (*Ebbole*, 169 AD3d at 1462). To the extent that plaintiff contends that, pursuant to *Noseworthy v City of New York* (298 NY 76 [1948]), she is entitled to a less stringent burden of proof in establishing the existence of an issue of fact with respect to defendant's negligence, we reject that contention. Plaintiff has "the burden of raising a triable issue of fact . . . before the *Noseworthy* rule may be applied, and [she] failed to meet that burden" (*Hill v Cash*, 117 AD3d 1423, 1427 [4th Dept 2014] [internal quotation marks omitted]; *see Smith v Stark*, 67 NY2d 693, 694-695 [1986]; *Shanahan v Mackowiak*, 111 AD3d 1328, 1330 [4th Dept 2013]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

687

CA 23-01727

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

IN THE MATTER OF ROCHESTER POLICE DEPARTMENT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JARVIS DUVAL, RESPONDENT-RESPONDENT.

PATRICK BEATH, CORPORATION COUNSEL, ROCHESTER, FOR
PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Thomas E. Moran, J.), entered March 29, 2023. The order denied the application for an extreme risk protection order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the application is reinstated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner filed an application seeking a temporary extreme risk protection order (TERPO) and final extreme risk protection order (ERPO) against respondent pursuant to the Extreme Risk Protection Act (ERPA) (*see* CPLR article 63-A). Supreme Court denied the TERPO, and scheduled a final ERPO hearing pursuant to CPLR 6343 (1). At the outset of the hearing, the court sua sponte raised the issue of the constitutionality of the ERPA. Petitioner then submitted its proof consisting of, inter alia, testimony from two of the officers who responded to a 14-hour long armed standoff involving respondent, as well as body camera footage. After petitioner rested, the court issued an order denying the ERPO on, inter alia, the ground that the ERPA is unconstitutional based on its reasoning in its prior decision in *G.W. v C.N.* (78 Misc 3d 289 [Sup Ct, Monroe County 2022], *abrogated by R.M. v C.M.*, 226 AD3d 153 [2d Dept 2024]). Petitioner now appeals, contending that the ERPA is constitutional.

Pursuant to CPLR 1012 (b) (1), "[w]hen the constitutionality of a statute of the state . . . is involved in an action to which the state is not a party, the attorney general shall be notified and permitted to intervene in support of its constitutionality." "The court having jurisdiction in an action or proceeding in which the constitutionality of a state statute . . . is challenged shall not consider any challenge to the constitutionality of such state statute . . . unless proof of service of the notice required by this subdivision is filed with such court" (CPLR 1012 [b] [3]; *see* Executive Law § 71 [3]; *Matter of Kesel v Holtz*, 222 AD3d 1397, 1398 [4th Dept 2023]; *Jefferds*

v Ellis, 122 AD2d 595, 595 [4th Dept 1986]). Inasmuch as there is no proof in the record that the Attorney General was provided with notice of this proceeding or an opportunity to intervene, we conclude that "the court was prohibited from considering [a] constitutional challenge . . . and, moreover, that challenge is not properly before us" (*Kesel*, 222 AD3d at 1398; *see Jefferds*, 122 AD2d at 595-596). We therefore reverse the order, reinstate the application, and remit the matter to Supreme Court for further proceedings thereon upon proof of notice to the Attorney General of the constitutional issue raised by the court and an opportunity for additional briefing.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

695

TP 24-00675

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

IN THE MATTER OF DACIA HIRSCH, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, AND
OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES,
RESPONDENTS.

EISENBERG & BAUM, LLP, NEW YORK CITY (ANDREW ROZYNSKI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [James A. Vazzana, J.], entered April 1, 2024) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the matter is remitted to respondent New York State Division of Human Rights for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (DHR) dismissing her complaint against respondent Office for People With Developmental Disabilities (OPWDD). Petitioner, who was born deaf, alleges that OPWDD unlawfully discriminated against her in violation of Executive Law § 296 by rescinding an offer of employment at OPWDD because of her hearing loss without first offering her a reasonable accommodation.

Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, is limited to the issue whether it is supported by substantial evidence (*see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]; *Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]). "It is peculiarly within the domain of the [DHR] Commissioner, who is presumed to have special expertise in the matter, to assess whether the facts and the law support a finding of unlawful discrimination" (*Matter of Garvey Nursing Home v New York State Div. of Human Rights*,

209 AD2d 619, 619 [2d Dept 1994] [internal quotation marks omitted]). Thus, we are not permitted to " 'weigh the evidence or reject' DHR's 'choice where the evidence is conflicting and room for a choice exists' " (*Matter of Clifton Park Apts., LLC v New York State Div. of Human Rights*, 41 NY3d 326, 333 [2024], quoting *Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623, 631 [1988]; *see Matter of City of Niagara Falls v New York State Div. of Human Rights*, 94 AD3d 1442, 1443-1444 [4th Dept 2012]).

Under New York State Human Rights Law (NYSHRL), petitioner "bears the burden of establishing a prima facie case . . . showing that (1) [she] is a person with a disability under the meaning of the [NYSHRL]; (2) an employer covered by the statute had notice of [her] disability; (3) with reasonable accommodation, [she] could perform the essential functions of the job at issue; and (4) the employer has refused to make such accommodations" (*Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1473 [4th Dept 2010] [internal quotation marks omitted]; *see* Executive Law § 296; *Rainer N. Mittl, Ophthalmologist, P.C.*, 100 NY2d at 330). There is no dispute that the first two elements are met here, inasmuch as petitioner was born deaf and used interpreters during her interview and physical examination with OPWDD.

DHR's determination as to the third element is not supported by substantial evidence. "Whether a job function is essential depends on multiple factors, 'including the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring the plaintiff to perform the function, mention of the function in any collective bargaining agreement, the work experience of past employees in the job, and the work experience of current employees in similar jobs' " (*Gill v Maul*, 61 AD3d 1159, 1160-1161 [3d Dept 2009], quoting *Price v City of New York*, 264 Fed Appx 66, 68-69 [2d Cir 2008]). Rather than considering such factors and whether petitioner made a prima facie case that she could undertake the essential functions of the job with or without reasonable accommodation, DHR adopted the conclusory determination that "[t]he physical requirements for the . . . position" as set forth by the Department of Civil Service, and specifically the requirement that petitioner must pass a hearing test, "are based on the essential functions of the job." That was error. Although written job descriptions, including the standards set by the Department of Civil Service, should be given deference in determining essential job functions in a reasonable accommodation analysis, no one factor is dispositive (*see Hunt-Watts v Nassau Health Care Corp.*, 43 F Supp 3d 119, 127-128 [ED NY 2014]; *see also Cardona v City of N.Y. Civ. Serv. Commn.*, 12 Misc 3d 1198 [A], *3-4 [Sup Ct, NY County 2006]; *see generally Abram*, 71 AD3d at 1473). Thus, DHR erred in making its determination based solely on the Department of Civil Service standards. Further, inasmuch as the record established that petitioner had previously performed substantially similar work, that she was able to perform that job with an interpreter as an accommodation, and that OPWDD's governing accommodation policy provides that reasonable accommodation includes providing interpreters, the record demonstrates that petitioner met her prima

facie burden as to the third element.

As to the fourth element, DHR determined that petitioner "did not request a reasonable accommodation from" OPWDD, and therefore concluded that petitioner failed to establish a prima facie case that OPWDD failed to provide reasonable accommodation. However, even where a petitioner "did not request any specific accommodation" prior to initiating "litigation, [NYSHRL] require[s] [employers] to engage in an interactive dialogue regarding possible accommodations once they bec[o]me aware of [a prospective employee's] condition" requiring accommodation (*Cooney v City of N.Y. Dept. of Sanitation*, 224 AD3d 585, 586 [1st Dept 2024], citing Executive Law § 296 [3] [a]). Indeed, the implementing regulations specifically state that "[t]he employer has a duty to move forward to consider accommodation once the need for accommodation is *known or requested*" (9 NYCRR 466.11 [j] [4] [emphasis added]). Petitioner therefore met her prima facie burden as to the fourth element.

Given that petitioner "carried her 'de minimis burden' of showing a prima facie case of discrimination" (*Basso v EarthLink, Inc.*, 157 AD3d 428, 429 [1st Dept 2018]; *see Matter of Kaplan v New York State Div. of Human Rights*, 95 AD3d 1120, 1123 [2d Dept 2012]), "the burden of production shift[ed] to [OPWDD] to rebut the presumption with evidence" that it chose not to hire petitioner "for a legitimate, nondiscriminatory reason" (*Rainer N. Mittl, Ophthalmologist, P.C.*, 100 NY2d at 330). Because the ALJ's determination, as adopted by DHR, erroneously concluded that petitioner failed to demonstrate a prima facie case, no determination was made whether OPWDD rebutted the presumption. We therefore annul the determination and remit the matter to DHR for a new determination (*see generally Clifton Park Apts., LLC*, 41 NY3d at 334; *Matter of Winkler v New York State Div. of Human Rights*, 59 AD3d 1055, 1056-1057 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

696

KA 17-01714

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIFFANIE IRWIN, DEFENDANT-APPELLANT.

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

TIFFANIE IRWIN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 19, 2016. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her *Alford* plea, of manslaughter in the first degree (Penal Law § 125.20 [1]) and assault in the second degree (§ 120.05 [2]). As an initial matter, we conclude that defendant's waiver of the right to appeal is invalid inasmuch as both the written waiver signed by defendant and County Court's oral waiver colloquy mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to any appeal and any postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Zabko*, 206 AD3d 1642, 1642-1643 [4th Dept 2022]; *see e.g. People v Austin*, 206 AD3d 1716, 1717 [4th Dept 2023]; *People v Cossette*, 199 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]).

Contrary to defendant's contention in her main and pro se supplemental briefs, the court properly refused to suppress evidence obtained as a result of four search warrants. Specifically, defendant contends that three of the search warrants lacked particularity with respect to the places to be searched and that all four warrants lacked particularity with respect to the items to be seized. We reject

defendant's contentions. "To meet the particularity requirement, a search warrant must (1) 'identify the specific offense for which the police have established probable cause,' (2) 'describe the place [or person] to be searched,' and (3) 'specify the items to be seized by their relation to designated crimes' " (*People v Wiggins*, 229 AD3d 1095, 1096 [4th Dept 2024], quoting *United States v Galpin*, 720 F3d 436, 445-446 [2d Cir 2013]; *see People v Saeli* [appeal No. 1], 219 AD3d 1122, 1124 [4th Dept 2023]). Assuming, arguendo, that defendant's challenges to the warrants are "preserved for our review because [their] validity [on those grounds] was expressly decided by the court" (*People v Colon*, 192 AD3d 1567, 1568 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *see* CPL 470.05 [2]; *People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]), we conclude that the warrants, which are "cloak[ed] . . . with a presumption of validity" (*People v DeProspero*, 91 AD3d 39, 44 [4th Dept 2011], *affd* 20 NY3d 527 [2013] [internal quotation marks omitted]) and are not to "be read in a hypertechnical manner" (*People v Hanlon*, 36 NY2d 549, 559 [1975]), were issued upon probable cause and described with sufficient particularity the places or person to be searched and the things to be seized (*see People v Nieves*, 36 NY2d 396, 400 [1975]; *see generally* US Const, 4th Amend; NY Const, art 1, § 12). As written, the warrants were " 'specific enough to leave no discretion to the executing officer[s]' " (*People v Brown*, 96 NY2d 80, 84 [2001]; *see People v Herron*, 199 AD3d 1476, 1479 [4th Dept 2021]).

We also reject defendant's contention in her main and pro se supplemental briefs that her *Alford* plea should be vacated. Initially, we note that "so long as [a] plea agreement is voluntarily, knowingly and intelligently made, the fact that it is linked to the prosecutor's acceptance of a plea bargain favorable to [third persons] does not, by itself, make defendant's plea illegal" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). "Although 'connected pleas can present concerns which require special care . . . ,' the inclusion of a third-party benefit is just one factor to consider in determining whether a plea was voluntarily, knowingly, and intelligently made" (*People v Shaw*, 222 AD3d 1401, 1402 [4th Dept 2023], *lv denied* 42 NY3d 930 [2024], quoting *Fiumefreddo*, 82 NY2d at 545). Here, " 'the record establishes that defendant's *Alford* plea was the product of a voluntary and rational choice, and the record . . . contains strong evidence of actual guilt' " (*Herron*, 199 AD3d at 1477; *see People v Wilson*, 197 AD3d 1006, 1007 [4th Dept 2021], *lv denied* 37 NY3d 1100 [2021]).

We have reviewed defendant's remaining contentions in her main brief, including her challenge to the severity of her negotiated sentence, and conclude that none warrants modification or reversal of the judgment.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

697

KA 20-00995

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK BOHN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 27, 2020. 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: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Ahmed*, 188 AD3d 1626, 1626 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

698

KA 24-00626

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY J. JORDAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Barry L. Porsch, A.J.), rendered September 8, 2023. The judgment convicted defendant, upon a jury verdict, of assault 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, after a jury trial, of assault in the second degree (Penal Law § 120.05 [2]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Based on our independent review of the evidence, we conclude that a different verdict would have been unreasonable (*see People v Bell*, 198 AD3d 1305, 1306 [4th Dept 2021], *lv denied* 37 NY3d 1144 [2021]). The victim testified without contradiction that defendant lunged at him with a knife in his hand and that he then felt his neck being slashed, and that testimony was buttressed by photographic evidence depicting blood on defendant's hands (*see generally People v Archibald*, 148 AD3d 1794, 1794 [4th Dept 2017], *lv denied* 29 NY3d 1075 [2017]).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on an alleged instance of prosecutorial misconduct during summation inasmuch as defense counsel made only a general objection to that remark, did not ask for a curative instruction or other further action, and based the subsequent motion for a mistrial on different grounds (*see People v Lewis*, 192 AD3d 1532, 1534 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]; *see also People v Gibson*, 134 AD3d 1512, 1512-1513 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). We decline to exercise our power to

review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, we conclude that County Court did not err in admitting in evidence testimony from two police officers that defendant was agitated and screaming obscenities after the incident inasmuch as the testimony was relevant to defendant's consciousness of guilt (*see People v Nelson*, 133 AD3d 536, 537 [1st Dept 2015], *lv denied* 26 NY3d 1148 [2016], *lv denied* 28 NY3d 1148 [2017]) and to complete the narrative of defendant's arrest (*see People v Dorm*, 47 AD3d 503, 503 [1st Dept 2008], *affd* 12 NY3d 16 [2009]), and it "was not so inflammatory that its prejudicial effect exceeded its probative value" (*People v Spencer*, 181 AD3d 1257, 1262 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]). Additionally, defendant's assertion that the victim's testimony falsely characterized him as having engaged in physical altercations prior to the incident is unsupported by the record.

We reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to request an adverse inference instruction concerning missing video surveillance evidence. Defense counsel cannot be deemed ineffective for failing to make a motion or argument that has little or no chance of success (*see People v Caban*, 5 NY3d 143, 152 [2005]), and there was no basis for requesting an adverse inference instruction here because defendant failed to establish that the missing video evidence was destroyed by agents of the government (*see People v Jones*, 211 AD3d 1594, 1596-1597 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]; *People v Bonaparte*, 196 AD3d 866, 869-870 [3d Dept 2021], *lv denied* 37 NY3d 1025 [2021]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

699

KA 18-01027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES VICKS, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (ALYSSA N. DWYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered November 29, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Defendant failed to preserve for our review his contention that his conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see generally 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]).

We reject defendant's further contention that he was deprived of effective assistance of counsel. The alleged claims of ineffective assistance set forth by defendant "are based largely on his hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Avilez*, 56 AD3d 1176, 1177 [4th Dept 2008], *lv denied* 12 NY3d 755 [2009]

[internal quotation marks omitted]; *see People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]; *People v Smith*, 228 AD3d 1324, 1325 [4th Dept 2024]). The remaining alleged shortcoming, i.e., that defense counsel made a general rather than a specific motion for a trial order of dismissal, "also does not constitute ineffective assistance of counsel where, as here, a specific motion would have had little or no chance of success" (*People v Miller*, 81 AD3d 1282, 1283 [4th Dept 2011], *lv denied* 16 NY3d 861 [2011]; *see People v Jones*, 147 AD3d 1521, 1521 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]).

Finally, contrary to defendant's contention, the sentence is not unduly harsh and severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

700

KA 23-00539

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL R. ALLEN, DEFENDANT-APPELLANT.

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

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Melinda H. McGunnigle, A.J.), rendered March 28, 2023. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree (two counts), sexual abuse in the second degree, forcible touching (two counts) and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Oswego County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of sexual abuse in the first degree (Penal Law § 130.65 [2], [4]) and two counts of forcible touching (§ 130.52 [1]). Although defendant contends on appeal that the verdict is not supported by legally sufficient evidence for multiple reasons, defendant preserved that contention only with respect to the forcible touching counts (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). 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 with respect to those counts is legally sufficient to establish that defendant's bodily conduct toward the respective victims was "done with the relevant mens rea" and "involv[ed] the application of some level of pressure to the victim's sexual or intimate parts," so that the contact "qualifie[d] as a forcible touch within the meaning of Penal Law § 130.52" (*People v Guaman*, 22 NY3d 678, 684 [2014]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of each 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 with respect to any count (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that a new trial is required because, after the jury rendered a verdict, a seated juror was discovered to be related to the district attorney within a degree of consanguinity or affinity that would have permitted a challenge for cause (*see* CPL 270.20 [1] [c]). We reject that contention. Although the juror would have been automatically barred from sitting on the jury if a timely challenge for cause premised on that ground had been made (*see People v Colburn*, 123 AD3d 1292, 1295 [3d Dept 2014], *lv denied* 25 NY3d 950 [2015]; *see also People v Provenzano*, 50 NY2d 420, 424 [1980]), here no objection to the juror was made prior to the verdict. CPL 270.15 (4) provides that "[a] challenge for cause of a prospective juror which is not made before [that prospective juror] is sworn as a trial juror shall be deemed to have been waived, except that such a challenge based upon a ground not known to the challenging party at that time may be made at any time before a witness is sworn at the trial." "Such language demonstrates a clear intention on the part of the Legislature to require challenges for cause of jurors in criminal cases at the earliest possible time, at the risk of waiving one's right to such challenge, for failure to act promptly" (*People v Ellis*, 54 AD2d 1052, 1052 [3d Dept 1976]). We conclude that defendant's objection to the subject juror is "deemed to have been waived" (CPL 270.15 [4]), inasmuch as the juror's relationship with the district attorney was not a ground unknown to defendant before the juror was seated (*see id.*).

