SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 18, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 18, 2022

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

318/20

CA 16-00523

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

WILL FOODS, LLC, PLAINTIFF-APPELLANT,

V ORDER

WILL POULTRY CO., INC., NANCY CHRISTODOULIDES,
AS EXECUTRIX OF THE ESTATE OF DONALD E. WILL,
DECEASED, MARGARET GLEASON,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

WENDY J. CHRISTOPHERSEN, BUFFALO, FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WILL POULTRY CO., INC. AND NANCY CHRISTODOULIDES, AS EXECUTRIX OF THE ESTATE OF DONALD E. WILL, DECEASED.

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (R. THOMAS BURGASSER OF COUNSEL), FOR DEFENDANT-RESPONDENT MARGARET GLEASON.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 10, 2015. The order denied plaintiff's motion for partial summary judgment and granted the cross motion of defendant Margaret Gleason for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 4, 16 and 19, 2022,

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

319/20
CA 16-01704
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND CURRAN, JJ.

WILL FOODS, LLC, PLAINTIFF-RESPONDENT,

V ORDER

WILL POULTRY CO., INC., NANCY CHRISTODOULIDES,
AS EXECUTRIX OF THE ESTATE OF DONALD E. WILL,
DECEASED, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WENDY J. CHRISTOPHERSEN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 1, 2016. The order granted the motion of plaintiff for leave to reargue, and upon reargument, granted the motion of plaintiff for summary judgment on the eighth and tenth causes of action in the amended complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 4 and 16, 2022,

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

320/20

CA 16-01705

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

WILL FOODS, LLC, PLAINTIFF-RESPONDENT,

V ORDER

WILL POULTRY CO., INC., NANCY CHRISTODOULIDES,
AS EXECUTRIX OF THE ESTATE OF DONALD E. WILL,
DECEASED, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

BARCLAY DAMON LLP, BUFFALO (JENNIFER G. FLANNERY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WENDY J. CHRISTOPHERSEN, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered July 6, 2016. The judgment awarded plaintiff money damages.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 4 and 16, 2022,

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

874

CA 21-00019

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

MATEO THOMAS CRETARO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SALLY HUNTINGTON AND WILLARD HILTS,
DEFENDANTS-RESPONDENTS.

CERIO LAW OFFICES, SYRACUSE (DAVID HERKALA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BRADLEY E. KEEM, SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 28, 2020. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, the return of personal property allegedly owned by him or damages for the value of that property. Defendants moved for summary judgment dismissing the complaint, contending, inter alia, that plaintiff "forfeited his rights" to the property when he failed to remove it from their premises in a timely manner. Supreme Court granted the motion, and plaintiff appeals.

Plaintiff is the former owner of certain real property. In 2008, plaintiff defaulted on his mortgage and, in 2012, a judgment of foreclosure was entered. Nevertheless, plaintiff remained on the premises until it was sold at auction in 2015. Plaintiff then vacated the premises but left hundreds of items behind. In 2016, defendants purchased the property at another auction and leased it to plaintiff's son and defendants' granddaughter (couple), who were married, with the idea that the couple would eventually buy the premises from defendants. When it became evident that the couple would not be in a position to buy the premises from defendants and the couple refused to vacate the premises, defendants evicted them.

After the couple vacated the premises, a significant amount of plaintiff's personal property remained on the premises. Defendants thereafter mailed to plaintiff and the couple a Notice of Abandoned

Property, advising them that, if they did not remove the remaining property "within thirty days of receipt of this letter, then [the property] [would] be considered abandoned and disposed of accordingly."

Plaintiff removed a limited amount of the property within that 30-day time period. Defendants do not dispute that they denied his requests for additional time to remove the rest of the property and that they thereafter disposed of that property in various ways.

We agree with plaintiff that the court erred in granting defendants' motion insofar as it sought summary judgment dismissing plaintiff's second cause of action, for conversion, and we therefore modify the order accordingly. We note that plaintiff has abandoned any contention that the court erred in granting the motion insofar as it sought summary judgment dismissing the first cause of action by failing to address that cause of action in his brief (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "In order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right" (*Giardini v Settanni*, 159 AD3d 874, 875 [2d Dept 2018]; *see Colavito*, 8 NY3d at 50; *Broadway Warehouse Co. v Buffalo Barn Bd., LLC*, 143 AD3d 1238, 1241 [4th Dept 2016]).

Thus, for defendants in this action to establish their entitlement to summary judgment dismissing the complaint, they were required to establish as a matter of law either that plaintiff did not have a legal right or possessory interest in the property left on the premises or that defendants' undisputed acts of dominion and control over that property were somehow authorized.

If the property can be deemed abandoned, then plaintiff's possessory interest was forfeited and defendants' actions were authorized, i.e., there can be no cause of action for conversion (*see e.g. Henryka v Amalgamated Warbasse House, Inc.*, 34 Misc 3d 157[A], 2012 NY Slip Op 50421[U] *2 [App Term, 2d Dept, 11th & 13th Jud Dists 2012]). "The abandonment of property is the relinquishing of all title, possession or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away" (*Foulke v New York Consol. R.R. Co.*, 228 NY 269, 273 [1920]).

Where a "[p]laintiff establishe[s] that he [or she] is the owner of the subject personal property, defendants had such property in their possession and they refused to return the property to him [or

her] upon . . . demand," that plaintiff "establishe[s] a prima facie case for conversion unless a lien or liens existed granting defendants superior possessory rights" (*Miller v Marchuska*, 31 AD3d 949, 950 [3d Dept 2006]). Here, defendants did not contend that any such liens existed, and their own submissions establish that plaintiff was the owner of the personal property left on the premises, that he attempted to remove some of the property during the 30-day period, and that he made requests for additional time to retrieve his property.

We thus conclude that defendants' own submissions raise triable issues of fact whether plaintiff abandoned the property and whether defendants had authority to exercise dominion over that property (*see Medlock Crossing Shopping Ctr. Duluth, GA. LP v Kitchen & Bath Studio, Inc.*, 126 AD3d 1463, 1466 [4th Dept 2015]; *8902 Corp. v Helmsley-Spear, Inc.*, 23 AD3d 316, 316 [1st Dept 2005]; *cf. Modica v Capece*, 189 AD2d 860, 861-862 [2d Dept 1993]).

Inasmuch as defendants failed to meet their initial burden of establishing that they did not convert the property, the burden never shifted to plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Based on our determination, we do not address plaintiff's remaining contentions.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

969

CA 20-01042

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

IN THE MATTER OF THE ESTATE OF RALPH W. BURROWS, ALSO KNOWN AS R.W. BURROWS, ALSO KNOWN AS RALPH WILLIAM BURROWS, ALSO KNOWN AS BILL BURROWS, DECEASED.

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

JI TING WANG BURROWS, ALSO KNOWN AS JANE BURROWS, AND EVAN DREYFUSS, PETITIONERS-RESPONDENTS;

MARCIA BURROWS, AS GUARDIAN OF AVA BURROWS AND AUDREY BURROWS, RESPONDENT-APPELLANT.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (GERARD G. BREW OF COUNSEL), AND KEENAN AND KEENAN, P.C., UTICA, FOR RESPONDENT-APPELLANT.

MCCARTHY FINGAR LLC, WHITE PLAINS (ROBERT H. ROSH OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Herkimer County (John H. Crandall, S.), dated May 28, 2020. The order, among other things, granted the motion of petitioners for summary judgment.

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

Memorandum: Marcia Burrows (respondent), as guardian of Ava Burrows and Audrey Burrows (children), appeals from an order that, inter alia, granted petitioners' motion for summary judgment dismissing both respondent's objections to the probate of decedent's will and a petition to set aside the accompanying revocable trust based on, inter alia, lack of capacity and undue influence; denied respondent's cross motion for, inter alia, partial summary judgment declaring that petitioners had the burden of proving that the will and trust were not products of undue influence; and admitted decedent's will to probate. We affirm.

Initially, we conclude that Surrogate's Court properly granted that part of petitioners' motion for summary judgment dismissing the objection with respect to decedent's testamentary capacity. "It is the indisputable rule in a will contest that '[t]he proponent has the burden of proving that the testator possessed testamentary capacity and the [Surrogate] must look to the following factors: (1) whether [the testator] understood the nature and consequences of executing a will; (2) whether [he] knew the nature and extent of the property [he] was disposing of; and (3) whether [he] knew those who would be

considered the natural objects of [his] bounty and [his] relations with them' " (*Matter of Kumstar*, 66 NY2d 691, 692 [1985], *rearg denied* 67 NY2d 647 [1986]; *see Matter of Alibrandi*, 104 AD3d 1175, 1175 [4th Dept 2013]; *Matter of Castiglione*, 40 AD3d 1227, 1228 [3d Dept 2007], *lv denied* 9 NY3d 806 [2007]). "Old age and bad health . . . when a will is executed are 'not necessarily inconsistent with testamentary capacity . . . as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made' " (*Matter of Makitra*, 101 AD3d 1579, 1580 [4th Dept 2012]; *see Alibrandi*, 104 AD3d at 1175-1176; *Matter of Buchanan*, 245 AD2d 642, 644 [3d Dept 1997], *lv dismissed* 91 NY2d 957 [1998]).

Here, petitioners satisfied their initial burden on the motion of establishing decedent's testamentary capacity through submission of, inter alia, the self-executing affidavit and the SCPA 1404 hearing testimony of the witnesses to the will's execution—i.e., decedent's estate attorney and his personal accountant—as well as testimony of decedent's longtime executive assistant (*see Matter of Giaquinto*, 164 AD3d 1527, 1528 [3d Dept 2018], *affd* 32 NY3d 1180 [2019]; *Alibrandi*, 104 AD3d at 1176; *Matter of Murray*, 49 AD3d 1003, 1004-1005 [3d Dept 2008]). Those individuals all testified that, despite his terminal illness, decedent was not operating under any mental impairment at the time of the will's execution and was entirely aware of his actions and his intentions with respect to the will. Indeed, those witnesses confirmed that decedent did not demonstrate any signs of cognitive decline; appeared to be fully competent, coherent, and aware when he executed the will; and understood the nature of the document that he was signing and what it accomplished. We also note that the execution of the will and the resolution of decedent's estate was the culmination of prolonged discussions between decedent and his estate attorney, as well as other advisors, and that decedent was an active participant throughout the estate planning process. The witnesses also testified that decedent repeatedly stated that he deliberately did not provide for the children in the will because he had already provided for them in a separate trust, thereby establishing that decedent had stated his intentions with respect to the children and had considered the consequences of his decision not to include them in the will (*see Alibrandi*, 104 AD3d at 1177; *Matter of Walker*, 80 AD3d 865, 866-867 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]).

In opposition, respondent failed to raise a triable issue of material fact with respect to decedent's capacity to execute the will. Respondent argued that there were questions of fact whether decedent had capacity to execute the will based on the effect his terminal cancer and its treatment had on his mind, alleging in particular that he suffered from "chemo brain" and was impaired by his use of morphine. As noted above, however, bad health—in this case a terminal cancer diagnosis—is not necessarily inconsistent with testamentary capacity because the relevant inquiry is whether decedent was competent at the time of the will's execution (*see Alibrandi*, 104 AD3d at 1177; *Makitra*, 101 AD3d at 1580; *Murray*, 49 AD3d at 1005). To the extent respondent contends that the Surrogate erred in granting petitioners' motion insofar as it sought to dismiss the testamentary

capacity objection, thereby precluding her from introducing at trial expert medical testimony showing that decedent's illness made him incompetent to execute the will, we note that such "medical opinion evidence assumes a relatively minor importance" where, as here, "there is direct evidence that . . . decedent possessed the understanding to make a testamentary disposition" (*Makitra*, 101 AD3d at 1580 [internal quotation marks omitted]; *see Matter of Coddington*, 281 App Div 143, 145 [3d Dept 1952], *affd* 307 NY 181 [1954]). In any event, respondent has failed to present any evidence, medical or otherwise, to show that—at the time the will was executed—decedent lacked the requisite capacity or that he was mentally incompetent as a consequence of his illness. Indeed, all of the evidence in the record supports petitioners' assertion that decedent was lucid and of sound mind at the time in question (*see Giaquinto*, 164 AD3d at 1529-1530). At best, respondent merely speculates that the effects of decedent's illness and the treatment for that condition undermined his capacity when he executed the will, which is insufficient to raise a triable issue of fact and prevent probate of the will (*see Matter of Bodkin* [appeal No. 3], 128 AD3d 1526, 1528 [4th Dept 2015]; *Matter of Eshaghian*, 54 AD3d 860, 861 [2d Dept 2008]).

