SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 26, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

275.1/20
CA 19-01071

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

DARRYL L. MACKAY AND JOANNE MACKAY, PLAINTIFFS,

V ORDER

155 EAST MAIN ST., LLC, ET AL., DEFENDANTS.

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155 EAST MAIN ST., LLC, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

DHD VENTURES MANAGEMENT COMPANY, INC.,
THIRD-PARTY DEFENDANT,
COMFORT SYSTEMS USA (SYRACUSE), INC., DOING
BUSINESS AS BILLONE MECHANICAL CONTRACTORS,
THIRD-PARTY DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M.G. KATZ OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 1, 2019. The order, among other things, granted the motion of defendant-third-party plaintiff in part, granted third-party plaintiff leave to amend the third-party complaint, precluded third-party defendant Comfort Systems USA (Syracuse), Inc., doing business as Billone Mechanical Contractors, from introducing any evidence at trial on the issue of contractual indemnification and imposed sanctions on nonparty Lisa J. Black, Esq.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 8 and August 12, 2020,

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

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

295/20

CA 19-01649

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

DARRYL L. MACKAY AND JOANNE MACKAY, PLAINTIFFS,

V ORDER

155 EAST MAIN ST., LLC, ET AL., DEFENDANTS.

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155 EAST MAIN ST., LLC, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

DHD VENTURES MANAGEMENT COMPANY, INC.,
THIRD-PARTY DEFENDANT,
AND COMFORT SYSTEMS USA (SYRACUSE), INC., DOING
BUSINESS AS BILLONE MECHANICAL CONTRACTORS,
THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M.G. KATZ OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered August 7, 2019. The order denied defendant-third-party plaintiff's motion for summary judgment against third-party defendant Comfort Systems USA (Syracuse), Inc., doing business as Billone Mechanical Contractors.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 8 and August 12, 2020,

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

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

853

CA 20-00271

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

AUDREY BENNETT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO PARKS AND RECREATION,
DEFENDANT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 24, 2019. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint and granted plaintiff's cross motion for an order deeming her notice of claim to be timely filed nunc pro tunc.

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

Memorandum: On February 13, 2018, plaintiff allegedly slipped and fell on snow-covered ice on a sidewalk in front of property owned by defendant. Plaintiff concedes that no timely notice of claim was served. Plaintiff served an untimely notice of claim, followed by a summons and complaint. Defendant moved for summary judgment dismissing the complaint for failure to serve a timely notice of claim and, by notice of cross motion filed August 7, 2019, plaintiff sought an order deeming her notice of claim to be timely filed nunc pro tunc. Defendant now appeals from an order denying the motion and granting the cross motion. We reverse.

It is well settled that an "application for the extension [of time within which to serve a notice of claim] may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled" (*Pierson v City of New York*, 56 NY2d 950, 954 [1982]; *see Matter of Attallah v Nassau Univ. Med. Ctr.*, 131 AD3d 609, 609 [2d Dept 2015]). Where that time expires before the application for an extension is made, "the court lack[s] the power to authorize late filing of the notice [of claim]" (*Pierson*, 56 NY2d at 956).

Here, we conclude that "[p]laintiff's service of the summons and complaint within the limitations period does not excuse the failure to serve a notice of claim within that period," and we further conclude that "plaintiff's earlier service of a notice of claim is a nullity inasmuch as the notice of claim was served more than 90 days after the accident but before leave to serve a late notice of claim was granted" (*Wall v Erie County*, 26 AD3d 753, 753 [4th Dept 2006]; *see Fixter v County of Livingston*, 143 AD3d 1294, 1294-1295 [4th Dept 2016]; *Matter of Witt v Town of Amherst* [appeal No. 2], 17 AD3d 1030, 1031 [4th Dept 2005]). Thus, because plaintiff's cross motion seeking an order deeming her notice of claim to be timely filed "was made after the expiration of the maximum period permitted" for seeking such relief, i.e., one year and 90 days, Supreme Court should have denied plaintiff's cross motion, granted defendant's motion, and dismissed the complaint (*Matter of Donovan v County of Niagara*, 100 AD2d 740, 740 [4th Dept 1984], *affd* 64 NY2d 973 [1985]; *see* General Municipal Law §§ 50-e [5]; 50-i [1]; *Pierson*, 56 NY2d at 954).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

889

KA 19-00317

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY LAWRENCE, DEFENDANT-APPELLANT.

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

ANTHONY LAWRENCE, DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 25, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts), criminal possession of a firearm, harassment in the second degree, exposure of a person and criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree, and criminal possession of a firearm, granting that part of the omnibus motion seeking to suppress the handgun, and dismissing counts one, two, three and nine of the indictment, and as modified the judgment is affirmed and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of one count of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]), one count of criminal possession of a firearm (§ 265.01-b [1]), one count of harassment in the second degree (§ 240.26 [1]), one count of exposure of a person (§ 245.01), and one count of criminal mischief in the fourth degree (§ 145.00 [1]), defendant contends in his main and pro se supplemental briefs that County Court erred in refusing to suppress the handgun that was seized from a vehicle in which he was a passenger and that, consequently, the four counts related to that handgun, i.e., the weapon and firearm counts, must be dismissed. We agree.

According to the testimony at the suppression hearing, two

officers responded to the scene of a one-car collision and observed defendant and a woman standing outside of the vehicle, which had struck a tree. The woman informed the officers that she had been driving the vehicle and that defendant had been a passenger. The woman did not have identification, and the officers allowed her to walk to her nearby residence to retrieve it. During the encounter, defendant informed the officers that the vehicle belonged to a friend and that its registration certificate was inside. Although defendant stated that he would retrieve the registration certificate, one of the officers stated that he would retrieve the registration certificate because he was standing closer to the car. The officer then bent down and entered the car so that he could access the glove compartment. As he did so, the officer saw a revolver on the dashboard that, because of the manner in which the airbag had deployed, had not been visible from the outside. At the suppression hearing, the officer testified that defendant did not consent to the search of the vehicle, and the officer agreed that he lacked probable cause to conduct the search.

As an initial matter, there is no dispute that defendant has standing as a passenger of the vehicle to challenge its search by virtue of the People's reliance on the statutory automobile presumption (*see People v Washington*, 50 AD3d 1539, 1540 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]; *cf. People v Graham*, 171 AD3d 1559 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]; *see generally People v Wesley*, 73 NY2d 351, 360-362 [1989]). Furthermore, under the circumstances of this case, we agree with defendant that the officer who conducted the search lacked probable cause to do so (*see generally People v Johnson*, 183 AD3d 1273, 1274-1275 [4th Dept 2020]). In reaching that conclusion, we reject the People's assertion that, based on the holdings of *People v Branigan* (67 NY2d 860 [1986]) and *People v Philbert* (270 AD2d 210 [1st Dept 2000], *lv denied* 95 NY2d 856 [2000]), the officer was entitled to enter the vehicle for the purpose of obtaining the vehicle's registration certificate. Unlike in *Branigan*, there were no " 'safety reasons' " in this case preventing the officer from allowing defendant to retrieve the registration himself (67 NY2d at 861) and, here, defendant did not initially fail to produce the registration when prompted to do so by law enforcement (*cf. id.* at 861-862). Unlike in *Philbert* (270 AD2d at 210), the officer here, as he confirmed at the suppression hearing, lacked probable cause to search the vehicle and had no reason to believe that the vehicle contained evidence of a crime. We therefore modify the judgment by reversing those parts convicting defendant of criminal possession of a weapon in the second degree, two counts of criminal possession of a weapon in the third degree, and criminal possession of a firearm and dismissing counts one, two, three and nine of the indictment (*see generally Johnson*, 183 AD3d at 1273-1275).

Defendant further contends in his main and pro se supplemental briefs that suppression of the handgun also requires us to reverse those parts of the judgment convicting him of harassment in the second degree, exposure of a person, and criminal mischief in the fourth degree. We reject that contention. Those charges are not related to the handgun and instead arose from defendant's conduct while in police custody after being transported to the police station, and we conclude

that there is no "reasonable possibility that the evidence supporting the . . . tainted counts influenced the guilty verdicts on the other [counts]" (*People v Sinha*, 19 NY3d 932, 934 [2012] [internal quotation marks omitted]; *see People v Bulgin*, 105 AD3d 551, 551 [1st Dept 2013], *lv denied* 21 NY3d 1002 [2013]).

Defendant additionally contends in his pro se supplemental brief that he received ineffective assistance of counsel. Contrary to defendant's contention, defense counsel was not ineffective for failing to request a missing witness charge (*see generally People v Spagnuolo*, 173 AD3d 1832, 1833 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]) or a circumstantial evidence charge (*see generally People v Johnson*, 21 AD3d 1395, 1395 [4th Dept 2005], *lv denied* 5 NY3d 883 [2005]) inasmuch as such requests would have had " 'little or no chance of success' " (*People v Ross*, 118 AD3d 1413, 1416 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). With respect to defendant's claim that defense counsel was ineffective for eliciting testimony that he was on parole at the time of the collision, defendant "failed to meet his burden of establishing the absence of any legitimate explanations for [defense counsel's] strateg[y]" (*People v Gregory*, 72 AD3d 1522, 1523 [4th Dept 2010], *lv denied* 15 NY3d 805 [2010]), which appears to have been to use the testimony to explain defendant's behavior at the scene.

Defendant failed to preserve his contention in his main brief that statements made by the prosecutor during summation deprived him of his right to a fair trial (*see People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]), and similarly failed to preserve his contentions in his pro se supplemental brief that he was denied a fair trial based on prosecutorial misconduct during the questioning of witnesses at trial and that the court failed to provide defense counsel with certain transcripts (*see People v Henley*, 145 AD3d 1578, 1579 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017], *reconsideration denied* 29 NY3d 1080 [2017]; *see generally* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We have considered defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants reversal or further modification of the judgment.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

898

CA 20-00310

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

ANTHONY P. CAMUGLIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY EDWARD PAGE, M.D., ET AL., DEFENDANTS,
JOHN RICHARD RESTIVO, M.D., ROBERT MEIER, M.D.,
AND RADIOLOGY ASSOCIATES OF NEW HARTFORD, LLP,
DEFENDANTS-RESPONDENTS.

MICHAEL J. LAUCELLO, CLINTON, FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered July 25, 2019. The order granted the motion of defendants Robert Meier, M.D., John Richard Restivo, M.D., and Radiology Associates of New Hartford, LLP for summary judgment dismissing the complaint against them.

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

Memorandum: In this medical malpractice action, plaintiff appeals from an order granting the motion of defendants-respondents (defendants) for summary judgment dismissing the complaint against them. We reject plaintiff's contention that Supreme Court erred in granting the motion, and therefore we affirm.

"It is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]). Here, defendants met their initial burden on the motion by establishing the absence of a deviation from the accepted standard of care (*see Bristol*, 189 AD3d at 2116; *Bubar*, 177 AD3d at 1360). Therefore, the burden shifted to plaintiff to raise an issue of fact by submitting an expert's affidavit establishing such a deviation (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]; *Bubar*, 177 AD3d at 1359). Contrary to plaintiff's contention, he failed to meet his burden. It is well settled that "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to

establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant physician's summary judgment motion" (*Alvarez*, 68 NY2d at 325; *see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Here, plaintiff's expert failed to quantify or describe in any way the features of the condition that defendants allegedly failed to observe, and thus the expert's affidavit is insufficient to raise a triable issue of fact whether defendants deviated from good and accepted medical practice (*see Rivers v Birnbaum*, 102 AD3d 26, 44 [2d Dept 2012]; *see also Campbell v Bell-Thomson*, 189 AD3d 2149, 2150- 2151 [4th Dept 2020]; *Donnelly v Parikh*, 150 AD3d 820, 824 [2d Dept 2017]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

918

CA 19-01688

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

HAROLD D. KOPP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RHINO ROOM, INC., DEFENDANT-APPELLANT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 21, 2019. The order, inter alia, granted plaintiff's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion insofar as it sought summary judgment on the complaint and insofar as it sought dismissal of defendant's first counterclaim, and reinstating that counterclaim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff and defendant own adjoining parcels of property, acquired in 1996 and 2000, respectively. An easement on defendant's property appears in the recorded chain of title and benefits plaintiff's property. Plaintiff commenced this action seeking, inter alia, to quiet title to the easement pursuant to RPAPL article 15 and alleging that he has a valid easement and that defendant has been obstructing his use of that easement. Defendant answered and asserted several counterclaims, including a counterclaim to quiet title to the easement on the ground of adverse possession. Plaintiff moved for summary judgment on his complaint and dismissing defendant's counterclaims, and defendant moved for summary judgment on its first counterclaim, alleging adverse possession. Supreme Court granted plaintiff's motion in its entirety and denied defendant's motion. Defendant appeals.

We note at the outset that defendant has abandoned any contentions concerning its second and third counterclaims inasmuch as it has failed to address those claims on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

We reject defendant's contention that the court erred in denying

its motion. An easement created by grant can be extinguished by adverse possession (*see Spiegel v Ferraro*, 73 NY2d 622, 625 [1989]). In order to extinguish an easement by adverse possession, a party must "establish that the use of the easement has been adverse to the owner of the easement, under a claim of right, open and notorious, exclusive and continuous for a period of 10 years" (*id.*). Thus, "an easement may be lost by adverse possession if the owner or possessor of the servient estate claims to own it free from the private right of another, and excludes the owner of the easement, who acquiesces in the exclusion for [the prescriptive period]" (*id*. at 626 [internal quotation marks omitted]; *see Gold v Di Cerbo*, 41 AD3d 1051, 1054 [3d Dept 2007], *lv denied* 9 NY3d 811 [2007]; *Zeledon v MacGillivray*, 263 AD2d 904, 905 [3d Dept 1999]).

"A party claiming adverse possession may establish possession for the statutory period by 'tacking' the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property" (*Munroe v Cheyenne Realty, LLC*, 131 AD3d 1141, 1142 [2d Dept 2015], *lv denied* 27 NY3d 904 [2016]). "Tacking is permitted where there is an 'unbroken chain of privity between the adverse possessors' " (*id*.). "For tacking to apply, a party must show that the party's predecessor 'intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed' " (*id.*, quoting *Brand v Prince*, 35 NY2d 634, 637 [1974]; *see Avraham v Lakeshore Yacht & Country Club*, 278 AD2d 842, 842-843 [4th Dept 2000]). Contrary to defendant's contention, it failed to meet its initial burden on the motion of establishing that the 10-year period could be satisfied by tacking on the periods of adverse possession or use by its predecessor. Notably, defendant submitted no evidence detailing its predecessor's use of the disputed easement (*see Diaz v Mai Jin Yang*, 148 AD3d 672, 674 [2d Dept 2017]).

We similarly conclude that defendant failed to meet its initial burden of establishing that it extinguished the easement by way of adverse possession from the time of its purchase of the property in 2000 until the end of the statutory period in 2010. In 2008, the legislature enacted sweeping amendments to the provisions of the RPAPL governing claims of adverse possession (*see* L 2008, ch 269). As amended, RPAPL 501 (3) now defines claim of right as "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be." The 2008 amendments apply to this time period, i.e., 2000-2010, inasmuch as the purported adverse possession could not vest prior to the enactment of the statute (*see Reyes v Carroll*, 137 AD3d 886, 887 [2d Dept 2016]). Here, we conclude that defendant failed to establish by clear and convincing evidence that its use and possession of the easement was under a claim of right as defendant failed to show, as a matter of law, a reasonable basis for the belief that the property belonged to it alone, free from the burden of an easement (*see* RPAPL 501 [3]; *Fini v Marini*, 164 AD3d 1218, 1220 [2d Dept 2018]).

We agree with defendant, however, that plaintiff was not entitled to summary judgment on his complaint or dismissing defendant's first counterclaim. Plaintiff's complaint included three causes of action,

the success of which required a finding of the continued existence of a valid easement. Similarly, to warrant summary judgment dismissing defendant's first counterclaim, plaintiff was required to demonstrate that the easement had not been extinguished by adverse possession. Here, however, the record establishes that defendant's use of the easement has been adverse to the owner of the easement, open and notorious, and continuous for a period of 10 years, and plaintiff did not meet his initial burden on his motion of establishing, as a matter of law, that the use was not under a claim of right as that term is defined by statute (*see* RPAPL 501 [3]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore modify the order by denying plaintiff's motion insofar as it sought summary judgment on the complaint and insofar as it sought summary judgment dismissing defendant's first counterclaim, alleging that the easement was extinguished by adverse possession, and we reinstate that counterclaim.

As a final note, we must again express our frustration to the trial courts that choose not to issue formal decisions (*see generally Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020]; *Doucette v Cuviello*, 159 AD3d 1528, 1528 [4th Dept 2018]; *McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]). This case involved competing summary judgment motions, and the trial court chose not to write. To maximize effective appellate review, we must remind our colleagues in the trial courts to provide their reasoning instead of simply issuing orders.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

990.1

TP 20-00512

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

IN THE MATTER OF MICHAELJON BLUE,
PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, COMMISSIONER, NEW YORK
STATE DEPARTMENT OF HEALTH, AND THE SHORE
WINDS, LLC, RESPONDENTS-DEFENDANTS.

EMPIRE JUSTICE CENTER, ROCHESTER (FIONA WOLFE OF COUNSEL), LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., AND DISABILITY RIGHTS NEW YORK, FOR PETITIONER-PLAINTIFF.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-DEFENDANT HOWARD A. ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH.

LAW OFFICES OF PULLANO & FARROW, ROCHESTER (MICHAEL P. SCOTT-KRISTANSEN OF COUNSEL), FOR RESPONDENT-DEFENDANT THE SHORE WINDS, LLC.

Proceeding pursuant to CPLR article 78 and declaratory judgment action (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Gail Donofrio, J.], entered February 26, 2020) to review a determination authorizing the discharge of petitioner-plaintiff from respondent-defendant The Shore Winds, LLC.