We reject defendant's related contention that County Court committed a mode of proceedings error during voir dire. During jury selection, the court, consistent with its statutory obligation, asked "questions affecting [the prospective jurors'] qualifications to serve" (CPL 270.15 [1] [b]), including whether any juror had a familial or close relationship with a law enforcement agency such as a district attorney's office. The subject juror raised her hand in an affirmative response, thereby placing the court and parties on notice that the subject juror had a potential bias or disqualifying relationship with a witness or attorney. The court then permitted "both parties . . . to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors" (CPL 270.15 [1] [c]). Thus, contrary to defendant's contention, this is not a situation where any alleged error of the court "prevent[ed] counsel from 'participating meaningfully in [a] critical stage of the trial,' " inasmuch as defense counsel's questioning of the potential jurors, including the subject juror, was not curtailed in any way (*People v Mack*, 27 NY3d 534, 544 [2016], *rearg denied* 28 NY3d 944 [2016]; *see People v O'Rama*, 78 NY2d 270, 279 [1991]). Instead, the record reflects that, at the time defense counsel commenced his individual questioning of the prospective jurors, he was aware that the subject juror, as well as several others, had a relationship with a law enforcement agency. Defense counsel nonetheless decided not to ask any juror to specify the nature of the relationship or the specific agency to which that juror was connected, explaining that police testimony was not "going to be a huge part of this case." We also reject defendant's contention that he was denied effective assistance of counsel by defense counsel's failure to challenge the

subject juror for cause. On this record, we cannot conclude that there was no strategic or other legitimate basis for defense counsel's decision (*see Colburn*, 123 AD3d at 1297), inasmuch as defense counsel may have decided, based on the available information, that the subject juror was an acceptable one from the defense point of view (*see People v Thompson*, 21 NY3d 555, 560 [2013]; *People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]).

Defendant failed to preserve for our review his contention that the grand jury proceeding was defective due to a "fail[ure] to conform to the requirements of [CPL article 190] to such degree that the integrity thereof [was] impaired and prejudice to the defendant [resulted]" (CPL 210.35 [5]). In any event, that contention is without merit (*see People v Richardson*, 132 AD3d 1239, 1241 [4th Dept 2015]). Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

701

CAF 23-01401

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

IN THE MATTER OF JULIET A.W.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMY W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered September 9, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, granted petitioner's motion for summary judgment.

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

Same memorandum as in *Matter of Juliet W. (Amy W.)* ([appeal No. 2] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

702

CAF 23-01402

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

IN THE MATTER OF JULIET W.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMY W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered January 27, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion dated July 22, 2022, is denied, and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding in March 2021 seeking to terminate respondent mother's parental rights with respect to the subject child on the grounds of, inter alia, mental illness and intellectual disability (*see* Social Services Law § 384-b [4] [c]). In appeal No. 1, the mother appeals from an intermediate order that granted petitioner's motion dated July 22, 2022, for summary judgment on the petition. In appeal No. 2, the mother appeals from a dispositional order that, inter alia, terminated the mother's parental rights, granted petitioner guardianship of the subject child, and freed that child for adoption. We dismiss the appeal in appeal No. 1 inasmuch as the intermediate order is not appealable as of right (*see* Family Ct Act § 1112 [a]). We note, however, that the mother's appeal from the dispositional order in appeal No. 2 brings up for review the propriety of the intermediate order in appeal No. 1 (*see Matter of Roman E.A. [Danielle M.]* [appeal No. 2], 107 AD3d 1455, 1455-1456 [4th Dept 2013]).

We agree with the mother that Family Court erred in granting petitioner's July 22, 2022 motion, and we therefore reverse the order

in appeal No. 2, deny that motion, and remit the matter to Family Court for further proceedings on the petition. The motion was premised solely on the ground that the mother was collaterally estopped from relitigating the issue whether she was "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for [the subject] child" (Social Services Law § 384-b [4] [c]). "Collateral estoppel permits the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 649 [1993]; *see Matter of Clarissa F. [Rex O.]*, 222 AD3d 1434, 1435 [4th Dept 2023]). Although collateral estoppel may be an appropriate ground on which to grant summary judgment in a Family Court proceeding under certain circumstances (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182-183 [1994]), such circumstances are not present here (*cf. Matter of Yeshua G. [Anthony G.]*, 162 AD3d 1470, 1470 [4th Dept 2018], *lv denied* 32 NY3d 903 [2018]).

In moving for summary judgment, petitioner did not submit any evidence of the current state of the mother's mental health and intellectual disability issues. Instead, petitioner relied solely on its argument that the mother was collaterally estopped from relitigating a 2018 judicial determination, in connection with a prior proceeding concerning certain of the mother's other children, that the mother was "presently and for the foreseeable future unable, due to [her] mental illness and intellectual disability . . . , to provide adequate care for the children [at issue in that proceeding]." Neither the relied-upon 2018 order of disposition nor its supporting decision, however, contains a finding of fact or conclusion of law that the mother's mental illness or intellectual disability permanently impaired the mother's ability to provide adequate care for a child (*see Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]; *see generally Matter of Trina Marie H.*, 48 NY2d 742, 743 [1979]). Instead, the prior judicial determination that the mother was "presently and for the foreseeable future" unable to provide adequate care was premised upon evaluations of the mother conducted in 2012 and 2017. Further, that determination was issued a year prior to the birth of the subject child in the present proceeding and, although the subject child was ordered into petitioner's care almost immediately following her birth, the instant petition was nonetheless not filed for yet another two years. Thus, the 2018 judicial determination, premised on three- to eight-year-old evidence, is insufficient to establish by clear and convincing evidence, as a matter of law, that the mother was, at the time of this proceeding, "*presently* and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for [the subject] child" (Social Services Law § 384-b [4] [c] [emphasis added]; *see Matter of Dochingozi B.*, 57 NY2d 641, 642-643 [1982]). We therefore conclude that the mother has not yet had a full and fair opportunity to litigate that issue (*see generally Clarissa F.*, 222 AD3d at 1435-1436).

A different result is not required by our determination in *Yeshua G.* that a respondent father was collaterally estopped from relitigating the issue whether he was " 'presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for a child' " (162 AD3d at 1470). Although not specifically stated in our memorandum decision in that case, *Yeshua G.* concerned one of several separate but contemporaneous termination proceedings pertaining to multiple children of the respondent father. There, the petitioning agency moved for summary judgment on the termination petition for the subject child within weeks of the prior judicial determination on which the agency relied. Thus, the respondent father in *Yeshua G.* had been afforded a full and fair opportunity to litigate the effect of his mental illness on his "present[ ]" ability to provide proper and adequate care for the subject child in that case (Social Services Law § 384-b [4] [c]; *see James M.*, 83 NY2d at 183). Under the circumstances presented here, however, the doctrine of collateral estoppel does not apply and the court should have denied the motion regardless of the mother's opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Clarissa F.*, 222 AD3d at 1435).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

704

OP 24-00740

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

IN THE MATTER OF SALEM NAGI, PETITIONER,

V MEMORANDUM AND ORDER

HON. MELISSA L. BARRETT, AS ACTING JUDGE
OF THE MONROE COUNTY COURT, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul a determination of respondent. The determination denied the application of petitioner for a pistol permit.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding pursuant to CPLR 506 (b) (1) seeking to annul the determination of respondent, following a hearing, denying his application for a concealed carry pistol and semi-automatic rifle license.

A firearm "licensing officer, such as respondent, has broad discretion to grant or deny a permit under Penal Law § 400.00 (1)," and the "officer's factual findings and credibility determinations are entitled to great deference" (*Matter of Sibley v Watches*, 194 AD3d 1385, 1388-1389 [4th Dept 2021], *lv denied* 37 NY3d 1131 [2021], *rearg denied* 38 NY3d 1006 [2022] [internal quotation marks omitted]*; see Matter of Cuda v Dwyer*, 107 AD3d 1409, 1410 [4th Dept 2013]). "Where an applicant challenges a determination that either revokes a firearm license or denies an application for a firearm license, the court can only review whether a rational basis exists for the licensing authority's determination, or whether the determination is arbitrary and capricious" (*Matter of Kantarakias v Hyun Chin Kim*, 226 AD3d 1020, 1021 [2d Dept 2024] [internal quotation marks omitted]; *see Matter of Bradstreet v Randall*, 215 AD3d 1271, 1271 [4th Dept 2023]). Contrary to petitioner's contention, the substantial evidence standard of review does not apply to respondent's determination, which did not involve a quasi-judicial hearing (*see generally Matter of Scherbyn v*

Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 757-758 [1991]; *Brennan v Green*, 167 AD3d 1482, 1482 [4th Dept 2018]). Here, applying the correct standard, we conclude that the determination was not "made in violation of lawful procedure, . . . affected by an error of law or . . . arbitrary and capricious" (CPLR 7803 [3]; *see Matter of Wilson v New York City Police Dept. License Div.*, 115 AD3d 552, 552 [1st Dept 2014]).

Petitioner also contends that respondent denied his application based on subjective and other impermissible factors. We reject that contention. Here, the firearm license application form submitted by petitioner asked, in accordance with Penal Law § 400.00 (1) (b) and (o), whether petitioner had "ever been interviewed by any police officer, sheriff deputy, or any other [l]aw [e]nforcement official in relationship to any incident [or] crime," to which petitioner answered "NO." The subsequent investigation of petitioner's application uncovered multiple instances in which petitioner had been interviewed by law enforcement officials, including one in which he was accused of threatening to shoot and kill his tenant. Thus, petitioner violated the fundamental and objective requirement in Penal Law § 400.00 (1) that "all statements in a proper application for a license are true," which was a sufficient basis for respondent to deny the application (*see Wilson*, 115 AD3d at 552). Petitioner's subsequent attempts to explain his untruthful answer in his application merely presented issues of credibility that respondent was entitled to resolve against petitioner (*see generally Sibley*, 194 AD3d at 1389).

Further, to the extent that petitioner contends that certain aspects of the licensing eligibility requirements of Penal Law § 400.00 (1) unconstitutionally infringe upon his right to bear arms under the Second Amendment (US Const, 2d Amend), petitioner's "claim for relief is not properly before this Court in an original proceeding pursuant to CPLR article 78, as a declaratory judgment action is the proper vehicle for challenging the constitutionality of a statute" (*Matter of Sherr v Everett*, 228 AD3d 872, 875 [2d Dept 2024]; *see Sibley*, 194 AD3d at 1388).

We have considered petitioner's remaining contentions and conclude that none warrants annulment of the determination or other relief.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

706

CA 23-01390

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

THOMAS TRATHEN, AS MANAGING PARTNER
OF TRATHEN LAND CO., LLC, AND TRATHEN
LAND CO., LLC, PLAINTIFFS-APPELLANTS,

V ORDER

AKZO NOBEL SALT, INC., DEFENDANT,
AND AMERICAN ROCK SALT COMPANY LLC,
DEFENDANT-RESPONDENT.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS

HARRIS BEACH PLLC, PITTSFORD (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Livingston County (J. Scott Odorisi, J.), entered January 4, 2023. The order and judgment, among other things, granted the motion of defendant American Rock Salt Company LLC to dismiss plaintiffs' complaint against it.

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

710

CA 23-01745

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

RHIANNON WHITE AND ANTHONY WHITE, SR., AS ADMINISTRATORS OF THE ESTATE OF ANTHONY WHITE, JR., DECEASED, AND RHIANNON WHITE AND ANTHONY WHITE, SR., INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V ORDER

ROBERT DRACKER, M.D., ET AL., DEFENDANTS, AND RAJIV MANGLA, M.D., DEFENDANT-RESPONDENT. (APPEAL NO. 1.)

KRAMER DILLOF LIVINGSTON & MOORE, NEW YORK CITY (JOHN D. CAGNEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RICOTTA, MATTREY, CALLOCHIA, MARKEL & CASSERT, BUFFALO (COLLEEN K. MATTREY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered September 22, 2023. The order granted the motion of defendant Rajiv Mangla, M.D., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 16, 2024,

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

711

CA 24-00188

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

RHIANNON WHITE AND ANTHONY WHITE, SR., AS ADMINISTRATORS OF THE ESTATE OF ANTHONY WHITE, JR., DECEASED, AND RHIANNON WHITE AND ANTHONY WHITE, SR., INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V ORDER

ROBERT DRACKER, M.D., ET AL., DEFENDANTS, AND RAJIV MANGLA, M.D., DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

KRAMER DILLOF LIVINGSTON & MOORE, NEW YORK CITY (JOHN D. CAGNEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RICOTTA, MATTREY, CALLOCHIA, MARKEL & CASSERT, BUFFALO (COLLEEN K. MATTREY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered January 2, 2024. The order and judgment, upon reargument, adhered to a decision and order granting the motion of defendant Rajiv Mangla, M.D., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 16, 2024,

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

712

TP 24-00718

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF K AND M MOTORS, INC.,
PETITIONER,

V MEMORANDUM AND ORDER

STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES, AND LESLIE F. BRENNAN, AS DEPUTY COMMISSIONER OF MOTOR VEHICLES OF NEW YORK STATE, RESPONDENTS.

JAMES A.W. MACLEOD, BUFFALO, AND LINWOOD ROBERTS, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (TED O'BRIEN OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Emilio Colaiacovo, J.], entered March 27, 2024) to review a determination of respondents. The determination sustained charges against petitioner, imposed civil penalties, and revoked petitioner's certificate of registration as a dealer.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law by annulling that part of the determination finding that petitioner violated 15 NYCRR 78.10 (c) (1) and vacating the penalty imposed thereon, and as modified the determination is confirmed without costs.

Memorandum: Petitioner, an automobile dealership, purportedly commenced this CPLR article 78 proceeding by filing an order to show cause signed by Supreme Court and an accompanying attorney affirmation seeking to annul a determination made following a hearing before an Administrative Law Judge (ALJ). The determination sustained the three charges alleged by respondent State of New York Department of Motor Vehicles against petitioner, imposed civil penalties, and revoked petitioner's automobile dealer registration. The charges arose from an investigation following an incident in which petitioner allowed an individual to operate a vehicle with a dealer plate issued to petitioner; that individual, while driving the vehicle in the early morning hours, struck another car and killed the two occupants thereof.

As an initial matter, we note that petitioner's failure to file a

petition (*see* CPLR 304 [a]; 7804 [a]) was a defect in personal jurisdiction, which respondents waived by failing to raise it in their answer (*see Holst v Liberatore*, 115 AD3d 1216, 1217 [4th Dept 2014]; *cf. Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327 [2011]).

Contrary to petitioner's contention on the merits, we conclude that substantial evidence supports the ALJ's determination that petitioner improperly used a dealer plate in violation of Vehicle and Traffic Law § 415 (8), as alleged in the first charge (*see Matter of Malphrus v State of New York Dept. of Motor Vehs.*, 191 AD2d 775, 775-776 [3d Dept 1993]), and that petitioner failed to properly maintain its book of registry in violation of 15 NYCRR 78.25 (a) (1), as alleged in the second charge (*see Matter of Heydari v Jackson*, 237 AD2d 763, 764 [3d Dept 1997], *lv denied* 90 NY2d 802 [1997]; *Matter of Old Country Toyota Corp. v Adduci*, 144 AD2d 470, 470-471 [2d Dept 1988]; *Matter of Old Country Toyota Corp. v Adduci*, 144 AD2d 471, 472 [2d Dept 1988]). We have reviewed petitioner's remaining challenges to the determination with respect to the first and second charges and conclude that, to the extent they are properly before us, none warrants annulment of the determination with respect to those charges. However, with respect to the third charge, alleging that petitioner violated 15 NYCRR 78.10 (c) (1) by failing to issue a certificate of sale via form MV-50 following the seizure of the vehicle after the incident, we conclude that the ALJ's determination that form MV-50 was required under the circumstances of this case is not supported by substantial evidence (*see Matter of Old Country Toyota Corp. v Adduci*, 136 AD2d 706, 707 [2d Dept 1988]; *cf. Old Country Toyota Corp.*, 144 AD2d at 472). We therefore modify the determination accordingly.

Petitioner further contends that the ALJ erred in considering information outside the record in determining the appropriate penalty and that the civil penalties and revocation of petitioner's automobile dealer registration imposed on the first and second charges are excessive. Contrary to petitioner's contention, the ALJ properly considered petitioner's history of other violations, which was included among the documents admitted in evidence at the hearing without objection (*see Matter of Licari v New York State Dept. of Motor Vehs.*, 153 AD3d 1598, 1599 [4th Dept 2017]; *Matter of JD's Towing & Battery Ctr., Inc. v New York State Dept. of Motor Vehs.*, 147 AD3d 835, 836 [2d Dept 2017], *lv denied* 29 NY3d 910 [2017]). Under the circumstances of this case, and considering in particular petitioner's lengthy history of violations, we conclude that the penalty with respect to the first and second charges is not "so disproportionate to the offense[s] 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, 237 [1974]; *see Matter of Maroccia v New York State Dept. of Motor Vehs.*, 155 AD3d 1555, 1556 [4th Dept 2017], *lv dismissed* 31 NY3d 927 [2018]; *Matter of Lynch v New York State Dept. of Motor Vehs.*

Appeals Bd., 125 AD3d 1326, 1327 [4th Dept 2015]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

713

KA 21-01720

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESMEN SIMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 8, 2021. The judgment convicted defendant upon his plea of guilty of aggravated criminal contempt.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of aggravated criminal contempt (Penal Law § 215.52 [3]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], *lv denied* — NY3d — [2024]; *People v Roberto*, 224 AD3d 1367, 1367 [4th Dept 2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

714

KA 22-00123

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAIL BARNWELL, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 1, 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 unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Scott*, 144 AD3d 1597, 1598 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v DeFazio*, 105 AD3d 1438, 1439 [4th Dept 2013], *lv denied* 21 NY3d 1015 [2013]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of her challenge to the severity of her sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

715

KA 22-00597

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY MILLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 11, 2022. The judgment convicted defendant upon a guilty plea of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. We conclude that the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Giles*, 219 AD3d 1706, 1706 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]), and we note that Supreme Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see generally Thomas*, 34 NY3d at 567; *Giles*, 219 AD3d at 1706; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). Here, the court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*Giles*, 219 AD3d at 1707 [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

717

KA 20-00656

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONTEK MASTIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered March 4, 2020. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals in appeal No. 1 from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), arising from the fatal shooting of the victim as he sat in the driver's seat of a vehicle in the parking lot of a gas station. Defendant appeals in appeal No. 2 from a judgment convicting him, upon his plea of guilty, of two counts of assault in the second degree (§ 120.05 [3]), arising from his assault of two law enforcement officers while in jail during the pendency of the charges in appeal No. 1. We affirm in each appeal.