We further conclude that the Surrogate properly granted that part of petitioners' motion for summary judgment dismissing the undue influence objection with respect to the will. "A . . . contestant seeking to prove undue influence must show the exercise of a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against [his] free will" (*Makitra*, 101 AD3d at 1581 [internal quotation marks omitted]; *see Kumstar*, 66 NY2d at 693; *Alibrandi*, 104 AD3d at 1177-1178). "Undue influence must be proved by evidence of a substantial nature . . . , e.g., by evidence identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Makitra*, 101 AD3d at 1581 [internal quotation marks omitted]). "Mere speculation and conclusory allegations, without specificity as to precisely where and when the influence was actually exerted, are insufficient to raise an issue of fact" (*Alibrandi*, 104 AD3d at 1178 [internal quotation marks omitted]; *see Walker*, 80 AD3d at 867).

Here, we conclude that petitioners met their initial burden on the motion to show that the will was not the product of undue influence (*see Alibrandi*, 104 AD3d at 1177-1178; *Matter of Coniglio*, 242 AD2d 901, 902 [4th Dept 1997]). The evidence establishes that, at the time of the will's execution, petitioner Ji Ting Wang Burrows (surviving spouse) was asked to leave the room so decedent could discuss the will with his advisors. The evidence also suggests that the surviving spouse was, at most, a passive participant in decedent's estate planning. Further, the testimony and affidavits submitted from decedent's advisors establish that decedent was actively engaged and clear about his intentions with respect to the will. As noted above, there was also testimony establishing that decedent intentionally decided not to include the children in the will inasmuch as he had

already provided for them elsewhere. Petitioners also submitted respondent's deposition testimony in which she stated that, although she had a "personal belief" that the surviving spouse had exerted pressure on decedent, she had no documentary or other proof to substantiate that assertion.

Respondent failed to raise a triable issue of fact in opposition inasmuch as she offered nothing but speculative allegations that petitioners actually influenced decedent's distribution of his assets through the will (*see Alibrandi*, 104 AD3d at 1178; *Matter of Dubin*, 54 AD3d 945, 946-947 [2d Dept 2008]; *see also Lewis v DiMaggio*, 151 AD3d 1296, 1299-1300 [3d Dept 2017]). At best, the circumstantial evidence respondent relies on to show petitioners' undue influence goes only to petitioners' opportunity or motive, not to whether they actually wielded such influence on decedent (*see Matter of Branovacki*, 278 AD2d 791, 792 [4th Dept 2000], *lv denied* 96 NY2d 708 [2001]; *Coniglio*, 242 AD2d at 902). To the extent that respondent relies on a single email exchange between the surviving spouse and decedent's estate attorney to show that the surviving spouse exerted influence on the will, we note that respondent's argument ignores the numerous other emails from around the same time demonstrating decedent's active participation in his estate planning. Further, the email from the surviving spouse belies respondent's contention that the surviving spouse controlled the estate negotiations because the email merely conveyed decedent's wishes to his attorney and, notably, decedent was copied on the email. Decedent's decision not to provide for the children in the will—a departure from his prior estate plan—did not, by itself, raise issues of fact with respect to whether the will was the product of undue influence because respondent did not controvert the testimony establishing that decedent knowingly departed from the prior estate plan based on his conclusion that he had already sufficiently provided for the children in other ways.

We also conclude that the Surrogate properly granted that part of the motion seeking summary judgment dismissing the petition to set aside the revocable trust. Assuming, arguendo, that, as respondent contends, the level of capacity required to execute a revocable trust is the same as that required to execute a contract (*see Matter of Edson*, NYLJ, Jul. 14, 1997 at 31, col 1, at 31, col 2, 1997 NYLJ LEXIS 440, *5-6 [Sur Ct, Suffolk County 1997]; 2 Harris, NY Estates: Probate, Administration and Litigation § 25:24 [2021]; Eve Preminger et al., Trusts and Estates Practice in New York § 5:203 [West's NY Prac Series 2021]; *cf. Matter of Cuttitto Family Trust*, 10 AD3d 656, 657 [2d Dept 2004]; *Matter of Aronoff*, 171 Misc 2d 172, 177 n 6 [Sur Ct, NY County 1996]), we conclude that petitioners satisfied their initial burden on the motion of establishing decedent's capacity to create the revocable trust. In support of their motion, petitioners submitted, inter alia, the affirmation of decedent's estate attorney who opined that, based on his extensive correspondence and communication with decedent in the months leading up to the trust's creation, decedent had the capacity to enter into a contract. Indeed, he noted that decedent was able to read and write, was aware of each and every provision in the trust and the nature and effect of his actions, and could understand and articulate the complexities of the

assets that were being placed in the trust. In short, decedent had the capacity to create the trust because his "mind was [not] so affected as to render him . . . wholly and absolutely incompetent to comprehend and understand the nature of the transaction" (*Matter of Mildred M.J.*, 43 AD3d 1391, 1392 [4th Dept 2007] [internal quotation marks omitted]; *see generally Thomas v Gray*, 121 AD3d 1091, 1092 [2d Dept 2014], *lv denied* 25 NY3d 961 [2015], *rearg denied* 25 NY3d 1196 [2015]; *Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). We further conclude that, in opposition, respondent failed to raise a triable issue of fact with respect to decedent's capacity to create the trust, instead relying heavily on the same impermissible speculation about the effects of decedent's cancer diagnosis on his ability to execute the trust that she offered with respect to the will (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

For reasons previously stated in connection with the will contest, we further conclude that petitioners met their initial burden of establishing that the revocable trust was not the product of undue influence (*see generally Bazigos v Krukar*, 140 AD3d 811, 813-814 [2d Dept 2016]; *Matter of Seelig*, 13 AD3d 776, 777-778 [3d Dept 2004], *lv denied* 4 NY3d 707 [2005]) and that respondent failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

We likewise conclude that the Surrogate properly denied respondent's cross motion for partial summary judgment seeking, inter alia, a declaration that petitioners maintained a confidential relationship with decedent such that the burden of proof shifted to them to establish that the will and revocable trust were not the products of undue influence. Generally, "[t]he burden of proving undue influence . . . rests with the party asserting its existence" (*Matter of Nurse*, 160 AD3d 745, 748 [2d Dept 2018]; *see Matter of Panek*, 237 AD2d 82, 83-84 [4th Dept 1997]). Where, however, "there was a confidential or fiduciary relationship between the beneficiary and the decedent, [a]n inference of undue influence arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction" (*Blase v Blase*, 148 AD3d 1777, 1778 [4th Dept 2017] [internal quotation marks omitted]; *see Bazigos*, 140 AD3d at 813; *Matter of Prievo v Urbaniak*, 64 AD3d 1240, 1241 [4th Dept 2009]), i.e., " 'to prove the transaction fair and free from undue influence' " (*Prievo*, 64 AD3d at 1241). On her cross motion, respondent had the initial burden to establish " 'the requisite threshold showing that a confidential relationship existed' " (*id.*; *see Matter of Graeve*, 113 AD3d 983, 984 [3d Dept 2014]).

"[T]o demonstrate the existence of a confidential relationship, there must be evidence of circumstances that demonstrate inequality or a controlling influence" (*Matter of Albert*, 137 AD3d 1266, 1268 [2d Dept 2016], *lv denied* 27 NY3d 910 [2016]; *see Nurse*, 160 AD3d at 748). A confidential relationship is "one that is 'of such a character as to render it certain that [the parties] do not deal on terms of equality' " (*Matter of Bonczyk v Williams*, 119 AD3d 1124, 1125 [3d Dept 2014]). As relevant here, "the existence of a family

relationship does not, per se, create a presumption of undue influence; there must be evidence of other facts or circumstances showing inequality or controlling influence" (*Feiden*, 151 AD2d at 891; *see Bonczyk*, 119 AD3d at 1126; *Graeve*, 113 AD3d at 984). Indeed, a "familial relationship counterbalances any presumptions arising from any claimed confidential relationship or the fact that petitioner was a beneficiary" (*Matter of Ruhle*, 173 AD3d 1389, 1391 [3d Dept 2019]).

Respondent did not meet her burden of establishing as a matter of law that the surviving spouse had a confidential relationship with decedent. Respondent supplied no evidence showing that the role of the surviving spouse in decedent's estate planning process or other financial decisions was "anything more than a conduit to effectuate [his] desires" (*Matter of Prevratil*, 121 AD3d 137, 142 [3d Dept 2014] [internal quotation marks omitted]; *see Bonczyk*, 119 AD3d at 1127). Indeed, any assertion that the surviving spouse exercised a controlling influence over decedent's decisions was undermined by the evidence establishing decedent's sound mind and his active participation in the estate planning process. Further, the surviving spouse's involvement in decedent's medical care did not establish a confidential relationship given that decedent "was not under her exclusive care and control and had fairly regular contact with friends as his illness progressed" (*Prevratil*, 121 AD3d at 142-143; *cf. Oakes v Muka*, 69 AD3d 1139, 1139-1141 [3d Dept 2010], *appeal dismissed* 15 NY3d 867 [2010], *reconsideration denied* 16 NY3d 733 [2011]). To the extent the surviving spouse's involvement in decedent's medical care suggests the existence of a confidential relationship, any presumptions arising from the existence of such a relationship were ultimately counterbalanced by the familial relationship between them (*see Ruhle*, 173 AD3d at 1391; *Prevratil*, 121 AD3d at 143; *Graeve*, 113 AD3d at 984-985).

Furthermore, the fact that the surviving spouse held a power of attorney for decedent did not establish a confidential relationship between her and decedent. A "power of attorney, standing alone, is insufficient to establish the existence of a confidential relationship or to shift the burden of proof regarding undue influence"—particularly where, as here, the surviving spouse never exercised the power of attorney (*Giaquinto*, 164 AD3d at 1530; *see Dwyer v Valachovic*, 137 AD3d 1369, 1371 [3d Dept 2016]). No inference of undue influence applies with respect to petitioner Evan Dreyfuss inasmuch as he was not a beneficiary of the will (*see Matter of Coopersmith*, 48 AD3d 562, 563 [2d Dept 2008]; *cf. Matter of Delorey*, 141 AD2d 540, 541-542 [2d Dept 1988]).

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

All concur except DEJOSEPH, J., who is not participating.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

987

CA 20-01580

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

EPISCOPAL CHURCH HOME AND AFFILIATES LIFE CARE COMMUNITY, INC., DOING BUSINESS AS CANTERBURY WOODS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

GATES CIRCLE HOLDINGS, LLC, DEFENDANT-APPELLANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (TRISTAN D. HUJER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered October 23, 2020. The order, among other things, granted in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of the motion seeking attorneys' fees and as modified the order is affirmed without costs.

Memorandum: Defendant appeals and plaintiff cross-appeals from an order that, inter alia, granted in part plaintiff's motion for summary judgment awarding it damages, attorneys' fees, and costs; denied defendant's cross motion for leave to renew its opposition to an earlier summary judgment motion; and set a date for a hearing on the amount of damages. We conclude that Supreme Court properly granted plaintiff's motion insofar as it sought damages but erred in granting that part of the motion seeking an award of attorneys' fees.