It is hereby ORDERED that the order insofar as it transferred that part of the action/proceeding seeking declaratory relief is unanimously vacated without costs, the declaratory judgment action and CPLR article 78 proceeding are severed, the declaratory judgment action is remitted to Supreme Court, Monroe County, for further proceedings, and the determination is confirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul a determination permitting the discharge and involuntary transfer of petitioner from respondent-defendant The Shore Winds, LLC (Shore Winds) nursing home to another nursing home. In the determination made following a hearing (*see* 10 NYCRR 415.3 [i] [2]), the Administrative Law Judge (ALJ) concluded that Shore Winds met its burden of establishing that the discharge and transfer was necessary on the ground of failure to pay and that the discharge plan

was appropriate (*see* 10 NYCRR 415.3 [i] [2] [iii] [b]).

Preliminarily, contrary to the contentions of petitioner and respondent-defendant Howard A. Zucker, Commissioner, New York State Department of Health (DOH), Supreme Court properly transferred the CPLR article 78 proceeding to this Court pursuant to CPLR 7804 (g) inasmuch as the petition-complaint (petition) raises an issue "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence" (CPLR 7803 [4]; *see also Matter of Hosmer v New York State Off. of Children & Family Servs.*, 289 AD2d 1042, 1042 [4th Dept 2001]; *Matter of McKins v Coughlin*, 142 AD2d 987, 987 [4th Dept 1988], *lv denied* 74 NY2d 603 [1989]). In particular, petitioner challenges the determination following a quasi-judicial hearing conducted pursuant to direction by law at which evidence was taken (*see* 10 NYCRR 415.3 [i] [2]) on the grounds that the ALJ disregarded evidence that Shore Winds failed to properly inform her of charges during her stay and that the ALJ's conclusion regarding the adequacy of the discharge plan was not supported by the hearing testimony (*see Matter of Beechwood Sanitarium v DeBuono*, 247 AD2d 928, 928-929 [4th Dept 1998]). Contrary to petitioner's assertion, our task with respect to those allegations is to determine whether the ALJ's conclusion that Shore Winds met its burden at the hearing is supported by substantial evidence (*see id.*). "This is so even where, as here, the relevant facts are largely undisputed, [inasmuch] as 'substantial evidence consists of proof within the whole record of such *quality and quantity* as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically' " (*Matter of Johnson v New York City Tr. Auth.*, 182 AD3d 970, 972 [3d Dept 2020], quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]; *see Matter of Burnett v Borden Chem. Div. Borden*, 35 NY2d 766, 767 [1974]). Therefore, "regardless of the terms used by petitioner [in the petition], a substantial evidence issue has been raised" (*Matter of Bulmahn v New York State Off. of Medicaid Inspector Gen.*, 106 AD3d 1504, 1505 [4th Dept 2013], *lv denied* 22 NY3d 860 [2014] [internal quotation marks omitted]). While petitioner additionally raises a question whether the ALJ's interpretation of a regulation is arbitrary and capricious (*see* CPLR 7803 [3]; *Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 276, 279-280 [2003]), the court still properly transferred the entire CPLR article 78 proceeding to this Court inasmuch as "the 'petition raises a substantial evidence question, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g)' " (*Matter of Green v Sticht*, 124 AD3d 1338, 1338 [4th Dept 2015], *lv denied* 26 NY3d 906 [2015]; *see Matter of OTR Media Group, Inc. v Board of Stds. & Appeals of the City of N.Y.*, 132 AD3d 607, 607-608 [1st Dept 2015]; *see generally Matter of Bernier v Shah*, 120 AD3d 1572, 1572-1573 [4th Dept 2014]; *Matter of Hoch v New York State Dept. of Health*, 1 AD3d 994, 994 [4th Dept 2003]).

Nonetheless, although petitioner also contends that she is

entitled to declaratory relief, we do not "have jurisdiction to consider the declaratory judgment action as part of this otherwise properly transferred CPLR article 78 proceeding" (*Matter of Cookhorne v Fischer*, 104 AD3d 1197, 1197 [4th Dept 2013]). The transfer of a declaratory judgment action to this Court is not authorized by CPLR 7804 (g) (*see Matter of Applegate v Heath*, 88 AD3d 699, 700 [2d Dept 2011]; *Matter of Coleman v Town of Eastchester*, 70 AD3d 940, 941 [2d Dept 2010]) and we "lack[] jurisdiction to consider a declaratory judgment action in the absence of a proper appeal from a court order or judgment" (*Matter of Cram v Town of Geneva*, 182 AD2d 1102, 1102-1103 [4th Dept 1992]). We therefore vacate the order insofar as it transferred the declaratory judgment action, sever the declaratory judgment action and CPLR article 78 proceeding, and remit the declaratory judgment action to Supreme Court for further proceedings (*see Cookhorne*, 104 AD3d at 1197-1198).

With respect to the merits of the CPLR article 78 proceeding, petitioner contends that the ALJ erred in concluding that Shore Winds met its burden of establishing that the discharge and transfer was necessary on the ground of failure to pay. We reject that contention.

As relevant here, the discharge and transfer of a resident from a nursing home is "permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third-party insurance) a stay at the facility" (10 NYCRR 415.3 [i] [1] [i] [b]). "Such transfer or discharge shall be permissible only if a charge is not in dispute, no appeal of a denial of benefits is pending, or funds for payment are actually available and the resident refuses to cooperate with the facility in obtaining the funds" (*id*.). The ALJ interpreted the regulation as permitting discharge for nonpayment where, after the requisite notice, there remains an unpaid charge (or charges) not in dispute, even if there are *other* charges that happen to be in dispute. "[C]ourts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]), and thus "an agency's interpretation of its own regulations will not be disturbed where it is not irrational or unreasonable" (*Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.*, 163 AD3d 1517, 1519 [4th Dept 2018], *lv denied* 32 NY3d 1191 [2019] [internal quotation marks omitted]; *see Elcor Health Servs.*, 100 NY2d at 276, 279-280). Here, contrary to petitioner's assertion, inasmuch as the regulation provides a disjunctive list of three limited situations in which a nursing home is permitted to discharge a resident for nonpayment, including where "a charge"—in the singular—"is not in dispute" (10 NYCRR 415.3 [i] [1] [i] [b]; *see generally Matter of Gerald R.M.*, 12 AD3d 1192, 1194 [4th Dept 2004]), we conclude that the ALJ's "interpretation does not conflict with the plain language of the regulation, is neither arbitrary and capricious nor irrational and, as a result, should not be disturbed" (*Elcor Health Servs*., 100 NY2d at 280).

Contrary to petitioner's further assertion, there is substantial evidence of undisputed charges of approximately $6,000 for net available monthly income (NAMI) and $3,500 for excess resources during

the period when Medicaid was effective, which petitioner failed to pay despite having reasonable and appropriate notice (*see* 10 NYCRR 415.3 [i] [1] [i] [b]). First, with respect to notice, the regulations make nursing homes responsible for "inform[ing] each resident verbally and in writing before, or at the time of admission, and periodically when changes occur during the resident's stay, of services available in the facility and of charges for those services, including any charges for services not covered by sources of third party payment or by the facility's basic per diem rate" (10 NYCRR 415.3 [h] [2] [iii]). Here, the ALJ properly concluded that the admission agreement signed by petitioner's representative on her behalf constituted an enforceable contract that adequately informed petitioner of the relevant charges. In the admission agreement, petitioner agreed to pay the daily basic charge as set by the program under which she had coverage, e.g., Medicaid, and she further agreed to "remain personally liable for any cost of care determined not covered by any third-party payor including . . . Medicaid." The fact that the admission agreement did not specify the exact dollar amount of the daily basic charge, which was set by the program under which petitioner had coverage, does not render the admission agreement so indefinite as to be unenforceable (*see Seton Health at Schuyler Ridge Residential Health Care v Dziuba*, 127 AD3d 1297, 1298 [3d Dept 2015]). " '[A] price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula' " (*id.*, quoting *Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990]). "[W]here at the time of the agreement the parties have manifested their intent to be bound, a price term will be sufficiently definite if it can be defined by reference to, among other things, 'an objective extrinsic event, condition or standard,' or by the subsequent conduct of the parties" (*id.* at 1299). Here, the price terms could be defined by reference to the Medicaid rates as determined by that program based on petitioner's eligibility and circumstances, and by any invoices sent to petitioner's representative (*see id.*). Consistent with the information provided in the admission agreement about petitioner's responsibility for charges not covered under Medicaid, Shore Winds' pre-discharge statements that were periodically issued to petitioner's representative reflected that petitioner owed, inter alia, monthly NAMI charges and the one-time excess resources charge from the effective date of her Medicaid coverage. Even assuming, arguendo, that the record establishes that petitioner had adequate notice of the NAMI and excess resources charges only, we conclude that the ALJ properly determined, based on a rational interpretation of the regulation, that those charges alone would be sufficient to establish valid grounds for discharge for nonpayment (*see* 10 NYCRR 415.3 [i] [1] [i] [b]). Second, with respect to the status of those charges, the record of the hearing establishes that such charges were not in dispute and remained unpaid (*see id.*). Based on the foregoing, we conclude that there is substantial evidence supporting the determination that Shore Winds met its burden of establishing that the discharge and transfer was necessary on the ground of failure to pay (*see* 10 NYCRR 415.3 [i] [1] [i] [b]; [i] [2] [iii] [b]).

Petitioner further contends that the ALJ erred in concluding that Shore Winds met its burden of establishing that the discharge plan was appropriate. We also reject that contention.

Shore Winds had the burden of establishing that the discharge plan for petitioner was appropriate (*see* 10 NYCRR 415.3 [i] [2] [iii] [b]). In doing so, Shore Winds had to establish, in relevant part, that it "provide[d] sufficient preparation and orientation to [petitioner] to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresse[d] the medical needs of [petitioner] and how these will be met after discharge" (10 NYCRR 415.3 [i] [1] [vi]).

Contrary to petitioner's assertion, we conclude that there is substantial evidence supporting the ALJ's conclusion that the discharge plan addressed petitioner's medical needs. Such evidence includes the professional opinions of Shore Winds' staff that the new nursing home would be a good fit for petitioner, the new nursing home's acceptance of petitioner after reviewing her medical records and history, and the testimony of Shore Winds' social worker regarding the appropriateness of the discharge to that location, her consultation with Shore Winds' staff about the discharge, and her representation that there was no difference between Shore Winds and the new nursing home with respect to the specialist and physician care that each could arrange for petitioner (*see id.*). We decline petitioner's request to, in effect, weigh the evidence inasmuch as, "in making a substantial evidence determination, we do not weigh the evidence or assess the credibility of the testimony presented" (*Matter of Klimov v New York State Div. of Human Rights*, 150 AD3d 1677, 1678 [4th Dept 2017] [internal quotation marks omitted]). Moreover, we reject petitioner's related contention that the ALJ improperly shifted the burden on the medical needs issue. The ALJ concluded only that petitioner failed to refute the evidence presented by Shore Winds that professionals considered the new nursing home a medically-appropriate facility for petitioner. The ALJ's conclusion was not in error given that Shore Winds had the burden at the hearing and petitioner, in response, was entitled to refute any testimony or evidence presented (*see* 10 NYCRR 415.3 [i] [2] [ii] [e]).

Contrary to petitioner's further contention, there is substantial evidence to support the conclusion that Shore Winds provided petitioner with sufficient preparation and orientation to ensure a safe and orderly transfer. The discharge plan provided that Shore Winds would arrange for the appropriate transportation to the new nursing home and, if needed, for a staff member to accompany petitioner. The discharge plan further provided a plan for packing and transporting petitioner's personal belongings, and obtaining new prescription medications upon arrival at the new nursing home. In terms of orientation at the new nursing home—a facility with which Shore Winds knew petitioner was unfamiliar—Shore Winds' social worker explained that there would be a discussion between a nurse at Shore Winds and a nurse at the new nursing home and that she would be in contact with the social worker at the new nursing home, who would be

able to answer any questions for petitioner. Shore Winds' social worker further explained that Shore Winds would provide a staff member to accompany petitioner to help her transition and that the new nursing home, based on information provided by Shore Winds, would have petitioner's medications ready before she arrived. Thus, there is substantial evidence that Shore Winds prepared and oriented petitioner for a safe and orderly transfer (*see* 10 NYCRR 415.3 [i] [1] [vi]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1079

KA 18-01956

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL MEEKS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, MCCARTHY LAW, KEENE VALLEY (NOREEN E. MCCARTHY 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 April 12, 2018. The judgment convicted defendant upon his plea of guilty of rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of rape in the first degree (Penal Law § 130.35 [4]), defendant contends that his waiver of indictment is jurisdictionally defective because it did not provide adequate notice of the charges upon which the prosecution by superior court information (SCI) would proceed (*see* CPL 195.10, 195.20; *see generally People v Thomas*, 34 NY3d 545, 568-570 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We agree. To be valid, a waiver of indictment must contain, inter alia, "the name, date and approximate time and place of each offense" to be charged in the SCI (CPL 195.20). A waiver of indictment that fails to provide sufficient information about the approximate time or location of an offense is not per se jurisdictionally defective where the alleged omissions merely involve "non-elemental factual information" (*Thomas*, 34 NY3d at 569; *see People v O'Connor*, 184 AD3d 1137, 1137-1138 [4th Dept 2020], *lv denied* 35 NY3d 1068 [2020]; *People v Ramirez*, 180 AD3d 1378, 1379 [4th Dept 2020], *lv denied* 35 NY3d 973 [2020]). As the Court of Appeals has recently stated, however, "the purpose of the written waiver of indictment form is to ensure the defendant had notice of the charges upon which the prosecution by SCI would proceed," and the written waiver "must memorialize with sufficient specificity the charges for which a defendant waives prosecution by indictment" (*Thomas*, 34 NY3d at 569). In assessing the

sufficiency of the facts alleged as to non-elements of the crime in an accusatory instrument, "the fundamental concern is whether the defendant had reasonable notice of the charges for double jeopardy purposes and to prepare a defense" (*id.* at 570).

Here, the underlying felony complaint alleged four offenses predicated on defendant's purported violation of three Penal Law provisions: two separate acts of rape in the first degree that occurred in September and October 2016, respectively (Penal Law § 130.35 [4]), an act of criminal sexual act in the first degree that occurred in November 2016 (§ 130.50 [4]), and acts that constituted endangering the welfare of a child (§ 260.10 [1]). In contrast, the waiver of indictment listed only a *single count* to be charged in the SCI: a count of rape in the first degree that allegedly occurred sometime between July and November 2016. Inasmuch as the sole charge in the waiver of indictment and SCI could plausibly refer to either of the acts of rape in the first degree alleged in the felony complaint, the waiver of indictment failed to put defendant on notice of the precise crime for which he was waiving prosecution by indictment and was thus jurisdictionally defective. Pointedly, this is not a case in which the waiver of indictment and SCI contained all of the same offenses alleged in the felony complaint, which, despite any generic language in the waiver, would have sufficed to place defendant on notice of the offenses for which he was waiving prosecution by indictment (*cf. Thomas*, 34 NY3d at 570; *O'Connor*, 184 AD3d at 1137-1138).

In addition to impeding defendant's ability to prepare a defense (*see Thomas*, 34 NY3d at 570), the defect in the waiver of indictment—i.e., the indeterminancy of the precise rape offense for which defendant was agreeing to waive indictment—implicates double jeopardy concerns because there was no language in the waiver form, SCI, or at the plea colloquy informing defendant that his plea to one count of rape in the first degree would be in full satisfaction of the offenses alleged in the felony complaint. Consequently, defendant could potentially be subjected to a subsequent prosecution for the offenses not identified in the waiver of indictment or charged in the SCI (*see e.g. People v Van Nostrand*, 217 AD2d 800, 801 [3d Dept 1995], *lv denied* 87 NY2d 851 [1995]; *People v Davis*, 187 AD2d 750, 750 [3d Dept 1992]). Absent a clear identification of which rape offense was the subject of the waiver of indictment and plea, there is no guarantee that any subsequent permissible prosecution connected to the felony complaint would not involve the offense already pleaded to. The lack of precision in the waiver of indictment would therefore effectively prevent defendant from defending against a subsequent prosecution on the ground of double jeopardy.

We therefore reverse the judgment, vacate the plea and waiver of indictment, dismiss the SCI, and remit the matter to County Court for proceedings pursuant to CPL 470.45 (*see People v Kerce*, 177 AD3d 1384, 1385 [4th Dept 2019]). In light of our determination, defendant's

remaining contentions are academic.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1095

CA 19-02340

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

TARIK ELIBOL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICIA MELLON-ELIBOL, DEFENDANT-RESPONDENT.

JOHN RICHARD STREB, KENMORE, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 14, 2019. The order directed plaintiff to contribute to defendant's counsel fees.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law with costs and the award of counsel fees is vacated.

Memorandum: Defendant moved by order to show cause for enforcement of an order requiring plaintiff to, inter alia, reimburse defendant for missed mortgage payments and maintain a policy of life insurance pursuant to the parties' judgment of divorce. The resolution of that motion is not apparent from the record and there is no resulting order. Nevertheless, defendant's attorney submitted a quantum meruit application seeking an award of counsel fees with respect to the motion. Plaintiff opposed the application. Without having any of the parties' financial information or holding a hearing on the application, Supreme Court granted the application to the extent of awarding $2,750.00 in counsel fees, which it considered "fair and reasonable."

Viewing all of the circumstances in this case, including the procedural irregularities of the application, the lack of evidence regarding the parties' financial circumstances, and the uncontested allegations in the record regarding misrepresentations made by defendant's attorney, we agree with plaintiff that the court abused its discretion in awarding counsel fees to defendant's attorney (*see generally* Domestic Relations Law § 238; *Matter of Nenninger v Kelly*, 140 AD3d 964, 965 [2d Dept 2016]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1107

KA 16-02355

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN L. BUTLER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CALVIN L. BUTLER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered August 25, 2016. The judgment convicted defendant upon a nonjury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, criminally using drug paraphernalia in the second degree (two counts) and unlawful possession of marihuana.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, criminal possession of a controlled substance in the third degree (CPCS 3rd) (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (CPCS 4th) (§ 220.09 [1]). That judgment arose from the discovery of illicit substances during a search of a residence in Ontario County. In appeal No. 2, defendant appeals from a judgment convicting him upon a plea of guilty of CPCS 3rd (§ 220.16 [1]). That judgment arose from his possession of illicit substances at the time of his arrest in Seneca County. Finally, in appeal No. 3, defendant appeals from a judgment convicting him upon a plea of guilty of criminal sale of a controlled substance in the third degree (§ 220.39 [1]), which was related to his sales of cocaine to a confidential informant in Seneca County.