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 in appeal No. 1 that the verdict is against the weight of the evidence with respect to his identity as the shooter (*see People v Thomas*, 176 AD3d 1639, 1640-1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495). The People introduced evidence at trial, including video footage from numerous sources, establishing, among other things, that the shooter exited a minivan registered to

codefendant after it followed the victim's vehicle to the area of the gas station, eventually approached the victim's vehicle and repeatedly shot the victim through the open driver's side window, and then returned to the waiting minivan and rode away from the scene; that the minivan was tracked to a shopping mall shortly after the shooting and surveillance video therefrom recorded a person wearing clothing matching that worn by the operator of the minivan accompanied by a person whose appearance and clothing matched both photos of defendant on social media and the video footage of the shooter; and that defendant and codefendant frequently posted identical photos as well as photos of each other or of themselves together on social media prior to the incident and had exchanged 39 telephone calls in the two weeks before the incident (*see People v Young*, 209 AD3d 1278, 1279-1280 [4th Dept 2022], *lv denied* 39 NY3d 988 [2022]; *People v Jordan*, 181 AD3d 1248, 1249 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *Thomas*, 176 AD3d at 1640-1641).

We also reject defendant's contention in appeal No. 1 that he was denied effective assistance of counsel. Where, as here, a defendant contends that they received ineffective assistance of counsel under both the Federal and New York State Constitutions, "we evaluate the claim using the state standard, which affords greater protection than its federal counterpart" (*People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see People v Stultz*, 2 NY3d 277, 282 [2004], *rearg denied* 3 NY3d 702 [2004]). Under the state standard, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). "[O]ur Constitution 'guarantees the accused a fair trial, not necessarily a perfect one' " (*People v Cummings*, 16 NY3d 784, 785 [2011], *cert denied* 565 US 862 [2011], quoting *Benevento*, 91 NY2d at 712), and thus "[t]o prevail on a claim of ineffective assistance, [a] defendant[ ] must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*People v Flores*, 84 NY2d 184, 187 [1994]; *see Benevento*, 91 NY2d at 713). " '[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy' " (*People v Honghirun*, 29 NY3d 284, 289 [2017]). "In other words, [the] defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*id.* [internal quotation marks omitted]). "However, a reviewing court must be careful not to 'second-guess' counsel, or assess counsel's performance 'with the clarity of hindsight,' effectively substituting its own judgment of the best approach to a given case" (*People v Pavone*, 26 NY3d 629, 647 [2015], quoting *Benevento*, 91 NY2d at 712; *see Honghirun*, 29 NY3d at 290).

Here, we conclude that defendant has not "sustain[ed] his burden to establish that his attorney[s] 'failed to provide meaningful representation' that compromised his 'right to a fair trial' "

(*Pavone*, 26 NY3d at 647; *see Honghirun*, 29 NY3d at 290-291). It is undisputed that defendant's attorneys pursued a reasonable trial strategy of seeking to cast doubt on defendant's identity as the shooter by, among other things, showing that people other than defendant had a motive to kill the victim. In furtherance of that strategy, one of defendant's attorneys (hereinafter, defense counsel) established during cross-examination of the lead detective that another man, as retribution for the victim's cooperation with the police in an unrelated robbery investigation that resulted in the man serving jail time, had demanded a significant amount of money and marihuana from the victim, with the threat that otherwise the man was going to have the victim killed. The victim had refused the man's demand and told the man to "take it in blood," which meant that the victim had challenged the man to follow through with his threat. Then, in a question reasonably designed to cast doubt upon the thoroughness of the investigation into people other than defendant who had a motive to kill the victim, defense counsel asked the lead detective whether the police had, in fact, investigated the man in connection with the homicide. The lead detective answered, however, that the police had investigated the man's role in the homicide and, as a result thereof, the police believed that the man had put a bounty on the victim and that "someone collected it." Now faced with the prospect that, if left unaddressed, the jury might infer that defendant had collected on the bounty, defense counsel—as he later explained to County Court outside the presence of the jury—made a tactical decision to "readjust" his cross-examination of the lead detective by inquiring whether the police had any proof as to who collected the purported bounty or knew whether the bounty allegation was true. The lead detective responded that he had such proof inasmuch as defendant had posted on social media the day after the murder a photo depicting stacks of money. Although defense counsel's question opened the door to the admission of the social media post, which the court had previously ruled inadmissible as too speculative, defense counsel reasonably opted to introduce the social media post as a defense exhibit after the court ruled that it was now going to "allow the People to offer that exhibit" and thereafter strategically sought to undermine the testimony concerning the police investigation by exacting admissions from the lead detective that he did not know who took the photo, when the photo was taken, or whose money was depicted in the photo, that the money could have been obtained from unrelated sources such as gambling winnings or repayment of a debt, and that no such money was located when the police executed a search warrant of defendant's home (*see Honghirun*, 29 NY3d at 290; *People v Tarver*, 202 AD3d 1368, 1370 [3d Dept 2022], *lv denied* 39 NY3d 1114 [2023]; *People v Smith*, 192 AD3d 1648, 1649 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]; *People v Banks*, 181 AD3d 973, 976-977 [3d Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Thus, although defense counsel's cross-examination of the lead detective opened the door to the admission of the social media post, "[v]iewed objectively, the transcript . . . reveal[s] the existence of a trial strategy that might well have been pursued by a reasonably competent attorney [and] . . . [i]t is not for this [C]ourt to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation"

(*People v Satterfield*, 66 NY2d 796, 799-800 [1985]; *see People v Delp*, 156 AD3d 1450, 1451 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]).

Moreover, even assuming, arguendo, that defense counsel erred in opening the door to the admission of the social media post and then introducing it in evidence as a defense exhibit without requesting a specific limiting instruction from the court, we conclude that defense counsel's conduct did not constitute "egregious and prejudicial error such that defendant did not receive a fair trial" (*Benevento*, 91 NY2d at 713 [internal quotation marks omitted]; *see People v Meyers*, 182 AD3d 1037, 1039 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). Any prejudice was minimized by defense counsel's remaining cross-examination of the lead detective and his summation, both of which effectively portrayed the People's theory of motive as speculative, along with the court's general instruction during its charge that the jury was not to speculate in evaluating the evidence and reaching a verdict (*see People v Turley*, 130 AD3d 1574, 1575-1576 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015], *reconsideration denied* 26 NY3d 1093 [2015]). Even if defendant did not receive error-free representation, "[t]he test is 'reasonable competence, not perfect representation' " (*People v Oathout*, 21 NY3d 127, 128 [2013]) and, here, viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see Baldi*, 54 NY2d at 147; *People v Reed*, 199 AD3d 1486, 1487-1488 [4th Dept 2021], *lv denied* 38 NY3d 930 [2022]; *People v Swift*, 195 AD3d 1496, 1499 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Warren*, 186 AD2d 1024, 1024 [4th Dept 1992], *lv denied* 81 NY2d 796 [1993]).

We have reviewed defendant's remaining contentions in appeal No. 1 concerning the trial and conclude that none requires reversal or modification of the judgment. Finally, even assuming, arguendo, that defendant's waiver of the right to appeal in appeal No. 2 is invalid and thus does not preclude our review of his challenge to the severity of the sentence in that appeal (*see People v McDonell*, 219 AD3d 1665, 1665 [4th Dept 2023], *lv denied* 40 NY3d 1081 [2023]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we nevertheless reject defendant's contention in both appeals that his sentences are unduly harsh and severe.

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

718

KA 20-01381

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONTEK MASTIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 16, 2020. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree (two counts).

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

Same memorandum as in *People v Mastin* ([appeal No. 1] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

719

KA 23-01279

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHANCHHAYAVAN T. CHOURB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 29, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We affirm.

We reject defendant's contentions that the evidence is legally insufficient to establish that he possessed the controlled substances and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant possessed the controlled substances (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Tulloch*, 83 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 17 NY3d 802 [2011]). Specifically, the controlled substances upon which the conviction is based—crack cocaine and powdered cocaine—were discovered, immediately after defendant attempted to flee from the police, in a bag in the middle of the street, near the location where defendant had been standing immediately before he fled. Although the police officers did not see defendant holding the bag or dropping it to the ground, they did not observe anything in that part of the well-lit street before the encounter with defendant. Moreover, despite being found in the middle of the street, the bag was not crushed or otherwise damaged. Consequently, there is a "valid line of

reasoning and permissible inferences" from which a rational jury could have found that defendant possessed the bag and discarded it when he fled from the police (*Bleakley*, 69 NY2d at 495; *see Tulloch*, 83 AD3d at 1559). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to object to the allegedly improper remark made by the prosecutor during the opening statement and, therefore, failed to preserve for our review his contention that he was denied a fair trial by that instance of alleged prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Williams*, 228 AD3d 1249, 1249 [4th Dept 2024]; *People v Grayson*, 216 AD3d 1444, 1445 [4th Dept 2023]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that County Court erred in failing to give the jury a circumstantial evidence charge. He failed to preserve that contention for our review, however, inasmuch as defendant "did not request a circumstantial evidence charge and did not object to the court's instructions as given" (*People v Chelley*, 121 AD3d 1505, 1505 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]; *see People v Toran*, 229 AD3d 1228, 1229 [4th Dept 2024]; *People v Recore*, 56 AD3d 1233, 1234 [4th Dept 2008], *lv denied* 12 NY3d 761 [2009]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's related contention that defense counsel was ineffective for failing to request a circumstantial evidence charge. Even assuming, arguendo, that defendant was entitled to such a charge, we conclude that the "single error in failing to request such a charge [would] not constitute ineffective representation as it was not so serious as to compromise defendant's right to a fair trial" (*People v Griffin*, 203 AD3d 1608, 1611 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022] [internal quotation marks omitted]; *see People v Gunney*, 13 AD3d 980, 983 [3d Dept 2004], *lv denied* 5 NY3d 789 [2005]).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial, inasmuch as he failed to raise that contention at sentencing (*see People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]). Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe.

Finally, we note that the court misstated at sentencing that defendant was a second felony offender, rather than a second felony drug offender previously convicted of a violent felony, and the

uniform sentence and commitment form incorrectly states that defendant was sentenced as a second felony offender. The uniform sentence and commitment form must be amended to reflect that he was actually sentenced as a second felony drug offender previously convicted of a violent felony (*see* Penal Law § 70.70 [1] [b]; [4]; *People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Hightower*, 207 AD3d 1199, 1202 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

721

KA 23-00692

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON EKIERT, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Karen Bailey Turner, J.), rendered December 14, 2022. The judgment convicted defendant after a nonjury trial of criminal sexual act in the second degree (two counts), sexual abuse in the third degree and criminal sexual act 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 nonjury verdict of two counts of criminal sexual act in the second degree (Penal Law former § 130.45 [1]), one count of sexual abuse in the third degree (§ 130.55), and one count of criminal sexual act in the third degree (former § 130.40 [2]). We reject defendant's contention that the verdict is against the weight of the evidence. 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, although an acquittal would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422 [4th Dept 2012]). Here, although there were some inconsistencies in the victim's testimony, we conclude that "[t]he victim's testimony was not 'so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Lewis*, 129 AD3d 1546, 1548 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]; *see People v Ptak*, 37 AD3d 1081, 1082 [4th Dept 2007], *lv denied* 8 NY3d 949 [2007]) and that there is no basis for disturbing the court's credibility determinations in this case. Although the court acquitted defendant of some charges in the

indictment, the court was entitled to credit some parts of the victim's testimony while rejecting others (*see People v Toft*, 156 AD3d 1234, 1235 [3d Dept 2017]; *People v Jemes*, 132 AD3d 1361, 1362 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]).

To the extent that defendant contends that he was convicted on the basis of an uncharged theory of guilt, that contention is not preserved for our review (*see People v Abdullah*, 194 AD3d 1346, 1347 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; *People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the sentence is unduly harsh and severe and that the court took into account improper sentencing factors when sentencing him. Contrary to defendant's contention, the court properly considered uncharged criminal conduct to the extent that it found the information reliable and accurate (*see People v Bratcher*, 291 AD2d 878, 879 [4th Dept 2002], *lv denied* 98 NY2d 673 [2002]; *People v Brunner*, 182 AD2d 1123, 1123 [4th Dept 1992], *lv denied* 80 NY2d 828 [1992]; *see also People v James*, 140 AD3d 1628, 1628 [4th Dept 2016]; *see generally People v Outley*, 80 NY2d 702, 712 [1993]). The court also did not err in considering statements defendant made to the police that had been suppressed (*see People v Brown*, 281 AD2d 700, 702 [3d Dept 2001], *lv denied* 96 NY2d 826 [2001]; *People v Mancini*, 239 AD2d 436, 436 [2d Dept 1997], *lv denied* 90 NY2d 907 [1997]; *see also People v Estenson*, 101 AD2d 687, 687 [4th Dept 1984]). The sentence is not unduly harsh or severe.

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

723

CAF 23-00663

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF GRETEL L. KEDLEY,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

TERRENCE P. KEDLEY,
RESPONDENT-PETITIONER-RESPONDENT.

KELLY M. FORST, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

KELLY M. FORST, ROCHESTER, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered November 22, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner primary physical residency of the subject children.

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: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

724

CAF 23-00118

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF KAL-EL F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAMON H., RESPONDENT-APPELLANT.

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

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JORDYN E. SCHENK OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 3, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

It is hereby ORDERED that the appeal insofar as it concerns the disposition except with respect to visitation is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this proceeding brought pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, placed the father under the supervision of petitioner, suspended his visitation with the child, and continued the child's placement with petitioner. As an initial matter, we dismiss the appeal insofar as it concerns the disposition—except with respect to the suspension of visitation—inasmuch as the father consented thereto (*see* CPLR 5511; *Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1465 [4th Dept 2024]; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]). The appeal, however, brings up for review the order of fact-finding determining that he neglected the child (*see Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1335 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]; *Noah C.*, 192 AD3d at 1676).

Contrary to the father's contention, Family Court did not err in determining that petitioner established that the father neglected the child. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] 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' " (*Matter of Jayla A. [Chelsea K.—Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015] [internal quotation marks omitted]; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]; *Matter of Shaylee R.*, 13 AD3d 1106, 1106 [4th Dept 2004]).

We conclude that a sound and substantial basis in the record supports the court's finding that the child was "in imminent danger of impairment as a result of [the father's] failure to exercise a minimum degree of care" in providing the child with adequate medical care and guardianship (*Jeromy J.*, 122 AD3d at 1399 [internal quotation marks omitted]; *see Matter of Ahren B.-N. [Gary B.-N.]*, 222 AD3d 1403, 1404 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]; *see generally Matter of Hofbauer*, 47 NY2d 648, 655 [1979]). Petitioner's evidence established that the child was born with a genetic disorder that caused him to have a severely compromised immune system that placed him at risk of death from even commonplace infections and illnesses. When the child was discharged from the hospital, in mid-March 2020, the father was given instructions on how to keep the child safe from infections and on the numerous follow-up appointments with medical specialists that would help manage the child's illness. Despite the father's awareness of the child's serious medical condition, he did not follow through on the instructions he was given, did not seem to appreciate the need to keep the child away from possible exposure to infection, and missed the child's first follow-up appointment with an immunology specialist (*see Matter of Adam M. [Susan M.]*, 195 AD3d 1560, 1561 [4th Dept 2021]; *Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]). In short, the father's "failure to follow through with necessary treatment for the child's serious medical condition supported the finding of medical neglect on his part" (*Matter of Notorious YY.*, 33 AD3d 1097, 1098 [3d Dept 2006]). Consequently, petitioner thereby established that the father "knew or should have known of circumstances requiring action to avoid harm or the risk of harm to the child and failed to act accordingly" (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014] [internal quotation marks omitted]; *see Ahren B.-N.*, 222 AD3d at 1405).

With respect to the suspension of the father's visitation, a matter expressly contested by the father despite his consent to the remainder of the disposition (*see generally Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]; *Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004]), we conclude that the court's determination in that regard is supported by the record (*see generally Matter of*

Roseman v Sierant, 142 AD3d 1323, 1326 [4th Dept 2016]; *Matter of Mallory v Mashack*, 266 AD2d 907, 907 [4th Dept 1999]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

725

CAF 22-01877

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF SAMANTHA RODRIGUEZ,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DARINELL YOUNG, JR., RESPONDENT-APPELLANT.

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

DEBORAH K. JESSEY, CLARENCE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Thomas M. DiMillo, A.J.), entered October 14, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner permission to relocate with the subject child to New York City.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals, as limited by his brief, from an order entered after a hearing insofar as it granted petitioner mother permission to relocate with the child to New York City. We affirm.

Contrary to the father's contention, the mother was not required to establish a change in circumstances sufficient to warrant a modification of the existing order of custody and visitation, inasmuch as she sought permission to relocate with the child (*see Matter of Betts v Moore*, 175 AD3d 874, 874-875 [4th Dept 2019]; *Lauzonis v Lauzonis*, 120 AD3d 922, 923 [4th Dept 2014]; *Matter of Chancer v Stowell*, 5 AD3d 1082, 1083 [4th Dept 2004]).