Plaintiff and defendant entered into a purchase agreement whereby plaintiff would buy certain property from defendant. The property at issue required environmental remediation, and the parties anticipated that the remediation work would generate certain tax credits. Pursuant to paragraph 6 (a) of the agreement, defendant agreed that plaintiff would "be entitled to receive" and defendant would pay to plaintiff a portion of those tax credits "realized by [defendant] or its members," with payment to be made within a certain period of time after the "receipt by [defendant] or [its] members" of those tax credits. The amount to be paid to plaintiff, however, was to "be net of federal income taxes paid or incurred with respect to [the] tax

credits by [defendant] or [its] members."

When defendant refused to pay plaintiff any portion of the tax credits that were generated as a result of the project, plaintiff commenced this action seeking its portion of the tax credits as well as attorneys' fees, actual damages, and third-party expenses, among other things. Defendant answered and asserted a counterclaim alleging that plaintiff's demand for payment of the tax credits constituted a breach of the agreement and seeking declarations that plaintiff was not entitled to any of the tax credits and was required to reimburse defendant for "all damages and third-party expenses, including but not limited to attorneys' fees." In a prior order the court awarded plaintiff partial summary judgment on its first cause of action for breach of contract and dismissed defendant's counterclaim insofar as it alleged breach of contract. The court concluded that plaintiff was entitled to payment of the tax credits, as reduced by the provisions of paragraph 6 (a). Plaintiff and defendant thereafter filed the motion and cross motion underlying this appeal.

As a preliminary matter, we note that the parties have limited their appeal and cross appeal to the substantive merits of the legal issues. Plaintiff did not below and does not on appeal contend that defendant's cross motion to renew is procedurally deficient. Similarly, defendant did not and does not contend that plaintiff's successive motion for summary judgment was improper. In fact, defendant expressly waived any procedural objections to the motion. Both parties asked the court to reconsider portions of its prior ruling and limited their arguments to the merits, as they do on appeal.

With respect to the merits, defendant contends on its appeal that the court erred in determining that plaintiff was entitled to a portion of the tax credits. We disagree. The agreement provided that plaintiff was entitled to a portion of the tax credits received and realized by defendant or its members. It is undisputed that defendant did not receive the tax credit. It is also undisputed that defendant's sole member was Montante Group, LLC (Montante). Montante is a partnership, and the tax credits were reported as income to the five individual partners of that partnership (Individuals). Defendant thus contends that, inasmuch as the credits were received and realized by the Individuals and not by defendant or its members, plaintiff "was not, is not, and never will be entitled to **any** tax credits."

"It is fundamental that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms . . . and that courts should read a contract as a harmonious and integrated whole to determine and give effect to its purpose and intent . . . Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements . . . In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]

[internal quotation marks omitted]; *see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Here, we agree with the court that interpreting paragraph 6 (a) as defendant suggests would render that provision meaningless. If defendant and its member, Montante, were never going to receive tax credits because each served as a "pass-through" to the Individuals (*see* 26 USC §§ 701; 702 [b]), then there was no point in making any provision for plaintiff to receive such credits. "[C]ourts may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear . . . However, such an approach is appropriate only in those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part" (*Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547-548 [1995]; *see Meyer v Stout*, 79 AD3d 1666, 1668 [4th Dept 2010]). Here, it would be absurd to conclude that the parties put forth a term in the agreement that could never come to fruition.

Moreover, as plaintiff correctly contends, "[a] partnership's gross income is calculated at the partnership level and passed through to individual partners. Any question as to whether the partnership has realized income must be resolved at the partnership, rather than the limited partner, level" (*Estate of Newman v Commissioner of Internal Revenue*, 934 F2d 426, 427 [2d Cir 1991]; *see Uniquest Delaware LLC v United States*, 294 F Supp 3d 107, 120 [WD NY 2018]; *see generally United States v Basye*, 410 US 441, 448 n 8 [1973]). Although the Individuals received and realized the tax credits as income on their personal returns, "for the limited purpose of calculating the amount of income received by a partnership, the partnership must be regarded as a separate economic entity that earns income and sustains losses as a result of its commercial activities" (*Estate of Newman*, 934 F2d at 433; *see Uniquest Delaware LLC*, 294 F Supp 3d at 120). We thus conclude that defendant's member, the Montante partnership, did in fact realize and receive the tax credits as income and, as a result, plaintiff is owed its share of those tax credits. Based on our determination, we do not address plaintiff's remaining contentions related to its entitlement to tax credits.

Plaintiff's contention on its cross appeal that its portion of the tax credits should not be reduced by the federal taxes paid by the Individuals with respect to those tax credits does not warrant modification or reversal of the order on appeal. We agree with defendant that, as the court ruled, it is entitled to an offset on damages for federal income taxes paid by the Individual members notwithstanding that Montante itself did not pay any income taxes on the tax credits, which, as noted, were received by the Individuals.

We agree with defendant on its appeal, however, that the court erred in granting the motion insofar as it sought attorneys' fees relating to plaintiff's attempt to enforce the agreement against defendant. As a general rule, "attorney[s'] fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties,

statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). "Courts must not 'infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise' " (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 361 [2020], quoting *Hooper Assoc.*, 74 NY2d at 492).

The parties do not contend that the indemnification provisions of the agreement provide for attorneys' fees in a direct action between them (*see generally Hooper Assoc.*, 74 NY2d at 491-492; *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 206-208 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]), but plaintiff does contend that such an award is authorized by the section of the agreement that provides for "actual damages and . . . third[-]party expenses" in the event of defendant's intentional and willful default. In our view, that provision does not make it unmistakably clear that defendant intended to waive the benefit of the general rule. We agree with defendant that this is not a situation in which the legal expenses were third-party expenses generated to cure a default occasioned by another party or to reduce or minimize harm caused by that default (*cf. City of Elmira v Larry Walter, Inc.*, 150 AD2d 129, 133 [3d Dept 1989], *affd* 76 NY2d 912 [1990]; *Aero Garage Corp. v Hirschfeld*, 185 AD2d 775, 776 [1st Dept 1992], *lv denied* 81 NY2d 701 [1992]). We thus modify the order by denying that part of plaintiff's motion seeking attorneys' fees resulting from its action to enforce the agreement.

All concur except CARNI, J.P., who is not participating.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1039

KA 19-00583

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GHANEM ABUGHANEM, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 (James A. McLeod, A.J.), entered February 6, 2019. The judgment convicted defendant upon a jury verdict of strangulation in the second degree, criminal obstruction of breathing or blood circulation and assault in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of strangulation in the second degree (Penal Law § 121.12), criminal obstruction of breathing or blood circulation (§ 121.11 [a]), and two counts of assault in the third degree (§ 120.00 [1]), resulting from an incident of domestic violence between defendant and his wife (complainant).

Defendant contends that he was deprived of a fair trial because, on numerous occasions, County Court improperly intervened in the interpreters' translation of testimony from the complainant and defendant by supplying the interpreters and witnesses with instructions. Defendant also contends that he was deprived of a fair trial due to several errors in the interpreters' translation of witness testimony. We conclude that those contentions are unpreserved because, as defendant correctly concedes, defense counsel did not object to any of the alleged improprieties at trial (*see* CPL 470.05 [2]; *see generally People v Pizarro*, 151 AD3d 1678, 1681 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *People v DeNormand*, 1 AD3d 1047, 1048 [4th Dept 2003], *lv denied* 1 NY3d 626 [2004]).

We also reject defendant's alternative contention that he was

denied effective assistance of counsel by defense counsel's failure to object to the aforementioned improprieties because we conclude that any such challenges were without merit (*see People v Stachnik*, 101 AD3d 1590, 1591 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]; *People v Bassett*, 55 AD3d 1434, 1438 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]). Specifically, the challenged incidents where the court intervened with the interpreters and the witnesses to provide instructions did not deprive defendant of a fair trial inasmuch as the court did "not unnecessarily or excessively interfere in the presentation of proof or convey to the jury [its] opinion concerning the credibility of the witnesses or the merits of the case" (*People v West*, 129 AD3d 1629, 1630 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015] [internal quotation marks omitted]; *see People v Richards*, 177 AD3d 1280, 1282 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). The court's interventions during the complainant's and defendant's testimony were done to "facilitate the progress of the trial" (*People v Pham*, 178 AD3d 1438, 1438 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020] [internal quotation marks omitted]), and, given the language barriers, were warranted to ensure that questions were properly posed and clearly answered (*see People v Roberts*, 210 AD2d 511, 511 [2d Dept 1994], *lv denied* 85 NY2d 865 [1995]; *People v Rodriguez*, 114 AD2d 525, 525 [2d Dept 1985], *lv denied* 66 NY2d 1043 [1985]; *cf. People v Buckheit*, 95 AD2d 814, 814 [2d Dept 1983]). In addition, defense counsel was not ineffective for failing to object to any errors in the translation of the witnesses' testimony because defendant failed to establish that there was " 'a serious error in translation' [or] that the alleged problems with the translation prevented him from conducting an effective [direct examination] or cross-examination [of the witnesses in question] or caused [him] any other prejudice" (*People v Chowdhury*, 180 AD3d 455, 456 [1st Dept 2020]; *see Pizarro*, 151 AD3d at 1681; *People v Dat Pham*, 283 AD2d 952, 952 [4th Dept 2001], *lv denied* 96 NY2d 900 [2001]).

Defendant next contends that the evidence is legally insufficient to support the conviction with respect to strangulation in the second degree under count one of the indictment, criminal obstruction of breathing or blood circulation under count two of the indictment, and assault in the third degree under counts three and four of the indictment. Insofar as relevant here, "[a] person is guilty of strangulation in the second degree when he or she commits the crime of criminal obstruction of breathing or blood circulation . . . and thereby causes stupor, loss of consciousness for any period of time, or any other physical injury or impairment" (Penal Law § 121.12). "A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she . . . applies pressure on the throat or neck of such person" (§ 121.11 [a]). "A person is guilty of assault in the third degree when . . . [w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person" (§ 120.00 [1]). Physical injury is defined as the "impairment of physical condition or substantial pain" (§ 10.00 [9]).

Viewing the evidence in the light most favorable to the People

(*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant is guilty under counts one, two, and three of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to counts one and two, we conclude that a rational jury could have inferred beyond a reasonable doubt that defendant committed strangulation in the second degree and criminal obstruction of breathing or blood circulation (*see People v Swift*, 195 AD3d 1496, 1497-1498 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Haardt*, 129 AD3d 1322, 1323-1324 [3d Dept 2015]). Specifically, the complainant testified that defendant put his hands around her neck and choked her from behind, constricting her breathing by applying force to the back of her neck with his thumbs while his fingers wrapped around to her throat. She also testified that after defendant released his handhold on her neck, he wrapped a blanket around complainant's head and neck and used it to choke her until she lost consciousness. Although the testifying first responders did not observe bruising to complainant's neck immediately after the incident, a photograph of the complainant taken at the hospital shows bruising to her neck area.

With respect to count three, we conclude that a rational jury could have inferred beyond a reasonable doubt that defendant committed assault in the third degree by punching the complainant in the face, which caused her to sustain a physical injury (*see People v Barrett*, 188 AD3d 1736, 1739 [4th Dept 2020]; *People v Azadian*, 195 AD2d 564, 564 [2d Dept 1993], *lv denied* 82 NY2d 804 [1993]; *see also People v Huddleston*, 196 AD3d 1098, 1099 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Specifically, the complainant testified that defendant hit her in the face, just above her mouth, with the cell phone he was holding in his hand. She also testified that, as a consequence of being hit in the face, she was in a lot of pain and could not speak because her mouth went numb, and that she received medical treatment for her injury. The first responders testified that the complainant was bleeding from her nose and mouth when they arrived, and photographs taken at the hospital documented her bloody mouth and swollen lips. Further, viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on counts one, two, and three of the indictment is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the evidence is legally insufficient to support his conviction of assault in the third degree under count four of the indictment. With respect to that count, which arose from the allegation that defendant caused the complainant physical injury by jumping on her back, we conclude that the People failed to present evidence establishing beyond a reasonable doubt that she sustained a physical injury during that part of the encounter. Specifically, although the complainant testified that defendant jumped on her back and that she reported back pain to both first responders and hospital personnel, there are no photographs of any back injuries or any evidence that the complainant suffered from substantial back pain following the incident (*see generally People v Smith* [appeal No.