Contrary to defendant's contention in the main brief in appeal No. 1, County Court's *Molineux* ruling does not warrant reversal. At the beginning of the trial, the court ruled that it would consider evidence of a sale that occurred on the day that defendant was

arrested and the residence in Ontario County was searched. The court determined that such evidence was relevant to the issue of defendant's intent to sell the controlled substances as well as the underlying narrative and background of the events that day. The court precluded the People from using evidence of drug sales made on other dates.

We perceive no error in the court's ruling. The drug sale in Seneca County on the day of defendant's arrest was the catalyst for the search of the Ontario County residence. It was the People's theory that defendant would retrieve drugs from that residence and sell them to, inter alia, the confidential informant in Seneca County. As a result, the *Molineux* evidence was relevant to establish that defendant intended to sell the drugs (*see People v Simmons*, 184 AD3d 326, 331 [4th Dept 2020]; *People v Whitfield*, 115 AD3d 1181, 1182 [4th Dept 2014], *lv denied* 23 NY3d 1044 [2014]). Such evidence was also relevant "to complete the narrative of events leading up to the crime for which defendant [was] on trial," and "the probative value of such evidence outweighed its prejudicial impact" (*Whitfield*, 115 AD3d at 1182 [internal quotation marks omitted]; *see generally People v Alvino*, 71 NY2d 233, 242 [1987]).

Unlike *People v Chaney* (298 AD2d 617, 617-619 [3d Dept 2002], *lv dismissed in part and denied in part* 100 NY2d 537 [2003]), a case cited by defendant, this is not a situation where the volume of drugs or other evidence made it clear that defendant intended to sell the drugs. Moreover, defendant put his intent at issue when defense counsel cross-examined the People's witness regarding whether the amount was consistent with personal use (*see People v Roberts*, 161 AD3d 1381, 1383 [3d Dept 2018]; *see also People v Veale*, 169 AD2d 939, 940 [3d Dept 1991], *affd* 78 NY2d 1022 [1991]).

Defendant further contends in his main brief in appeal No. 1 that the prosecutor violated the court's *Molineux* ruling when he discussed evidence related to precluded drug sales in his opening statement and admitted in evidence exhibits 23 and 24. The exhibits contained recordings of telephone calls defendant made while incarcerated at the Seneca County Jail, which contained references to the precluded sales. As defendant correctly concedes, his contentions concerning prosecutorial misconduct are not preserved for our review (*see People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]; *People v Brown*, 94 AD3d 1461, 1462 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]; *see generally People v Tonge*, 93 NY2d 838, 839-840 [1999]). In any event, defendant's contentions lack merit. The prosecutor made no reference to precluded evidence in his opening statement and, when submitting the relevant exhibits to the court in this nonjury trial, the prosecutor asked the court to consider them "in conjunction with [its] *Molineux* ruling," specifically noting that defendant made references to sales that were "not . . . relevant for this trial." The trial judge indicated that he understood that defendant referenced sales that "took place before the date in question," but stated that he would "disregard those and place them out of [his] mind as if [he] didn't hear them."

We further conclude that, contrary to defendant's contention in

his main and pro se supplemental briefs in appeal No. 1, he was not denied a fair trial when the court listened to the entirety of exhibits 23 and 24. "In a bench trial, the court is presumed to have considered only competent evidence in reaching its verdict" (*People v LoMaglio*, 124 AD3d 1414, 1416 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015] [internal quotation marks omitted]). That presumption, however, does not apply where a court sitting as the trier of fact improperly allows evidence over objection unless there is "some reliable indication that, notwithstanding the erroneous ruling, the judge knows that the evidence must be disregarded" (*People v Pabon*, 28 NY3d 147, 158 [2016]). Here, as in *Pabon*, "the judge's on-the-record statement that he was 'not [considering the inadmissible evidence]' provides sufficient assurance that" the inadmissible evidence was not being considered by the court (*id.*). The court's general reference to the exhibits when rendering its verdict does not establish that the court considered precluded information that was contained in those exhibits (*see People v O'Neill*, 169 AD3d 1515, 1516 [4th Dept 2019]; *People v Barnes*, 137 AD3d 1571, 1572 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016]; *cf. People v Memon*, 145 AD3d 1492, 1493 [4th Dept 2016]).

As the final contention in his main brief in appeal No. 1, defendant contends that he was denied effective assistance of counsel. We reject that contention. Viewing the evidence, the law and the circumstances of this case in their totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

In his pro se supplemental brief in appeal No. 1, defendant contends that the court erred in refusing to provide a missing witness instruction related to the lessor of the residence that was searched. As a preliminary matter, defendant's request for the instruction was untimely inasmuch as it was made after both parties rested (*see People v Muscarella*, 132 AD3d 1288, 1290 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]; *People v Williams*, 94 AD3d 1555, 1556 [4th Dept 2012]; *cf. People v Carr*, 14 NY3d 808, 809 [2010]). In any event, the charge would not have been warranted because defendant failed to meet his initial burden of establishing that the witness, i.e., defendant's long-term girlfriend, could be expected to testify favorably to the People (*see People v Barill*, 120 AD3d 951, 953 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014], *reconsideration denied* 25 NY3d 949 [2015]; *see generally People v Smith*, 33 NY3d 454, 459 [2019]; *People v Gonzalez*, 68 NY2d 424, 427 [1986]).

In appeal Nos. 2 and 3, defendant challenges the validity of the waiver of the right to appeal and further contends that, if the judgment in appeal No. 1 is reversed, then the judgments in appeal Nos. 2 and 3 must be reversed inasmuch as he pleaded guilty based on the promise that the sentences in those appeals would run concurrently with the sentence in appeal No. 1. We reject defendant's contention that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634

[2020]; *People v Ramos*, 7 NY3d 737, 738 [2006]). However, assuming, arguendo, that defendant's further contention is not encompassed by his valid waiver of the right to appeal, we conclude that, in view of our determination affirming the judgment in appeal No. 1, that contention lacks merit (*see People v Blackshell*, 178 AD3d 1355, 1358 [4th Dept 2019], *lv denied* 35 NY3d 968 [2020]; *People v Taylor*, 4 AD3d 875, 876 [4th Dept 2004], *lv denied* 3 NY3d 648 [2004]; *cf. People v Rowland*, 8 NY3d 342, 344-345 [2007]; *People v Fuggazzatto*, 62 NY2d 862, 863 [1984]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1112

KA 17-01704

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN L. BUTLER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MARK S. SINKIEWICZ, ACTING DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered April 25, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Same Memorandum as in *People v Butler* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1113

KA 17-01705

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN L. BUTLER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

MARK S. SINKIEWICZ, ACTING DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered April 25, 2017. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree.

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

Same Memorandum as in *People v Butler* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1127

KA 18-00950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YASSIN HUSSEIN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 15, 2017. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree, robbery in the second degree and criminal possession of stolen property 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 robbery in the first degree (Penal Law § 160.15 [3]), robbery in the second degree (§ 160.10 [1]), and criminal possession of stolen property in the fifth degree (§ 165.40). Defendant contends that he did not validly waive his right to appeal, and that the sentence is unduly harsh and severe. We agree with defendant that his waiver of the right to appeal is invalid. County Court mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal, and there was no clarification that appellate review remained available for certain issues. We therefore cannot conclude that the waiver of appeal was knowing or voluntary (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020]). The better practice is for the court to use the Model Colloquy, "which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we conclude that the negotiated sentence is not unduly

harsh or severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

1173

KA 19-02152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFTON A. MCBEAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered April 30, 2019. The judgment convicted defendant upon a plea of guilty of attempted burglary in the first 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 vacating that part of the sentence ordering restitution and by amending the order of protection to expire on May 22, 2033, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). Contrary to defendant's contention, the waiver of the right to appeal is valid. "[A]ll the relevant circumstances reveal a knowing and voluntary waiver" (*People v Thomas*, 34 NY3d 545, 563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant contends that the waiver of the right to appeal is invalid because he did not have an opportunity to discuss it with defense counsel. Defendant has waived that particular contention, however, inasmuch as County Court afforded defendant an opportunity to discuss the waiver of the right to appeal with defense counsel, but defendant declined that opportunity (*see generally People v Forshey*, 298 AD2d 962, 963 [4th Dept 2002], *lv denied* 99 NY2d 558 [2002], *reconsideration denied* 100 NY2d 561 [2003]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence and also "includes waiver of the right to invoke [this Court's] interest-of-justice jurisdiction to reduce the sentence" (*People v Lopez*, 6 NY3d 248, 255 [2006]; *see People v Vickers*, 186 AD3d 1070, 1071 [4th Dept 2020], *lv denied* 36 NY3d 977 [2020]).

Defendant's contention regarding the restitution component of his sentence survives his valid waiver of the right to appeal (*see People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d

953 [2019]; *People v Thomas*, 71 AD3d 1231, 1232 [3d Dept 2010], *lv denied* 14 NY3d 893 [2010]). The People correctly concede that the court erred in ordering restitution to a person who was not a "victim of the offense" (Penal Law § 60.27 [4] [b]), and we therefore modify the judgment by vacating that part of the sentence ordering restitution (*see People v Meyers*, 182 AD3d 1037, 1042 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]).

Finally, defendant's contention that the court erred in calculating the expiration date of the order of protection also survives his waiver of the right to appeal (*see People v Lopez*, 151 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]) and, although defendant failed to preserve that contention for our review, we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Lopez*, 151 AD3d at 1650; *People v Richardson*, 143 AD3d 1252, 1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]). Here, the expiration date of the maximum term of defendant's determinate sentence of imprisonment is May 22, 2025. Pursuant to CPL 530.13 (4) (A) (ii), the duration of the order of protection may not exceed, as it does here, eight years from that date. We therefore further modify the judgment by amending the order of protection to expire on May 22, 2033 (*see People v Griswold*, 186 AD3d 1104, 1105 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Chattley*, 49 AD3d 1307, 1307 [4th Dept 2008], *lv denied* 10 NY3d 933 [2008]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 15-00607

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARNEST HAWKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered September 18, 2014. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment that convicted him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of reckless endangerment in the first degree (§ 120.25). Defendant was acquitted of the remaining two counts of the indictment. The charges arose from defendant's alleged involvement in a robbery and shooting committed by a codefendant. The trial evidence established that the codefendant robbed an individual at gunpoint and that, as the codefendant walked away, the victim got into a vehicle, and the operator of that vehicle began driving toward the codefendant. The codefendant fired several shots at the vehicle in which the victim was riding, and then the codefendant got into a vehicle operated by defendant (defendant's car), which had been parked a couple of blocks away from the scene of the robbery, and defendant drove away.

Defendant contends on appeal that the evidence is legally insufficient to support the conviction or, alternatively, that the verdict is against the weight of the evidence. We agree with defendant that the evidence is legally insufficient to support his conviction of counts two and four of the indictment. Count two of the indictment, charging criminal possession of a weapon in the second

degree under Penal Law § 265.03 (1) (b), required the People to prove beyond a reasonable doubt that defendant either personally possessed or assisted the codefendant in possessing a loaded firearm, specifically a semiautomatic pistol, "with [the] intent to use the same unlawfully against another" (§ 265.03 [1]; *see* §§ 20.00, 265.03 [1] [b]). Initially, although defendant was charged as both a principal and an accessory, there is no dispute that defendant did not personally participate in the robbery itself and that he was not present when the codefendant robbed the victim (*see People v Eldridge*, 302 AD2d 934, 935 [4th Dept 2003], *lv denied* 99 NY2d 654 [2003]). Thus, defendant may be held criminally liable for the conduct of the codefendant only "if he acted with the mental culpability required for committing the underlying offense and solicited, requested, commanded, importuned or intentionally aided [the codefendant] to engage in conduct constituting the offense" (*People v Flanagan*, 28 NY3d 644, 661 [2017], *rearg denied* 29 NY3d 981 [2017]; *see* § 20.00; *People v Zanders*, 187 AD3d 1579, 1580 [4th Dept 2020], *lv denied* 36 NY3d 932 [2020]). Here, in a statement to a police investigator, defendant initially asserted that he did not recognize the codefendant when the codefendant forced defendant at gunpoint to get in defendant's car and drive away with the codefendant riding as a passenger. Defendant subsequently admitted to the investigator that he recognized the codefendant's name as someone who had previously robbed defendant and his uncle and, in a recorded phone call that he made after his arrest, defendant appears to refer to the codefendant by a nickname. Nonetheless, there is no evidence that defendant and the codefendant were together earlier on the day of the robbery and shooting, no evidence that defendant had prior knowledge either that the codefendant would be armed that day or that he was intending to rob someone, and no evidence that defendant and the codefendant had an ongoing relationship (*see Eldridge*, 302 AD2d at 935; *cf. Zanders*, 187 AD3d at 1580). Thus, viewing the evidence in the light most favorable to the People, as we must, we conclude that the evidence is legally insufficient to establish that defendant shared the codefendant's intent to use the loaded semiautomatic pistol unlawfully against another (*see generally People v Contes*, 60 NY2d 620, 621 [1983]).

With respect to count four of the indictment, charging reckless endangerment in the first degree, the People were required to prove beyond a reasonable doubt that defendant, either personally or by acting in concert with the codefendant, recklessly engaged in conduct that created a grave risk of death to another person by shooting a handgun at an occupied vehicle (*see* Penal Law § 120.25). The evidence established that the codefendant fired shots at the vehicle in which the victim was riding almost immediately after the robbery occurred and prior to the codefendant getting into defendant's car. Thus, for the same reasons discussed above, the evidence is legally insufficient to establish that defendant had any knowledge of the codefendant's possession of a firearm prior to the shooting or that defendant somehow "solicited, requested, commanded, importuned or intentionally aided [the codefendant] to engage in" the reckless shooting at the vehicle in which the victim was riding (*Flanagan*, 28 NY3d at 661; *see* § 20.00; *Eldridge*, 302 AD2d at 935).

We reject defendant's contention that there is legally insufficient evidence to support his conviction of count three of the indictment, criminal possession of a weapon in the second degree based on possession of a loaded semiautomatic pistol outside of his home or place of business (*see* Penal Law § 265.03 [3]). Witnesses testified that they saw no altercation between defendant and the codefendant when the latter entered defendant's car. Further, the codefendant was apprehended after he exited defendant's vehicle in an area near the location where the loaded semiautomatic pistol used in the robbery and shooting was recovered. Defendant himself told the interviewing police investigator that he had observed the codefendant fire the pistol at another vehicle before the codefendant forced defendant at gunpoint to get into defendant's car and directed defendant to drive away, thus indicating that defendant was aware while he was driving that the codefendant was armed with a loaded weapon (*see generally People v Allah*, 71 NY2d 830, 831-832 [1988]; *People v James*, 176 AD3d 1492, 1493 [3d Dept 2019], *lv denied* 34 NY3d 1078 [2019]). In addition, a rational trier of fact could infer from the evidence presented that defendant recognized the codefendant at the time he got into defendant's car (*see generally Contes*, 60 NY2d at 621). We therefore conclude, contrary to defendant's contention, that there is legally sufficient evidence establishing that defendant intentionally aided the codefendant in his possession of a loaded semiautomatic pistol outside of his home or place of business (*see* § 20.00; *Flanagan*, 28 NY3d at 661; *James*, 176 AD3d at 1493).

Nevertheless, viewing the evidence in light of the elements of criminal possession of a weapon in the second degree under count three of the indictment as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Initially, an acquittal of that count would not have been unreasonable inasmuch as the jury could have credited defendant's statement that the codefendant forced him to drive away (*see generally Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495). Thus, we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*Danielson*, 9 NY3d at 348). Here, although the evidence that defendant knew who the codefendant was prior to the robbery provides a rational basis for questioning defendant's credibility, we conclude, upon our independent review of the evidence, that the People failed to prove beyond a reasonable doubt that defendant, finding himself in the presence of a man with a loaded weapon, willingly "solicited, requested, commanded, importuned or intentionally aided" the codefendant's possession of that weapon (*Flanagan*, 28 NY3d at 661; *see* Penal Law § 20.00), or that defendant "shared a 'community of purpose' with [the codefendant]" (*Allah*, 71 NY2d at 832).

In light of our conclusions, defendant's remaining contentions are academic.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 16-00757

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

SHAKEITH STACKHOUSE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 19, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, robbery in the first degree (two counts), conspiracy in the fourth degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts and on the law, counts two and three of the indictment are dismissed against defendant, and a new trial is granted on the remaining counts of the indictment against him.

Opinion by TROUTMAN, J.:

Defendant appeals from a judgment convicting him upon a jury verdict of one count of murder in the second degree (Penal Law § 125.25 [3]), two counts of robbery in the first degree (§ 160.15 [1], [3]), one count of conspiracy in the fourth degree (§ 105.10 [1]), and one count of criminal possession of a weapon (CPW) in the fourth degree (§ 265.01 [2]). For the reasons discussed herein, we reverse the judgment, dismiss the robbery counts of the indictment against defendant, and grant him a new trial on the remaining counts.

I. Facts

On October 14, 2013, the victim stumbled home, a fatal knife wound in his back. He was pronounced dead that evening. Two days later, the police interviewed defendant, who provided a video-recorded statement. Defendant admitted that, on the evening of the crime, he was on South Salina Street in the City of Syracuse with three other young men—a cousin of his, a juvenile, and Tony Comer, Jr.—when the victim approached them for the purpose of buying drugs. Comer used the promise of drugs to lure the victim into a cut in the roadway and

steal his wallet. When Comer and the victim came out of the cut, the victim was shirtless. Comer was smiling, holding the victim's torn, white T-shirt. The victim left, shouting that he would come back with a gun and start shooting. Comer told the others that the victim still had $10 on his person, and the juvenile stated that he wanted the victim's last $10. About 10 or 15 minutes later, the victim returned wearing a sweatshirt, looking for his wallet. Defendant, his cousin, and the juvenile fought the victim. Defendant admitted that, by fighting the victim, he was helping the juvenile to acquire the victim's last $10 and that, during the fight, defendant stabbed the victim once in the back using a knife that he had concealed in his sleeve.