Contrary to the father's further contention, we conclude that Family Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that the mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests, and we further conclude that the court's determination has " 'a sound and substantial basis in the record' " (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *see Matter of Martin v Martin*, 221 AD3d 1557, 1558 [4th Dept 2023]). Here, the mother established at the hearing that she has been the primary caregiver of the child and that the father's visitation

with the child was inconsistent. "Although the unilateral removal of the child[ ] from the jurisdiction is a factor for the court's consideration, an award of custody must be based on the best interests of the child[ ] and not a desire to punish the recalcitrant parent" (*Matter of Robert C. E. v Felicia N. F.*, 197 AD3d 100, 103 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021] [internal quotation marks omitted]). Here, the mother testified that she initially planned a temporary move to New York City to care for her mother, who was undergoing cancer treatment. While in New York City, the mother, who had lost her job, apartment, and car due to the COVID-19 pandemic, was able to obtain suitable housing and full-time, salaried employment. Further, the record establishes that the father has no "accustomed close involvement in the child[ ]'s everyday life" (*Tropea*, 87 NY2d at 740), and thus we conclude that the need to "give appropriate weight to . . . the feasibility of preserving the relationship between the noncustodial parent and [the] child[ ] through suitable visitation arrangements" does not take precedence over the need to give appropriate weight to the necessity for the relocation (*id.* at 740-741; *see Martin*, 221 AD3d at 1558).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

729

CA 23-01330

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

PEARL STREET PARKING ASSOCIATES LLC, AND VIOLET REALTY, INC., DOING BUSINESS AS MAIN PLACE LIBERTY GROUP, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

COUNTY OF ERIE, MARK C. POLONCARZ, WILLIAM GEARY, DEFENDANTS-RESPONDENTS-APPELLANTS, AND CITY OF BUFFALO, DEFENDANT.

THE KNOER GROUP, PLLC, BUFFALO (COLIN M. KNOER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

LIPPES MATHIAS LLP, BUFFALO (JAMES P. BLENK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered July 31, 2023. The order, among other things, denied in part plaintiffs' motion to compel and denied the cross-motion of defendants County of Erie, Mark C. Poloncarz, and William Geary to dismiss the complaint.

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

731

CA 23-01807

PRESENT: SMITH, J.P., CURRAN, GREENWOOD, AND HANNAH, JJ.

PAUL S. PIOTROWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CHEEKTOWAGA, ANNE M. CARLUCCI AND KENNETH A. CARLUCCI, III, DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (KEVIN E. LOFTUS OF COUNSEL), FOR DEFENDANT-APPELLANT TOWN OF CHEEKTOWAGA.

RUPP PFALZGRAF LLC, BUFFALO (JILL R. ROLOFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS ANNE M. CARLUCCI AND KENNETH A. CARLUCCI, III.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered October 13, 2023. The order denied the motion of defendant Town of Cheektowaga and the cross-motion of defendants Anne M. Carlucci and Kenneth A. Carlucci, III for summary judgment dismissing the amended complaint and cross-claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross-motion of defendants Anne M. Carlucci and Kenneth A. Carlucci, III, and dismissing the amended complaint and cross-claims against them, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his foot got caught on a sidewalk curb ramp located in defendant Town of Cheektowaga (Town) and he fell. Plaintiff alleged that the tactile surface on the curb ramp was broken and in an unsafe and dangerous condition. The Town moved for summary judgment dismissing the amended complaint and cross-claims against it, and defendants Anne M. Carlucci and Kenneth A. Carlucci, III, the owners of the abutting property, cross-moved for summary judgment dismissing the amended complaint and cross-claims against them. Supreme Court denied the motion and cross-motion, and both the Carluccis and the Town appeal.

Addressing first the Carluccis' appeal, we agree with the Carluccis that the court erred in denying their cross-motion. "Generally, liability for injuries sustained as a result of negligent

maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *see Clauss v Bank of Am., N.A.*, 151 AD3d 1629, 1630 [4th Dept 2017]; *Capretto v City of Buffalo*, 124 AD3d 1304, 1306 [4th Dept 2015]). " 'That rule does not apply, however, if there is an ordinance or municipal charter that specifically imposes a duty on the abutting landowner to maintain and repair the public sidewalk and provides that a breach of that duty will result in liability for injuries to the users of the sidewalk; the sidewalk was constructed in a special manner for the use of the abutting landowner; the abutting landowner affirmatively created the defect; or the abutting landowner negligently constructed or repaired the sidewalk' " (*Clauss*, 151 AD3d at 1630; *see Hausser*, 88 NY2d at 453).

Here, the Carluccis' submissions, including plaintiff's deposition testimony, which is relied upon by all the parties, established that plaintiff fell due to a defect on the curb ramp (*see generally Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744-745 [1986]; *Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365 [4th Dept 2012]). In addition, it is undisputed that, as the Carluccis' submissions also established, the curb ramp was not constructed in a special manner for the Carluccis' use, and the Carluccis did not affirmatively create the defect or negligently construct or repair the curb ramp. Furthermore, the Carluccis' submissions established that the relevant section of the Code of the Town of Cheektowaga (Town Code) concerning maintenance of sidewalks by property owners is inapplicable to the facts of this case. Town Code § 210-14 provides, in pertinent part, that "[t]he owner or occupant of any premises adjoining any street where a sidewalk has been laid shall maintain and keep the sidewalk on such street in good repair . . . The owner and the occupant shall be jointly and severally responsible for compliance with the provisions hereof. Said responsibility shall include liability for injuries that result from failure to maintain, repair and keep said sidewalk in a safe condition for usage." It is well settled that "legislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008] [internal quotation marks omitted]) and, here, Town Code § 210-14 does not impose civil liability on property owners for injuries that occur due to a defective tactile surface on a curb ramp (*see generally Vucetovic*, 10 NY3d at 521; *Gary v 101 Owners Corp.*, 89 AD3d 627, 627 [1st Dept 2011]). There is no definition of "sidewalk" in the Town Code and no mention of tactiles or curb ramps. If the Town "desired to shift liability for accidents involving [tactiles on curb ramps] exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish [that] goal" (*Vucetovic*, 10 NY3d at 522).

In light of the foregoing, we conclude that the Carluccis met their initial burden on their cross-motion of demonstrating their entitlement to summary judgment dismissing the amended complaint and cross-claims against them, and we further conclude that plaintiff and the Town failed to raise a triable issue of fact in opposition (*see*

generally Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). We therefore modify the order accordingly.

With respect to the Town's appeal, we reject the Town's contention that the court erred in denying its motion. "Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective [sidewalk] . . . condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies" (*Szuba v City of Buffalo*, 193 AD3d 1386, 1387 [4th Dept 2021] [internal quotation marks omitted]; *see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Horst v City of Buffalo*, 191 AD3d 1297, 1297-1298 [4th Dept 2021]). Here, the Town's submissions, including plaintiff's deposition testimony, established that plaintiff fell on the curb ramp in question, which "functionally fulfills the same purpose that a standard sidewalk would serve," and thus constitutes a sidewalk for purposes of the prior written notice provision in Town Code § 168-2 (*Woodson v City of New York*, 93 NY2d 936, 938 [1999]; *see Hinton v Village of Pulaski*, 33 NY3d 931, 932-933 [2019]; *see also Donnelly v Village of Perry*, 88 AD2d 764, 765 [4th Dept 1982]). Consequently, The Town had the initial burden on its motion of establishing that no prior written notice of the alleged condition was given to either "the Town Clerk or [the] Town Superintendent of Highways" (Town Code § 168-2 [A]). The Town submitted the affidavit of its Town Clerk, who averred that she searched the records in the Town Clerk's office and found no notice of a defect in the area of plaintiff's fall prior to the accident. The Town, however, did not submit evidence to establish that no prior written notice was given to the Town Superintendent of Highways (*see Weinstein v County of Nassau*, 180 AD3d 730, 732 [2d Dept 2020]). The Town's reliance on the deposition testimony of its Superintendent of Highways is misplaced. In response to a question regarding residential complaints of damage caused by snowplows, he testified that "[w]e did not know until [he] received [a] letter" from plaintiff after the incident about the damage to the sidewalk ramp at issue. Inasmuch as he did not testify that he ever searched the Town Highway Department's records for prior written notice, we conclude that the Town failed to establish as a matter of law that the Town Superintendent of Highways did not receive prior written notice of the alleged defect (*see Garcia v Town of Tonawanda*, 210 AD3d 1483, 1484 [4th Dept 2022]). Because the Town failed to meet its initial burden on its motion, we need not consider the sufficiency of plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

732

CA 23-01926

PRESENT: SMITH, J.P., CURRAN, MONTOUR, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF DANIELLE DILL, PSY.D.,
EXECUTIVE DIRECTOR, CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN S., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered October 16, 2023. The order authorized petitioner to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting petitioner's application for authorization to administer medication to respondent over his objection. The order has since expired, rendering this appeal moot (*see Matter of McCulloch v Melvin H.*, 156 AD3d 1480, 1481 [4th Dept 2017], *appeal dismissed* 31 NY3d 927 [2018], *lv denied* 32 NY3d 902 [2018]; *Matter of Russell v Tripp*, 144 AD3d 1593, 1594 [4th Dept 2016]), and this case does not fall within the exception to the mootness doctrine (*see Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

734

KA 22-00596

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA JACOBY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered November 30, 2021. The judgment convicted defendant upon his plea of guilty of assault in the first degree (two counts), robbery in the first degree, assault in the third degree and false personation.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of, inter alia, two counts of assault in the first degree (Penal Law § 120.10 [1], [2]) and one count of robbery in the first degree (§ 160.15 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

737

KA 23-00853

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HASHA OUTLEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 1, 2022. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a weapon in the second degree, reckless endangerment in the first degree, unlawful fleeing a police officer in a motor vehicle in the third degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), reckless endangerment in the first degree (§ 120.25), unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25), and tampering with physical evidence (§ 215.40 [2]).

We agree with defendant that her waiver of the right to appeal was invalid. County Court's oral colloquy "mischaracterized [the waiver] as an absolute bar to the taking of an appeal" (*People v McCrayer*, 199 AD3d 1401, 1401 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and, although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver "does not cure the deficient oral colloquy because the court did not inquire of defendant whether [she] understood the written waiver or . . . had read the waiver before signing it" (*People v Augello*, 222 AD3d 1398, 1399 [4th Dept 2023], *lv denied* 41 NY3d 942 [2024]). Nonetheless, we conclude

that the sentence is not unduly harsh or severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

739

KA 23-01866

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTIAN BUSH, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered October 30, 2023. 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.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

740

KA 22-01649

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIEQUIN CHEESE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 9, 2021. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

Defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, 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 Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that County Court erred in denying defendant's challenge for cause to a prospective juror. "It is well established that 'prospective jurors who give some indication of bias but do not provide an unequivocal assurance of impartiality must be excused for cause' " (*People v Hernandez*, 174 AD3d 1352, 1353 [4th Dept 2019], quoting *People v Nicholas*, 98 NY2d 749, 750 [2002]; *see People v Arnold*, 96 NY2d 358, 362 [2001]; *People v Johnson*, 94 NY2d 600, 614 [2000]). Here, the prospective juror gave "some

indication of bias" (*Nicholas*, 98 NY2d at 750) by stating that he "[a]bsolutely" might hold it against defendant if defendant chose not to testify (*see People v Bludson*, 97 NY2d 644, 645-646 [2001]; *People v Hargis*, 151 AD3d 1946, 1947 [4th Dept 2017]).

Contrary to the court's determination, the prospective juror did not "give unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence" (*Johnson*, 94 NY2d at 614). Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [a prospective] juror[ ] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent [the prospective juror] from reaching an impartial verdict" (*Arnold*, 96 NY2d at 362; *see People v Harris*, 19 NY3d 679, 685 [2012]). "If there is any doubt about a prospective juror's impartiality, [the] trial court[ ] should err on the side of excusing the juror, since at worst the court will have 'replaced one impartial juror with another' " (*Arnold*, 96 NY2d at 362; *see People v Warrington*, 28 NY3d 1116, 1120 [2016]; *Harris*, 19 NY3d at 685; *People v Johnson*, 94 NY2d 600, 616 [2000]). We conclude that the prospective juror's act of nodding his head affirmatively after the court gave an instruction and posed a question to the entire jury panel was "insufficient to constitute such an unequivocal declaration" (*Bludson*, 97 NY2d at 646; *see People v Strassner*, 126 AD3d 1395, 1396 [4th Dept 2015]). Contrary to the People's urging, this case is distinguishable from *People v Smith* (200 AD3d 1689 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]). In *Smith*, the court's questioning "was addressing the remaining two prospective jurors who had expressed a desire to hear from defendant–including the [prospective] juror [at issue]," and was not, as here, addressing the panel as a whole (*id.* at 1692). Additionally, in *Smith* the prospective juror made a verbal affirmative response "when asked by the court if he could assure the court that he would 'be fair and impartial and render a verdict in accordance with the evidence and the law as [the court] explain[ed] it' " (*id.*). Further, the People's reliance on *People v Brzezicki* (249 AD2d 917, 917-918 [4th Dept 1998]) is misplaced because that case predates the Court of Appeals' determination that "the collective acknowledgment by the entire jury panel that they would follow the [court's] instructions . . . [is] insufficient to constitute an unequivocal declaration of impartiality" from a prospective juror who gave some indication of bias (*Arnold*, 96 NY2d at 363; *see Bludson*, 97 NY2d at 646).

Inasmuch as defendant peremptorily challenged the prospective juror and thereafter exhausted all available peremptory challenges, we must reverse the judgment and grant defendant a new trial (*see* CPL 270.20 [2]; *People v Heverly*, 224 AD3d 1243, 1245 [4th Dept 2024]).

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

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

745

CAF 23-01409

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF CHARLES E. BETZ, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JULIANNA D. BETZ, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Lenora B. Foote-Beavers, A.J.), entered August 17, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner father sole custody of the subject child. Family Court denied the requests of the mother's counsel for an adjournment and "proceed[ed] by default" after the mother appeared late at a hearing on the father's modification petition.

We agree with the mother that the court erred in disposing of the matter on the basis of her purported default (*see Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]). Initially, we reject the contention of the attorney for the child (AFC) that the order was "entered upon the default of the aggrieved party" (CPLR 5511) and is therefore not appealable. While the mother was not present in the courtroom at the start of the proceeding, she arrived at a point when the court had not yet addressed the father's modification petition relating to the subject child. The court engaged in a discussion with the mother, the father, and the AFC with respect to a proposed resolution awarding sole custody of the subject child to the father and specifying the mother's access to the subject child. It was only after the mother's counsel represented that the mother would not agree to the proposed resolution that the court ordered the mother out of the courtroom. Moreover, the order appealed from does not reflect that it was made on default, but rather states that the mother appeared personally and by her attorney. Under these

circumstances, we conclude that the order is appealable (*see generally Matter of Griselda N.G. v Yvette C.*, 192 AD3d 592, 593 [1st Dept 2021]; *Matter of Avdic v Avdic*, 125 AD3d 1534, 1536 [4th Dept 2015]).

In any event, even if we were to conclude that the order was entered upon the mother's default, we nonetheless could reach the issue of the court's denial of the request for an adjournment inasmuch as it was the subject of contest below (*see Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *Cameron B.*, 149 AD3d at 1503; *Matter of Daija K.P. [Danielle P.]*, 129 AD3d 1087, 1087 [2d Dept 2015]).

We further agree with the mother that the court abused its discretion in denying her counsel's request to adjourn the hearing. It is well settled that "[t]he grant or denial of a motion for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Steven B.*, 6 NY3d 888, 889 [2006] [internal quotation marks omitted]). Here, the record reveals that it was unclear to the parties on the day of the hearing whether a trial was to happen on that date and whether the parties were prepared to proceed with trial. The notice sent by the court to the parties to appear on that date stated that the purpose of the appearance was to address a "[m]otion." The AFC had moved by order to show cause to subpoena documents relating to the subject child for trial. Furthermore, the father's attorney had requested an adjournment of the trial just two weeks prior to the appearance date and indicated that the mother's attorney and the AFC consented to the adjournment, particularly in light of the AFC's request for the documents.

We therefore reverse the order and remit the matter to Family Court for a hearing on the father's modification petition as it relates to the custody of the subject child.

In light of our determination, we do not reach the mother's remaining contention.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

749

CA 24-00352

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

THE CINCINNATI INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. DOMINGUEZ, KJ MECHANICAL OF
WNY, INC., DEFENDANTS,
AND DIRECT HVAC SERVICES INC., INDIVIDUALLY AND
DOING BUSINESS AS KJ MECHANICAL OF WNY, INC.,
DEFENDANT-APPELLANT.

LAW OFFICE OF SANTACROSE, FRARY, TOMKO, DIAZ-ORDAZ & WHITING, BUFFALO (RICHARD S. POVEROMO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBERT A. STUTMAN, P.C., NEW YORK CITY (DANIEL HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered February 15, 2024. The order denied the motion of defendant Direct HVAC Services Inc., individually and doing business as KJ Mechanical of WNY, Inc., for summary judgment.

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

Memorandum: In this subrogation action, plaintiff insurer seeks damages arising from a fire it alleges was caused by the negligent design and installation of an exhaust system by defendant KJ Mechanical of WNY, Inc. (KJ Mechanical). In its complaint, plaintiff further alleges, inter alia, that defendant Direct HVAC Services Inc., individually and doing business as KJ Mechanical of WNY, Inc. (Direct HVAC), is liable for those damages as the successor of KJ Mechanical by de facto merger. Direct HVAC appeals from an order denying its motion for summary judgment dismissing the complaint against it. We affirm.

Generally, a business entity that acquires the assets of another business entity may be held liable for the torts of its predecessor only if: "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]). The second *Schumacher* exception for

consolidations and mergers includes de facto mergers, in which " 'the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation' " (*Simpson v Ithaca Gun Co. LLC*, 50 AD3d 1475, 1476 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]). "The premise that a successor corporation may be responsible for the liabilities of a predecessor corporation is 'based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased' " (*id.*, quoting *Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). "Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation" (*Sweatland v Park Corp.*, 181 AD2d 243, 245-246 [4th Dept 1992]; *see also R&D Elecs., Inc. v NYP Mgt., Co., Inc.*, 162 AD3d 1513, 1516 [4th Dept 2018]).

Direct HVAC contends that Supreme Court erred in denying its motion inasmuch as it met its burden of establishing that there was no de facto merger here due to the lack of continuity of ownership. We reject that contention. " 'Public policy considerations dictate that, at least in the context of tort liability, courts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred . . . , those factors alone should not be determinative' . . . Instead, the court should analyze each situation on a case-by-case basis and . . . the presence or absence of continuity of ownership is not determinative" (*Lippens v Winkler Backereitechnik GmbH* [appeal No. 2], 138 AD3d 1507, 1510 [4th Dept 2016]).