1], 186 AD3d 1106, 1108 [4th Dept 2020]; *People v Gibson*, 134 AD3d 1512, 1514 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). We therefore modify the judgment by reversing that part convicting defendant of assault in the third degree under count four of the indictment and dismissing that count of the indictment.

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

All concur except CARNI, J., who is not participating.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1080

KA 18-02068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAKIM YANCY, DEFENDANT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON 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 (Sam L. Valleriani, J.), rendered October 12, 2017. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [3]), arising from an escalating encounter with a police officer during which defendant ultimately punched the officer multiple times. We affirm.

Contrary to defendant's contention, under the circumstances of this case, we conclude that County Court did not err in refusing to provide the jury with the expanded definition of the "lawful duty" element of Penal Law § 120.05 (3) that was requested by defendant (*see generally* CPL 300.10 [2]; *People v J.L.*, 36 NY3d 112, 119 [2020]; *People v Medina*, 18 NY3d 98, 104 [2011]).

Defendant also contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. We reject those contentions. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Next, even assuming, arguendo, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of the crime as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303

[2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

All concur except CARNI, J., who is not participating.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1085

CAF 21-00162

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

IN THE MATTER OF RAJEA T., JR.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NIASIA J., RESPONDENT-RESPONDENT.

THE BATAVIAN, LLC, APPELLANT.

CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC, ITHACA (HEATHER E. MURRAY, OF COUNSEL), FOR APPELLANT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Erin P. DeLabio, A.J.), entered December 24, 2020 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of The Batavian, LLC seeking, among other things, access to a transcript of a proceeding that occurred on November 26, 2019.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion insofar as it sought access to the transcript of the attorney disqualification hearing and as modified the order is affirmed without costs and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: Appellant, a nonparty online-only local news outlet covering Batavia and Genesee County, appeals from an order denying its motion for, inter alia, permission to "intervene" in this Family Court Act article 10 proceeding. Appellant published a story covering criminal charges against a Batavia resident arising from certain allegations, including that the resident had intentionally struck and caused physical injuries to a five-year-old child. Appellant subsequently learned that the resident—i.e., respondent in this neglect proceeding, arising from allegations that included the incident with the child—had moved to disqualify Deputy County Attorney Durin Rogers. At that time, Rogers was simultaneously serving as the part-time Judge in Batavia City Court. The disqualification motion alleged that, inasmuch as the resident was being criminally prosecuted before the full-time City Court Judge, and Rogers shared chambers and staff in City Court and could be called on to preside if the full-time City Court Judge was unavailable, Rogers should be disqualified from prosecuting this child protective matter on the ground that his ethical obligations precluded him from serving dual roles. The disqualification motion further alleged, inter alia,

that Rogers's unwillingness to disqualify himself from the neglect proceeding had resulted in ethical violations, including ex parte communications with the prosecutor about the criminal charges and the appearance of impropriety that Rogers was advancing a prosecutorial objective beyond his judicial role.

Appellant's owner considered the disqualification motion based on Rogers's alleged conflict of interest to be newsworthy because, at that time, Rogers was a candidate for the full-time City Court judgeship. According to the owner, because it had been a long time since there had been a contested judicial election in Batavia, there was significant public interest in the race, and appellant covered the judicial candidates, including Rogers, throughout the lead-up to the election. Appellant then published an article previewing the upcoming argument on the disqualification motion. A few days after the article was published, Rogers won the election for the full-time City Court judgeship.

Subsequently, on the day of the scheduled argument on the disqualification motion, the owner went to the courthouse with the intent of covering the hearing. However, the owner was denied access to the courtroom. After conferring with Family Court, a court deputy reported that the court would not allow the owner in the courtroom because the hearing was part of a sensitive matter. The owner requested that he be allowed to make an argument that he should be provided access to the hearing, but the court deputy reported, after again conferring with the court, that the court would not allow the owner the opportunity to be heard. Appellant published an article later that day describing how the court had excluded the press from covering the hearing on the disqualification motion.

After unsuccessfully seeking the transcript of the hearing, by written request to the court, in order to remedy the alleged improper exclusion from the courtroom, appellant moved for permission to "intervene" in this neglect proceeding and, in essence, for release of the transcript, even if redacted. As noted, the court denied the motion.

As a preliminary matter, with respect to the vehicle by which it sought release of the transcript, appellant contends that the court erred by denying it permission to "intervene" in this Family Court Act article 10 proceeding for that limited purpose. While there are cases characterizing similar motions as seeking a form of intervention (*see Maxim, Inc. v Feifer*, 145 AD3d 516, 516-517 [1st Dept 2016]; *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 499-501 [2d Dept 2007]; *see generally* 200 Siegel's Practice Review, *Media's Right to Intervene* at 4 [Aug. 2008]), we conclude that appellant's motion is better understood as a permissible application for release of the transcript pursuant to Family Court Act § 166. That statute provides that although "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection[,] . . . the court in its discretion in any case may permit the inspection of any papers or records" (*id.*; *see also* 22 NYCRR 205.5). Here, appellant was excluded from the underlying hearing on the disqualification motion and, as a

remedy, sought access to the transcript of that hearing. Appellant's motion is properly brought as an application made to Family Court for release of the transcript, which must be determined in accordance with the standards applicable to child protective proceedings in that court (*see generally Matter of Herald Co. v Mariani*, 67 NY2d 668, 670 [1986]).

As a further preliminary matter, we agree with appellant that the court erred to the extent that it denied the motion on the ground of defective service. The court reasoned that service was defective because, although all the parties to this proceeding were served and appeared, "the subject of the motion," Rogers, was not served. The applicable rule, however, provides only that, "[a]t the time of service of the notice of motion, the moving party shall serve copies of all affidavits and briefs upon all of the attorneys for the parties or upon the parties appearing *pro se*" (22 NYCRR 205.11 [b]). Inasmuch as Rogers was not a party to this proceeding, appellant had no obligation to serve him. In any event, as appellant further contends, the court erred in sua sponte denying the motion based, ostensibly, on lack of personal jurisdiction over Rogers (*see Matter of Monroe County Dept. of Human Servs.—CSEU v Derrell M.*, 111 AD3d 1394, 1394 [4th Dept 2013]).

On the merits, appellant contends that the court violated its right to attend the disqualification hearing, and that it is therefore entitled to a transcript of the hearing, the release of which, with appropriate redaction, would be consistent with Family Court Act § 166 and 22 NYCRR 205.5. We agree.

As relevant here, "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same" (Judiciary Law § 4). "Underpinning this statute's mandate is our State's long-standing, sound public policy 'that all judicial proceedings, both civil and criminal, are presumptively open to the public,' " including the press (*Matter of James Q.*, 32 NY3d 671, 676 [2019]; *see Matter of Capital Newspapers Div. of Hearst Corp. v Moynihan*, 71 NY2d 263, 265 [1988]). "This fundamental [presumption] of public access to judicial proceedings applies equally to matters heard in Family Court" (*Matter of Kent v Kent*, 29 AD3d 123, 135 [1st Dept 2006]; *see* 22 NYCRR 205.4), including proceedings pursuant to Family Court Act article 10 (*see* § 1043; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1043).

Nonetheless, the general rule of public access "is not absolute and may be limited upon a finding that compelling interests justify closure or partial closure" (*Kent*, 29 AD3d at 135-136; *see Matter of P.B. v C.C.*, 223 AD2d 294, 295 [1st Dept 1996], *lv denied* 89 NY2d 808 [1997]). The presumption in favor of public access "is particularly subject to challenge where the interests of children are implicated" (*Anonymous v Anonymous*, 263 AD2d 341, 343 [1st Dept 2000]; *see Kent*, 29 AD3d at 136). Indeed, "[t]he general public may be excluded from any hearing under [Family Court Act] article [10] and only such persons and the representatives of authorized agencies admitted

thereto as have an interest in the case" (§ 1043). In making that determination, however, "[a]ny exclusion of courtroom observers must . . . be accomplished in accordance with 22 NYCRR 205.4 (b)" (*Kent*, 29 AD3d at 136; *see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1043). That rule provides that "[t]he general public or any person may be excluded from a courtroom [in Family Court] only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case" (22 NYCRR 205.4 [b]). The rule further provides certain nonexclusive factors that a Family Court judge may consider in exercising his or her discretion, and requires that the judge make findings prior to ordering any exclusion (*see id.*).

Here, as appellant contends and contrary to the assertion of the appellate Attorney for the Child, the court abused its discretion in excluding appellant from the hearing on the underlying disqualification motion. It is undisputed that the court violated 22 NYCRR 205.4 (b) by failing to make findings prior to ordering the exclusion, and further there is no indication in the record that the court rendered its determination based on supporting evidence or considered any of the relevant factors in exercising its discretion. Moreover, our review of the relevant factors reveals that the court lacked an adequate basis to exclude appellant from the hearing on the disqualification motion (*see generally Matter of Katherine B.*, 189 AD2d 443, 452 [2d Dept 1993]). First, appellant was not "causing or . . . likely to cause a disruption" in the attorney disqualification hearing (22 NYCRR 205.4 [b] [1]), because the owner was not admitted to the hearing and there was no suggestion that he would disrupt it; in fact, appellant had covered previous court proceedings without incident (*cf. Matter of Andrea B.*, 66 AD3d 770, 771 [2d Dept 2009], *lv denied* 13 NY3d 716 [2010]). Second, there is no indication in the record that appellant's presence was "objected to by one of the parties . . . for a compelling reason" (22 NYCRR 205.4 [b] [2]). Third, although as a general matter privacy interests are paramount and the State has an "interest in protecting children from the possible harmful effects of disclosing to the public allegations and evidence of parental abuse and neglect" in article 10 proceedings (*Katherine B.*, 189 AD2d at 450; *see* 22 NYCRR 205.4 [b] [3]; *see also* Family Ct Act § 1011; *Matter of Ruben R.*, 219 AD2d 117, 124 [1st Dept 1996], *lv denied* 88 NY2d 806 [1996]; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1043), the limited hearing to which appellant sought access here involved only an attorney's alleged conflict of interest and, unlike a fact-finding hearing for example, would not have required disclosure or detailed discussion of the underlying allegations of neglect (*cf. Matter of Gloria M. [Kiladi M.]*, 96 AD3d 1060, 1061 [2d Dept 2012], *lv denied* 19 NY3d 814 [2012]; *Ruben R.*, 219 AD2d at 124-129). Fourth, to the extent that sensitive matters related to the neglect allegations would need to be discussed during the attorney disqualification hearing, "less restrictive alternatives to exclusion" were available (22 NYCRR 205.4 [b] [4]), inasmuch as the court could have, inter alia, conditioned appellant's attendance upon the nondisclosure of confidential information (*see* Merril Sobie, Practice Commentaries,

McKinney's Cons Laws of NY, Family Ct Act § 1043). Following the court's improper exclusion of appellant from the courtroom during the attorney disqualification hearing, appellant sought the transcript of that hearing, and we conclude for the reasons that follow that the court further erred in failing to afford appellant that remedy (*see generally Matter of Herald Co. v Weisenberg*, 59 NY2d 378, 384 [1983]).