Defendant and the three other young men were indicted jointly on counts of felony murder in the second degree (count one), robbery in the first degree (counts two and three), and conspiracy in the fourth degree (count four), and defendant was also charged with CPW in the fourth degree (count six). With respect to counts two and three against defendant, a bill of particulars alleged:

> "[T]he offense occurred . . . between . . . 7:00 p.m. and 7:54 p.m. . . . in an area of . . . three [city] blocks . . . The police located the victim's wallet and some of its contents in a vacant field approximately a block from [the corner of South Salina Street and East Beard Avenue]. The defendant confessed to the police . . . and described these locations and what occurred . . . [He] was aware the victim's wallet was taken and he was aware that the victim had ten dollars and he assisted with taking or attempting to take ten dollars during this entire chain of events that made up the robbery."

On July 18, 2014, defendant wrote a letter to the judge, stating that he had seen defense counsel only twice in the nine months he had been in jail, and that counsel was ignoring his requests to meet and to provide copies of his paperwork. Defendant requested new assigned counsel. County Court did not address defendant's complaints for another six months.

Meanwhile, defendant filed an omnibus motion in which he sought, inter alia, suppression of his video-recorded statement. The court convened a *Huntley* hearing on November 19, 2014. Before the hearing commenced, defense counsel mentioned his desire to submit a list of necessary redactions in the event that the court were to refuse to suppress the statement. The court eventually denied that part of defendant's omnibus motion seeking suppression of the statement, at which time defense counsel put on record that the court had previously indicated that it would allow the defense to request redactions. However, no redactions would ever be requested.

On January 27, 2015, the court invited defendant to talk about the complaints that he made about defense counsel over six months

earlier. Defendant explained that he and defense counsel were "not seeing eye to eye." The court responded:

> "[Y]ou should get along with your lawyer, I guess, about seeing eye to eye. I don't know in terms of what that means, necessarily. But this is on for trial. And I think you and [defense counsel] should get along and communicate. And if you want some more communication with [defense counsel], I'm sure he'll do that as well. But this case is on for trial."

On March 30, 2015, defendant submitted a pro se motion for assignment of new counsel, which the court denied.

On April 28, 2015, defendant wrote a letter informing the court that another attorney was willing to represent him without pushing back the trial date. The court assigned her to represent defendant, emphasizing that the trial date was fixed for May 11, 2015, and would not be pushed back.

Defendant's jury trial commenced on the scheduled date. The People presented defendant's video-recorded police statement, wherein defendant admitted that he fought the victim, that by doing so defendant was helping the juvenile to acquire the victim's last $10, that defendant wielded a knife during the fight, and that during the fight defendant stabbed the victim in the back using the knife. The video was played for the jury virtually in its entirety, allowing the jury to hear defendant's unredacted reference to his prior history of incarceration. The People also presented a surveillance video of the corner of South Salina Street and East Beard Avenue during the relevant time period. The surveillance video depicted the victim wandering around the area, eventually walking out of frame accompanied by three men at 7:46 p.m., and stumbling back into frame alone three minutes later. Testimony of a police officer, as well as photographs in evidence, established that investigators discovered the victim's wallet lying in an open field behind a nearby library. Another photograph depicted the victim's unstained, white T-shirt lying in a nearby patch of grass, and an ATM surveillance photograph depicted Comer using the victim's bank card to withdraw cash at 7:56 p.m.

In summation, the People argued that there was a single robbery: "[Defendant] was present . . . during the entire incident . . . [The defense] repeatedly tried to tease this out as separate incidents. This was one entire robbery. [The victim's] wallet was taken, certainly. And then ten dollars was taken." The jury found defendant guilty on all counts.

II. Legal sufficiency and weight of the evidence

Defendant contends that the conviction with respect to counts one, two, three, and six of the indictment is not supported by legally sufficient evidence, and he further contends that the verdict with respect to those counts is against the weight of the evidence.

A. Counts one and six (felony murder and CPW)

As a preliminary matter, defendant's challenge to the legal sufficiency of the evidence with respect to counts one and six of the indictment is, in part, unpreserved for our review because defendant's motion for a trial order of dismissal was not " 'specifically directed' " at each of the errors alleged (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Murray*, 191 AD3d 1324, —, 2021 NY Slip Op 00722, at *1 [4th Dept 2021]). Nevertheless, to the extent that defendant's contention with respect to those counts is unpreserved, we 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 his conviction with respect to count one of the indictment, charging felony murder, is based on legally insufficient evidence inasmuch as his confession to the underlying predicate felony of robbery or attempted robbery lacked corroboration (*see* CPL 60.50). We reject that contention. Under CPL 60.50, "[a] person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the offense charged has been committed." All the statute requires is " 'some proof, of whatever weight, that a crime was committed by someone' " (*People v Chico*, 90 NY2d 585, 589 [1997], quoting *People v Daniels*, 37 NY2d 624, 629 [1975]). Although such proof may be direct or circumstantial, it must be proof of the fact of the crime (*see People v Cuozzo*, 292 NY 85, 92 [1944]). Proof that merely corroborates portions of the statement in which the confession or admission is made will not suffice (*see id.* at 93). The purpose of the rule is to prevent a conviction of a crime based on a confession when, in fact, no crime has been committed by anyone (*see Chico*, 90 NY2d at 590; *Cuozzo*, 292 NY at 92).

Where, as here, a defendant is charged with felony murder based on his or her confession or admission to causing the death of a person in furtherance of a robbery or an attempted robbery, CPL 60.50 does not require independent corroboration of the defendant's confession to the underlying predicate felony, i.e., robbery or attempted robbery (*see People v Davis*, 46 NY2d 780, 781 [1978]; *People v Harper*, 132 AD3d 1230, 1231 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). The statute merely requires "proof of the corpus delicti" (*People v Murray*, 40 NY2d 327, 331 [1976], *rearg denied* 40 NY2d 1080 [1976], *cert denied* 430 US 948 [1977]), which, in the case of a felony murder, is "a death resulting from someone's criminality, i.e., a death that did not occur by suicide, disease or accident" (*Harper*, 132 AD3d at 1231). Here, the fact that the victim died as a result of a knife wound to the back is sufficient corroboration (*see id.*).

Defendant further contends that the conviction with respect to count one of the indictment is based on legally insufficient evidence because he lacked the intent to forcibly steal property from the victim, as required to establish his culpability for the underlying felony (*see* Penal Law § 160.15; *see generally People v Nichols*, 230 NY 221, 226-227 [1921]). We reject that contention. " 'A defendant may

be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused' " (*People v Moreland*, 103 AD3d 1275, 1276 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013]; *see People v Desius*, 188 AD3d 1626, 1627 [4th Dept 2020]). Here, defendant admitted that he had been informed that the victim had $10, that the juvenile wanted to steal the $10, that defendant attacked the victim, and that, by doing so, defendant was helping his cousin and the juvenile steal the victim's last $10. Based on those admissions, a rational jury could infer that defendant had the requisite intent (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Contrary to defendant's legal sufficiency challenge with respect to count six of the indictment, charging him with CPW in the fourth degree, we conclude that the fact that the victim was stabbed to death sufficiently corroborates his confession (*see* Penal Law § 265.01 [2]; *People v Hawkins*, 110 AD3d 1242, 1243 [3d Dept 2013], *lv denied* 22 NY3d 1041 [2013]) and that the evidence is legally sufficient to establish that defendant intended to use the knife unlawfully against another (*see* § 265.01 [2]). Furthermore, viewing the evidence in light of the elements of the crimes of felony murder and CPW in the fourth degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

B. Counts two and three (robbery)

We agree with defendant that the verdict with respect to counts two and three of the indictment, charging him with robbery in the first degree, is against the weight of the evidence. We note, at the outset, that it is unclear whether the jury convicted defendant of those counts based on the theory that he participated in the theft of the victim's wallet or the theory that he participated in the subsequent theft of the victim's last $10.[1] Nevertheless, because the conviction does not withstand scrutiny under either theory, those counts of the indictment must be dismissed against defendant.

We first address the theory that defendant participated in the theft of the victim's wallet. The cornerstone of the People's case was defendant's confession, wherein defendant stated that Comer stole the wallet, the victim left the area and came back, and then defendant and his companions commenced the fatal attack after that. Defendant's timeline is amply corroborated by physical evidence. The victim's white T-shirt must have been torn from his body before he was stabbed

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[1] Defendant does not contend that the counts of the indictment charging him with robbery were facially duplicitous or rendered duplicitous by the People's evidence at trial (*see generally* CPL 200.30 [1]; *People v Bauman*, 12 NY3d 152, 154 [2009]; *People v Quiros*, 185 AD3d 1546, 1547 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]), and therefore we have no occasion to address those issues here.

because it was not stained by his blood. The fact that the dying victim was found wearing a sweatshirt soaked in blood establishes that he was wearing the sweatshirt, not the T-shirt, when he was stabbed, as does the surveillance video, which shows the victim wearing the sweatshirt in the minutes before and after the stabbing. The People's assertion that the assailants may have "pulled off both of the victim's shirts" during the attack, and that the victim "simply slid his sweatshirt back on" "during a break in the action," is implausible.

Further, the physical evidence amply corroborates defendant's statement that Comer stole the wallet during the first of the two incidents. The surveillance video shows the victim accompanied by three men, not four men, during the moments before the stabbing, and the ATM photograph depicts Comer using the victim's bank card at around the same time as the stabbing. Because defendant's version of the events is amply supported by the physical evidence, we conclude that, viewing the evidence in light of the elements of the crime of robbery in the first degree as charged to the jury under counts two and three of the indictment (*see Danielson*, 9 NY3d at 349), the verdict on those counts, to the extent that it is based on the People's theory that defendant participated in the theft of the victim's wallet, is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

With respect to the theory that defendant participated in the theft of the victim's last $10, we conclude that the verdict is against the weight of the evidence inasmuch as defendant's admission to that crime is uncorroborated (*see* CPL 60.50; *People v Maynard*, 143 AD3d 1249, 1250-1251 [4th Dept 2016], *lv denied* 28 NY3d 1148 [2017]). There was no "additional proof" that defendant or anyone else stole or attempted to steal the victim's last $10 (CPL 60.50; *see Harper*, 132 AD3d at 1231). Thus, although defendant's confession to felony murder was corroborated, his confession to the underlying robbery was not corroborated (*see Harper*, 132 AD3d at 1231), rendering the verdict on counts two and three, to the extent that they are based on the only remaining theory, against the weight of the evidence (*see Maynard*, 143 AD3d at 1251).

III. Suppression

Defendant's contention that the court erred in refusing to suppress his statements to the police is unpreserved because his specific contention is raised for the first time on appeal (*see* CPL 470.05 [2]; *People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]). We decline to exercise our discretion to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

IV. Right to counsel

Defendant contends, for two separate, but intertwined reasons, that the court failed to properly safeguard his constitutional right

to counsel (*see* US Const, 6th Amend; NY Const, art I, § 6). Specifically, defendant contends that the court erred in failing to conduct a minimal inquiry concerning his serious complaints about defense counsel, and that he was denied effective assistance of counsel. We agree with defendant in both respects.

A. Minimal inquiry

Our State and Federal Constitutions guarantee the right to counsel to indigent defendants in criminal proceedings (*see People v Smith*, 18 NY3d 588, 592 [2012]; *People v Porto*, 16 NY3d 93, 99 [2010]). Although the right does not encompass the right to an attorney of one's own choosing (*see Porto*, 16 NY3d at 99), an indigent person's right to counsel is just as important as that of a person who can afford to retain counsel. Indeed, the right to counsel is not merely a right to the pro forma assignment of a member of the bar (*see People v Medina*, 44 NY2d 199, 207 [1978]). Counsel must provide " 'effective' " representation (*id.*; *see People v Baldi*, 54 NY2d 137, 146 [1981]), and it is well established that the courts have an "ongoing duty" to safeguard that right (*People v Linares*, 2 NY3d 507, 510 [2004]; *see Medina*, 44 NY2d at 207).

Consistent with that duty, "courts must carefully evaluate serious complaints about counsel" (*Smith*, 18 NY3d at 592 [internal quotation marks omitted]; *see Porto*, 16 NY3d at 99-100). If the defendant advances "specific factual allegations of 'serious complaints about counsel' " (*Porto*, 16 NY3d at 100, quoting *Medina*, 44 NY2d at 207), the court is obligated to conduct "a 'minimal inquiry' " (*id.*, quoting *People v Sides*, 75 NY2d 822, 825 [1990]). The purpose of such an inquiry is to allow the court to "discern meritorious complaints from disingenuous applications by inquiring as to 'the nature of the disagreement or its potential for resolution' " (*id.*, quoting *Sides*, 75 NY2d at 825). If " 'good cause' " is shown, the court must grant a request for assignment of new counsel (*id.*; *see Smith*, 18 NY3d at 592). In deciding if good cause exists, a "trial court must consider the timing of the defendant's request, its effect on the progress of the case and whether present counsel will likely provide the defendant with meaningful assistance" (*Linares*, 2 NY3d at 510; *see Porto*, 16 NY3d at 100). " 'Good cause determinations are necessarily case-specific' " (*Smith*, 18 NY3d at 592, quoting *Linares*, 2 NY3d at 510), though good cause is generally found to be lacking where " 'tensions between client and counsel on the eve of trial were the precipitate of differences over strategy' or 'where a defendant was guilty of delaying tactics' " (*id.* at 593, quoting *Medina*, 44 NY2d at 208).

Here, defendant's initial request for new counsel "was supported by specific factual allegations of serious complaints about counsel" (*People v Smith*, 30 NY3d 1043, 1044 [2017] [internal quotation marks omitted]). Specifically, defendant alleged that he had seen defense counsel only twice in the preceding nine months that he had been jailed, and defense counsel was ignoring his requests to meet and to provide copies of his paperwork. Although defendant's request

obligated the court to conduct "a 'minimal inquiry' into 'the nature of the disagreement or its potential for resolution' " (*id.*), the court proceeded to a *Huntley* hearing and decided that part of defendant's omnibus motion seeking suppression without acknowledging defendant's complaints. Indeed, the court did not acknowledge his complaints until more than six months later, at which time the court addressed defendant's complaints with an open-ended question. Defendant briefly stated that he and defense counsel were not "seeing eye to eye." The court did not understand why, but, rather than seek to clarify the nature of the disagreement, the court gave a lengthy speech that defended defense counsel's performance and recited platitudes about communication while repeatedly noting the pending trial date, which was at that point 3½ months away. "The court might well have found upon limited inquiry that defendant's request was without genuine basis, but it could not so summarily dismiss this request" (*Sides*, 75 NY2d at 825).

Although the court eventually granted defendant's request for new counsel—fully three months later—she was not appointed until shortly before trial. Defendant did not request an adjournment of the trial date at that time, but it seems clear that he had internalized the court's insistence on a May 11 trial date, and it was the court's earlier error that forced defendant to choose between one attorney he did not want and another who had less than two weeks to prepare for a complicated murder trial. The relative lack of preparation time may have been a factor in replacement counsel's failure to seek redaction of the video-recorded statement, but such a showing is not necessary. "Courts should not delve into questions of prejudice when assistance of counsel is involved" (*People v Carr*, 25 NY3d 105, 112 [2015]). Thus, we conclude that the court's error in failing to inquire into defendant's complaints about defense counsel in an adequate or timely fashion requires reversal of the judgment of conviction with respect to the remaining counts of the indictment against defendant, i.e., counts one, four, and six, and we grant a new trial on those counts of the indictment against him (*see Sides*, 75 NY2d at 824-825).

B. Ineffective assistance of counsel

Although many of the errors alleged by defendant do not rise to the level of constitutional ineffectiveness (*see generally Baldi*, 54 NY2d at 147), we agree with defendant that, under the unique circumstances of this case, he was denied effective assistance of counsel by defense counsel's failure to seek any redaction of his video-recorded statement once the court refused to suppress it. The record reflects that the court indicated that defendant would be allowed to submit a list of proposed redactions, but no list was submitted. The jury was thus permitted to hear defendant's reference to his history of incarceration. "It is axiomatic that the prosecution is prohibited from introducing evidence of the past criminal record of a defendant where, as here, he has not taken the stand in his own behalf or put his character in issue" (*People v Mullin*, 41 NY2d 475, 479 [1977]), and thus that portion of the video should have been redacted upon an application by defendant (*see generally People v Ag*, 127 AD3d 581, 582 [1st Dept 2015], *lv denied* 25

NY3d 1159 [2015]). Other portions may have been the subject of a meritorious application based on the ground that certain statements were more prejudicial than probative (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]) and, although we cannot say that there would be no strategic or tactical reason for declining to seek redaction of those portions of the video, we conclude that defense counsel's inexplicable failure to seek redaction of defendant's reference to his criminal history demonstrates that defense counsel lacked a strategic or tactical rationale for failing to seek redaction of the other arguably prejudicial portions of the video (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]).

We note that, in concluding that defendant was denied effective assistance of counsel, we do not fault either of his attorneys individually. Defendant's first attorney was not allowed to see the representation through, and his second attorney was given only 10 days to prepare. Nevertheless, in reviewing defendant's contention, we consider the evidence, the law, and the circumstances of the case in their totality (*see Baldi*, 54 NY2d at 147). Here, the court's mishandling of defendant's request for new counsel created a circumstance that rendered the representation ineffective in its totality, and that denial of effective representation also requires reversal of the judgment with respect to the remaining counts of the indictment against defendant and a new trial on those counts against him. In light of our determination, we do not reach defendant's remaining contentions.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

28

KA 15-01986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QURAN L. COFFIE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 15, 2015. The judgment convicted defendant upon a jury verdict of robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of two counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]) and one count of attempted assault in the first degree (§§ 110.00, 120.10 [1]).