We also reject Direct HVAC's contention that there was no de facto merger here merely because KJ Mechanical, despite ceasing operations, was not formally dissolved through the office of the secretary of state. A de facto merger does not require the "legal dissolution" of the predecessor company "[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]; *see Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 753 [2d Dept 2005]).

Finally, we conclude that the court properly determined that Direct HVAC failed to meet its burden on the motion inasmuch as its own submissions raised triable issues of fact whether KJ Mechanical ceased ordinary business operations, Direct HVAC assumed liabilities necessary for the uninterrupted continuation of KJ Mechanical's business, and there was a general continuity of KJ Mechanical's business operations, particularly in light of the affirmative representation made by Direct HVAC on invoices sent to KJ Mechanical's

customers, including plaintiff's insured, claiming that the two had "merged" (*see Hoover v New Holland N. Am., Inc.*, 71 AD3d 1593, 1594 [4th Dept 2010]; *see also Fitzgerald*, 286 AD2d at 575).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

752

CA 24-00650

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

ANZALONE PROPERTY ASSOCIATES, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

HIGHBRIDGE STREET PROPERTIES, LLC,
DEFENDANT-APPELLANT.

MARK A. WOLBER, UTICA, FOR DEFENDANT-APPELLANT.

THE STEELE LAW FIRM, P.C., OSWEGO (VAUGHN D. LANG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered December 11, 2023. The order denied the motion of defendant for summary judgment.

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

756

KA 18-02303

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIZZIAH S. MURRAY, DEFENDANT-APPELLANT.

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

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 15, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, obstructing governmental administration in the second degree, resisting arrest and bicycle failure to keep right (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that his sentence is not unduly harsh or severe. Defendant failed to preserve for our review his conclusory contention that the sentence constitutes cruel and unusual punishment (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Suprunchik*, 208 AD3d 1058, 1059 [4th Dept 2022]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Suprunchik*, 208 AD3d at 1059).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

757

KA 20-00697

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS PARK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BRAEDAN M. GILLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ALEXANDER R. SCHERER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered March 9, 2020. The judgment convicted defendant upon his plea of guilty of rape in the first degree and criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of rape in the first degree (Penal Law former § 130.35 [1]) and criminal sexual act in the first degree (former § 130.50 [1]), arising from two incidents involving separate victims.

Defendant contends that he was forced during his first trial to move for a mistrial due to prosecutorial misconduct and that any subsequent prosecution was thus barred by the double jeopardy clauses of the Federal (US Const 5th Amend) and State (NY Const, art I, § 6) Constitutions. We reject that contention. "Where the defendant either requests a mistrial or consents to its declaration, the double jeopardy clauses do not ordinarily bar a second trial" (*People v Haffa*, 197 AD3d 964, 965 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021] [internal quotation marks omitted]; *see People v Reardon*, 126 AD2d 974, 974 [4th Dept 1987]). "However, an exception exists where the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial" (*Haffa*, 197 AD3d at 965 [internal quotation marks omitted]; *see Oregon v Kennedy*, 456 US 667, 679 [1982]). Here, the record does not support defendant's claim that the mistrial motion was "necessitated by a deliberate intent on the part of the prosecution to provoke a mistrial" (*Haffa*, 197 AD3d at 965 [internal quotation marks omitted];

see Reardon, 126 AD2d at 974).

Defendant contends that he was denied his constitutional right to a speedy trial. Although defendant's contention survives his plea of guilty (*see People v Romeo*, 47 AD3d 954, 957 [2d Dept 2008], *affd* 12 NY3d 51 [2009], *cert denied* 558 US 817 [2009]), it is not preserved for our review inasmuch as defendant failed to move to dismiss the indictment on that ground (*see People v Works*, 211 AD3d 1574, 1575 [4th Dept 2022], *lv denied* 39 NY3d 1114 [2023]; *People v Chinn*, 104 AD3d 1167, 1169 [4th Dept 2013], *lv denied* 21 NY3d 1014 [2013]). We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

By pleading guilty, defendant forfeited his contention that County Court erred in denying his severance motion (*see People v McMillan*, 227 AD3d 1413, 1413 [4th Dept 2024]; *People v Hunter*, 49 AD3d 1243, 1243 [4th Dept 2008]).

Defendant failed to preserve for our review his contention that his plea was invalid because the sentence promise was premised on an illegal minimum term of incarceration (*see* Penal Law § 70.04 [3] [a]; *People v Williams*, 27 NY3d 212, 222-223 [2016]). Although defendant did not challenge the legality of his sentence before the sentencing court, we cannot allow an illegal sentence to stand (*see People v Considine*, 167 AD3d 1554, 1555 [4th Dept 2018]; *People v Southard*, 163 AD3d 1461, 1461 [4th Dept 2018]; *People v Sellers*, 222 AD2d 941, 941 [3d Dept 1995]). We therefore modify the judgment by vacating the sentence and we remit the matter to County Court to afford defendant the opportunity to either withdraw his plea or be resentenced to the legal term of incarceration on both counts (*see Sellers*, 222 AD2d at 941; *see generally People v Ciccarelli*, 32 AD3d 1175, 1176 [4th Dept 2006]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

759

KA 21-01594

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS E. SCHRADER, DEFENDANT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered June 30, 2021. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree and assault 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Defendant's conviction stems from a road rage incident where defendant shot the victim four times. Defendant and the victim stopped and exited their vehicles and confronted each other while engaging in a verbal altercation before returning to their vehicles and driving off. A short time later, defendant and the victim stopped their vehicles at an intersection, exited their vehicles, and engaged in a brief physical altercation. As the victim turned to walk or run away, defendant pulled out a gun and shot him.

Defendant's contention that the evidence is legally insufficient to support the conviction of attempted murder inasmuch as the People did not establish that he intended to kill the victim is not preserved for our review because defendant failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v McDonald*, 189 AD3d 2162, 2162 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]) and also failed to renew his motion after he presented evidence (*see People v Mabry*, 214 AD3d 1300, 1301 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023], *reconsideration denied* 40 NY3d 1081 [2023]). 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 establish defendant's intent to kill (*see generally People v Bleakley*,

69 NY2d 490, 495 [1987]). "It is well established that a defendant's [i]ntent to kill may be inferred by [his] conduct as well as the circumstances surrounding the crime . . . , and that a jury is entitled to infer that a defendant intended the natural and probable consequences of his acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks omitted]; *see People v Lopez*, 96 AD3d 1621, 1622 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]). Here, the People presented evidence that defendant and the victim were in two altercations immediately before the shooting and that defendant shot the victim four times from approximately 10 feet away (*see People v Torres*, 136 AD3d 1329, 1330 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016], *cert denied* 580 US 1068 [2017]; *Lopez*, 96 AD3d at 1622; *People v Lucas*, 94 AD3d 1441, 1441 [4th Dept 2012], *lv denied* 19 NY3d 964 [2012]).

Defendant's further contention that the evidence is legally insufficient to support the conviction of attempted murder and assault inasmuch as the People did not disprove the defense of justification beyond a reasonable doubt is also not preserved for our review (*see Gray*, 86 NY2d at 19; *People v Brown*, 194 AD3d 1399, 1400 [4th Dept 2021]). In any event, we conclude that the contention is without merit (*see generally Bleakley*, 69 NY2d at 495). Additionally, viewing the evidence in light of the elements of the crimes and the defense of justification 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. The jury could reasonably have found based on the testimony of the People's witnesses and the dash camera video that the victim was not using or attempting to use deadly physical force when defendant shot him (*see People v St. John*, 215 AD3d 1267, 1268 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023]; *see generally* Penal Law § 35.15 [2] [a]). Moreover, the jury could reasonably have found based on that same testimony and video that defendant had the opportunity to retreat and failed to do so (*see St. John*, 215 AD3d at 1268; *see generally* § 35.15 [2] [a]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

760

KA 23-00881

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE S. MYLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered May 4, 2023. The judgment convicted defendant upon a jury verdict of murder in the first degree, burglary in the first degree, criminal possession of a weapon in the second degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), burglary in the first degree (§ 140.30 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), and tampering with physical evidence (§ 215.40 [2]). Defendant's conviction stems from his conduct in entering the home of his former paramour (female victim) in the middle of the night and shooting both her and a male victim multiple times, killing them.

Defendant contends that County Court failed to make a sufficient inquiry into the People's readiness pursuant to CPL 30.30 (5). That contention is not preserved for our review (*see People v Everson*, 229 AD3d 1349, 1349 [4th Dept 2024]; *see generally People v Hardy*, 47 NY2d 500, 505 [1979]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's contention that the conviction is not supported by legally sufficient evidence that he was present at the scene and committed the offenses is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of

the evidence" (*People v Desmond*, 224 AD3d 1303, 1304 [4th Dept 2024], *lv denied* 41 NY3d 964 [2024] [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]). Viewing the evidence in light of the elements of the crimes 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]). We further conclude that, contrary to defendant's contention, the court did not abuse its discretion in determining that the female victim's son had the capacity to give sworn testimony (*see People v Brown*, 89 AD3d 1473, 1474 [4th Dept 2011], *lv denied* 18 NY3d 955 [2012]; *People v Thompson*, 59 AD3d 1115, 1117 [4th Dept 2009], *lv denied* 12 NY3d 860 [2009]).

Defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to preserve a speedy trial claim, failure to preserve an appellate record during jury selection, and communication issues with defendant. We reject that contention. First, inasmuch as defendant was charged with murder in the first degree, any motion to dismiss on statutory speedy trial grounds would not have been successful (*see* CPL 30.30 [3] [a]; *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Second, although the appellate record for the jury selection does not consistently identify the jurors by either seat number or surname, defendant does not identify any substantive issue arising from the jury selection. We note that defendant did not exhaust his peremptory challenges in accordance with CPL 270.20 (2), and thus any challenge to the court's denial of defense counsel's challenges for cause would not have led to a reversal (*see People v Young*, 195 AD3d 1455, 1455 [4th Dept 2021], *lv denied* 37 NY3d 975 [2021]). Third, to the extent that defendant's contention regarding communication issues with defendant is based on matters outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claims (*see generally People v Sims*, 41 NY3d 995, 996 [2024]; *People v Rojas-Aponte*, 224 AD3d 1264, 1265 [4th Dept 2024]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant next contends that he was denied a fair trial by two instances of alleged prosecutorial misconduct. Defendant's challenge to the prosecutor's remarks regarding the victim's son during opening statements is not preserved for our review (*see* CPL 470.05 [2]; *People v Freeman*, 46 AD3d 1375, 1376 [4th Dept 2007], *lv denied* 10 NY3d 840 [2008]). With respect to the challenge to the prosecutor's use of a PowerPoint presentation to merge two admitted trial exhibits depicting photographs of the male victim and the suspect, we agree with defendant that the prosecutor effectively created a new exhibit, which was improper. We conclude, however, that the prosecutor's improper use of the exhibit did not deprive defendant of a fair trial (*see People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *see generally People v Williams*, 29 NY3d 84, 89 [2017]; *People v Logan*, 178 AD3d 1386, 1388-1389 [4th Dept 2019], *lv denied* 35

NY3d 1028 [2020]).

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

761

KA 18-00224

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COLIN A. RIDEOUT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 13, 2017. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and tampering with physical evidence (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and two counts of tampering with physical evidence (§ 215.40 [2]). Contrary to defendant's contention, we conclude that the circumstantial evidence, when viewed in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]), is legally sufficient to support the conviction of murder in the second degree (*see People v Neulander*, 221 AD3d 1412, 1412-1413 [4th Dept 2023], *lv denied* 41 NY3d 984 [2024]; *People v Maull*, 167 AD3d 1465, 1466 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention that Supreme Court should have severed his trial from that of his codefendants is not preserved for our review because his motions for severance were based on different grounds than those he now raises on appeal (*see People v Rolldan*, 175 AD3d 1811, 1812 [4th Dept 2019], *lv denied* 34 NY3d 1081 [2019]; *People v Howie*, 149 AD3d 1497, 1499 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017]; *People v Wooden*, 296 AD2d 865, 866 [4th Dept 2002], *lv denied* 99 NY2d 541 [2002]). In any event, we conclude that defendant's contention lacks merit (*see generally People v Mahboubian*, 74 NY2d

174, 183-185 [1989]). Finally, we reject defendant's contention that the sentence imposed by the court—consecutive indeterminate terms aggregating to 27⅔ years to life imprisonment—is unduly harsh and severe.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

762

KA 23-00879

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW STOBY, DEFENDANT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SHEILA L. BAUTISTA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered April 3, 2023. The judgment convicted defendant upon his plea of guilty of 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 his plea of guilty of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). Defendant contends that County Court did not make sufficient inquiry as to the People's actual readiness for trial under CPL 30.30 (5), erred in failing to strike the People's certificate of compliance, and erred in denying his "speedy trial motion" on timeliness grounds. Defendant contends in particular that, although the People indicated their readiness for trial, they had failed to comply with their disclosure obligations. Defendant's contentions are not preserved for appellate review "because he never moved to dismiss the indictment on th[ose] ground[s]" (*People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see People v Robinson*, 225 AD3d 1266, 1267 [4th Dept 2024]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant contends, in the alternative, that he was denied effective assistance of counsel by defense counsel's failure to raise the alleged speedy trial violations in his omnibus motion. Under the circumstances presented on the record, we conclude that defendant "has failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings" (*People v Rojas-Aponte*, 224 AD3d 1264, 1265 [4th Dept 2024] [internal quotation

marks omitted]; *see People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]). Moreover, to the extent that defendant's contentions are based on matters outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claims (*see Dunn*, 229 AD3d at 1223; *see generally People v Sims*, 41 NY3d 995, 996 [2024]; *Rojas-Aponte*, 224 AD3d at 1265).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

764

KA 23-00897

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR D. MOORE, DEFENDANT-APPELLANT.

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

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 16, 2020. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts), robbery in the first degree, assault in the third degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of burglary in the first degree (Penal Law § 140.30 [1], [2]) and one count each of robbery in the first degree (§ 160.15 [2]), assault in the third degree (§ 120.00 [1]), and criminal use of a firearm in the first degree (§ 265.09 [1] [a]). Defendant's conviction stems from a home invasion burglary and robbery during which he displayed a gun and caused injury to the homeowner when he struck him in the head with the gun after a struggle.

Defendant contends that County Court erred in allowing prejudicial testimony by the People's forensic scientist, who compared defendant's DNA to a sample taken from the victim's jacket. Defendant, however, failed to object to most of the forensic scientist's testimony, and thus his contention is preserved only in part. To the extent that defendant's contention is not preserved for our review (*see* CPL 470.05 [2]), we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Regarding the one instance where defendant objected to the forensic scientist's testimony, defendant consented to the court's suggestion not to bring the issue to the jury's attention by striking the objected-to

testimony, and defendant therefore waived his challenge (*see generally People v Ahmed*, 66 NY2d 307, 311 [1985], *rearg denied* 67 NY2d 647 [1986]; *People v Fricke*, 216 AD3d 1446, 1448-1449 [4th Dept 2023], *lv denied* 40 NY3d 928 [2023]; *People v Davis*, 155 AD3d 1527, 1528 [4th Dept 2017], *lv denied* 31 NY3d 1012 [2018]).

Defendant failed to preserve for our review his further contention that the evidence is legally insufficient to establish that he caused a physical injury to the victim or that he possessed the firearm inasmuch as his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Desmond*, 224 AD3d 1303, 1304 [4th Dept 2024], *lv denied* 41 NY3d 964 [2024] [internal quotation marks omitted]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that the court should have issued a cross-racial identification charge is not preserved for our review inasmuch as he failed to request such instruction (*see People v Gonzalez*, 208 AD3d 981, 982 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]). The sentence is not unduly harsh or severe. We note, however, that the certificate of disposition should be amended to reflect that defendant was sentenced as a second felony offender (*see People v Parilla*, 214 AD3d 1399, 1402 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]).

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

766

CA 23-00497

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

ERIE INSURANCE COMPANY, AS SUBROGEE OF
MAC'S PIZZERIA & GRILL CORP., ET AL.,
PLAINTIFF-APPELLANT,

V ORDER

CHILDREN'S PALACE CHILDCARE CENTER, INC.,
DEFENDANT,
DELL, INC., AND DELL, INC., DOING BUSINESS
AS DELL COMPUTERS, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

RUPP PFALZGRAF LLC, BUFFALO (BRANDON SNYDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered February 23, 2023. The order granted the motion of defendants Dell, Inc., and Dell, Inc., doing business as Dell Computers, Inc. 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: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

767.1

CA 23-00477

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

HARLEYSVILLE PREFERRED INSURANCE COMPANY AND HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS SUBROGEE OF G.W.P. LLC, DOING BUSINESS AS GATEWAY PLAZA, PLAINTIFFS-APPELLANTS,

V ORDER

CHILDREN'S PALACE CHILDCARE CENTER, INC., DEFENDANT, DELL, INC., AND DELL, INC., DOING BUSINESS AS DELL COMPUTERS, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

HURWITZ FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered February 23, 2023. The order granted the motion of defendants Dell, Inc. and Dell, Inc., doing business as Dell Computers, Inc. 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: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

767.2

CA 23-00476

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

HARLEYSVILLE PREFERRED INSURANCE COMPANY AND HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS SUBROGEE OF G.W.P. LLC, DOING BUSINESS AS GATEWAY PLAZA, PLAINTIFFS-APPELLANTS,

V ORDER

CHILDREN'S PALACE CHILDCARE CENTER, INC., DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 2.)

HURWITZ FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered March 2, 2023. The order granted the motion of defendant Children's Palace Childcare Center, Inc. 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: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

767

CA 23-00498

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

ERIE INSURANCE COMPANY, AS SUBROGEE OF
MAC'S PIZZERIA & GRILL, CORP., ET AL.,
PLAINTIFF-APPELLANT,

V ORDER

CHILDREN'S PALACE CHILDCARE CENTER, INC.,
DEFENDANT-RESPONDENT,
DELL, INC., AND DELL, INC., DOING BUSINESS
AS DELL COMPUTERS, INC., DEFENDANTS.
(APPEAL NO. 2.)