Contrary to the court's determination, the release of the transcript is consistent with Family Court Act § 166 and 22 NYCRR 205.5. To reiterate, the statute provides in relevant part that although "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection[,] . . . the court in its discretion in any case may permit the inspection of any papers or records" (Family Ct Act § 166). The statute thus "does not render Family Court records confidential, but merely provides that they are not open to indiscriminate public inspection" (*Schwahl v Grant*, 47 AD3d 698, 699 [2d Dept 2008]; *see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 166). The statute makes clear that Family Court "has the discretionary statutory authority to permit the inspection of any record by anyone at any time" (Merril Sobie & Gary Solomon, New York Family Court Practice § 1:16 [2d ed 10 West's NY Prac Series Jan. 2022 Update]).

Here, the court abused its discretion in denying appellant access to the transcript. As noted, the court erroneously excluded appellant from the disqualification hearing, and thus appellant was entitled to the transcript of the hearing at which it would have been present but for the court's error. Moreover, denying appellant's motion in its entirety did not serve to prevent the public dissemination of confidential or sensitive information because the hearing concerned a disqualification motion, not the underlying neglect allegations and, to the extent that confidential or sensitive matters were discussed, the court had the option of redacting those parts of the transcript (*see generally Schwahl*, 47 AD3d at 699; *Harris v City of Buffalo*, 197 AD2d 918, 919 [4th Dept 1993]). To the extent that the court determined that the attorney disqualification hearing was no longer relevant because Rogers had already been elected to the full-time judgeship, we agree with appellant that the court improperly ignored both the continued importance of appellant's role in reporting accusations of ethical violations or conflicts of interest on the part of a judge and the principle that, here, it was within the province of appellant to determine whether the hearing on the disqualification motion remained newsworthy.

Additionally, as appellant contends and the appellate Attorney for the Child correctly concedes, 22 NYCRR 205.5 does not preclude the release of the transcript to appellant. As relevant to proceedings in which a child is a party or the child's custody may be affected, the rule provides that, "[s]ubject to limitations and procedures set by statute and case law," certain specified persons and entities, such as the parents, attorney for the child, and authorized representatives of the child protective agency, "shall be permitted access to the pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and . . . transcribed minutes of any hearing held

in the proceeding" (*id*.). Contrary to the court's determination, the rule is preferential, not exclusionary, inasmuch as it specifies certain persons and entities who are entitled, by rule, to access to the named Family Court records, and the rule is otherwise subject to applicable statutes—i.e., Family Court Act § 166, which permits discretionary disclosure to others (*see* Merril Sobie & Gary Solomon, New York Family Court Practice § 1:16 [2d ed 10 West's NY Prac Series Jan 2022 Update]).

We also agree with appellant that the court erred in determining that Social Services § 422 (4) precludes release of the transcript. That statute, which involves the confidentiality of child abuse and maltreatment reports and other information obtained concerning such reports, is inapplicable because appellant does not seek access to any such reports or information (*cf. Matter of Sarah FF.*, 18 AD3d 1072, 1073-1074 [3d Dept 2005]).

Based on the foregoing, we modify the order by granting the motion insofar as it sought access to the transcript of the attorney disqualification hearing and remit the matter to Family Court to release to appellant that transcript, subject to appropriate redaction of confidential information by Family Court.

All concur except CARNI, J., who is not participating.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1089

CA 21-00664

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

JENNIFER DENNING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GARRETT WHITTALL, DEFENDANT-RESPONDENT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., BATH (DAVID KAGLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered October 13, 2020. The order granted in part plaintiff's motion for, inter alia, a default judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by vacating the award of damages to plaintiff and the award of back rent to defendant and granting the motion insofar as it sought an inquest on the issue of damages, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Allegany County, for further proceedings in accordance with the following memorandum: Plaintiff tenant commenced this action against defendant landlord asserting causes of action for, inter alia, violations of Real Property Law §§ 223-b and 235-b, RPAPL 768 and Executive Law § 382. Plaintiff moved for, inter alia, a default judgment on liability and for an award of damages or, in the alternative, an inquest into the amount of damages. Supreme Court, inter alia, granted the motion in part, awarded plaintiff a default judgment on liability due to defendant's failure to answer the complaint and, without a hearing, awarded plaintiff damages for constructive eviction in an amount equal to 50 percent of the rent funds that were being held in escrow, and released the remaining rent funds from escrow to defendant as payment of back rent. We agree with plaintiff that the court erred in denying the motion insofar as plaintiff sought an inquest on damages for each of the causes of action asserted in the complaint (*see generally Matter of Castaldo [Harrington]*, 212 AD2d 1004, 1005 [4th Dept 1995]). We therefore modify the order by vacating the damages award to plaintiff and the award of back rent to defendant and granting the motion insofar as it sought an inquest on the issue of damages, and we remit the matter to Supreme Court for a determination of plaintiff's damages.

All concur except CARNI, J., who is not participating.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1104

KA 15-01249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS JOHNSON, ALSO KNOWN AS THOMAS JOHNSON, III,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 16, 2015. The judgment convicted defendant upon a jury verdict of aggravated murder, attempted aggravated murder, assault in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, aggravated murder (Penal Law § 125.26 [1] [a] [i]; [b]) for intentionally killing a Rochester city police officer in the line of duty. Pretrial proceedings were conducted in County Court (Argento, J.), and the case was transferred to Supreme Court (Moran, J.) for trial. At trial, defendant asked Supreme Court to instruct the jury that, in order to secure a conviction for aggravated murder as charged in the indictment, the People were obligated to prove that the victim-officer was *lawfully performing* his official duties at the time of his murder. Supreme Court refused to give such an instruction; indeed, Supreme Court explicitly instructed the jury *not* to consider the lawfulness of the victim-officer's actions at the time of his murder. We now affirm.

Viewing the evidence in light of the elements of aggravated murder as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Johnson*, 10 NY3d 875, 878 [2008]; *People v Romero*, 7 NY3d 633, 644 n 2 [2006]), we conclude that the verdict convicting defendant of that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, because Supreme Court did not submit the issue of lawfulness

to the jury, the guilty verdict on the aggravated murder charge cannot, as a matter of law, be against the weight of the evidence on the ground that the People failed to establish that the victim-officer was *lawfully performing* his official duties at the time of his murder (*see People v Manners*, 196 AD3d 1125, 1126 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]). We note parenthetically that, contrary to defendant's assumption, the proper remedy for a preserved instructional error is a new trial, not weight of the evidence review conducted by reference to the correct jury charge (*see e.g. People v Downey*, 158 AD3d 1198, 1198-1200 [4th Dept 2018]; *People v Pritchard*, 149 AD3d 1479, 1479-1480 [4th Dept 2017]).

Contrary to defendant's further contention, Supreme Court properly refused to instruct the jury that, in order to secure a conviction for aggravated murder as charged in the indictment, the People were required to prove that the victim-officer was *lawfully* performing his official duties at the time of his murder. The governing statute provides that a person commits aggravated murder by, inter alia, intentionally killing a police officer "engaged in the course of performing his or her official duties" (Penal Law § 125.26 [1] [a] [i]). There is no merit to defendant's contention that the term "official duties" in this context necessarily encompasses only official duties *performed lawfully* (*see People v Glanda*, 18 AD3d 956, 958 [3d Dept 2005], *lv denied* 6 NY3d 754 [2005], *reconsideration denied* 6 NY3d 848 [2006]). After all, official duties may be performed either lawfully or unlawfully (*see generally Rivas-Villegas v Cortesluna*, — US —, 142 S Ct 4, 7-9 [2021]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528-532 [2018]), and the legislature did not confine the crime of aggravated murder under Penal Law § 125.26 (1) (a) (i) to the intentional killing of police officers *lawfully performing* official duties. By contrast, the legislature did include a "lawful" duty element in certain subdivisions of the crime of assault in the second degree (§ 120.05 [3], [3-a], [3-b], [3-c], [11-b], [11-c], [14]), and that "fact . . . demonstrates that defendant's reading [of section 125.26 (1) (a) (i)] is untenable because, if the [legislature] meant to [limit the scope of that provision to instances in which the murdered officer was lawfully performing official duties], it knew how to do so" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 172 [2019]). Indeed, the Court of Appeals has "firmly held that the failure of the legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *rearg denied* 85 NY2d 968 [1995], *cert denied* 516 US 919 [1995]; *see Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60-61 [2013]), and the courts "are not at liberty to second-guess the legislature's determination, or to disregard—or rewrite—its statutory text" (*Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 567 [2018]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 240).

Defendant's proffered analogy between the "official duties" element of aggravated murder (Penal Law § 125.26 [1] [a] [i]) and the "official function" element of obstructing governmental administration

in the second degree (§ 195.05) is inapt. The technical legality of an officer's actions has no bearing on a defendant's culpability for murdering that officer in the line of duty under Penal Law § 125.26 (1) (a) (i) (*see generally Glanda*, 18 AD3d at 958); conversely, the technical legality of police action bears directly on a defendant's culpability for obstructing such police action under section 195.05 (*see People v Lupinacci*, 191 AD2d 589, 589 [2d Dept 1993]). Moreover, in a prosecution for obstructing governmental administration, the subject police officer can testify to the legality and basis of the official functions allegedly obstructed; conversely, in a prosecution for aggravated murder, the subject police officer is dead and thus cannot testify about the legality and basis of his or her official duties at the time of the murder. We therefore decline to construe the "official duties" element of aggravated murder in lockstep with the "official function" element of obstructing governmental administration in the second degree (*see generally People v McNamara*, 78 NY2d 626, 630 [1991]; *People v Neumann*, 51 NY2d 658, 665 [1980]; McKinney's Cons Laws of NY, Book 1, Statutes § 236).

Defendant further contends that he was deprived of a fair trial due to judicial bias and partiality. Assuming, arguendo, that County Court should have immediately recused itself after attending the victim-officer's funeral, we nevertheless conclude that reversal on that basis is unwarranted for the following three reasons unique to this case (*see generally* CPL 470.05 [1]). First, County Court did not preside over the trial, and thus could not have influenced or affected its outcome in any way. Second, defendant does not assign error to any ruling that County Court made in this case, nor does defendant identify how County Court's participation inured to his detriment in any respect. Third, County Court's only significant substantive determination in this case—a suppression ruling that defendant does not challenge—was explicitly reconsidered, ratified, and adopted by Supreme Court before trial.

We have considered and rejected defendant's additional allegations of judicial bias and partiality. In light of our conclusions, defendant's remaining contentions are academic.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1149

KA 18-01267

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY SPENCER, JR., ALSO KNOWN AS ANTHONY J. SPENCER, JR., ALSO KNOWN AS ANTHONY J. SPENCER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered April 6, 2018. The judgment convicted defendant, upon a jury verdict, of gang assault in the first degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of gang assault in the first degree (Penal Law § 120.07) and assault in the first degree (§ 120.10 [1]). We affirm.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, County Court properly denied his request for a justification instruction (*see People v McGhee*, 4 AD3d 485, 486 [2d Dept 2004], *lv denied* 2 NY3d 803 [2004]; *see generally People v Hall*, 195 AD3d 1574, 1575 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). We reject defendant's four claims of ineffective assistance of counsel (*see People v Harris*, 195 AD3d 1535, 1537 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *People v Townsend*, 171 AD3d 1479, 1481 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]; *People v Dark*, 122 AD3d 1321, 1322-1323 [4th Dept 2014], *lv denied* 26 NY3d 1039 [2015], *reconsideration denied* 27 NY3d 1068 [2016]; *People v Betsch*, 4 AD3d 818, 819 [4th Dept 2004], *lv denied* 2 NY3d 796 [2004], *reconsideration denied* 3 NY3d 657 [2004]). The sentence is not unduly harsh or severe. Defendant's remaining contention is unpreserved for appellate review, and we decline to

exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1164

KA 19-00931

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER DIXON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN R. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 12, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). The conviction arises from an incident in which a police officer, accompanied by other officers on patrol, pulled into the parking lot of a cocktail lounge and, after observing defendant sitting in a parked vehicle, approached the vehicle. The officer began to ask defendant for his name, identification and reason for being in the parking lot, when he smelled burning marihuana through a slightly opened window of the vehicle. The officer requested that defendant exit the vehicle, and then discovered during a further interaction that defendant possessed a quantity of cocaine. We affirm.