In appeal No. 1, we agree with defendant that Supreme Court erred in failing to hold a *Huntley* hearing before the start of trial. "When [a] motion [to suppress evidence] is made before trial, the trial may not be commenced until determination of the motion" (CPL 710.40 [3]; *see People v Jackson*, 221 AD2d 964, 964 [4th Dept 1995], *lv denied* 87 NY2d 903 [1995]; *People v Blowe*, 130 AD2d 668, 670 [2d Dept 1987]; *see also Matter of Green v DeMarco*, 87 AD3d 15, 17-18 [4th Dept 2011]). Here, defendant moved to suppress his statements to the police on the ground that they were involuntarily made (*see* CPL 710.20 [3]), but the court did not rule on the motion prior to trial and repeatedly refused to conduct a pretrial *Huntley* hearing, even after the People requested a *Huntley* hearing at the outset of the trial. Instead, the court granted the People's request for a *Huntley* hearing over defendant's objection after nine of the ten prosecution witnesses had already testified. Following that hearing, the court found the statements to

be voluntary and thus admissible.

The error is not harmless. It is well established that, "unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error" (*People v Crimmins*, 36 NY2d 230, 241 [1975]). Here, the evidence was not overwhelming (*cf. People v Horn*, 186 AD3d 1117, 1121 [4th Dept 2020], *lv denied* 36 NY3d 973 [2020]). The central factual question in this case was identity. The evidence of identity was that defendant was apprehended coming out of a building located on the block towards which the culprit had been seen running, he fit the description of the culprit, and he was identified by three eyewitnesses after a showup procedure. On the other hand, defendant did not have in his possession the fruits of the crime or the firearm used in the crime, nor was he dressed like the culprit. Moreover, showup identification procedures are inherently suggestive (*see People v Ortiz*, 90 NY2d 533, 537 [1997]; *People v Miller*, 191 AD3d 111, 116 [4th Dept 2020]), and the culprit had been wearing a partial face covering at the time of the crime, which further undermined the reliability of the identifications (*see State v Henderson*, 208 NJ 208, 266, 27 A3d 872, 907 [2011]).

Therefore, we reverse the judgment in appeal No. 1 and grant defendant a new trial on count one of the indictment (*see Blowe*, 130 AD2d at 668).

In appeal No. 2, defendant contends that the conviction is based on legally insufficient evidence and that the verdict is against the weight of the evidence. We reject those contentions. There is a valid line of reasoning and permissible inferences that could lead a rational jury to find the elements of the crimes proved beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that the court failed to adequately inquire into his request for new counsel. Where a defendant makes a seemingly serious request for new counsel, the court must make some minimal inquiry to determine whether the claim is meritorious (*see People v Sides*, 75 NY2d 822, 825 [1990]). Where, however, a defendant states only conclusory allegations without providing factual details, he or she fails to make a seemingly serious request, and further inquiry is not required (*see People v Porto*, 16 NY3d 93, 100 [2010]; *People v Thompson*, 32 AD3d 743, 743 [1st Dept 2006], *lv denied* 9 NY3d 870 [2007]). Here, on the day trial was scheduled to begin, defendant stated that defense counsel was "fired" for "[l]ack of communication." We conclude that no further inquiry by the court was required because that complaint was not a " 'serious complaint[] about counsel' " (*Porto*, 16 NY3d at 100; *see People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). We note that the court had already presided over the trial that resulted in the judgment on appeal in appeal No. 1 and had the

opportunity to observe defense counsel and his interactions with defendant throughout those proceedings.

We agree with defendant, however, that the sentence is unduly harsh and severe, and therefore we modify the judgment in appeal No. 2 as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with one another. Finally, we note that the certificate of conviction incorrectly reflects that defendant was sentenced to 3½ to 10 years' imprisonment on count one of the indictment, and it must therefore be amended to reflect that he was sentenced to 3⅓ to 10 years for that conviction (*see People v Correa*, 145 AD3d 1640, 1641 [4th Dept 2016]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

33

KA 16-00624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QURAN L. COFFIE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 17, 2016. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree (two counts) and attempted assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with one another, and as modified the judgment is affirmed.

Same memorandum as in *People v Coffie* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

59

CA 20-00866

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
SYRACUSE CITY SCHOOL DISTRICT,
PETITIONER-APPELLANT, MEMORANDUM AND ORDER

AND

ROCHELLE GILBERT (RAY), RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KATE REID OF COUNSEL), FOR PETITIONER-APPELLANT.

ROBERT T. REILLY, LATHAM (ELIZABETH R. SCHUSTER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 13, 2020 in a proceeding pursuant to CPLR article 75. The order dismissed petitioner's application to vacate an arbitration award.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by confirming the award and as modified the order is affirmed without costs.

Memorandum: Petitioner, Syracuse City School District (District), appeals from an order that dismissed its CPLR article 75 petition seeking to vacate an arbitration award. In the award, the Hearing Officer dismissed disciplinary charges against respondent, a tenured teaching assistant, determining that a hearing pursuant to Education Law § 3020-a was not necessary because respondent had submitted an "irrevocable Letter of Resignation for the purpose of retirement." Although we agree with respondent that petitioner was not entitled to vacatur of the award, we note that Supreme Court erred in failing to confirm the award pursuant to CPLR 7511 (e). We therefore modify the order accordingly.

"Education Law § 3020-a (5) limits judicial review of a hearing officer's determination to the grounds set forth in CPLR 7511" (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011]). Generally, "a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]). Where, as here, the parties are "subject to compulsory arbitration, the award must satisfy an additional layer of judicial

scrutiny—it 'must have evidentiary support and cannot be arbitrary and capricious' " (*McGraham*, 17 NY3d at 919; *see Matter of Bender [Lancaster Cent. Sch. Dist.]*, 175 AD3d 993, 996 [4th Dept 2019]). Inasmuch as there is no claim that the award violates a strong public policy or exceeds a limitation on the arbitrator's power, the award in this case can be vacated only if it is arbitrary, capricious or irrational (*see McGraham*, 17 NY3d at 920; *see also Falzone*, 15 NY3d at 534; *Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1121 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]).

It has been held that a hearing pursuant to Education Law § 3020-a is required "in the absence of an irrevocable resignation" by the employee or a voluntary settlement (*Matter of Folta v Sobol*, 210 AD2d 857, 858 [3d Dept 1994]). In other words, where a resignation is deemed conditional or revocable such that the employee could obtain employment with petitioner again in the future, the disciplinary proceeding should move forward (*see e.g. McGraham*, 17 NY3d at 919 n).

Here, in her letter of resignation, respondent stated that she was submitting an "irrevocable Letter of Resignation for the purposes of retirement" and that she "[had] no plans to, nor [would she] apply to work [for petitioner] in the future." Respondent added that her retirement application had been accepted by the New York State Teacher's Retirement System and that she "will not request or otherwise act in any manner to withdraw [her] resignation." Under the circumstances, we conclude that the Hearing Officer's determination that respondent's letter constituted an unconditional and irrevocable resignation, barring further prosecution of the section 3020-a charges, has evidentiary support in the record and is not arbitrary, capricious, or irrational (*see generally Matter of Girard v Board of Educ. of City School Dist. of City of Buffalo*, 168 AD2d 183, 184-185 [4th Dept 1991]; *Matter of Cannon v Ulster County Bd. of Coop. Educ. Servs.*, 155 AD2d 846, 847 [3d Dept 1989]; *cf. generally McGraham*, 17 NY3d at 919 n; *Matter of DeVito v Department of Educ. of the City of N.Y.*, 112 AD3d 421, 421 [1st Dept 2013]; *Folta*, 210 AD2d at 858-859).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

60

CA 19-01806

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

TERRY SLOWE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LECESSE CONSTRUCTION SERVICES, LLC, AND STONE QUARRY HOUSING DEVELOPMENT FUND CORP., DEFENDANTS-RESPONDENTS.

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

LAW OFFICE OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered September 6, 2019. The order, among other things, granted in part the motion of defendants and dismissed the Labor Law §§ 240 (1) and 241 (6) claims and denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion with respect to the Labor Law § 241 (6) claim and reinstating that claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages after he was injured by a component of an unbuilt mailbox structure that fell onto him at a construction site. The site was owned by defendant Stone Quarry Housing Development Fund Corp., and the construction project was managed by defendant Lecesse Construction Services, LLC. In his complaint, plaintiff asserted, inter alia, a Labor Law § 241 (6) claim. Defendants moved for summary judgment dismissing the complaint, and plaintiff now appeals from an order that, among other things, granted that motion in part and dismissed, inter alia, the section 241 (6) claim.

Plaintiff's Labor Law § 241 (6) claim is predicated on 12 NYCRR 23-2.1 (a) (1), which provides in relevant part that "[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" (*see generally Aragona v State of New York*, 74 AD3d 1260, 1261-1262 [2d Dept 2010]; *Lehner v Dormitory Auth. of State of N.Y.*, 221 AD2d 958, 959 [4th Dept 1995]). Contrary to defendants' assertion, the

scope of 12 NYCRR 23-2.1 (a) (1) is not limited exclusively to obstructed thoroughfares (*see Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409, 410 [1st Dept 2013]; *Castillo v 3440 LLC*, 46 AD3d 382, 383 [1st Dept 2007]; *but see Cody v State of New York*, 82 AD3d 925, 928 [2d Dept 2011]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382 [1st Dept 2007]). Rather, the plain text of the regulation creates three distinct obligations and potential sources of liability: first, "[a]ll building materials shall be stored in a safe and orderly manner"; second, "[m]aterial piles shall be stable under all conditions"; and third, "[m]aterial piles shall be . . . so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare" (12 NYCRR 23-2.1 [a] [1]). Neither *Motyka v Ogden Martin Sys. of Onondaga Ltd. Partnership* (272 AD2d 980, 981 [4th Dept 2000]) nor *Cafarella v Harrison Radiator Div. of Gen. Motors* (237 AD2d 936, 938 [4th Dept 1997]) supports defendants' interpretation of 12 NYCRR 23-2.1 (a) (1) because those cases addressed only the obstructed-thoroughfare portion of the regulation.

Here, we agree with plaintiff that the mailbox component at issue qualifies as a "building material[]" within the meaning of 12 NYCRR 23-2.1 (a) (1), and we further agree with plaintiff that triable issues of fact exist regarding the "safe[ty] and orderl[iness]" of the "manner" in which defendants "stored" that "building material[]." Consequently, Supreme Court erred in granting defendants' motion insofar as it sought summary judgment dismissing plaintiff's Labor Law § 241 (6) claim (*see Rodriguez*, 109 AD3d at 410; *Castillo*, 46 AD3d at 383). We therefore modify the order accordingly.

We have considered and rejected plaintiff's remaining contentions.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-00333

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

MIDTOWN MARKET MISSOURI CITY, TX. LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK TAVAKOLI, DEFENDANT-APPELLANT,
AND SH SALON LLC, DEFENDANT.

FRANK A. ALOI, ROCHESTER (ROBERT J. LUNN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 19, 2020. The order and judgment, among other things, awarded plaintiff partial summary judgment and money damages.

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

Memorandum: Plaintiff's predecessor conveyed its interest in a plaza in Missouri City, Texas and assigned a lease for salon space with defendants' predecessor to plaintiff. Plaintiff and defendants subsequently entered into two amendments to the lease agreement. Contemporaneously with the execution of the amendments, defendant Frank Tavakoli, owner of defendant SH Salon LLC, personally guaranteed performance of the lease and its amendments and consented to jurisdiction and venue in Monroe County. Approximately two years after the second lease amendment, defendants ceased making rental payments and abandoned the premises, claiming that plaintiff had failed to uphold its verbal representations that it would provide, inter alia, security and lighting for the premises, and marketing of the business. Plaintiff then commenced this action seeking damages for defendants' alleged breach of the commercial lease and Tavakoli's breach of the guarantees by failing to pay timely rent and by vacating or abandoning the premises. Tavakoli appeals from an order and judgment that granted plaintiff's motion for, inter alia, partial summary judgment on liability and denied defendants' cross motion for leave to amend the answer to assert certain affirmative defenses and counterclaims. We affirm.

"A guaranty is a promise to fulfill the obligations of another

party, and is subject 'to the ordinary principles of contract construction' " (*Cooperatieve Centrale Raiffeisen–Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]). "Under those principles, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*id.* at 493). Here, plaintiff met its initial burden on the motion by establishing that Tavakoli breached the guarantees executed by him (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We reject the contention of Tavakoli that he raised a triable issue of fact in opposition by presenting evidence of an oral condition precedent to the legal effectiveness of the guarantees. "[P]arol evidence may be admissible to prove a condition precedent to the legal effectiveness of a written agreement if the condition is not contradictory or at variance with its express terms" (*Bank of Suffolk County v Kite*, 49 NY2d 827, 828 [1980]; *see Tambe Elec., Inc. v Home Depot U.S.A., Inc.*, 49 AD3d 1161, 1162 [4th Dept 2008]). Here, the alleged oral condition precedent contradicts the unconditional guarantees that Tavakoli executed, and therefore it cannot be proven by parol evidence (*see Cooperatieve Centrale Raiffeisen–Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch*, 25 NY3d at 493-494; *Citibank v Plapinger*, 66 NY2d 90, 94-95 [1985], *rearg denied* 67 NY2d 647 [1986]; *Marine Midland Bank v Maloy*, 174 AD2d 994, 994 [4th Dept 1991]; *Meadow Brook Natl. Bank v Bzura*, 20 AD2d 287, 288 [1st Dept 1964]; *cf. Long Is. Trust Co. v International Inst. for Packaging Educ.*, 38 NY2d 493, 497 [1976]; *see also Wurlitzer Co. v Playtime Distribs.*, 58 AD2d 684, 684 [3d Dept 1977]).

Finally, we reject Tavakoli's contention that Supreme Court abused its discretion in denying the cross motion seeking leave to amend the answer to assert certain affirmative defenses and counterclaims (*see generally Woloszuk v Logan-Young*, 162 AD3d 1548, 1549 [4th Dept 2018]; *Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 19-01923

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEYONTAY SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 24, 2019. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). 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]). "The resolution of credibility issues by the jury and its determination of the weight to be given to the evidence are accorded great deference" (*People v Wallace*, 306 AD2d 802, 802 [4th Dept 2003]; *see Bleakley*, 69 NY2d at 495). Here, the jury was entitled to credit the testimony of an eyewitness to the shooting, which occurred outside of the home where the eyewitness and the victim lived, and who identified defendant in a photo array as the shooter. The eyewitness's testimony was corroborated by, inter alia, surveillance footage showing that, just prior to the shooting, one or more persons in a Ford Taurus followed the victim from his place of work to the street where he resided, and testimony from another witness, along with defendant's admission to the police, that, approximately an hour before the shooting, defendant was driving the Ford Taurus. "Sitting as the thirteenth juror . . . [and] weigh[ing] the evidence in light of the elements of the crime[s] as charged to the other jurors" (*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; *People v Davis*, 115 AD3d 1167, 1168-1169 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]).

Contrary to the further contention of defendant, he was not deprived of effective assistance of counsel when defense counsel failed to call an expert witness on the reliability of eyewitness identification. Defendant has failed to establish the absence of any strategic or other legitimate explanation for the failure of defense counsel to call an expert (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). Moreover, defendant failed to demonstrate that he was prejudiced by the lack of such expert testimony, especially in light of defense counsel's "vigorous cross-examination" of the eyewitness (*People v Maxey*, 129 AD3d 1664, 1665 [4th Dept 2015], *lv denied* 27 NY3d 1002 [2016], *reconsideration denied* 28 NY3d 933 [2016]). Defendant's further contentions that defense counsel was ineffective for failing to impeach the eyewitness by calling witnesses to testify regarding the eyewitness's prior inconsistent statements and allegedly opening the door to the admission in evidence of a video recording of the eyewitness identification procedure are simply "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 Morrison*, 48 AD3d 1044, 1045 [4th Dept 2008], *lv denied* 10 NY3d 867 [2008]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

76

KA 18-01548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QWUNTA CURRY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN 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 May 9, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends that County Court erred in refusing to suppress contraband found on his person during the booking process following his arrest stemming from the discovery of cocaine and drug trafficking paraphernalia in his vehicle because the police unlawfully subjected him to a strip search and visual body cavity inspection without reasonable suspicion. Preliminarily, defendant " 'failed to raise that specific contention either as part of his omnibus motion . . . or at the [suppression] hearing' " (*People v Gambale*, 150 AD3d 1667, 1668 [4th Dept 2017]). The court, however, made specific findings regarding the police officers' observations of defendant's suspicious behavior during the vehicle stop, their discovery of cocaine and paraphernalia in the vehicle, their knowledge of defendant's arrest on drug charges, and their performance of the bodily search during the booking process, and drew a legal conclusion that, viewing those facts in totality, the bodily search of defendant was a reasonable intrusion and the contraband recovered therefrom was lawfully obtained (*see Gambale*, 150 AD3d at 1668). We therefore conclude that the court "expressly decided the question raised on appeal," thereby preserving defendant's specific contention for our review (CPL 470.05 [2]; *see*

People v Prado, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *Gambale*, 150 AD3d at 1668; *cf. People v Graham*, 25 NY3d 994, 997 [2015]).