RUPP PFALZGRAF LLC, BUFFALO (BRANDON SNYDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK J. MACKEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered March 2, 2023. The order granted the motion of defendant Children's Palace Childcare Center, Inc. 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: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

768

CA 24-00615

PRESENT: SMITH, J.P., BANNISTER, MONTOUR, GREENWOOD, AND KEANE, JJ.

JAMES DONEGAN AND MARY DONEGAN,
PLAINTIFFS-APPELLANTS,

V ORDER

JONATHAN L. PARRY AND JESSICA W. PARRY,
DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MICHAELS BERSANI KALABANKA, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered October 25, 2023. The order, among other things, granted defendants' cross-motion for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

774

KA 22-01417

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONDALE L. COOPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 30, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

775

KA 23-00834

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN J. ADAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered December 15, 2022. The judgment convicted defendant upon a guilty plea of murder in the second degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [1] [a]), stemming from the shooting death of the victim. We affirm.

Defendant contends that County Court did not make sufficient inquiry as to the People's actual readiness for trial under CPL 30.30 (5) and that his right to a speedy trial was violated inasmuch as, although the People indicated their readiness for trial, they had not yet turned over all required law enforcement disciplinary records and therefore failed to comply with their initial disclosure obligations under CPL 245.20 (1) (k) (iv). However, that contention is not preserved for appellate review "because he never moved to dismiss the indictment on that ground" (*People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see People v Robinson*, 225 AD3d 1266, 1267-1268 [4th Dept 2024]) or objected to the court's on-the-record inquiry into the People's actual readiness (*see generally* CPL 30.30 [5]; *People v Bonilla*, 229 AD3d 850, 854 [3d Dept 2024]), 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]). Moreover, we conclude that "[b]y subsequently pleading guilty, . . . defendant forfeited [his] contention [insofar as it related to the People's disclosure obligations] because 'the forfeiture occasioned by a guilty plea extends to claims premised

upon, inter alia, . . . motions relating to discovery' " (*People v Smith*, 217 AD3d 1578, 1578 [4th Dept 2023]; *see Robinson*, 225 AD3d at 1268).

Defendant further contends that he was denied effective assistance of counsel on the ground that defense counsel failed to move to dismiss the indictment pursuant to CPL 30.30 (1). Even assuming, arguendo, that defendant's contention survives his guilty plea (*see People v Motell*, 229 AD3d 1330, 1332 [4th Dept 2024]; *People v Clark*, 191 AD3d 1485, 1486 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]), we reject that contention inasmuch as "[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 Little*, 229 AD3d 1156, 1157 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]). CPL 30.30 (1) "do[es] not apply to a criminal action wherein the defendant is accused of," inter alia, murder in the second degree, as is true in this case (CPL 30.30 [3] [a]). Consequently, defense counsel could not be ineffective for failing to file a statutory speedy trial motion where, as here, the requirements of CPL 30.30 (1) do not apply (*see People v Word*, 260 AD2d 196, 197 [1st Dept 1999], *lv denied* 93 NY2d 1029 [1999], *reconsideration denied* 94 NY2d 799 [1999]; *People v Ortiz*, 209 AD2d 332, 334 [1st Dept 1994], *lv denied* 86 NY2d 739 [1995]; *see generally People v Wiggins*, 31 NY3d 1, 11 [2018]).

Defendant further contends that the court erred in refusing to suppress statements that he made during two police interrogations inasmuch as he unequivocally requested counsel during the first police interrogation. We reject that contention and conclude that the record amply supports the court's determination that defendant did not, at any time during the first interrogation, unequivocally request the assistance of counsel (*see People v Karlsen*, 147 AD3d 1466, 1467 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *see generally People v Dawson*, 38 NY3d 1055, 1055 [2022]). Defendant's statement that he was getting "pretty close" to asking for counsel established only that, as of that time, he had not yet requested the assistance of counsel; it was "merely a forewarning of a possible, contingent desire to confer with counsel rather than an unequivocal statement of [a] defendant's present desire to do so" (*People v Bowman*, 194 AD3d 1123, 1128 [3d Dept 2021], *lv denied* 37 NY3d 963 [2021] [internal quotation marks omitted]; *see generally People v Mitchell*, 2 NY3d 272, 276 [2004]; *People v Ibarrondo*, 208 AD3d 1647, 1648 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]). Moreover, defendant's other verbalization concerning the assistance of counsel was presented to the police in the form of a question and it is well settled that "a query as to whether counsel ought to be obtained will not suffice to unequivocally invoke the indelible right to counsel" (*Dawson*, 38 NY3d at 1055 [internal quotation marks omitted]; *see People v Hicks*, 69 NY2d 969, 970 [1987], *rearg denied* 70 NY2d 796 [1987]; *People v Hall*, 53 AD3d 1080, 1081 [4th Dept 2008], *lv denied* 11 NY3d 855 [2008]).

Defendant also contends that suppression of his statements made during the second interrogation, which was conducted the morning after

the first interrogation, was required because the police did not reread the *Miranda* warnings to him before the second interrogation. We reject that contention. It is well settled that there is "no need for the police to readminister *Miranda* warnings [where, as here,] defendant remained in continuous custody, nothing occurred that would have induced defendant to believe he was no longer the focal point of the investigation, and there was no reason to believe that defendant no longer understood his constitutional rights" (*People v Hinojoso-Soto*, 161 AD3d 1541, 1543 [4th Dept 2018], *lv denied* 32 NY3d 938 [2018] [internal quotation marks omitted]; *see People v Peterkin*, 89 AD3d 1455, 1455 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012]). It is undisputed that defendant remained in custody between the reading of the *Miranda* warnings and the renewed questioning of defendant during the second interrogation, and we further conclude that the evidence presented at the suppression hearing supports the determination that the time period between the *Miranda* warnings and the renewed questioning was not unreasonable (*see Peterkin*, 89 AD3d at 1456; *People v Cooper*, 59 AD3d 1052, 1054 [4th Dept 2009], *lv denied* 12 NY3d 852 [2009]), particularly in light of the fact that defendant's custody occurred in a non-coercive environment, where he was provided with food, cigarettes, the ability to watch television, and a place to rest (*see Cooper*, 59 AD3d at 1054; *People v Leflore*, 303 AD2d 1041, 1042 [4th Dept 2003], *lv denied* 100 NY2d 563 [2003]; *People v Baker*, 208 AD2d 758, 758-759 [2d Dept 1994], *lv denied* 85 NY2d 905 [1995]).

We reject defendant's further contention that he was coerced into making statements on the ground that the police engaged in deceptive tactics when they used his prior friendship with an investigator to their advantage during the interrogations. "Deceptive police stratagems in securing a statement 'need not result in involuntariness without some showing that the deception was so fundamentally unfair as to deny due process or that a promise or threat was made that could induce a false confession' " (*People v Dishaw*, 30 AD3d 689, 690 [3d Dept 2006], *lv denied* 7 NY3d 787 [2006], quoting *People v Tarsia*, 50 NY2d 1, 11 [1980]; *see People v Bradberry*, 131 AD3d 800, 802 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015]), and there was no such showing here (*see generally People v Lee*, 277 AD2d 1006, 1007 [4th Dept 2000], *lv denied* 96 NY2d 785 [2001]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

777

KA 21-00807

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRISHA A. CASTELLANO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 September 12, 2019. The judgment convicted defendant upon her plea of guilty of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: On appeal from a judgment convicting her upon a plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that her waiver of the right to appeal is invalid and that her contention concerning the severity of her sentence is thus properly before us. Inasmuch as defendant has completed serving the sentence imposed, her contention that the sentence is unduly harsh and severe has been rendered moot (*see People v McMullen*, 224 AD3d 1280, 1281 [4th Dept 2024]; *People v Demay*, 201 AD3d 1351, 1351-1352 [4th Dept 2022]; *People v Seppe*, 188 AD3d 1716, 1716 [4th Dept 2020]). Even assuming, arguendo, that defendant's challenge to her sentence has not been rendered moot and that she did not validly waive her right to appeal, we would conclude that the sentence is not unduly harsh or severe (*see e.g. People v Ismael*, 210 AD3d 1528, 1529-1530 [4th Dept 2022]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

779

KA 20-00786

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. GOINS, III, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 21, 2020. 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: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant challenges the constitutionality of Penal Law § 265.03 in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to raise any such challenge before Supreme Court, and his challenge therefore is not preserved for our review (*see* CPL 470.05 [2]; *People v Cabrera*, 41 NY3d 35, 42-51 [2023]; *People v David*, 41 NY3d 90, 97-100 [2023]; *People v Rouse*, 225 AD3d 1120, 1121 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]). 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]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

780

KA 20-00327

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. HOWARD, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (Alex R. Renzi, J.), rendered December 4, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a forged instrument in the second degree (9 counts) and criminal possession of a weapon in the fourth degree.

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

Same memorandum as in *People v Howard* ([appeal No. 2] — AD3d — [Nov. 15, 2024] [4th Dept 2024]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

781

KA 20-00435

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN C. HOWARD, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (Alex R. Renzi, J.), rendered December 4, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a forged instrument in the second degree (20 counts).

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of 20 counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25), stemming from his alleged possession of forged checks. In appeal No. 1, he appeals from a judgment convicting him upon a jury verdict of nine counts of criminal possession of a forged instrument in the second degree (§ 170.25) and one count of criminal possession of a weapon in the fourth degree (§ 265.01 [4]), stemming from his alleged possession of additional forged checks and a rifle. Appeal Nos. 1 and 2 arise from separate indictments that were consolidated and tried together.

With respect to appeal No. 2, defendant contends that Supreme Court (Moran, J.) erred in refusing to suppress tangible evidence that was the fruit of an unlawful warrantless search of his home. We agree. It is undisputed that, at the time the police recovered the tangible evidence in question, they did not have a warrant to search defendant's home. " 'All warrantless searches presumptively are unreasonable per se' " (*People v Jimenez*, 22 NY3d 717, 721 [2014], quoting *People v Hodge*, 44 NY2d 553, 557 [1978]; *see generally*

Schneckloth v Bustamonte, 412 US 218, 219 [1973]). Thus, "[w]here a warrant has not been obtained, it is the People who have the burden of overcoming that presumption" (*Hodge*, 44 NY2d at 557; *see People v Messano*, 41 NY3d 228, 233-234 [2024]; *see generally People v Berrios*, 28 NY2d 361, 367 [1971]). The People may meet their burden in that regard by establishing the applicability of one of the exceptions to the warrant requirement (*see People v Sanders*, 26 NY3d 773, 776-777 [2016]; *Hodge*, 44 NY2d at 557; *People v Barner*, 221 AD3d 1493, 1495-1496 [4th Dept 2023]).

As relevant here, the People sought to establish that the plain view doctrine, an established exception to the warrant requirement, justified their seizure of the challenged tangible evidence—i.e., checks, a printer, and a computer discovered in defendant's living room (*see Messano*, 41 NY3d at 232-233; *see generally Arizona v Hicks*, 480 US 321, 326 [1987]; *Coolidge v New Hampshire*, 403 US 443, 465 [1971 plurality]). "Under the plain view doctrine, if the sight of an object gives the police probable cause to believe that it is the instrumentality of a crime, the object may be seized without a warrant if three conditions are met: (1) the police are lawfully in the position from which the object is viewed; (2) the police have lawful access to the object; and (3) the object's incriminating nature is immediately apparent" (*People v Diaz*, 81 NY2d 106, 110 [1993], *abrogated on other grounds by Minnesota v Dickerson*, 508 US 366 [1993]; *see People v Mosquito*, 197 AD3d 504, 509 [2d Dept 2021]; *People v Bishop*, 161 AD3d 1547, 1547 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018]).

We conclude that the People met their burden with respect to the first two elements of the plain view exception because the police officers were lawfully in defendant's house responding to an emergency at the time they encountered the tangible evidence in question. We reject defendant's contention that the officers' continued presence in the house while waiting for a police investigator to arrive, after the initial basis for the police entry had been resolved, was unreasonable (*see People v Richardson*, 155 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]; *People v Lubbe*, 58 AD3d 426, 426 [1st Dept 2009], *lv denied* 12 NY3d 818 [2009]; *People v Osorio*, 34 AD3d 1271, 1272 [4th Dept 2006], *lv denied* 8 NY3d 883 [2007]).

Nevertheless, we conclude that the People did not meet their burden of establishing the third element of the plain view exception—i.e., that the incriminating nature of the seized items was immediately apparent. In making such a determination, we must consider whether "the facts available to the [police] officer would warrant a [person] of reasonable caution in the belief . . . that [the] items may be contraband or stolen property or useful as evidence of a crime" (*Texas v Brown*, 460 US 730, 742 [1983] [internal quotation marks omitted]). This is a probable cause standard—i.e., there need not be "certainty or near certainty" about the incriminating nature of the seized items (*People v Taylor*, 104 AD3d 431, 432 [1st Dept 2013], *lv denied* 21 NY3d 914 [2013]; *see Brown*, 460 US at 741-742). That element is not satisfied, however, "where the object [to be seized] must be moved or manipulated before its illegality can be determined"

(*Mosquito*, 197 AD3d at 509; *see Dickerson*, 508 US at 378-379). Indeed, "[s]uch a search or seizure may not be upheld without proof that the [police] officer who moved or manipulated the object had probable cause to believe that the object was evidence or contraband at the time that it was moved or manipulated" (*People v Rodriguez*, 211 AD3d 854, 858 [2d Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *see Mosquito*, 197 AD3d at 509; *People v Rivas*, 214 AD2d 996, 996 [4th Dept 1995], *lv denied* 86 NY2d 801 [1995]). Still, "[a] truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a search" (*Mosquito*, 197 AD3d at 509 [internal quotation marks omitted]; *see Hicks*, 480 US at 328; *Shamaeizadeh v Cunigan*, 338 F3d 535, 555 [6th Cir 2003], *cert denied* 541 US 1041 [2004]).

Here, we conclude that the People did not meet their burden of establishing that the police obtained probable cause to believe that the items in question were evidence or contraband merely by observing the checks and other items in defendant's living room. Indeed, the evidence at the suppression hearing suggests that the police obtained probable cause only upon manipulating and moving the checks discovered in defendant's home. None of the police officers who testified at the suppression hearing expressly denied touching or manipulating the checks before determining that they were incriminating evidence. Moreover, body-worn camera (BWC) footage from two non-testifying officers entered in evidence at the suppression hearing suggests that the police did not ascertain the incriminating nature of the evidence until after they moved and manipulated the checks. In one officer's BWC footage, another officer is seen bending over with his arm outstretched toward the area where the evidence was found, at which point the footage cuts out. In the BWC footage from the officer seen bending over, even though the BWC is not pointed toward the checks, sounds indicative of shuffling papers are apparent as the officer is heard discussing various information found on the checks—i.e., information about the checks' payors and the amount.

Based on that evidence, we conclude that the People did not meet their burden of establishing that the incriminating nature of the seized items was immediately apparent inasmuch as they did not show that any probable cause was developed through mere observation, rather than through moving and manipulating the items in question (*see Rodriguez*, 211 AD3d at 858; *Mosquito*, 197 AD3d at 509-511; *Rivas*, 214 AD2d at 996). Consequently, because the People failed to establish the applicability of the plain view exception to justify their seizure of the items in question, we conclude that the court erred in refusing to suppress the tangible evidence seized by the police without a warrant.

We further conclude that any purported consent to a search of the home given by defendant or his romantic partner—which occurred *after* the police discovered the tangible evidence in question—did not attenuate the taint of the unlawful search (*see People v Sweat*, 170 AD3d 1659, 1660 [4th Dept 2019]). Indeed, rather than there being any "significant intervening event which justified the conclusion that [such] evidence was not the product of the illegal activity" (*People v*

Williams, 79 AD3d 1653, 1655 [4th Dept 2010], *affd* 17 NY3d 834 [2011] [internal quotation marks omitted]), the sequence of events in the record shows that the purported consents were not sufficiently distinguishable from the unlawful search so as to attenuate the taint of the illegality but rather "flowed directly from" that illegality (*People v Young*, 255 AD2d 905, 906 [4th Dept 1998]; *see Sweat*, 170 AD3d at 1660).

Because the items suppressed constitute the sole evidence against defendant in appeal No. 2, we dismiss the indictment in that appeal (*see People v Walker*, 221 AD3d 1568, 1570 [4th Dept 2023]; *People v Young*, 202 AD2d 957, 958 [4th Dept 1994]). In light of our conclusion, defendant's remaining contentions in appeal No. 2 are academic.

We nevertheless reject defendant's further contention that our conclusion in appeal No. 2 requires us to grant suppression and dismiss the indictment in appeal No. 1. The evidence at issue in that appeal was obtained following the execution of a search warrant for defendant's house, which defendant asserts was obtained, at least in part, based on the items seized during the unlawful warrantless search of his home at issue in appeal No. 2. However, even though the search warrant application mentioned the fruits of the warrantless search, "the warrant . . . was primarily justified by the existence of more recent facts revealing ongoing criminal activity sufficient to justify a finding of probable cause at the time the warrant was issued" (*People v Harris*, 83 AD3d 1220, 1222 [3d Dept 2011], *lv denied* 17 NY3d 817 [2011] [internal quotation marks omitted]). Even excluding the material obtained via the unlawful search, we conclude that "the remaining information in the application was sufficient to establish probable cause to believe that evidence of a crime might be found in defendant's residence" (*People v Howard*, 215 AD3d 1257, 1258 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023] [internal quotation marks omitted]; *see People v Austin*, 214 AD3d 1391, 1394 [4th Dept 2023], *lv denied* 40 NY3d 932 [2023]). Consequently, defendant was not entitled to suppression of the fruits of the search warrant in appeal No. 1.

Alternatively, defendant contends that—even if he is not entitled to suppression in appeal No. 1—he is entitled to a new trial in appeal No. 1 inasmuch as evidence from the unlawful search was used by the People at trial to establish elements with respect to charges in appeal No. 1. We reject that contention and conclude that reversal is not required in appeal No. 1 because, under the circumstances of this case, "there is no reasonable possibility that the evidence supporting the alleged tainted [conviction in appeal No. 2] had a spillover effect on the other conviction[ ]" (*People v Sinha*, 19 NY3d 932, 935 [2012]; *see People v Doshi*, 93 NY2d 499, 505 [1999]; *People v Lee*, 224 AD3d 1372, 1374 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]).