Defendant primarily contends that County Court erred in refusing to suppress physical evidence obtained during the encounter because the police lacked the requisite objective, credible reason to approach the vehicle and request information from him. We reject that contention. "In evaluating police conduct, a court 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016]; *see People v De Bour*, 40 NY2d 210, 222-223 [1976]). At the first level of a police-civilian encounter, i.e., a

request for information, a police officer may approach an individual "when there is some objective credible reason for that interference not necessarily indicative of criminality" (*De Bour*, 40 NY2d at 223), and "[t]he request may 'involve[ ] basic, nonthreatening questions regarding, for instance, identity, address or destination' " (*People v Garcia*, 20 NY3d 317, 322 [2012], quoting *People v Hollman*, 79 NY2d 181, 185 [1992]; *see People v McIntosh*, 96 NY2d 521, 525 [2001]). Although the first level "sets a low bar for an initial encounter" (*People v Barksdale*, 26 NY3d 139, 143 [2015]), the Court of Appeals has nevertheless observed that, "[i]n determining the legality of an encounter under *De Bour* and *Hollman*, it has been crucial whether a nexus to [defendant's] conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. The fact that an encounter occurred in a high-crime vicinity, without more, has not passed *De Bour* and *Hollman* scrutiny" (*McIntosh*, 96 NY2d at 526-527; *see Savage*, 137 AD3d at 1638). The second level of a police-civilian encounter, "the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a[n officer] is entitled to interfere with a [civilian] to the extent necessary to gain explanatory information, but short of a forcible seizure" (*De Bour*, 40 NY2d at 223).

As an initial matter, to the extent that defendant contends that the officer engaged in a level two intrusion from the outset of the encounter, that contention lacks merit. "The approach of [an] occupant[] of a stopped or parked vehicle to request information is analyzed under the first [level] of the *De Bour* hierarchy . . . and need only be justified by an 'articulable basis,' meaning an 'objective, credible reason not necessarily indicative of criminality' " (*People v Grady*, 272 AD2d 952, 952 [4th Dept 2000], *lv denied* 95 NY2d 905 [2000], quoting *People v Ocasio*, 85 NY2d 982, 985 [1995]; *see People v Witt*, 129 AD3d 1449, 1450 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]). Here, the record of the suppression hearing establishes that the officer did not ask "pointed questions that would lead the person approached reasonably to believe that he or she [was] suspected of some wrongdoing and [was] the focus of the officer's investigation" (*Hollman*, 79 NY2d at 185; *see People v Karagoz*, 143 AD3d 912, 914 [2d Dept 2016]). Rather, the officer engaged in a level one request for information by making the basic, nonthreatening request for defendant's identification information and his reason for being in the parking lot (*see Hollman*, 79 NY2d at 191).

Contrary to defendant's primary contention, the officer had an objective, credible reason for approaching the parked vehicle and requesting information, thereby rendering the police encounter lawful at its inception (*see Witt*, 129 AD3d at 1450). Not only was defendant's vehicle located in a high-crime area and parked at an establishment around which criminal activity was known to occur, but the police also had an active trespass affidavit on file for the cocktail lounge that allowed them to deal with the issues that occurred there, the parking lot was governed by a visible no loitering sign, and defendant was observed, albeit briefly, sitting in the lone occupied vehicle without making any attempt to go inside the

establishment, thereby suggesting the possibility that defendant lacked a legitimate reason to be there (*see Barksdale*, 26 NY3d at 141-144; *Ocasio*, 85 NY2d at 983-985; *People v Layou*, 134 AD3d 1510, 1511-1512 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]). Given the abovementioned additional observations, providing the police with a particularized reason to request information from defendant beyond his mere presence in a high-crime area, the case before us is distinguishable from those upon which defendant relies (*cf. People v King*, 199 AD3d 1454, 1454 [4th Dept 2021]; *People v Stover*, 181 AD3d 1061, 1063-1064 [3d Dept 2020]; *Savage*, 137 AD3d at 1639; *People v Miles*, 82 AD3d 1010, 1010-1011 [2d Dept 2011]). Based on the foregoing, we conclude that "the totality of the information known to the police prior to entering the parking lot and their observations upon doing so provided an articulable reason for approaching the vehicle in question to request information with respect to the identity of the occupant[] and [his] purpose for being in the area" (*People v Ramos*, 60 AD3d 1317, 1317 [4th Dept 2009], *lv denied* 12 NY3d 928 [2009]).

Contrary to defendant's further contention, which is preserved for our review (*see People v Callahan*, 134 AD3d 1432, 1432 [4th Dept 2015]; *cf. People v Nunez*, 261 AD2d 127, 127 [1st Dept 1999], *lv denied* 93 NY2d 1004 [1999]; *People v Matthews*, 249 AD2d 963, 963 [4th Dept 1998]), we conclude that the court did not abuse its discretion in denying defense counsel's request to adjourn the rescheduled trial on the drug charges (*see People v Resto*, 147 AD3d 1331, 1332 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]; *People v Garcia*, 101 AD3d 1604, 1605 [4th Dept 2012], *lv denied* 20 NY3d 1098 [2013]; *see generally People v Spears*, 64 NY2d 698, 699-700 [1984]).

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 Curry*, 192 AD3d 1649, 1652 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *People v Martinez*, 166 AD3d 1558, 1560 [4th Dept 2018]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1166

KA 20-00855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAWAUN VAUGHN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 7, 2020. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We affirm.

Defendant contends that County Court erred in refusing to suppress physical evidence recovered from his vehicle after police officers approached and searched the vehicle, as well as statements he made to police thereafter. We reject that contention. When the police approach an individual situated in a vehicle "that is already parked and stationary, the only level of suspicion necessary to justify that approach is an articulable, credible reason for doing so, not necessarily indicative of criminality" (*People v Witt*, 129 AD3d 1449, 1450 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]; *see People v Ocasio*, 85 NY2d 982, 985 [1995]; *People v Grady*, 272 AD2d 952, 952 [4th Dept 2000], *lv denied* 95 NY2d 905 [2000]). To approach an occupied vehicle, "[a]ll that is required is that the intrusion be predicated on more than a hunch, whim, caprice or idle curiosity" (*Grady*, 272 AD2d at 952 [internal quotation marks omitted]; *see Ocasio*, 85 NY2d at 985). To that end, a person's presence in a high-crime area, without more, does not provide an objective credible reason for approaching the vehicle (*see People v McIntosh*, 96 NY2d 521, 526-527 [2001]; *People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016]).

Here, an officer testified at the suppression hearing that he and his partner were conducting a property check at an apartment complex located in a "known gang area" when they observed two occupied vehicles in the parking lot, one of which was defendant's vehicle. While the officer was walking in the direction of defendant's vehicle—but before he had any contact with defendant or initiated any encounter with him—he detected the odor of burning marihuana emanating from inside the vehicle, which was an odor he recognized based on his training and experience. Thus, in addition to having an objective, credible reason to approach defendant in the vehicle, the officer also had probable cause to search the vehicle (*see People v Clanton*, 151 AD3d 1576, 1577 [4th Dept 2017]; *People v Ricks*, 145 AD3d 1610, 1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]). Contrary to defendant's contention, this is not a case where the police detected the odor of burning marihuana *after* the officer had already initiated an encounter with a defendant situated in a vehicle (*cf. People v King*, 199 AD3d 1454, 1454 [4th Dept 2021]).

We also reject defendant's alternative contention that newly-enacted Penal Law § 222.05 (3) (L 2021, ch 92)—which provides, as relevant here, that the odor of cannabis can no longer be the sole basis supporting a "determination of reasonable cause to believe a crime has been committed"—should be applied retroactively to conclude that the police lacked probable cause to search the vehicle. It is well settled that "[s]tatutes dealing with matters other than procedure are not intended to be applied retroactively absent a plainly manifested legislative intent to that effect" (*People v Oliver*, 1 NY2d 152, 157 [1956]; *see People v Behlog*, 74 NY2d 237, 240 [1989]). Here, nothing in the plain language of Penal Law § 222.05 (3) indicates that the legislature clearly intended that provision to have retroactive effect (*see* L 2021, ch 92; *see also People v Austen*, 197 AD3d 861, 864 [4th Dept 2021, Smith, J., concurring]; *People v Lawrence*, 80 AD3d 1011, 1012 [3d Dept 2011]). Indeed, we note that where the legislature intended for the new laws regulating marihuana to have retroactive effect, it clearly specified so (*see e.g.* CPL 440.46-a).

In light of our determination, we reject defendant's further contention that his statements to the police must be suppressed as fruit of the poisonous tree (*see generally People v Nichols*, 113 AD3d 1122, 1123 [4th Dept 2014], *lv denied* 23 NY3d 1065 [2014]; *People v Sims*, 106 AD3d 1473, 1474 [4th Dept 2013], *appeal dismissed* 22 NY3d 992 [2013]).

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1174

CA 20-01504

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

JOSUE ORTIZ, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126292.)
(APPEAL NO. 1.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered May 18, 2020. The order denied the motion of defendant for summary judgment.

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

Same memorandum as in *Ortiz v State of New York* ([appeal No. 3] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1175

CA 20-01505

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

JOSUE ORTIZ, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126292.)
(APPEAL NO. 2.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a corrected order of the Court of Claims (Michael E. Hudson, J.), entered July 13, 2020. The corrected order denied the motion of defendant for summary judgment.

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

Same memorandum as in *Ortiz v State of New York* ([appeal No. 3] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1176

CA 21-00647

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

JOSUE ORTIZ, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126292.)
(APPEAL NO. 3.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered March 31, 2021. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimant commenced this action for wrongful conviction and imprisonment pursuant to Court of Claims Act § 8-b following the vacatur of a judgment convicting him, upon his plea of guilty, of two counts of manslaughter in the first degree (Penal Law § 125.20 [1]) (judgment). In appeal No. 1, the Court of Claims denied without prejudice the motion of defendant, State of New York (State), for summary judgment dismissing the claim on the ground that a Court of Claims Act § 8-b claim cannot succeed where there is a conviction by guilty plea. In appeal No. 2, the court issued a corrected order that was substantially the same as the order in appeal No. 1. In appeal No. 3, however, the court granted the State's second motion for summary judgment dismissing the claim, reasoning that the evidence submitted in support of the motion established that the judgment was vacated on grounds not eligible for relief under Court of Claims Act § 8-b.

We note at the outset that the appeals from the orders in appeal Nos. 1 and 2 must be dismissed inasmuch as claimant is not aggrieved by those orders because he was the successful opponent of defendant's first motion (*see* CPLR 5511; *Sodhi v 112 Park Enters., LLC*, 147 AD3d 1000, 1001 [2d Dept 2017]).

In appeal No. 3, we conclude that the State's submissions in

support of the second motion establish as a matter of law that claimant has no cause of action for wrongful conviction and imprisonment and that, therefore, the court properly granted its second motion. "The [l]egislature enacted Court of Claims Act § 8-b in 1984 to allow innocent persons to recover damages from the [S]tate where they can prove by clear and convincing evidence that they were unjustly convicted and imprisoned" (*Long v State of New York*, 7 NY3d 269, 273 [2006]). To recover under Court of Claims Act § 8-b in the absence of an acquittal upon retrial, however, the criminal judgment must have been reversed or vacated on one or more statutorily enumerated grounds (*see* § 8-b [3] [b] [ii]; *Long*, 7 NY3d at 274). The only provisions of CPL 440.10 (1) that so qualify are paragraphs (a), (b), (c), (e), and (g) thereof (*see* Court of Claims Act § 8-b [3] [b] [ii] [A]). As a waiver of the State's sovereign immunity from suit, the "requirements of [section 8-b] are to be strictly construed" (*Gioeli v State of New York*, 39 AD3d 815, 816 [2d Dept 2007]; *see Long*, 7 NY3d at 276), and a wrongful conviction and imprisonment claim therefore cannot be maintained if the criminal judgment was vacated on a non-enumerated ground (*see Jeanty v State of New York*, 175 AD3d 1073, 1074 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020]; *see also Baba-Ali v State of New York*, 19 NY3d 627, 633 n 5 [2012]).