We nevertheless reject defendant's contention on the merits. "[A] post-arrest strip search must be based upon reasonable suspicion that an arrestee is hiding contraband beneath his or her clothing, and . . . a search involving visual examination of an arrestee's anal and genital cavities—a distinctly elevated level of intrusion, which must be separately justified—may not be performed except upon a 'specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity' " (*People v Mothersell*, 14 NY3d 358, 366 [2010], quoting *People v Hall*, 10 NY3d 303, 311 [2008], *cert denied* 555 US 938 [2008]). Here, the testimony of the officers at the suppression hearing, which the court credited, established that the officers observed that a vehicle driven and occupied solely by defendant had illegally tinted side windows and, instead of immediately pulling over when the officers activated their emergency lights, defendant continued driving for several hundred feet despite the presence of numerous safe locations to stop. During that period, the vehicle veered slightly and the arresting officer observed through the back window that defendant was making a furtive, lunging movement to the right toward the passenger seat. The arresting officer's concerns with defendant's evasive delay in pulling over and furtive movement within the vehicle included his belief, based on his experience, that defendant was trying to conceal something such as contraband. After defendant stopped and was removed from the vehicle, the arresting officer observed and then confirmed with a field test that there was cocaine on the driver's seat and floorboard. Despite the fact that a subsequent inventory search of the vehicle revealed the presence of a digital scale with cocaine residue on it and multiple cell phones, the arresting officer had not found anything on defendant's person upon pat frisking him. Based on the encounter, the arresting officer conveyed to the booking officer at the justice center that he suspected that defendant had some type of contraband on his person. Contrary to defendant's assertion, the testimony of the booking officer established that he did not initiate a strip search based on a blanket policy; rather, he properly considered both the nature of the crime for which defendant was arrested and the information conveyed by the arresting officer regarding his suspicion that defendant was concealing contraband (*see Hall*, 10 NY3d at 309, 312; *People v Banks*, 38 AD3d 938, 940 [3d Dept 2007], *lv denied* 9 NY3d 840 [2007]). Based on that evidence, including defendant's evasive delay in pulling over, his furtive movement in the vehicle before doing so, the discovery of items associated with drug trafficking such as loose cocaine, the scale with cocaine residue on it and multiple cell phones, the lack of any contraband found on defendant's person following the pat frisk, and the inference drawn by the arresting officer based on his experience that defendant was concealing contraband on his person, we conclude that "the strip search and visual cavity inspection of defendant's body were constitutionally valid because the particular facts, viewed objectively and in their totality, provided the police with reasonable suspicion that defendant

had drugs secreted underneath his clothing and possibly in his body" (*Hall,* 10 NY3d at 312; *see People v Hightower*, 186 AD3d 926, 929-930 [3d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Lowman*, 49 AD3d 1262, 1263 [4th Dept 2008], *lv denied* 10 NY3d 936 [2008]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, inasmuch as the certificate of conviction and uniform sentence and commitment form incorrectly reflect that defendant was sentenced as a second felony offender, they must be amended to reflect that he was actually sentenced as a second felony drug offender previously convicted of a violent felony offense (*see People v Martinez*, 166 AD3d 1558, 1560 [4th Dept 2018]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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CAF 19-01514

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

IN THE MATTER OF ELIZABETH FOLEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES L. DWYER, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 28, 2019 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate.

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

Memorandum: Respondent appeals from an order denying his objections to the order of the Support Magistrate, which, inter alia, determined that he willfully violated a prior order of child support. We affirm. A parent is presumed to have sufficient means to support his or her minor child (*see* Family Ct Act § 437; *Matter of Monroe County Child Support Enforcement Unit v Hemminger*, 186 AD3d 1093, 1093 [4th Dept 2020]; *Matter of Wayne County Dept. of Social Servs. v Loren*, 159 AD3d 1504, 1504-1505 [4th Dept 2018]). Thus, evidence that a respondent has failed to pay child support as ordered constitutes "prima facie evidence of a willful violation" (*Matter of Movsovich v Wood*, 178 AD3d 1441, 1441 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020] [internal quotation marks omitted]; *see* § 454 [3] [a]).

Here, petitioner made out a prima facie case of a willful violation by establishing that respondent had not made certain support payments required by the prior order, a claim that respondent did not dispute (*see Matter of Riggs v VanDusen*, 78 AD3d 1577, 1577 [4th Dept 2010]). The burden thus shifted to respondent to offer "some competent, credible evidence of his inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70 [1995]; *see Matter of Huard v Lugo*, 81 AD3d 1265, 1267 [4th Dept 2011], *lv denied* 16 NY3d 710 [2011]). Respondent failed to meet that burden. Although respondent testified that he had no source of income and no assets, he was able to provide for his own food and shelter (*see Matter of Fallon v Fallon*, 286 AD2d 389, 389 [2d Dept 2001]) even though he had not applied for public assistance since losing his job in 2017.

Respondent admitted that he was not physically or mentally incapable of working, and he failed to present evidence establishing that he made reasonable efforts to obtain gainful employment to meet his support obligation (*see Movsovich*, 178 AD3d at 1442; *Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452-1453 [4th Dept 2007]). According deference to the Support Magistrate's credibility assessments (*see Matter of Mandile v Deshotel*, 166 AD3d 1511, 1512 [4th Dept 2018]), we find no reason to disturb her determination that respondent failed to demonstrate his inability to comply with the child support order (*see Matter of Roshia v Thiel*, 110 AD3d 1490, 1492 [4th Dept 2013], *lv dismissed in part and denied in part* 22 NY3d 1037 [2013]).

Respondent failed to preserve for our review his contentions that the Support Magistrate erred in refusing to reopen the underlying support proceeding (*see Matter of White v Knapp*, 66 AD3d 1358, 1359 [4th Dept 2009]) and that his support arrears should have been capped because his income fell below the federal poverty guidelines (*see Matter of Farruggia v Farruggia*, 125 AD3d 1490, 1490 [4th Dept 2015]). Respondent's contention that the prior order of support is invalid is not properly before this Court (*see* Family Ct Act § 439 [e]; *see also Matter of Ouimet v Ouimet*, 193 AD2d 1099, 1099 [4th Dept 1993]). Finally, to the extent that respondent contends that he was denied effective assistance of counsel in this proceeding due to the failure of counsel to object to the prior order of support on the ground that his income was calculated in contravention of Family Court Act § 413 (1), we reject that contention (*see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1628 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *see generally Matter of Girard v Neville*, 137 AD3d 1589, 1590 [4th Dept 2016]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

147

CA 19-02307

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

RODNEY LONG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GRAPHIC CONTROLS ACQUISITION CORP. AND CLEAN AIR TECHNOLOGY, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered May 30, 2019. The order, among other things, determined that plaintiff's former attorney had the authority to enter into a settlement on plaintiff's behalf.

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

Memorandum: In appeal No. 1, plaintiff appeals from an order that, inter alia, determined after a hearing that plaintiff's former attorney had the authority to enter into a settlement on his behalf and, in appeal No. 2, plaintiff appeals from an order denying plaintiff's motion for leave to reargue or renew. Although plaintiff failed to identify the "prior motion" that he was seeking leave to reargue or renew (CPLR 2221 [a]), it appears that plaintiff was seeking leave to reargue or renew, inter alia, his opposition to defendants' cross motion to enforce the settlement.

With respect to appeal No. 1, we reject plaintiff's contention that Supreme Court (Montour, J.) erred in its determination. It is well settled that "[s]tipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). Even where an attorney lacks actual authority to enter into a settlement, the settlement is nevertheless binding where the attorney has apparent authority (*see id.* at 231; *Davidson v Metropolitan Tr. Auth.*, 44 AD3d 819, 819 [2d Dept 2007]; *see also Bubeck v Main Urology Assoc.*, 275 AD2d 909, 910 [4th Dept 2000]). "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into

a transaction" (*Hallock*, 64 NY2d at 231). The testimony at the hearing established that plaintiff's former attorney represented him from the commencement of the litigation until he accepted the settlement offer on plaintiff's behalf, a period of approximately two years. The former attorney represented plaintiff during his deposition, traveled to another state to depose representatives of one of the defendants, and participated in the Alternative Dispute Resolution (ADR) program. An offer of settlement was made by the attorney for defendants when the attorneys appeared before an attorney mediator at ADR and, after plaintiff's former attorney conveyed that offer to plaintiff at a meeting several days later, the former attorney emailed defendants' attorney to accept the offer. Based on that evidence, the court properly concluded that plaintiff's former attorney had the requisite apparent authority to enter into the settlement (*see Amerally v Liberty King Produce, Inc.*, 170 AD3d 637, 637 [2d Dept 2019]; *Davidson*, 44 AD3d at 819; *see also Bubeck*, 275 AD2d at 910).

Also with respect to appeal No. 1, plaintiff contends that the court should have considered an issue that Supreme Court (Devlin, J.) had left outstanding, i.e., whether there was a valid settlement or whether the settlement was unconscionable. We reject that contention. By order entered May 24, 2016, the court (Devlin, J.) granted defendants' cross motion to enforce the settlement agreement, and plaintiff failed to appeal from that order. The court (Devlin, J.) granted plaintiff's motion for leave to reargue and renew, inter alia, his opposition to that cross motion, but only to the extent of conducting a hearing on the issue of the authority of plaintiff's former attorney to enter into the settlement. Plaintiff also did not appeal from that order. The case was thereafter transferred to Justice Montour, who correctly recognized that there were no other issues before the court to decide besides the issue of the authority of plaintiff's former attorney to enter into the settlement.

With respect to appeal No. 2, the appeal from the order insofar as it denied that part of plaintiff's motion seeking leave to reargue must be dismissed because no appeal lies therefrom (*see Kirchner v County of Niagara*, 153 AD3d 1572, 1574 [4th Dept 2017]), and we conclude that the court did not abuse its discretion in denying that part of the motion seeking leave to renew (*see id.*; *Fuentes v Hoffman*, 122 AD3d 1319, 1320 [4th Dept 2014]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

148

CA 20-00672

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

RODNEY LONG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GRAPHIC CONTROLS ACQUISITION CORP. AND CLEAN AIR TECHNOLOGY, INC., DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 13, 2020. The order denied plaintiff's motion seeking leave to reargue or renew.

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

Same memorandum as in *Long v Graphic Controls Acquisition Corp.* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 16-02155

PRESENT: CARNI, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER G. FIGUEROA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 19, 2016. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the second degree (Penal Law §§ 110.00, 220.18 [1]). As an initial matter, we conclude that both the signed written waiver of the right to appeal and the oral waiver colloquy mischaracterized the nature of the right to appeal and thus 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]).

Defendant contends in his main brief that he received ineffective assistance of counsel due to his second attorney's alleged failure to timely file a supplemental omnibus motion within an extended time period granted by County Court, and his second attorney's submission of an affidavit from defendant conceding that defendant lived at the residence where the drugs underlying his conviction were found. To the extent that the contention survives defendant's guilty plea (*see generally People v Rizek* [appeal No. 1], 64 AD3d 1180, 1180 [4th Dept 2009], *lv denied* 13 NY3d 862 [2009]), we reject it. As an initial matter, the record does not support defendant's contention that the court granted counsel an extension of time within which to file a motion to suppress as part of a supplemental omnibus motion. With respect to defendant's contention that counsel was ineffective for submitting the affidavit from defendant, we conclude that defendant

failed on this record to demonstrate any prejudice from that alleged error (*see generally People v Loomis*, 126 AD3d 1394, 1395 [4th Dept 2015]).

By failing to move to withdraw the plea or vacate the judgment of conviction, defendant failed to preserve his contention in his pro se supplemental brief that his guilty plea was not knowing, voluntary, and intelligent (*see People v Watkins*, 77 AD3d 1403, 1403 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]), 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]).

We have considered defendant's remaining contentions in his pro se supplemental brief, and conclude that none warrants modification or reversal of the judgment.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 18-02100

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered September 12, 2018. The judgment convicted defendant upon a nonjury verdict of robbery in the third degree, petit larceny (two counts) and assault 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, inter alia, robbery in the third degree (Penal Law § 160.05) and assault in the third degree (§ 120.00 [1]). We affirm.

The conviction of robbery in the third degree and assault in the third degree is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence independently and in light of the elements of those crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), we reject defendant's contention that the verdict convicting him of those crimes is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the fact that he was the only individual in the photo array with a tattoo and piercing did not make the photo array unduly suggestive; the tattoo and piercing were barely visible and thus did not "orient the viewer toward the defendant as the perpetrator" (*People v Spence*, 92 AD3d 905, 905 [2d Dept 2012]; *see People v Clarke*, 55 AD3d 1447, 1449 [4th Dept 2008], *lv denied* 11 NY3d 923 [2009]; *People v Jamison*, 291 AD2d 298, 299 [1st Dept 2002], *lv denied* 98 NY2d 652 [2002]; *see generally People v Hoffman*, 162 AD3d 1753, 1755 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]).

Defendant's absence from a particular sidebar conference did not violate his constitutional and statutory right to be present at all material stages of the trial. The trial judge stated on the record that the disputed sidebar involved scheduling and related issues, and it is well established that a criminal defendant has no constitutional or statutory right to personally attend sidebar conferences involving ministerial matters such as scheduling (*see People v Dokes*, 79 NY2d 656, 660 [1992]). Defendant's allegation that the trial judge lied in describing the sidebar is "entirely lacking in merit" (*Matter of Flanigan v Smyth*, 148 AD3d 1249, 1253 [3d Dept 2017], *lv dismissed in part and denied in part* 29 NY3d 1046 [2017]).

To the extent it can be reviewed on direct appeal, defendant's ineffective assistance of counsel claim is without merit (*see People v Brunner*, 16 NY3d 820, 821 [2011]; *People v Nichols*, 163 AD3d 39, 50 [4th Dept 2018]; *People v Madison*, 106 AD3d 1490, 1492 [4th Dept 2013]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Finally, the sentence is not unduly harsh or severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

166

KA 18-01783

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY EMMONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 8, 2018. The judgment convicted defendant upon a jury verdict of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal mischief in the third degree (Penal Law § 145.05 [2]). We affirm.

Defendant's contention that Supreme Court violated his constitutional right to present a defense when it struck part of his trial testimony is unpreserved for our review (*see People v Lane*, 7 NY3d 888, 889-890 [2006]; *see generally People v Flores*, 83 AD3d 1460, 1460 [4th Dept 2011], *affd* 19 NY3d 881 [2012]). In any event, we conclude that the court neither abused its discretion in striking defendant's testimony, nor deprived defendant of his right to present a defense in doing so (*see People v Morgan*, 148 AD3d 1590, 1591 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *see generally People v John*, 288 AD2d 848, 849 [4th Dept 2001], *lv denied* 97 NY2d 705 [2002]; *People v Sirmons*, 242 AD2d 883, 884-885 [4th Dept 1997], *lv denied* 92 NY2d 1038 [1998]).

We further reject defendant's contention that the court abused its discretion in its *Molineux* ruling. It is well established that "[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Here, a police officer's testimony about defendant's prior criminal mischief conviction was properly admitted for the purposes of establishing

defendant's intent and absence of mistake. Specifically, the challenged testimony was relevant for those purposes because it established that defendant was aware that he could be charged with a criminal offense for damaging police property, i.e., that did not have "any reasonable ground to believe that he . . . ha[d] [the] right to" damage property belonging to the police (Penal Law § 145.05). Contrary to defendant's contention, the probative value of that evidence was not outweighed by its potential for prejudice (*see generally People v Alvino*, 71 NY2d 233, 242 [1987]) and, moreover, the court's prompt limiting instruction ameliorated any prejudice (*see People v Elmore*, 175 AD3d 1003, 1004 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *People v Larkins*, 153 AD3d 1584, 1587 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]).

Defendant also contends that the court erred in failing to instruct the jury on a justification defense under Penal Law § 35.05 (2). Defendant, however, failed to request such an instruction or object to the instruction as given at trial and therefore failed to preserve that contention for our review (*see People v Washington*, 173 AD3d 1644, 1645 [4th Dept 2019], *lv denied* 34 NY3d 985 [2019]; *People v Daggett*, 150 AD3d 1680, 1682 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *People v Fagan*, 24 AD3d 1185, 1187 [4th Dept 2005]). 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]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

167

KA 18-02090

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER BOYD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered July 19, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the first degree (two counts), robbery in the first degree (three counts), assault in the first degree, attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on counts six and eight shall run concurrently with each other and with all other counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of robbery in the first degree (Penal Law § 160.15 [1], [4]), two counts each of burglary in the first degree (§ 140.30 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), and one count each of assault in the first degree (§ 120.10 [4]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and criminal possession of stolen property in the fourth degree (§ 165.45 [5]). Defendant contends and the People correctly concede that his waiver of the right to appeal is invalid because County Court "mischaracterized it as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Brooks*, 187 AD3d 1587, 1588 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021] [internal quotation marks omitted]).

Nevertheless, we reject defendant's contention that the court

erred in determining that he voluntarily waived his *Miranda* rights prior to making certain statements to the police and thus erred in refusing to suppress those statements. It is well settled that "[a] statement given freely and voluntarily" is admissible in evidence (*Miranda v Arizona*, 384 US 436, 478 [1966]). Here, the evidence presented at the suppression hearing, which included the testimony of a police investigator who interviewed defendant and a video recording of that interview, establishes that the investigator advised defendant of his *Miranda* rights and then asked defendant whether he understood them. Defendant nodded his head affirmatively to indicate that he understood (*see People v Henriquez*, 159 AD3d 541, 541 [1st Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *People v Madison*, 71 AD3d 1422, 1423 [4th Dept 2010], *lv denied* 15 NY3d 753 [2010]). The investigator asked, "Yes?," and defendant again nodded his head affirmatively. The investigator asked defendant to say "yes" so that he would know defendant was listening. Thereafter, defendant said, "Yes." The investigator then asked defendant if he wished to speak, and defendant nodded his head affirmatively. We conclude that, viewing the totality of the circumstances (*see People v Deitz*, 148 AD3d 1653, 1653 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]), defendant's waiver of his *Miranda* rights was voluntary. Furthermore, although defendant appeared to be in discomfort during the interview, he explained to the investigator that he had been shot approximately four weeks earlier and did not require immediate medical attention (*see People v Harrington*, 163 AD2d 327, 327-328 [2d Dept 1990], *lv denied* 76 NY2d 940 [1990]).

We agree with defendant, however, that the sentence is illegal insofar as the court directed that the sentence imposed for assault in the first degree under count six of the indictment run consecutively to the sentence imposed for criminal possession of a weapon under count eight. Where a defendant is charged with both criminal possession of a weapon in violation of Penal Law § 265.03 (3) and a different crime that has an element involving the use of that weapon, consecutive sentencing is permissible if "[the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon" such that the possessory crime has already been completed (*People v Brown*, 21 NY3d 739, 751 [2013]; *see People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). The People have the burden of establishing that consecutive sentences are legal, i.e., that the two crimes were committed through separate and distinct acts (*see People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]).