We reject defendant's further contention in appeal No. 1 that the evidence is legally insufficient to establish the element of intent to defraud, deceive, or injure another, necessary to support each conviction of criminal possession of a forged instrument in the second degree. Viewing the evidence in the light most favorable to the

People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant had the requisite intent (*see generally People v Rodriguez*, 17 NY3d 486, 489 [2011]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). "A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, [that person] utters or possesses any forged instrument of a kind specified in section 170.10" (Penal Law § 170.25). Such fraudulent intent "may be inferred from a defendant's actions and surrounding circumstances" (*People v Rebollo*, 107 AD3d 1059, 1061 [3d Dept 2013]), and "need not be targeted at any specific person; a general intent to defraud suffices and the statute does not require that the defendant actually attempt to use the forged documents" (*People v Rodriguez*, 71 AD3d 450, 452-453 [1st Dept 2010], *affd* 17 NY3d 486 [2011]).

Here, the evidence at trial establishes that defendant was printing checks payable by businesses with which he had no connection and those businesses were unaware of the checks' drafting. Further, the trial evidence establishes that defendant intended for the checks to be negotiated inasmuch as they bore actual bank account numbers and he had purchased ink that would allow the checks to be read by bank scanners. We conclude that "it was permissible for the jury to infer that defendant was recently involved in the production of . . . false documents and that he retained the intent to defraud at the time" when the checks were recovered (*Rodriguez*, 17 NY3d at 490; *see People v Dallas*, 46 AD3d 489, 491 [1st Dept 2007], *lv denied* 10 NY3d 809 [2008], *reconsideration denied* 10 NY3d 933 [2008]). Consequently, there is a "valid line of reasoning and permissible inferences" from which a rational jury could have found that defendant had the requisite fraudulent intent concerning the checks found in his possession (*Bleakley*, 69 NY2d at 495; *see Rodriguez*, 17 NY3d at 489-490). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

To the extent that defendant contends in appeal No. 1 that, in sentencing him, Supreme Court (Renzi, J.) penalized him for exercising his right to a trial, we conclude that defendant's contention is unpreserved inasmuch as he failed to raise that contention at sentencing (*see People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]; *People v Gorton*, 195 AD3d 1428, 1430 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]).

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

785

CA 23-01880

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

APPLIED HEALTHCARE RESEARCH MANAGEMENT,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KEMI R. IBRAHIM, DEFENDANT-APPELLANT.

CRISCIONE RAVALA, LLP, NEW YORK CITY (GALEN J. CRISCIONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KLOSS STENGER & GORMLEY LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered October 30, 2023. The order denied the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the first, third, and fourth causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a New York corporation, commenced this action seeking damages arising from defendant's alleged breach of the parties' consulting agreement and from allegedly defamatory letters defendant sent to two of plaintiff's clients. Defendant, an individual residing in Texas, moved to dismiss the complaint pursuant to CPLR 3211 (a) (8) on the ground that Supreme Court lacked personal jurisdiction over her or, in the alternative, pursuant to CPLR 3211 (a) (7) on the ground that the complaint failed to state a claim. The court denied the motion, and defendant appeals.

We reject defendant's contention that the court erred in denying her motion insofar as it sought dismissal of the complaint for lack of personal jurisdiction. Pursuant to New York's long-arm statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state" (CPLR 302 [a] [1]). Jurisdiction can attach on the basis of one transaction, even if the defendant never enters the state, " 'so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]; *see Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). Purposeful activities

are those by which a defendant, "through volitional acts, 'avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws' " (*Fischbarg*, 9 NY3d at 380; *see Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1461 [4th Dept 2014], *lv dismissed* 24 NY3d 928 [2014]). Such acts may be contrasted with "random, fortuitous, or attenuated contacts, . . . [or] the unilateral activity of another party or a third person" (*Burger King Corp. v Rudzewicz*, 471 US 462, 475 [1985] [internal quotation marks omitted]; *see generally LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216-217 [2000]).

Here, the parties' contract called for defendant to provide data models for plaintiff's clients. Although defendant never physically entered New York as part of her relationship with plaintiff, she purposefully entered into a months-long contract with plaintiff that required her to project herself into New York to retrieve digital files from plaintiff's New York-based server, including software, proprietary data, and examples of prior work. Moreover, the fact that defendant would be required to project herself into New York and transmit files to and from plaintiff's server was explicit in the contract, which stated that "[a]ll communication will be through [plaintiff's] email server, phone and intranet." Defendant was thereby enabled to transact business within the state, "without physically entering" the state (*Deutsche Bank Sec., Inc.*, 7 NY3d at 71), by means of " 'the knowing and repeated transmission of computer files over the [i]nternet' " to and from New York (*Best Van Lines, Inc. v Walker*, 490 F3d 239, 251 [2d Cir 2007]; *see Centrifugal Force, Inc. v Softnet Communication, Inc.*, 2009 WL 1059647, *5 [SD NY, Apr. 17, 2009, No. 08 Civ. 5463(CM)(GWG)]; *see also Grimaldi v Guinn*, 72 AD3d 37, 51-52 [2d Dept 2010]).

Moreover, plaintiff alleges that defendant breached the contract by failing to deliver to plaintiff the data models she created. Pursuant to the long-arm statute, "New York courts may . . . exercise jurisdiction over a nondomiciliary who contracts outside this State to supply goods or services in New York even if the goods are never shipped or the services are never supplied in New York, so long as the cause of action . . . arose out of that contract" (*Alan Lupton Assoc. v Northeast Plastics*, 105 AD2d 3, 6 [4th Dept 1984]; *see generally Island Wholesale Wood Supplies v Blanchard Indus.*, 101 AD2d 878, 880 [2d Dept 1984]). Whether the provision of those data models is considered "goods" or "services," defendant's failure to deliver them to New York constitutes a basis for personal jurisdiction (*see LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1302 [4th Dept 2011]; *Courtroom Tel. Network v Focus Media*, 264 AD2d 351, 353 [1st Dept 1999]).

Based on the totality of the circumstances in this case (*see Sager v City of Buffalo*, 151 AD3d 1908, 1909 [4th Dept 2017]; *Atwal v Atwal*, 24 AD3d 1297, 1298 [4th Dept 2005]), we conclude that defendant had the requisite " 'minimum contacts' with this state to warrant the exercise of long-arm jurisdiction pursuant to CPLR 302 (a) (1)" and "that the exercise of jurisdiction here comports with due process"

(*Cellino & Barnes, P.C.*, 117 AD3d at 1461; *see generally LaMarca*, 95 NY2d at 216).

Defendant further contends that the court erred in denying her motion insofar as it sought dismissal of the complaint for failure to state a cause of action. "When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiff[ ] with the benefit of every favorable inference . . . Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018] [internal quotation marks omitted]). Here, the complaint, with its attached exhibits, adequately sets forth causes of action for breach of contract and defamation, and defendant's contentions to the contrary raise issues of fact and do not warrant relief under CPLR 3211 (a) (7) (*see generally Tower Broadcasting, LLC v Equinox Broadcasting Corp.*, 160 AD3d 1435, 1436 [4th Dept 2018]).

We agree with defendant, however, that the first cause of action, for declaratory judgment, should be dismissed because there is no need for declaratory relief "where the issues concern the merits of the breach of contract cause[] of action" (*Burgdorf v Kasper*, 83 AD3d 1553, 1555 [4th Dept 2011]; *see generally James v Alderton Dock Yards*, 256 NY 298, 305 [1931], *rearg denied* 256 NY 681 [1931]). Declaratory relief is " 'unnecessary and inappropriate' " under the circumstances of this case because " 'plaintiff has an adequate, alternative remedy' " in the breach of contract cause of action (*Main Evaluations v State of New York*, 296 AD2d 852, 853 [4th Dept 2002], *appeal dismissed & lv denied* 98 NY2d 762 [2002]; *see Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142, 1144 [4th Dept 2009]). We therefore modify the order accordingly.

Finally, plaintiff has consented in its brief on appeal to the dismissal of the third and fourth causes of action, for tortious interference with contract and tortious interference with business relations, respectively, and we therefore further modify the order accordingly (*see Harris v Rome Mem. Hosp.*, 217 AD3d 1412, 1413 [4th Dept 2023]; *see also Sochan v Mueller*, 162 AD3d 1621, 1622 [4th Dept 2018]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

786

CA 23-01412

PRESENT: WHALEN, P.J., CURRAN, OGDEN, DELCONTE, AND HANNAH, JJ.

WILLIAM SOJDA, PLAINTIFF-APPELLANT,

V ORDER

E&R GENERAL CONSTRUCTION, DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, PC, BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JOHN WALLACE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 17, 2023. The order granted the motion of defendant for summary judgment and denied the cross-motion of plaintiff for partial 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: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

792

KA 21-00453

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT C. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Steuben County Court (Chauncey J. Watches, J.), rendered January 6, 2021. Defendant was resentenced upon his conviction of rape in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a resentence pursuant to which County Court increased to the lawful minimum the postrelease supervision component of the sentence previously imposed on his conviction, following a jury trial, of rape in the first degree (Penal Law former § 130.35 [2]). Defendant's sole contention on appeal is that we should remit the matter for a hearing on his claim, raised during the resentencing proceeding, that he was denied effective assistance of counsel during plea negotiations because trial counsel purportedly misadvised him regarding the minimum period of postrelease supervision he faced if convicted after trial, which erroneous advice allegedly led him to reject pretrial plea offers that would have resulted in a less severe sentence (*see generally Lafler v Cooper*, 566 US 156, 162-163 [2012]). Defendant's contention regarding the effectiveness of trial counsel during plea negotiations is not, however, reviewable on appeal from the resentence (*see* CPL 450.30 [3]; *People v Luddington*, 5 AD3d 1042, 1042 [4th Dept 2004], *lv denied* 3 NY3d 643 [2004]). The proper procedural vehicle to review defendant's contention is a motion to vacate the judgment of conviction pursuant to CPL 440.10 (*see generally People v McNair*, 294 AD2d 952, 952 [4th Dept 2002], *lv denied* 98 NY2d 699 [2002]). Inasmuch as defendant does not raise any contentions regarding the resentence, we dismiss the appeal (*see generally People v Parrilla*, 227 AD3d 1419, 1419-1420 [4th

Dept 2024]; *People v Woodward*, 189 AD3d 2107, 2107-2108 [4th Dept 2020]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

794

KA 22-01847

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL MAXWELL, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SABRINA A. BREMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Julie M. Hahn, J.), rendered October 27, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (three counts) and criminally using drug paraphernalia 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 a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). Defendant's conviction stems from the execution of a search warrant at the downstairs apartment of a house in the early morning hours. The police recovered individually-wrapped drugs and drug paraphernalia from a rear bedroom, the kitchen, and the living room. The police also recovered a loaded gun, wrapped in a white towel, from the floor of the rear bedroom and several rounds of ammunition from that room.

We reject defendant's contention that the evidence is legally insufficient to establish either his constructive possession of the gun, drugs, and drug paraphernalia located in the house or his liability as an accessory. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is sufficient evidence that defendant constructively possessed the contraband (*see People v Torrance*, 206 AD3d 1722, 1723 [4th Dept 2022]; *People v Everson*, 169 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019]) or that he acted as an

accessory (*see People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Slade*, 133 AD3d 1203, 1204 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]). The testimony of the police witnesses as well as a witness for the codefendant established that the downstairs apartment was a trap house, i.e., a house that was used solely for the purpose of selling narcotics. Two police witnesses gave extensive testimony about the characteristics of trap houses, including that they are sparsely furnished; that all points of entry would be barricaded and surveillance cameras would be used; that the individual in control of the trap house would not sleep or stay there; that one or two people working for the person in charge would occupy the trap house and package narcotics there; and that sales would occur at a door or window. They also explained that firearms were often found in trap houses and that a "community gun" would be available for use by anyone involved in the operation of the trap house.

An investigator conducted surveillance of the house for several weeks prior to the execution of the warrant and observed numerous people walking along the side and toward the rear of the house. During the execution of the warrant, the police had to use chainsaws to remove the front and back door, and the front door was blocked by two-by-fours. Four surveillance cameras outside the house were transmitting live feeds to a television inside the house, and there was also another television on. When the police eventually gained entry into the downstairs apartment, they found the codefendant in a stairwell leading to the upstairs apartment and found defendant in the shower in the upstairs apartment. Defendant had a cut above his eye, there was a blood trail leading from the staircase off the downstairs apartment kitchen to the upstairs apartment, and defendant's balled-up clothing, which lay next to the shower, was partially wet and had blood on it. Defendant's identification was found in the living room of the downstairs apartment, and his fingerprint was on the bottom of a dinner plate that had drug paraphernalia on it and had been found in the living room of the downstairs apartment.

The target of the police investigation, who was found at another location, pleaded guilty in connection with the gun recovered from the search of the downstairs apartment. He testified on the codefendant's behalf and admitted that the house was a trap house. Although he testified that the gun and drugs were his, he admitted that defendant had permission to be in the house to watch television. As noted, drugs and drug paraphernalia were located throughout the downstairs apartment, including some individually-packaged drugs that were found in the kitchen on a stand near the window with some loose money. The police also recovered signs from the kitchen that said "knock on window, bell broke" and "closed till Sept. 15!!!! Sorry"; September 15 was the day before the warrant was executed.

We conclude that the People established that defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband [was] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* Penal Law § 10.00 [8]; *Jones*, 224 AD3d at 1352-1353). The evidence "went beyond defendant's mere

presence in the [house] at the time of the search and established 'a particular set of circumstances from which a jury could infer possession' of the contraband" (*People v McGough*, 122 AD3d 1164, 1166 [3d Dept 2014], *lv denied* 24 NY3d 1220 [2015], quoting *People v Bundy*, 90 NY2d 918, 920 [1997]; *see People v Crowley*, 188 AD3d 1665, 1666 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]). A "valid line of reasoning and permissible inferences" (*People v Bleakley*, 69 NY2d 490, 495 [1987]) from the evidence—including the fact that two televisions were on in the downstairs apartment, that defendant's identification was in the living room, that defendant's fingerprint was on a plate in the living room, that defendant was bleeding and a blood trail led to the upstairs apartment, and that defendant had permission to be in the downstairs apartment—supports the conclusion that defendant had been in the downstairs apartment just prior to the police entry into the house. The evidence also supports the inference that defendant was selling drugs from the kitchen window and had possession of the drugs and gun for the operation of the trap house. Although "[a] defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession" of the weapon (*People v King*, 206 AD3d 1593, 1594 [4th Dept 2022]), as set forth above, there is ample additional evidence here to support the inference of defendant's possession under the specific facts of this case. Further, the jury rationally could have concluded that defendant acted with the mental state necessary for the crimes and that he intentionally aided the other individuals to engage in conduct constituting those offenses (*see Jones*, 224 AD3d at 1353).

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 likewise reject defendant's contention that the verdict is against the weight of the evidence (*see Jones*, 224 AD3d at 1353; *People v Stumbo*, 155 AD3d 1604, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction should be amended to reflect that defendant was sentenced as a second felony drug offender (*see People v Parilla*, 214 AD3d 1399, 1402 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

795

KA 19-02356

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACQUES YATES, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JACQUES YATES, DEFENDANT-APPELLANT PRO SE.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 29, 2019. The judgment convicted defendant, after a nonjury trial, of rape in the second degree, rape in the third degree (two counts) and endangering the welfare of a child (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of one count of rape in the second degree (Penal Law former § 130.30 [1]), two counts of rape in the third degree (former § 130.25 [2]), and three counts of endangering the welfare of a child (§ 260.10 [1]). Defendant drove three minor victims to a hotel where he obtained a room for the night. Defendant and the victims consumed alcohol and smoked marijuana supplied by defendant. Thereafter, defendant engaged in sexual intercourse and other sexual conduct with the three victims.

Defendant initially contends in his main brief that County Court erred in granting the People's motion to amend the indictment to correct a 10-day error in the date of birth of one of the victims. We reject that contention. The Criminal Procedure Law provides that "[a]t any time before or during trial, the court may, upon application of the people and with notice to the defendant and opportunity to be heard, order the amendment of an indictment . . . when such an amendment does not change the theory or theories of the prosecution . . . or otherwise tend to prejudice the defendant on the merits" (CPL

200.70 [1]; *see also People v Taylor*, 202 AD3d 1461, 1461 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]). Here, defendant does not dispute that the 10-day amendment did not alter the theory of the prosecution or prejudice defendant on the merits, insofar as that victim's age in years at the time of the offense was unchanged. To the extent that defendant contends in his main brief that his conviction is not supported by legally sufficient evidence, we reject that contention (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Upon viewing the evidence in light of the elements of the crimes in this nonjury trial and deferring to the court's determinations on credibility (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends in his main brief that the court erred in refusing to dismiss the indictment based upon selective prosecution. We reject that contention. To establish that he was the victim of the unconstitutional selective enforcement of the Penal Law, defendant had the "heavy burden" of showing "that the law was enforced with both an 'unequal hand' and an 'evil eye'; 'to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification' " (*People v Blount*, 90 NY2d 998, 999 [1997]; *see People v Welch*, 2 AD3d 1354, 1358 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]). Defendant failed to meet his burden of establishing that he—a 38-year-old man—was similarly situated to one of the minor victims.

We reject defendant's contention in his main brief that his sentence is unduly harsh and severe. However, we note that while the certificate of disposition states that the defendant was sentenced to a determinate term of one year's incarceration on each of the three counts of endangering the welfare of a child, including count 7, at sentencing, the court failed to pronounce a sentence on that count. Inasmuch as the court "failed to impose a sentence for each count of which defendant was convicted" (*People v Bradley*, 52 AD3d 1261, 1262 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]; *see* CPL 380.20), we modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (*see People v Brady*, 195 AD3d 1545, 1546 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]).

We have reviewed the remaining contentions raised by defendant in his pro se supplemental brief and conclude that they are either unpreserved or lacking in merit.

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

797

KA 23-01805

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM M. WOLCOTT, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Melinda H. McGunnigle, J.), entered August 29, 2023. 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that he is entitled to a downward departure from his presumptive risk level. We reject that contention.