Here, claimant contends that the judgment was vacated pursuant to paragraph (g-1) and that paragraph (g-1) is part of paragraph (g) and should therefore be treated as an enumerated ground for relief under Court of Claims Act § 8-b. Even assuming, arguendo, that the judgment was vacated pursuant to that paragraph, we reject claimant's contention that paragraph (g-1) is an enumerated ground for relief. Prior to 2012, a motion to set aside a judgment on the basis of DNA evidence was considered under paragraph (g), but such a motion could not be made where the conviction was obtained by a guilty plea (*see People v Tiger*, 32 NY3d 91, 99 [2018]). In 2012, the legislature amended CPL 440.10 (1) "by adding a new paragraph (g-1)" (L 2012, ch 19, § 4) relating to "[f]orensic DNA testing of evidence performed since the entry of a judgment" (CPL 440.10 [1] [g-1]). At the time paragraph (g-1) was added, various other statutes were amended (L 2012, ch 19). Had the legislature intended paragraph (g-1) to be included as an enumerated ground for a Court of Claims Act § 8-b claim, it is reasonable to expect that it would have amended section 8-b to so state (*see generally People v Page*, 35 NY3d 199, 207-208 [2020], *cert denied* — US —, 141 S Ct 601 [2020]). The legislature did not make such an amendment, and we therefore read paragraph (g-1) as a separate ground for relief—i.e., one not encompassed in CPL 440.10 (1) (g). Thus, because CPL 440.10 (1) (g-1) is not among the enumerated grounds for relief under Court of Claims Act § 8-b, the court properly granted defendant's motion for summary judgment dismissing the wrongful conviction claim (*see Jeanty*, 175 AD3d at 1074).

We have reviewed claimant's remaining contention and conclude that it lacks merit.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1177

CA 21-00611

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

FREDERICK N. FARWELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, SYRACUSE POLICE DEPARTMENT AND GREGORY J. DIPUCCIO, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered April 19, 2021. 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: Plaintiff commenced this action seeking damages for injuries he sustained when the bicycle he was riding collided at an intersection with a police vehicle operated by defendant Gregory J. DiPuccio (defendant officer), a police officer employed by defendant Syracuse Police Department who was responding to an emergency call. Defendants thereafter moved for summary judgment dismissing the complaint on the ground that defendant officer did not act with "reckless disregard" for the safety of others. Supreme Court denied the motion, and we affirm.

We conclude that, at the time of the collision, defendant officer was operating an authorized emergency vehicle while involved in an emergency operation (*see* Vehicle and Traffic Law §§ 101, 114-b). Thus, the standard of liability pursuant to Vehicle and Traffic Law § 1104 (e), i.e., reckless disregard for the safety of others, rather than that of ordinary negligence, applies to his actions (*see Criscione v City of New York*, 97 NY2d 152, 157-158 [2001]; *Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373 [4th Dept 2012]). Although defendants established as a matter of law that defendant officer's conduct did not rise to the level of reckless disregard for the safety of others (*see Szczerbiak v Pilat*, 90 NY2d 553, 556-557 [1997]), plaintiff raised a triable issue of fact with respect thereto (*see Coston v City of Buffalo*, 162 AD3d 1492, 1493 [4th Dept 2018]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*

v City of New York, 49 NY2d 557, 562 [1980]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1178

CA 20-01218

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

JACLYN F. SILVER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CASSANDRA VICTOR, DEFENDANT-RESPONDENT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Dennis E. Ward, J.), entered September 15, 2020. The judgment decreed that defendant was not negligent.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when, in an attempt to cross a multi-lane street outside of a crosswalk in a busy commercial neighborhood, she walked between rows of stationary cars in the right and middle lanes before emerging into the left turn lane where she was struck by defendant's vehicle. On appeal from a judgment entered upon a jury verdict finding that defendant was not negligent, plaintiff contends that the verdict is against the weight of the evidence, and thus that Supreme Court erred in denying her posttrial motion insofar as it sought to set aside the verdict on that ground. We reject that contention. Here, it cannot be said that "the evidence so preponderated in favor of plaintiff that the jury's verdict could not have been reached on any fair interpretation of the evidence" (*Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011] [internal quotation marks omitted]; *see Kurtz v Poirier*, 128 AD3d 1491, 1492 [4th Dept 2015]; *Hinkle v Trejo*, 89 AD3d 631, 631-632 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]; *cf. Pellegrino v Youll*, 37 AD3d 1064, 1064 [4th Dept 2007]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1180

CA 20-01279

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

ALYSSA K. STRASSBURG,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MERCHANTS AUTOMOTIVE GROUP, INC.,
CURT MANUFACTURING, LLC, AND
DENNIS L. DADY,
DEFENDANTS-APPELLANTS-RESPONDENTS.

TREVETT CRISTO, ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 29, 2020. The order granted in part and denied in part the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion for summary judgment on the issue whether defendant Dennis L. Dady's negligence was the sole proximate cause of the accident and for summary judgment dismissing the first affirmative defense and reinstating that affirmative defense, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she was struck while walking in a crosswalk by a vehicle operated by Dennis L. Dady (defendant). The vehicle was owned by defendant Merchants Automotive Group, Inc. and leased to defendant's employer, defendant Curt Manufacturing, LLC. Plaintiff moved for summary judgment on the issues of defendants' liability, i.e., negligence and serious injury, and whether defendant's negligence was the sole proximate cause of the accident. Plaintiff also moved for, inter alia, summary judgment dismissing defendants' first affirmative defense of comparative negligence. Supreme Court granted plaintiff's motion with respect to the issues of defendant's negligence and of that negligence being the sole proximate cause of the accident and with respect to the first affirmative defense, but denied the motion with respect to the issue of serious injury. Defendants now appeal, and plaintiff cross-appeals.

Contrary to defendants' contention on their appeal, the court properly granted that part of the motion on the issue of defendant's negligence. It is well settled that a driver has a "common-law duty to see that which [should have been] seen [as a driver] through the proper use of his [or her] senses" (*Luttrell v Vega*, 162 AD3d 1637, 1638 [4th Dept 2018] [internal quotation marks omitted]; *see McCarthy v Hameed*, 191 AD3d 1462, 1463 [4th Dept 2021]). Additionally, Vehicle and Traffic Law § 1151 (a) provides in relevant part that "[w]hen traffic-control signals are not in place . . . the driver of a vehicle shall yield the right of way . . . to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling."

Here, plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of defendant's negligence by establishing that she was crossing the street within the crosswalk when she was "struck by defendant's vehicle, which was making a . . . turn" (*Beamud v Gray*, 45 AD3d 257, 257 [1st Dept 2007]; *see Bush v Kovacevic*, 140 AD3d 1651, 1652 [4th Dept 2016]; *Gyabaah v Rivlab Transp. Corp.*, 129 AD3d 447, 447 [1st Dept 2015]). Specifically, plaintiff submitted, inter alia, her deposition testimony wherein she testified that she was within the crosswalk at the time of the collision. She also submitted the deposition testimony of defendant, who denied seeing plaintiff anytime before the collision and admitted that the collision occurred within the crosswalk (*see Benedikt v Certified Lbr. Corp.*, 60 AD3d 798, 798 [2d Dept 2009]; *Sulaiman v Thomas*, 54 AD3d 751, 752 [2d Dept 2008]). We further conclude that defendants failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Lowes v Anas*, 195 AD3d 1579, 1581-1582 [4th Dept 2021]; *Bush*, 140 AD3d at 1652-1653).

We agree with defendants, however, to the extent they argue that the court erred in granting those parts of the motion for summary judgment on the issue whether defendant's negligence was the sole proximate cause of the accident and dismissing the first affirmative defense of comparative negligence, and we therefore modify the order accordingly. " '[T]he question of a plaintiff's comparative negligence almost invariably raises a factual issue for resolution by the trier of fact' " (*Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019 [4th Dept 2003]; *see Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]). Here, plaintiff failed to meet her initial burden of establishing "a total absence of comparative negligence as a matter of law" (*Dasher*, 305 AD2d at 1019). Plaintiff's submissions on the motion demonstrated that she started to cross the street from somewhere other than the sidewalk directly adjacent to the crosswalk. Thus, plaintiff's own submissions raise a triable issue of fact whether she started to cross at a location from which a driver would not reasonably anticipate that a pedestrian would emerge and whether she therefore failed to exercise due care in crossing the street (*see generally* Vehicle and Traffic Law § 1152 [a]; *Allen v Illes*, 55 AD3d 1312, 1313 [4th Dept 2008]; *Ryan v Budget Rent a Car*, 37 AD3d 698, 699 [2d Dept 2007]). Inasmuch as there are triable issues of fact

pertaining to plaintiff's comparative fault, there are likewise triable issues of fact whether defendant's negligence was the *sole* proximate cause of the accident (*see generally Edwards v Gorman*, 162 AD3d 1480, 1481 [4th Dept 2018]; *Russo v Pearson*, 148 AD3d 1762, 1763 [4th Dept 2017]; *Kelsey v Degan*, 266 AD2d 843, 843 [4th Dept 1999]).

Contrary to plaintiff's contention on cross appeal, the court did not err in denying the motion on the issue of serious injury. We conclude that plaintiff did not meet her initial burden of establishing that she sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories of serious injury because she failed to provide objective evidence that she suffers from anosmia, i.e., loss of smell, as a consequence of the accident (*see generally* Insurance Law § 5102 [d]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 957-958 [1992]). Plaintiff's submission of the affirmations of her treating neurologist and the medical reports of the physicians who examined plaintiff on defendants' behalf were insufficient to establish plaintiff's entitlement to judgment as a matter of law with respect to that condition because they were based solely on plaintiff's subjective complaints of loss of smell (*see Alcombrack v Swarts*, 49 AD3d 1170, 1171-1172 [4th Dept 2008]; *see also Burke v Carney*, 37 AD3d 1107, 1108 [4th Dept 2007]; *see generally Toure*, 98 NY2d at 350).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

1181

CA 21-00123

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

FAREENA A. SHAH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH A. NOWAKOWSKI, ET AL., DEFENDANTS,
AND EMILY DINATALE, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 23, 2020. The amended order, among other things, denied the motion of defendant Emily Dinatale for summary judgment and granted in part the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying that part of plaintiff's cross motion seeking summary judgment on the issues of negligence and serious injury against defendant Emily Dinatale and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained after a vehicle operated by Emily Dinatale (defendant) rear-ended another vehicle, causing a chain reaction in which plaintiff's vehicle was rear-ended and propelled into the vehicle stopped in front of her. Defendant thereafter moved for summary judgment dismissing the complaint against her on the grounds that any injury sustained by plaintiff was not causally related to the accident and that, in any event, plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, or 90/180-day categories. Plaintiff cross-moved for summary judgment on the issues of negligence and serious injury. Defendant appeals from an amended order that, inter alia, denied her motion and granted that part of plaintiff's cross motion for summary judgment against defendant on the issues of negligence and serious injury.