Where, as here, a defendant is convicted by a guilty plea, the People may rely on the allegations in the counts of the indictment to which the defendant pleaded guilty, as well as the facts adduced during the plea allocution (*see People v Dean*, 8 NY3d 929, 931 [2007]; *People v Laureano*, 87 NY2d 640, 644 [1996]). The People failed to meet their burden inasmuch as there are no facts alleged in the counts of the indictment to which defendant pleaded guilty or in the plea allocution that would establish that defendant possessed the loaded firearm prior to forming his intent to shoot the victim (*cf. Lozada*,

164 AD3d at 1627) or that the act of possessing the loaded firearm "was separate and distinct from" his act of shooting the victim (*People v Harris*, 115 AD3d 761, 763 [2d Dept 2014], *lv denied* 23 NY3d 1062 [2014], *reconsideration denied* 24 NY3d 1084 [2014]). We therefore modify the judgment by directing that the sentences imposed on counts six and eight of the indictment shall run concurrently with each other and with all other counts.

In light of our determination, we do not address defendant's alternate contention that the imposition of consecutive sentences is unduly harsh and severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

241

CAF 19-02274

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

IN THE MATTER OF CHRISTOPHER DREW,
PETITIONER-RESPONDENT,

V ORDER

ASHLEY NEW, RESPONDENT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

THOMAS V. CASE, HORNELL, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Chauncey J. Watches, J.), entered November 25, 2019 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal custody of the subject child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Cullop v Miller*, 173 AD3d 1652, 1652-1653 [4th Dept 2019]; *Matter of Smith v Cashaw* [appeal No. 1], 129 AD3d 1551, 1551 [4th Dept 2015]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

252

KA 19-00489

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE PORTERFIELD, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 3, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Preliminarily, the People correctly concede that defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

On the merits, defendant challenges Supreme Court's refusal to suppress his statement at the crime scene. Although defendant acknowledges that the police did not question or interrogate him at the scene, he asserts that his statement was nevertheless inadmissible because officers purposefully delayed removing him from the "chaotic" crime scene in the hope that he would spontaneously confess. We reject that contention. Both the United States Supreme Court and the Court of Appeals have held that " '[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself' " (*People v Doll*, 21 NY3d 665, 672 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014], quoting *Arizona v Mauro*, 481 US 520, 529 [1987]). Moreover, it is well established that police officers need not "take affirmative steps, by gag or otherwise, to prevent a talkative person in custody from making an incriminating statement" (*People v Rivers*, 56 NY2d 476, 479 [1982], *rearg denied* 57 NY2d 775 [1982]; *see People v Krom*, 61 NY2d 187, 199 [1984]). Thus, the officers' alleged failure to immediately transport defendant to the

precinct did not, standing alone, amount to the functional equivalent of interrogation and thereby require the suppression of his spontaneous, pre-*Miranda* statement at the scene (*see Doll*, 21 NY3d at 671-672).

Contrary to defendant's further contention, the court properly determined that his post-*Miranda* statements at the precinct were not involuntary (*see People v Mateo*, 2 NY3d 383, 413-414 [2004], *cert denied* 542 US 946 [2004]; *People v Childres*, 60 AD3d 1278, 1278-1279 [4th Dept 2009], *lv denied* 12 NY3d 913 [2009]). Finally, the period of postrelease supervision is not unduly harsh and severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

256

KA 19-01641

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC X. MARTINEZ, DEFENDANT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated February 22, 2018. The order, among other things, determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk and a sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We affirm.

Contrary to defendant's sole contention, we conclude that County Court properly assessed 15 points under risk factor 11 for his history of substance abuse inasmuch as " '[t]he statements in the case summary and [preplea] report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under th[at] risk factor' " (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see People v Turner*, 188 AD3d 1746, 1747 [4th Dept 2020]). The record establishes that defendant began using alcohol and marihuana as a teenager and continued to do so for about a decade, roughly until the time of the underlying sex offenses (*see People v Lopez*, 179 AD3d 1456, 1456 [4th Dept 2020], *lv denied* 35 NY3d 906 [2020]; *Kunz*, 150 AD3d at 1697). Additionally, to the extent that defendant preserved the issue for our review (*see generally People v Perry*, 174 AD3d 1234, 1235 [3d Dept 2019], *lv denied* 34 NY3d 905 [2019]), we conclude that the court properly relied on statements in the case summary establishing that, upon his reception into the Department of Corrections and Community Supervision, defendant scored in the "alcoholic" range on a screening evaluation (*see People v Slishevsky*, 174 AD3d 1399, 1400 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]; *People v Leeson*, 148 AD3d 1677,

1678 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *cf. People v Rohoman*, 121 AD3d 876, 877 [2d Dept 2014]; *People v Coger*, 108 AD3d 1234, 1235 [4th Dept 2013]; *People v Madera*, 100 AD3d 1111, 1112 [3d Dept 2012]). The case summary also establishes that defendant was "referred to and engaged in [alcohol and] substance abuse treatment while incarcerated" (*Turner*, 188 AD3d at 1747) which, contrary to defendant's assertion, "further support[s] the court's assessment of points for a history of drug or alcohol abuse" (*People v Figueroa*, 141 AD3d 1112, 1113 [4th Dept 2016], *lv denied* 28 NY3d 907 [2016]; *see People v Barber*, 173 AD3d 1857, 1858 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]). Thus, while defendant had also previously represented that his prior use of alcohol and marihuana was occasional only and had denied that he needed treatment, the court was entitled to reject those assertions inasmuch as they are contradicted by defendant's screening evaluation and his referral to and participation in alcohol and substance abuse treatment while incarcerated (*see People v Glanowski*, 140 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 28 NY3d 902 [2016]; *People v England*, 118 AD3d 1289, 1289 [4th Dept 2014]). Based on the foregoing, even if it is unclear given his conflicting statements whether defendant also participated in outpatient substance abuse treatment prior to the underlying sex offenses, we conclude that the People nonetheless established by clear and convincing evidence that defendant had a history of substance abuse, thereby warranting the assessment of 15 points under risk factor 11 (*see e.g. Slishevsky*, 174 AD3d at 1400; *Barber*, 173 AD3d at 1858; *see generally* Correction Law § 168-n [3]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

257

KA 15-02013

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. FELONG, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered October 28, 2015. The judgment convicted defendant upon a jury verdict of assault on a police officer, assault in the second degree, unauthorized use of a vehicle in the second degree, aggravated unlicensed operation of a motor vehicle in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault on a police officer (Penal Law § 120.08), assault in the second degree (§ 120.05 [3]), unauthorized use of a vehicle in the second degree (§ 165.06), resisting arrest (§ 205.30), and aggravated unlicensed operation of a motor vehicle in the second degree (Vehicle and Traffic Law § 511 [2] [a] [i]). The charges arose from an incident in which defendant, who was operating a stolen vehicle, fled from a traffic stop and one of the responding officers injured his knee when he jumped over a fence while pursuing him.

Viewing the evidence in light of the elements of assault on a police officer 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]). We reject defendant's contention that the conviction of assault on a police officer is against the weight of the evidence with respect to the element of causation. Where, as here, a defendant's flight "naturally induces a police officer to engage in pursuit, and the officer is killed [or injured] in the course of that

pursuit, the causation element of the crime will be satisfied" (*People v Britt*, 132 AD3d 1254, 1254 [4th Dept 2015], *lv denied* 26 NY3d 1108 [2016] [internal quotation marks omitted]; *see People v Carncross*, 14 NY3d 319, 325 [2010]; *People v Cipollina*, 94 AD3d 1549, 1550 [4th Dept 2012], *lv denied* 19 NY3d 971 [2012]). We likewise reject defendant's contention that the conviction of assault on a police officer is against the weight of the evidence with respect to the element of serious physical injury. " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]). Here, the credible evidence established that the officer's injury required arthroscopic knee surgery to reconstruct the ACL as well as a partial lateral meniscectomy; that the officer was completely disabled for almost 10 months; and that, at the time of trial two years after the incident, his range of motion remained restricted and he was no longer able to participate in certain activities. Based on that evidence, the jury was justified in finding beyond a reasonable doubt that the officer suffered a serious physical injury (*see People v Hilton*, 166 AD3d 1316, 1318-1319 [3d Dept 2018], *lv denied* 32 NY3d 1205 [2019]; *see also People v Johnson*, 50 AD3d 1537, 1538 [4th Dept 2008], *lv denied* 10 NY3d 935 [2008]; *see generally Danielson*, 9 NY3d at 349).

We agree with defendant, however, that assault in the second degree is an inclusory concurrent count of assault on a police officer. Counts are concurrent when "concurrent sentences only may be imposed in case of conviction thereon," and such counts "are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" (CPL 300.30 [3], [4]). Here, concurrent sentencing was required inasmuch as the same conduct formed the basis of each count (*see People v Couser*, 28 NY3d 368, 375-376 [2016]) and, as charged here, assault in the second degree is a lesser included offense of assault on a police officer (*see* CPL 1.20 [37]; *see generally People v Glover*, 57 NY2d 61, 63-64 [1982]). Thus, that part of the judgment convicting defendant of assault in the second degree must be reversed and count two of the indictment dismissed (*see People v Box*, 181 AD3d 1238, 1242-1243 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US — [Jan. 11, 2021]), and we therefore modify the judgment accordingly.

The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of aggravated unlicensed operation of a motor vehicle in the first degree, and it therefore must be amended to reflect that defendant was convicted of aggravated unlicensed operation of a motor vehicle in the second degree (*see People v Cooper*, 136 AD3d 1397, 1398 [4th Dept 2016], *lv denied* 27 NY3d 1067 [2016]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

260

KA 17-00936

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW D. FLETCHER, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered January 27, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the first degree (Penal Law § 120.10 [1], [2]). The charges arose from an incident in which defendant slashed the face of the mother of his child with a box cutter; the incident took place in the victim's home and in the presence of their 18-month-old child and the victim's niece. Defendant's contention that the evidence is legally insufficient to establish his identity as the perpetrator "is not preserved for our review inasmuch as he failed to move for a trial order of dismissal on that ground" (*People v Whiting*, 170 AD3d 1654, 1655 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019], *reconsideration denied* 33 NY3d 1075 [2019]; *see People v Gray*, 86 NY2d 10, 19 [1995]). Defendant made only a general motion for a trial order of dismissal, which he renewed (*see People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]), and his motion was not specifically directed at the alleged error asserted on appeal (*see generally People v DaCosta*, 6 NY3d 181, 184 [2006]).

In any event, defendant's contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim and her niece identified defendant as the perpetrator of the assault, and three

other witnesses testified that they saw defendant with the victim inside the victim's home immediately before she was injured. Thus, a rational person could conclude from the testimony of the witnesses that defendant was the perpetrator (*see People v Gordon*, 23 NY3d 643, 649 [2014]). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, witness credibility is "of paramount importance to the determination of guilt or innocence, [we] must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495), and we perceive no reason to disturb the jury's credibility determinations (*see id.*).

Defendant's contention that County Court erred in admitting into evidence medical records of the victim that contained a hearsay statement identifying defendant as the suspect is not preserved for our review (*see* CPL 470.05 [2]; *People v Emanuel*, 89 AD3d 1481, 1482 [4th Dept 2011], *lv denied* 18 NY3d 882 [2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was denied effective assistance of counsel based on his attorney's failure to secure the presence at trial of a witness who would have corroborated his claim that he was in Alabama on the date of the assault. Contrary to defendant's contention, the witness indicated in a letter to the court that she did not remember the events of that date and, therefore, she could not have corroborated defendant's testimony that he was in Alabama on that date (*see generally People v Morgan*, 77 AD3d 1419, 1420 [4th Dept 2010], *lv denied* 15 NY3d 922 [2010]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

261

CAF 20-00606

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

IN THE MATTER OF JOSEPH MICHAEL MILANO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TERESA A. ANDERSON, RESPONDENT-RESPONDENT.

LOCKHART LAW OFFICE, P.C., NORTH SYRACUSE (BETH A. LOCKHART OF COUNSEL), FOR PETITIONER-APPELLANT.

CDH LAW, PLLC, SYRACUSE (J. DAVID HAMMOND OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 3, 2019 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to an order of a Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner father appeals from an order denying his written objections to the order of the Support Magistrate, which dismissed his petition seeking to terminate his child support obligation on the ground that the subject child was emancipated due to her participation in the Air Force Reserve Officer Training Corps. We dismiss the appeal as moot.

"Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]). "Thus, an appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman*, 19 NY3d at 1090; *see City of New York v Maul*, 14 NY3d 499, 507 [2010]). "An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts" (*Coleman*, 19 NY3d at 1090; *see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Here, during the pendency of this appeal, the child turned 21

years old and, therefore, the father's obligation to pay child support ceased (*see* Family Ct Act § 413 [1] [a]; *Matter of Frederick-Kane v Potter*, 187 AD3d 1436, 1436 [3d Dept 2020]). Moreover, even if the father succeeded on this appeal, he "would have no avenue to regain any sums he might have overpaid in child support" (*Frederick-Kane*, 187 AD3d at 1436). "[T]here is a 'strong public policy against restitution or recoupment of support overpayments' " (*Johnson v Chapin*, 12 NY3d 461, 466 [2009], *rearg denied* 13 NY3d 88 [2009]), and we conclude that there is "no basis to depart from that policy here" (*Frederick-Kane*, 187 AD3d at 1437). Under the circumstances of this case, " 'the rights of the parties will [not] be directly affected by the determination of [this] appeal' " (*id.*, quoting *Hearst Corp.*, 50 NY2d at 714). Contrary to the father's contention, we conclude that the exception to the mootness doctrine does not apply (*see generally Saratoga County Chamber of Commerce*, 100 NY2d at 811-812; *Hearst Corp.*, 50 NY2d at 714-715).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

271

CA 19-02363

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

ONNALEE F. LANDERS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF FRANCIS J. LANDERS, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HOWELL MOTORS, INC. AND MICHAEL J. LANDERS, DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (GARRY M. GRABER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (GEORGE V.C. MUSCATO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 26, 2019. The order denied the motion of defendants for summary judgment.

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

Memorandum: In this litigation arising from a dispute over the ownership of a motor vehicle, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm. Ownership of a vehicle passes "when the parties intend that it pass" (*Abele Tractor & Equip. Co., Inc. v Schaeffer*, 188 AD3d 1500, 1502 [3d Dept 2020] [internal quotation marks omitted]; *see Cunningham v Ford*, 20 AD3d 897, 897-898 [4th Dept 2005]), and defendants' own evidentiary submissions created an issue of fact whether defendant Howell Motors, Inc., intended to transfer ownership of the subject vehicle to plaintiff's decedent prior to his death (*see generally Abele Tractor & Equip. Co., Inc.*, 188 AD3d at 1503; *Portillo v Carlson*, 167 AD3d 792, 793 [2d Dept 2018]; *Duger v Estate of Carey*, 307 AD2d 675, 676 [3d Dept 2003]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

279

CAF 19-01775

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF DEREK RAMON JOHNSON,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KENYA IESHA JOHNSON,
RESPONDENT-APPELLANT-RESPONDENT.

IN THE MATTER OF KENYA IESHA JOHNSON,
PETITIONER-APPELLANT-RESPONDENT,

V

DEREK RAMON JOHNSON,
RESPONDENT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT-RESPONDENT AND PETITIONER-APPELLANT-RESPONDENT.

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

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal and cross appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 27, 2019 in proceedings pursuant to Family Court Act article 6. The order, inter alia, awarded the parties joint custody of the subject child with primary physical residence to respondent-petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding primary physical residence of the parties' child to petitioner-respondent and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent-petitioner mother appeals and petitioner-respondent father cross-appeals from an order that, inter alia, awarded the parties joint custody of their child with primary physical residence to the mother and denied the mother's request to relocate with the child from Jefferson County to North Carolina. In appeal No. 2, the father appeals from an order denying his motion to reconstruct trial testimony that is absent from the record in appeal No. 1. In appeal No. 3, the father appeals from an

order denying his motion to settle the record in appeal No. 1 to include his original and amended petitions seeking, inter alia, joint custody of the child.

Addressing first appeal Nos. 2 and 3, we reject the father's contention in those appeals that Family Court erred in denying his motions to reconstruct and settle the record in appeal No. 1. The father stipulated to the record in appeal No. 1 prior to filing those motions, and the court properly considered those motions as seeking to vacate that stipulation (*see generally O'Shei v FMC Corp.*, 147 AD2d 985, 985 [4th Dept 1989]; *Gayden v City of Rochester*, 145 AD2d 995, 995 [4th Dept 1988]). However, "[o]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *see McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *Matter of Ruiz v Rivera*, 300 AD2d 402, 403 [2d Dept 2002]), and the father has made no such showing here (*see Hale v Meadowood Farms of Cazenovia, LLC*, 104 AD3d 1330, 1332 [4th Dept 2013]). We therefore affirm the orders in appeal Nos. 2 and 3.

The mother contends on her appeal in appeal No. 1 that the court erred in denying her request to relocate with the child to North Carolina. We reject that contention. Inasmuch as this case involves an initial custody determination, the mother is correct that "it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeal dismissed* 19 NY3d 887 [2012], 20 NY3d 1052 [2013]; *see Matter of Quistorf v Levesque*, 117 AD3d 1456, 1456-1457 [4th Dept 2014]). "Although a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination" (*Saperston*, 93 AD3d at 1272; *see Matter of Torkildsen v Torkildsen*, 72 AD3d 1405, 1406 [3d Dept 2010]). Here, upon weighing all the appropriate factors (*see Matter of Jacobson v Wilkinson*, 128 AD3d 1335, 1336 [4th Dept 2015]), we agree with the court's determination that "the child[ ]'s relationship with [the father] would be adversely affected by the proposed relocation because of the distance between [Jefferson] County and [North Carolina]" (*Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [4th Dept 2006], *lv denied* 6 NY3d 714 [2006]; *see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 802 [2012]). The record establishes that, although the mother had stronger family ties to North Carolina than to New York, her plans for housing, employment, and schooling in North Carolina were not well developed, and the record further establishes that the child had shown a marked improvement in behavior after the father's parenting time with the child was increased under temporary custody orders issued prior to the trial (*see generally Matter of Furman v Furman*, 168 AD2d 702, 702-703 [3d Dept 1990]).