Contrary to defendant's contention, we conclude that his mere non-denial of responsibility to the police and eventual acceptance of responsibility by virtue of his guilty plea in his underlying child sex abuse case, satisfactory conduct while confined, release with specialized supervision, stable living situation and strong family support network, performance in an educational program, and engagement in treatment programs do not constitute proper mitigating factors inasmuch as those circumstances were adequately taken into account by the risk assessment guidelines (*see People v Dyer*, 225 AD3d 1263, 1264 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]; *People v Swartz*, 216 AD3d 1426, 1427 [4th Dept 2023], *lv denied* 40 NY3d 906 [2023]; *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]; *People v Smith*, 108 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 22 NY3d 856 [2013]; *cf. People v Stagles*, 222 AD3d 1341, 1343 [4th Dept 2023]; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15-18 [2006] [Guidelines]).

Next, "while an offender's response to treatment, 'if

exceptional' . . . , may constitute a mitigating factor to serve as the basis for a downward departure" (*People v Scott*, 186 AD3d 1052, 1054 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020], quoting Guidelines at 17), we further conclude that, even accepting the representations in the affirmation of defendant's attorney, defendant failed to meet his burden of proving by a preponderance of the evidence that his response to treatment was exceptional (*see Dyer*, 225 AD3d at 1264; *People v Harris*, 217 AD3d 1385, 1386-1387 [4th Dept 2023], *lv denied* 40 NY3d 909 [2023]; *June*, 150 AD3d at 1702). Similarly, with respect to defendant's assertion that his near completion of a community college degree is a mitigating circumstance, defendant did not proffer any proof of, and thus failed to demonstrate by a preponderance of the evidence, how that alleged mitigating circumstance would reduce his risk of sexual recidivism or danger to the community (*see Dyer*, 225 AD3d at 1264-1265).

Finally, even assuming, arguendo, that defendant satisfied his burden with respect to the first two steps of the downward departure analysis (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we conclude on this record, after applying the third step of weighing the aggravating and mitigating factors, that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism (*see Harris*, 217 AD3d at 1387-1388; *People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see generally People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

799

CAF 23-01308

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF BENEDICT R. ROTUNDO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATIE A. DEPTOLA, FORMERLY KNOWN AS
KATIE A. ROTUNDO, RESPONDENT-APPELLANT.

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

BRIAN J. EHRHARD, UTICA, ATTORNEY FOR THE CHILD.

EDWARD G. KAMINSKI, UTICA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Jason D. Flemma, J.), rendered May 25, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical residence of 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 6, respondent mother appeals from an order that, inter alia, granted petitioner father's amended petition to modify a prior order of custody and granted him primary physical residence of the parties' three children. We affirm.

The mother contends that she was denied effective assistance of counsel inasmuch as counsel did not advise her to settle the case and did not adequately examine or cross-examine the witnesses, raise objections, or admit material into evidence. Initially, we note that, " 'because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015]). " 'So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, a [parent's] constitutional right to the effective assistance of counsel will have been met' " (*Matter of Laura E. v Matthew E.*, 226 AD3d 1117, 1118 [3d Dept 2024]; *see Sloan v Sloan*, 224 AD3d 712, 713 [2d Dept 2024]).

Regarding the allegation that counsel failed to advise the mother to settle the case, we are unable to review the mother's contention to the extent it involves matters outside the record on appeal (*see Matter of Brooks v Martinez*, 218 AD3d 568, 569 [2d Dept 2023]; *Matter of Brandon v King*, 137 AD3d 1727, 1728 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]). To the extent that the record permits review of her contention regarding a settlement, we conclude that the mother did not " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see Brown*, 125 AD3d at 1390-1391). Indeed, the record establishes that the parties had reached a settlement, but Family Court would not accept it after the mother made indications that she was not amenable to it. With respect to the mother's remaining claims of ineffective assistance, we conclude that " '[t]he record, viewed in its totality, establishes that the [mother] received meaningful representation' " (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]; *see Matter of Thomas v Thomas*, 221 AD3d 609, 610 [2d Dept 2023]).

The mother further contends that the two youngest children were denied effective assistance of counsel inasmuch as the attorney for the children (AFC) did not ascertain the wishes of his clients or communicate those wishes to the court and failed to submit a written closing argument. Section 7.2 of the Rules of the Chief Judge provides that, in proceedings such as an article 6 custody proceeding where the child is the subject and an AFC has been appointed pursuant to Family Court Act § 249, the AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]). "In ascertaining the child's position, the [AFC] must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances" (22 NYCRR 7.2 [d] [1]). A child in an article 6 custody proceeding is entitled to effective assistance of counsel (*see Matter of Sloma v Saya*, 210 AD3d 1494, 1495 [4th Dept 2022]).

Initially, we note that the AFC's failure to submit a written closing argument does not constitute ineffective assistance of counsel (*see Matter of Terramiggi v Tarolli*, 151 AD3d 1670, 1672 [4th Dept 2017]). The mother's contention that the AFC failed to meet with the children is speculative and based on matters outside the record and is therefore not properly before us (*see Matter of Honeyford v Luke*, 186 AD3d 1049, 1050 [4th Dept 2020]). The record before us does not support the mother's allegation (*see Matter of Smith v Ballam*, 176 AD3d 1591, 1593 [4th Dept 2019]). We note that, although the AFC did not place on the record the wishes of his clients, the court held an in camera hearing with the children. The mother failed to establish " 'the absence of strategic or other legitimate explanations for counsel's alleged shortcomings' " (*Matter of Doner v Flora*, 229 AD3d

1158, 1158 [4th Dept 2024]; *see Matter of Ballard v Piston*, 178 AD3d 1397, 1398 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

805

CA 23-01983

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

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

V MEMORANDUM AND ORDER

MAHWEE S., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Lamendola, J.), entered October 27, 2023, in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent, who suffers from, inter alia, pedophilic disorder, admitted that he was a detained sex offender who had a mental abnormality, and Supreme Court held a dispositional hearing to determine whether respondent required confinement in a secure treatment facility or could be released on strict and intensive supervision and treatment (SIST). Respondent now appeals from an order determining that he is a dangerous sex offender requiring confinement under Mental Hygiene Law § 10.03 (e) and directing that he be confined in a secure treatment facility. We affirm.

As relevant here, a " '[d]angerous sex offender requiring confinement' " is a detained sex offender "suffering 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" (*id.*). Only where the offender is "presently 'unable' to control [their] sexual conduct" may they be confined under section 10.03 (e) (*Matter of State of New York v George N.*, 160 AD3d 28, 33 [4th Dept 2018]).

Contrary to respondent's contention, petitioner met its burden of proving by clear and convincing evidence that respondent is presently unable to control his sexual conduct and is a dangerous sex offender requiring confinement (*see Matter of Juan U. v State of New York*, 149

AD3d 1300, 1302-1303 [3d Dept 2017]; *Matter of State of New York v Armstrong*, 119 AD3d 1431, 1432 [4th Dept 2014]). Petitioner's expert testified that respondent had a strong predisposition to commit sex offenses because he suffers from pedophilic disorder and, due to his mild intellectual disability and psychotic disorder, he had poor cognitive problem solving. Respondent had difficulty making reasoned decisions and reading social cues. In addition, his antisocial personality trait enabled him to act upon his urges and desires with little or no regard for the consequences it might cause to his victims. Both petitioner's and respondent's experts agreed that respondent had no tools or plan to prevent him from reoffending, he could not recall anything from prior sex offender classes, and he refused treatment and medication while confined awaiting the outcome of the hearing.

Both experts also agreed that respondent posed an above average risk to reoffend. Further, although the general trend shown in research suggested that the risk of reoffending should decline after the age of 40, respondent's sexual offending behavior did not decrease with his advanced age. Petitioner's expert concluded that, without the structure and support from a secure treatment facility, respondent would likely sexually reoffend in a community setting. Respondent's expert agreed that respondent had a strong predisposition to commit sex offenses and an inability to control his behavior, but she opined that respondent did not require confinement, but rather needed 24-hour supervision and that placement in a group home run by the Office for People with Developmental Disabilities (OPWDD) was the best option for respondent. If respondent refused that option, however, as he had in the past, then she agreed with petitioner that respondent required confinement in a secure treatment facility.

Mental Hygiene Law article 10 "does not permit confinement as part of SIST" (*Matter of State of New York v Nelson D.*, 22 NY3d 233, 235 [2013]). Article 10 provides for only two dispositional outcomes—confinement or an outpatient SIST regime—and a respondent's placement at an OPWDD facility constitutes involuntary confinement (*see Nelson D.*, 22 NY3d at 236-237). Thus, there is no option here of releasing respondent on SIST and requiring him to be confined at an OPWDD facility (*see id.*; *see also Matter of James WW. v State of New York*, 201 AD3d 1069, 1071 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

810

CA 23-01335

PRESENT: SMITH, J.P., MONTOUR, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF THE ESTATE OF NABIL FAKHRA,
DECEASED.

SARA NABIL FAKHRA, PETITIONER-RESPONDENT;

ORDER

AOUS FAKHRA, RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (KYLE D. GOOCH OF COUNSEL), FOR RESPONDENT-APPELLANT.

LACY KATZEN LLP, ROCHESTER (NATHAN A. SHOFF OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (Christopher S. Ciaccio, S.), entered July 7, 2023. The order, among other things, granted in part the motion of petitioner for summary judgment, and denied the motion of respondent for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 3, 2024,

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

813

KA 20-00659

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT MOSS, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered March 10, 2020. The judgment convicted defendant upon his plea of guilty of burglary 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 burglary in the second degree (Penal Law § 140.25 [2]). We affirm.

Defendant contends that County Court erred in refusing to suppress identification evidence on the ground that the photo array from which a witness identified defendant was unduly suggestive. We reject that contention. Because "the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection," the photo array itself was not unduly suggestive (*People v Quinones*, 5 AD3d 1093, 1093 [4th Dept 2004], *lv denied* 3 NY3d 646 [2004]; *see People v Johnson*, 126 AD3d 1326, 1327 [4th Dept 2015], *lv denied* 25 NY3d 1166 [2015]). Likewise, the procedures used by the police in presenting the photo array were not unduly suggestive (*see People v Rainey*, — AD3d —, 2024 NY Slip Op 04892, *1 [4th Dept 2024]), particularly in light of the fact that the police used a " 'blind or blinded procedure' " (CPL 60.25 [1] [c]; *see People v Tyme*, 222 AD3d 783, 783-784 [2d Dept 2023], *lv denied* 41 NY3d 944 [2024]; *see generally People v Griffin*, 203 AD3d 1608, 1613 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]).

Defendant further contends that the court erred in refusing to suppress physical evidence obtained following his arrest on the ground

that his arrest was not supported by probable cause. We reject that contention. Here, the People established that the police had probable cause to arrest defendant for the burglary based on, inter alia, the "be-on-the-lookout" (BOLO) for defendant that was issued by the police detective investigating the burglary and who had met with the witness who identified defendant in the photo array. "Under the fellow officer rule, a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of or as a result of communication with a fellow officer or another police agency in possession of information sufficient to constitute probable cause for the arrest . . . Information received from another police officer is presumptively reliable" (*People v Ketcham*, 93 NY2d 416, 419-420 [1999] [internal quotation marks omitted]; *see People v Rosario*, 78 NY2d 583, 588 [1991], *cert denied* 502 US 1109 [1992]; *People v Searight*, 162 AD3d 1633, 1634-1635 [4th Dept 2018]).

Here, the BOLO relied on by the arresting officer was based on probable cause that defendant committed the burglary inasmuch as it was based on the witness's identification of defendant as the perpetrator (*see People v McCutcheon*, 214 AD3d 1446, 1447 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]; *People v Motter*, 235 AD2d 582, 586 [3d Dept 1997], *lv denied* 89 NY2d 1038 [1997]). Additionally, the arresting officer relied on information passed along by the police detective that the burglary suspect had stolen a unique green bicycle—the same bicycle that defendant was observed riding at the time of his arrest. Consequently, inasmuch as defendant's arrest was lawful, we reject defendant's contention that the court erred in refusing to suppress physical evidence seized incident to the lawful arrest (*see McCutcheon*, 214 AD3d at 1447).

Entered: November 15, 2024 Ann Dillon Flynn
Clerk of the Court

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

815

KA 20-01046

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS J. MOSHER, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered June 29, 2020. The judgment convicted defendant, upon a guilty plea, of criminal contempt in the first degree, criminal contempt in the second degree, and aggravated family offense (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of one count of criminal contempt in the second degree (Penal Law § 215.50 [3]), two counts of aggravated family offense (§ 240.75) and one count of criminal contempt in the first degree (§ 215.51 [b] [iv]), defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to timely request judicial diversion to drug treatment court. We reject that contention.

"In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Price*, 194 AD3d 1382, 1385 [4th Dept 2021], *lv denied* 37 NY3d 974 [2021] [internal quotation marks omitted]; *see People v Ford*, 86 NY2d 397, 404 [1995]). To establish ineffective assistance, a defendant must "demonstrate the absence of strategic or other legitimate explanations" for counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant failed to meet that burden inasmuch as he was not charged with an offense specified in CPL 216.00 (former [1]), and thus would not have been eligible for diversion (*see Matter of Doorley v DeMarco*,

106 AD3d 27, 36-37 [4th Dept 2013]), even if defense counsel had made the request in a timely manner (*see generally* CPL 216.05 [1]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

819

CA 23-01882

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
ADAM BROCKWAY, ET AL., PETITIONERS-APPELLANTS,

AND MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, RESPONDENT-RESPONDENT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MICHELLE K. DEKAY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered October 2, 2023. The order dismissed the petition to modify an arbitration award.

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

Memorandum: Petitioners are individual members of Corrections Unit 7800-09 (Corrections Unit), a collective bargaining unit consisting of persons employed in certain titles by the Onondaga County Sheriff's Department. Prior to January 30, 2019, the Corrections Unit was a part of the much larger bargaining unit, known as the Onondaga Local 834 of Civil Service Employees Association, Inc. (CSEA), which included virtually all employees of respondent County of Onondaga (County). In early 2020 and in response to the COVID-19 pandemic, the County closed its offices and facilities in whole or in part and instituted a series of measurements to address the emergency situation. The County required some County employees, however, to continue to work because they were deemed essential to County operations. Thereafter, the CSEA filed a grievance seeking additional compensation for covered employees who were required to report to work at County operations during emergency conditions, upon allegations that the employees were entitled to such compensation pursuant to a provision in the collective bargaining agreement between the CSEA and the County (CBA). The CSEA and the County, however, had entered into a Memorandum of Agreement (MOA) during the pandemic providing that employees would receive the "salary and/or regular daily wage or base rate of employees in the CSEA Bargaining Unit(s) through March 31, 2020 due to COVID 19, if employees in the CSEA Bargaining Unit(s) [were] scheduled to work or stand by from home by the County." The MOA further provided that it superseded all language in the CBA "as it

relates to employee compensation and work assignments through March 31, 2020." After the CSEA and the County were unable to resolve the grievance, a demand for arbitration was filed by the CSEA. After a hearing, the arbitrator denied the grievance, finding, in relevant part, that the MOA superseded the relevant provision in the CBA. Petitioners assert that the CSEA's counsel's office advised the Corrections Unit that the County considered the arbitrator's award to apply to the Corrections Unit as well as the larger CSEA.

Petitioners thereafter brought the instant petition against the County, seeking an order modifying the arbitrator's award so that it provides that the award has no effect on the Corrections Unit or the collective bargaining agreement between the Corrections Unit and the County. Petitioners allege that, although the CSEA and the Corrections Unit have common representation through the CSEA's counsel's office, they are separate bargaining units with separate collective bargaining interests and separate collective bargaining agreements. Moreover, petitioners allege that the Corrections Unit was never asked to accept, nor did it sign off on, the MOA, and that the Corrections Unit did not authorize the CSEA to act on its behalf in the grievance. Supreme Court determined that petitioners did not have standing and dismissed the petition. We affirm.

CPLR 7511 (a) provides that "[a]n application to vacate or modify an [arbitrator's] award may be made *by a party* within ninety days after its delivery to him" (emphasis added). Further, when an arbitration results from a procedure outlined in a collective bargaining agreement, only those who are parties to the collective bargaining agreement can seek to vacate the arbitrator's award, unless the collective bargaining agreement grants those rights to a third party (*see Matter of Alava v Consolidated Edison Co. of N.Y.*, 183 AD2d 713, 714 [2d Dept 1992]; *see also Matter of City of Syracuse [Lee]*, 163 AD3d 1394, 1397 [4th Dept 2018]; *see generally Matter of Wilson v Board of Educ. of City of N.Y.*, 261 AD2d 409, 409 [2d Dept 1999]).

Here, the CSEA brought the grievance on behalf of County employees covered by the CBA. The CBA provides that an employee may submit their own grievance to the County, however, it permits only the CSEA to submit a class action grievance. The CBA further provides that the CSEA may request arbitration with respect to a grievance, but no provision in the CBA permits an employee to request arbitration, nor is there a provision that makes the employees a party to the collective bargaining agreement (*see generally Matter of Case v Monroe Community Coll.*, 89 NY2d 438, 442-443 [1997]; *Matter of Diaz v Pilgrim State Psychiatric Ctr. of State of N.Y.*, 62 NY2d 693, 695 [1984]). Additionally, neither petitioners nor the Corrections Unit participated in the arbitration and nothing in the record suggests that the Corrections Union instructed the CSEA to act on its behalf. Thus, we conclude that petitioners were not parties to the arbitration, and therefore they do not have standing to petition to modify the arbitrator's award (*see generally* CPLR 7511 [a]; *Matter of Widrick [Carpinelli]*, 155 AD3d 1564, 1564 [4th Dept 2017], *affd* 32

NY3d 975 [2018]; *County of Westchester v Mahoney*, 56 NY2d 756, 758 [1982]).

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court

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

824

CA 23-01829

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

EPHRAIM ATWAL AND SANDESH SINGH,
PLAINTIFFS-RESPONDENTS,

V ORDER

BRIAN SEMKIW, RUI MENDES AND BLAIR BAKER,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered October 20, 2023. The order, among other things, denied defendants' motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 18, 2024,

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

Entered: November 15, 2024

Ann Dillon Flynn
Clerk of the Court