With respect to the father's cross appeal, we conclude as an

initial matter that, even without the inclusion of the father's original and amended petitions in the record in appeal No. 1, the father has standing to cross-appeal from the order in that appeal inasmuch as he is aggrieved by the court's determination on the mother's petition. That determination is an initial custody determination, and the father's counsel made clear during oral summation at the conclusion of the trial that the father was seeking joint custody of the child with primary physical residence to him. Thus, the father "ha[s] a direct interest in the matter at issue that is affected by the result, and the adjudication [has] binding force against [his] rights, person or property" (*Matter of Valenson v Kenyon*, 80 AD3d 799, 799 [3d Dept 2011]; *see* CPLR 5511).

Furthermore, we agree with the father on his cross appeal that there is not a sound and substantial basis in the record to support the court's determination that it is in the child's best interests to award the mother primary physical residence (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]). Here, the record establishes that both parents were fit and had appropriate residences and financial resources to support the child, but the mother had repeatedly attempted to undermine the father's relationship with the child, while the father did not engage in such behavior (*see Matter of Honsberger v Honsberger*, 144 AD3d 1680, 1680 [4th Dept 2016]; *Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1726 [4th Dept 2016]). " 'It is well settled . . . that [a] concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of LaMay v Staves*, 128 AD3d 1485, 1485 [4th Dept 2015]). Therefore, although we agree with the court's determination that the parties should share joint custody of the child and "enjoy equal parenting time on an alternate week schedule," we modify the order in appeal No. 1 by awarding primary physical residence of the parties' child to the father.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

280

CAF 19-01530

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF FAITH B. AND JOEL L.

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

MEMORANDUM AND ORDER

JOCELYN V., RESPONDENT-APPELLANT,
AND MANUEL L., RESPONDENT.

THEODORE W. STENUF, MINOA, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (DAVID L. CHAPLIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered July 11, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Jocelyn V. had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, adjudicated her two children to be neglected. We reject the mother's contention that Family Court erred in determining that petitioner established, by a preponderance of the evidence, that she neglected the children (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *see generally Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1345-1346 [4th Dept 2017]; *Matter of Emily W. [Michael S.—Rebecca S.]*, 150 AD3d 1707, 1709 [4th Dept 2017]).

Contrary to the mother's contention, "a single incident where the parent's judgment was strongly impaired and the child [was] exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Lasondra D. [Cassandra D.—Victor S.]*, 151 AD3d 1655, 1656 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017] [internal quotation marks omitted]; *see Kaylee D.*, 154 AD3d at 1344; *Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014]). Petitioner established at the fact-finding hearing that, on the occasion in question here, the mother went with her children to a counseling meeting at petitioner's office and, during the course of the meeting, the mother expressed suicidal ideation by stating, inter alia, that she wanted to

step in front of a motor vehicle, and she also stated that she could not care for the children and that she wished they had never been born. Petitioner's witnesses at that hearing, i.e., a counselor and the supervisor who was on duty at the time of the meeting, described the mother as loud, pressured in her speech, very upset, and in great distress. Based on our review of the evidence, we conclude that the record supports the court's determination that the mother neglected the children on the day in question as a result of her mental illness (*see Matter of Kendall N. [Angela M.]*, 188 AD3d 1688, 1688-1689 [4th Dept 2020]; *Matter of Cameron M. [Keira P.]*, 187 AD3d 1582, 1582-1583 [4th Dept 2020]). Petitioner established by a preponderance of the evidence that the children's physical, mental, or emotional conditions were in imminent danger of becoming impaired if the children had been released to the mother's care following the meeting (*see Kendall N.*, 188 AD3d at 1689; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]; *Lasondra D.*, 151 AD3d at 1656). Although the mother attempted in her testimony to minimize the significance of her statements and actions on the day in question, we see no reason to disturb the court's assessment of the credibility of the witnesses (*see Kaylee D.*, 154 AD3d at 1345-1346; *Emily W.*, 150 AD3d at 1709).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

281

CAF 20-00201

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF MALACHI S., ALSO KNOWN AS MALACHI W.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

TERESA S., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

ELLA MARSHALL, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered January 10, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that terminated her parental rights with respect to the subject child on the ground of mental illness. We affirm.

The mother contends that a new trial is required because Family Court permitted the mother's guardian ad litem to absent herself from a portion of the termination proceeding. That contention is unpreserved inasmuch as the mother's counsel did not move for an adjournment of the proceeding or object on the ground that the guardian ad litem was absent (*see generally Matter of Justin T. [Wanda T.-Joseph M.]*, 154 AD3d 1338, 1339-1340 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]). In any event, although the better practice would have been to have the guardian ad litem present, under the circumstances of this case, any error was harmless (*see generally Matter of Steven D., Jr. [Steven D., Sr.]*, 188 AD3d 1770, 1772 [4th

Dept 2020]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

284

CAF 20-01185

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF DEREK RAMON JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KENYA IESHA JOHNSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF KENYA IESHA JOHNSON,
PETITIONER-RESPONDENT,

V

DEREK RAMON JOHNSON, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 5, 2020 in proceedings pursuant to Family Court Act article 6. The order denied the motion of petitioner-respondent to reconstruct trial testimony.

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

Same memorandum as in *Matter of Johnson v Johnson* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

285

CAF 20-01259

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF DEREK RAMON JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KENYA IESHA JOHNSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF KENYA IESHA JOHNSON,
PETITIONER-RESPONDENT,

V

DEREK RAMON JOHNSON, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 28, 2020 in proceedings pursuant to Family Court Act article 6. The order denied the motion of petitioner-respondent to settle the record on appeal to include additional documents.

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

Same memorandum as in *Matter of Johnson v Johnson* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

286

CAF 19-02015

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF NOAH C., ROMEO C., JADEN C.
AND JACOB C.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES CHILD PROTECTIVE UNIT, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GREG C. AND JACQUELINE C., RESPONDENTS-APPELLANTS.

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT GREG C.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT JACQUELINE C.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (JENNIFER L. WORRALL OF COUNSEL), FOR PETITIONER-RESPONDENT.

TERESA M. PARE, CANANDAIGUA, ATTORNEY FOR THE CHILDREN.

LEAH T. CINTINEO, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Ontario County (Jacqueline E. Sisson, A.J.), entered September 30, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed the subject children in the custody of the Ontario County Department of Social Services until the completion of the next permanency hearing.

It is hereby ORDERED that said appeal insofar as it concerns the order of disposition is unanimously dismissed and the "determination upon fact-finding hearing" is modified on the law by vacating the findings that respondents neglected the subject children by failing to provide them with adequate food and shelter and by using excessive corporal punishment, and as modified the "determination upon fact-finding hearing" is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother and respondent father each appeal from an order of disposition that, inter alia, placed the subject children in the custody of the Ontario County Department of Social Services until the completion of the next permanency hearing. As an initial matter, we dismiss the appeal insofar as it concerns the order of disposition inasmuch as the provisions of that order were entered on consent of the parties (*see* CPLR 5511; *Matter of Kendall N. [Angela M.]*, 188 AD3d 1688, 1688 [4th Dept 2020]; *Matter of Annabella B.C.*

[Sandra L.C.], 129 AD3d 1550, 1550-1551 [4th Dept 2015]). The appeal, however, brings up for review the "determination upon fact-finding hearing" (*see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]), which adjudged respondents to have neglected the subject children and incorporated Family Court's written decision setting forth its findings on the issue of neglect. Although respondents consented to the provisions of the order of disposition in lieu of a hearing, they are nevertheless aggrieved by the court's findings of neglect (*see generally Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592 [4th Dept 2014]; *Matter of Child Welfare Admin. v Jennifer A.*, 218 AD2d 694, 695 [2d Dept 1995], *lv denied* 87 NY2d 804 [1995]).

Contrary to respondents' contention, we conclude that petitioner established by a preponderance of the evidence that the subject children were neglected. Pursuant to Family Court Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." That statutory presumption " 'operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established' " (*Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], *lv dismissed* 12 NY3d 747 [2009]; *see Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313 [4th Dept 2012]).

Here, petitioner established that the mother admitted repeated cocaine use, that she misused drugs so often that she was running out of veins suitable for injection, that she was observed to be under the influence of drugs at various times by friends and by a visitation supervisor, and that she tested positive for several different drugs on several occasions. With respect to the father, petitioner established that he admitted using cocaine prior to a supervised visit and being under the influence of Suboxone on other occasions, and he further admitted that he had relapsed during the pendency of these proceedings. In addition, an Ontario County Sheriff's Deputy observed the father to be under the influence of drugs while placing him under arrest for an unrelated warrant during the pendency of these proceedings, and the deputy found cocaine in the father's possession at that time. Furthermore, the subject children found needles in respondents' home, and a neighbor observed a white powdery substance on a table in the home, while the children were present, under circumstances supporting the conclusion that the substance was a drug. Thus, the court's determination that petitioner established neglect by a preponderance of the evidence (*see Matter of Jack S. [Leah S.]*, 176 AD3d 1643, 1644-1645 [4th Dept 2019]; *Matter of Jack S. [Franklin*

O.S.], 173 AD3d 1842, 1843 [4th Dept 2019]) is supported by the requisite sound and substantial basis in the record (*see Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1493-1494 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]; *Matter of James D.D. [Tamela F.]*, 111 AD3d 1337, 1337-1338 [4th Dept 2015]). Although respondents presented evidence that would support a contrary conclusion, it is well settled that "the court's credibility determinations are . . . entitled to great deference" (*Matter of Syira W. [Latasha B.]*, 78 AD3d 1552, 1553 [4th Dept 2010]; *see Matter of Merrick T.*, 55 AD3d 1318, 1319 [4th Dept 2008]). Additionally, the court properly drew " 'the strongest possible negative inference' against [respondents] after [they] failed to testify at the fact-finding hearing" (*Matter of Kennedie M. [Douglas M.]*, 89 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]; *see Matter of Brittany W. [Patrick W]*, 103 AD3d 1217, 1218 [4th Dept 2013]; *see also Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79-80 [1995]).

We agree, however, with respondents that the court's finding that they neglected the subject children by failing to provide them with adequate food and shelter is not supported by the requisite preponderance of the evidence (*see Matter of Justin P. [Damien P.]*, 148 AD3d 903, 904 [2d Dept 2017]; *cf. Mary R.F.*, 144 AD3d at 1493-1494). Similarly, we conclude that petitioner failed to introduce sufficient evidence to corroborate a statement by one of the subject children that one of the respondents caused certain injuries that the child sustained, and thus failed to establish by a preponderance of the evidence that, as the court further found, respondents neglected the children by using excessive corporal punishment (*see generally Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). We therefore modify the "determination upon fact-finding hearing" by vacating those findings (*see Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

301

KA 18-02016

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

RONALD J. BARBER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered August 20, 2018. The judgment convicted defendant upon a jury verdict of criminal mischief in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal mischief in the third degree (Penal Law § 145.05 [2]) based upon damage he caused to limousines belonging to the business where he was employed as a driver.

Defendant contends that he was denied effective assistance of counsel because defense counsel purportedly misadvised him of the pretrial plea offer and failed to review a video recording of defendant's interrogation before trial. Both of those contentions, however, rely on matters outside the record on appeal and must therefore be raised by motion pursuant to CPL 440.10 (*see People v Spencer*, 185 AD3d 1440, 1442 [4th Dept 2020]; *People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *People v Mangiarella*, 128 AD3d 1418, 1418 [4th Dept 2015]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury, we conclude that, although "an acquittal would not have been unreasonable," the verdict is not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348 [2007]). While surveillance video footage did not clearly show defendant damaging the limousines, it showed him walking successively behind each of the damaged limousines in a manner that witnesses testified had no legitimate business purpose. Based upon that evidence, in conjunction with the

physical evidence and the testimony establishing the time frame in which the damage occurred, the jury, in convicting defendant, did not "fail[ ] to give the evidence the weight it should be accorded" (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

306

KA 15-01683

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZONDRE HOLT, ALSO KNOWN AS ZANDREA K. HOLT,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered July 9, 2015. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arose from an incident in which defendant was found in possession of a firearm following the stop by police officers of a vehicle that he was driving.

Defendant contends that his waiver of the right to appeal is invalid and that County Court erred in denying that part of his omnibus motion seeking to suppress physical evidence and statements obtained as a result of the traffic stop. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our consideration of his suppression contention (*see People v Johnson*, 189 AD3d 2145, 2146 [4th Dept 2020]), we conclude that the contention lacks merit. Defendant does not dispute that the officers who performed the stop did so after observing defendant commit a traffic violation. Contrary to defendant's contention, "regardless of whether the stop was pretextual, it was lawful inasmuch as the police had probable cause to believe that the driver of the vehicle had committed a traffic violation" (*People v Huddleston*, 160 AD3d 1359, 1360 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *see People v Brunson*, 145 AD3d 1476, 1477 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]; *People v Donaldson*, 35 AD3d 1242, 1243 [4th Dept

2006], *lv denied* 8 NY3d 984 [2007]). Contrary to defendant's further contention, the officers did not improperly escalate the encounter by opening the car door while ordering defendant to exit the vehicle after he had refused. At that point in the encounter, the officers possessed probable cause to arrest defendant based upon his failure to produce a valid driver's licence (*see People v Clark*, 227 AD2d 983, 984 [4th Dept 1996]).

Defendant failed to preserve his remaining contention that his guilty plea was not knowing, intelligent, and voluntary (*see People v Hill*, 128 AD3d 1479, 1480 [4th Dept 2015], *lv denied* 26 NY3d 930 [2015]; *People v Davis*, 37 AD3d 1179, 1179 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

308

CAF 19-01626

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

IN THE MATTER OF FRANK MYERS, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SARA MYERS AND ONONDAGA COUNTY DEPARTMENT OF
CHILDREN AND FAMILY SERVICES,
RESPONDENTS-RESPONDENTS.

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

JOELLE E. ROTONDO, EAST SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered August 8, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order dismissing his petition to modify a prior stipulated order of custody on the ground that he failed to establish a change in circumstances. We agree with the father that Family Court's determination lacks a sound and substantial basis in the record (*see generally Matter of Hermann v Williams*, 179 AD3d 1545, 1545 [4th Dept 2020]). "A party seeking to modify an existing custody arrangement must demonstrate a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the children" (*Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]; *see Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1768 [4th Dept 2016]; *Matter of Foster v Foster*, 128 AD3d 1381, 1381 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]). In seeking to modify the stipulated custody order, the father was required to show "a change in circumstances 'since the time of the stipulation' " (*Matter of Maracle v Deschamps*, 124 AD3d 1392, 1392 [4th Dept 2015]). Here, the father and respondent mother entered into the stipulated order shortly after the child's fifth birthday, before she would have entered kindergarten. At the hearing on the petition, the court received the child's third-grade school attendance records in evidence. Although we cannot discern the precise number of

absences from our review of the appellate record, the court expressed that it was "concerned" with the number of absences up to that point in the school year, of which there were approximately 30. Thus, we conclude that the father established a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child because the child's school records demonstrate that she had excessive school absences in the third grade (*cf. Matter of Audreanna VV. v Nancy WW.*, 158 AD3d 1007, 1009 [3d Dept 2018]; *Matter of Paul T. v Ann-Marie T.*, 75 AD3d 788, 790 [3d Dept 2010], *lv denied* 15 NY3d 713 [2010]; *Matter of Sullivan v Sullivan*, 40 AD3d 865, 866 [2d Dept 2007]). Therefore, we reverse the order, reinstate the petition, and remit the matter to Family Court for a hearing on the best interests of the child (*see Matter of Gelling v McNabb*, 126 AD3d 1487, 1488 [4th Dept 2015]; *see generally Fox v Fox*, 177 AD2d 209, 211-212 [4th Dept 1992]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 16-00549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN G. CRUZ, ALSO KNOWN AS MELVIN GONZALEZ,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered April 2, 2015. The judgment convicted defendant, upon a plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the first degree (Penal Law § 130.35 [4]). We affirm. Defendant contends that the plea was not voluntary because County Court abused its discretion in denying his request for an adjournment of the scheduled trial. Defendant failed to preserve that contention for appellate review because he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108-2109 [4th Dept 2020]). Furthermore, the narrow exception to the preservation requirement does not apply (*see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, we conclude that the court did not abuse its discretion in denying defendant's request for an adjournment (*see People v Spears*, 24 NY3d 1057, 1058-1060 [2014]; *People v Brown*, 159 AD2d 1011, 1011 [4th Dept 1990], *lv denied* 76 NY2d 731 [1990]). "The court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127 [4th Dept 1990], *lv denied* 76 NY2d 852 [1990]; *see People v Bones*, 50 AD3d 1527, 1528 [4th Dept 2008], *lv denied* 10 NY3d 956 [2008]), and here defendant failed to make the requisite showing of prejudice.

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 19-01759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA TAYLOR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered April 2, 2019. The judgment convicted defendant upon a plea of guilty of welfare fraud in the fifth degree and offering a false instrument for filing in the first degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of welfare fraud in the fifth degree (Penal Law § 158.05) and two counts of offering a false instrument for filing in the first degree (§ 175.35 [1]). In appeal No. 2, she appeals from a judgment convicting her upon a plea of guilty of two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and one count each of criminal sale of a controlled substance in the third degree (§ 220.39 [1]) and criminal nuisance in the first degree (§ 240.46). The two pleas were entered in a single plea proceeding. In both appeals, defendant contends that her waiver of the right to appeal is invalid and that the sentences are unduly harsh and severe. The record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses her challenge to the severity of the sentences (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 19-01761

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA TAYLOR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered April 2, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree (two counts), criminal sale of a controlled substance in the third degree and criminal nuisance in the first degree.

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

Same memorandum as in *People v Taylor* ([appeal No. 1] — AD3d — [Mar. 26, 2021] [4th Dept 2021]).

Entered: March 26, 2021

Mark W. Bennett
Clerk of the Court