Defendant contends that Supreme Court erred in denying her motion because she met her initial burden of establishing that "plaintiff did

not suffer a serious injury causally related to the accident" (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]) and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to defendant's contention, her own submissions in support of the motion raise triable issues of fact whether the motor vehicle accident caused plaintiff's alleged injuries (*see Carter v Patterson*, 197 AD3d 857, 858 [4th Dept 2021]; *Schaubroeck v Moriarty*, 162 AD3d 1608, 1609 [4th Dept 2018]). Defendant submitted the report of her expert physician, who concluded that plaintiff's injuries were either preexisting or degenerative in nature. The report of defendant's expert, however, "does not establish that plaintiff's condition is the result of a preexisting [or] degenerative [condition] inasmuch as it fails to account for evidence that plaintiff had no complaints of pain prior to the accident" (*Carter*, 197 AD3d at 858 [internal quotation marks omitted]). Further, defendant's expert failed to address plaintiff's medical records, which noted that plaintiff's range of motion had further decreased by 25% after the accident (*see generally Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]; *Clark v Aquino*, 113 AD3d 1076, 1076 [4th Dept 2014]).

Even assuming, arguendo, that defendant met her initial burden on the motion by demonstrating that the accident did not cause or exacerbate plaintiff's injuries, we conclude that plaintiff raised a triable issue of fact in opposition with respect to causation (*see Chunn v Carman*, 8 AD3d 745, 746-747 [3d Dept 2004]) by submitting the affirmation of her expert, who concluded that plaintiff's injuries to her right shoulder, neck, and back were exacerbated as a result of the accident (*see generally Carter*, 197 AD3d at 859).

Contrary to defendant's further contention, we conclude that the court also properly denied her motion with respect to the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories of serious injury. Even assuming, arguendo, that defendant made a "prima facie showing that plaintiff's alleged injuries did not satisfy [the] serious injury threshold" with respect to those categories (*Pommells v Perez*, 4 NY3d 566, 574 [2005]), we conclude that plaintiff raised an issue of fact whether she sustained a serious injury under those categories (*see Vitez v Shelton*, 6 AD3d 1180, 1181-1182 [4th Dept 2004]).

With respect to the significant limitation of use and permanent consequential limitation of use categories, plaintiff presented objective proof that she sustained decreased range of motion to her right shoulder and lumbar and cervical spine. Plaintiff also submitted the results of her MRI and CT scan tests, the qualitative and quantitative assessments of her treating physicians establishing the limited range of motion to her spine and right shoulder, and her expert's affirmation concluding that plaintiff's injuries were significant.

Plaintiff also raised an issue of fact with respect to the 90/180-day category of serious injury. Despite plaintiff's inability to "recall if she was unable to care for herself or perform her daily

hygiene activities" following the accident, plaintiff submitted evidence sufficient to raise a triable issue of fact whether she was prevented from performing substantially all of the material acts that constituted her usual and customary daily activities during no less than 90 days of the 180 days following the accident (*see generally* Insurance Law § 5102 [d]). Plaintiff submitted her deposition testimony, in which she described her limitations, and the notes of her primary care physician confirming that plaintiff was placed on work restrictions following the accident for approximately four or five months (*see George v City of Syracuse*, 188 AD3d 1612, 1614 [4th Dept 2020]; *Felton v Kelly*, 44 AD3d 1217, 1219-1220 [3d Dept 2007]). In addition, plaintiff's expert opined that the exacerbation of plaintiff's right shoulder and spine injuries "contributed to limitations on her usual and customary daily activities for more than 90 days" following the accident, "including bending and lifting without limitations and pain."

We agree with defendant, however, that the court erred in granting plaintiff's cross motion insofar as it sought summary judgment against her on the issue of serious injury, and we therefore modify the amended order accordingly. Contrary to plaintiff's assertion, she failed to allege postconcussive syndrome or a left knee injury in her bill of particulars. That omission was not remedied by plaintiff's statement in the bill of particulars that "[f]urther injuries may be identified within the medical records of" plaintiff inasmuch as that statement "fail[s] to adequately limit the proof and could result in surprise to defendant" (*Neissel v Rensselaer Polytechnic Inst.*, 30 AD3d 881, 882 [3d Dept 2006]). "Defendant is entitled to know, over . . . plaintiff[']s own verification, precisely what . . . plaintiff[] will claim on the trial. It is not enough simply to 'refer' defendant to some report made by another" (*D'Onofrio v Davis*, 14 AD2d 960, 960 [3d Dept 1961]). Thus, because plaintiff did not allege in the pleadings that her injuries included postconcussive syndrome or a left knee injury, and plaintiff did not move for leave to amend the bill of particulars to assert such allegations, defendant was not required to address those alleged injuries in her own motion or in opposition to plaintiff's cross motion (*see Pom Chun Kim v Franco*, 137 AD3d 991, 992 [2d Dept 2016]; *Camacho v Dwelle*, 54 AD3d 706, 706 [2d Dept 2008]).

We also agree with defendant that the court erred in granting plaintiff's cross motion insofar as it sought summary judgment against her with respect to the issue of negligence, and we therefore further modify the amended order accordingly. "It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . [, and, i]n order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision" (*Niedzwiecki v Yeates*, 175 AD3d 903, 904 [4th Dept 2019] [internal quotation marks omitted]). "One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment" (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation

marks omitted]; *see Niedzwiecki*, 175 AD3d at 904; *Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018]). Here, plaintiff failed to meet her initial burden on the cross motion with respect to the issue of negligence inasmuch as she submitted the deposition testimony of defendant, in which defendant " 'provided a nonnegligent explanation for the collision,' " i.e., that the collision occurred when a nonparty vehicle stopped abruptly in front of her vehicle (*Gardner v Chester*, 151 AD3d 1894, 1896 [4th Dept 2017]; *see Niedzwiecki*, 175 AD3d at 904; *Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 1266-1267 [4th Dept 2006]). Thus, plaintiff's own submissions raise "a triable issue of fact as to whether a nonnegligent explanation exists for the rear-end collision" (*Bell v Brown*, 152 AD3d 1114, 1115 [3d Dept 2017]; *see Niedzwiecki*, 175 AD3d at 904).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 18-01926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. SINGLETON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered May 18, 2018. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends that County Court erred in denying his motion to suppress certain tangible evidence recovered by police officers following the officers' stop of a taxi in which defendant was a passenger. We agree inasmuch as we conclude that the People failed to meet their initial burden of showing the legality of the police conduct in the first instance (*see People v Berrios*, 28 NY2d 361, 367 [1971]; *People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). The necessary predicate for the stop of defendant's vehicle was " 'at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' " (*People v Lopez*, 149 AD3d 1545, 1547 [4th Dept 2017]; *see People v Spencer*, 84 NY2d 749, 753 [1995], *cert denied* 516 US 905 [1995]). At the suppression hearing, a police detective testified that he directed the stop of the taxi based on a belief that defendant was in fact a different man whom authorities had identified as a suspect in a shooting that had occurred over a month earlier. The detective had received a tip from an informant that led him to believe that the shooting suspect might be in a specified motel room. Surveillance was set up around the motel, but the detective

himself was not in a position from which he could observe the motel room. Upon being informed that a black male had exited the motel room and left the premises in the taxi, the detective directed that the taxi be stopped by patrol cars.

We agree with defendant that the People failed to establish that the detective had reasonable suspicion to believe that defendant, the passenger in the taxi, was the shooting suspect (*see Lopez*, 149 AD3d at 1547). The detective conceded that he had never seen a still photo of the suspect, that the video of the shooting that he did view lacked detail, and that he was unaware of whether the suspect's actual height, weight, skin tone, or other specific discernable characteristic were on the arrest warrant for the shooting suspect. Further, the informant never identified the man in the motel room as the shooter, and the vague description given, i.e., that the man was from Rochester, that his nickname was the ubiquitous "Jay," and that he "had a warrant", is too generalized to support the reasonable suspicion required for the officers' stop of the taxi (*see People v Jones*, 174 AD3d 1532, 1534 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]; *Lopez*, 149 AD3d at 1547; *People v Nunez*, 111 AD3d 854, 856 [2d Dept 2013]; *cf. People v Cash J.Y.*, 60 AD3d 1487, 1488 [4th Dept 2009], *lv denied* 12 NY3d 913 [2009]). This is also not a case in which the "proximity of the defendant to the site of the crime[and] the brief period of time between the crime and the discovery of the defendant near the location of the crime" added to the totality of circumstances supporting the detective's reasonable suspicion (*People v Clark*, 191 AD3d 1485, 1486 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021] [internal quotation marks omitted]). Given that the stop of the taxi was not supported by a reasonable suspicion of criminality, the tangible evidence recovered therefrom should have been suppressed as the unattenuated by-product of the illegal stop (*see Lopez*, 149 AD3d at 1547-1548). In addition, because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see id.* at 1548). We therefore reverse the judgment and grant defendant's motion insofar as it sought suppression of tangible evidence, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45. In light of our decision, we do not address defendant's remaining contentions.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 17-00047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. ADAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 1, 2016. The judgment convicted defendant, upon a jury verdict, of burglary 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 burglary in the second degree (Penal Law § 140.25 [2]). We affirm.

Defendant's legal sufficiency contention is unpreserved for appellate review (*see People v Hawkins*, 11 NY3d 484, 492 [2008]). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Cole*, 162 AD3d 1219, 1223-1224 [3d Dept 2018], *lv denied* 32 NY3d 1002 [2018]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, County Court properly gave a motive instruction (*see generally People v Drake*, 7 NY3d 28, 33 [2006]; *People v Fitzgerald*, 156 NY 253, 258 [1898]). We note that the court did not affirmatively "instruct[ ] the jury to consider motive," as defendant claims; rather, the court merely allowed the jury to consider motive in evaluating whether the People met their burden of proof. Moreover, because it is undisputed that the tenants of the burglarized apartment were the rightful owners of the property stolen therefrom, we reject defendant's further contention that the court improperly allowed the People to refer to those tenants as "victims" (*cf. People v Horton*, 181 AD3d 986, 990 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]). Nor did the court "abuse its discretion

in permitting the prosecutor to recall a witness well before the close of the People's case . . . to address an identification issue" not adequately addressed during the witness' original testimony (*People v Guitierrez*, 74 AD3d 1834, 1834 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]; *see People v Guiterrez*, 270 AD2d 184, 184 [1st Dept 2000]).

The sentence is not unduly harsh or severe. Finally, the certificate of conviction and the uniform sentence and commitment form must be corrected to reflect that defendant was convicted upon a jury verdict, not upon his guilty plea.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-00692

PRESENT: WHALEN, P.J., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 17, 2017. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him, upon a jury verdict, of four counts of burglary in the second degree (Penal Law § 140.25 [2]), as charged in separate indictments. We affirm in both appeals.

Defendant contends in both appeals that County Court erred in permitting two fingerprint examiners to testify to their opinions within "a reasonable degree of scientific certainty." Contrary to the People's assertion, defendant preserved his contention for our review by specifically objecting to testimony from the first fingerprint examiner that her opinion was made to a reasonable degree of scientific certainty (*see generally* CPL 470.05 [2]; *People v Burke-Wells*, 134 AD3d 1436, 1436 [4th Dept 2015], *lv denied* 27 NY3d 963 [2016]). The court overruled that objection, definitively rejecting defendant's challenge to the form of the opinion questions posed to the witness, and thus defendant was not required to repeat the objection in order to preserve for review his contention with respect to the second fingerprint examiner (*see generally People v Finch*, 23 NY3d 408, 413 [2014]). Nonetheless, even assuming, arguendo, that the court erred in permitting the fingerprint examiners to state their opinion to a reasonable degree of scientific certainty, we conclude that any such error is harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Davis*, 21 AD3d 1336, 1337 [4th Dept 2005], *lv denied* 6 NY3d 811 [2006]).

We reject defendant's contention that the court erred in denying his challenge for cause with respect to a prospective juror who indicated that he did not have a complete understanding of English, which was his second language. The prospective juror stated that he had lived in the United States for 45 years, that he understood "most" English, and that he understood all of the questioning by the court and the attorneys during voir dire. Based on the foregoing, we conclude that "the record establishes that [the prospective juror's] ability to communicate in the English language was sufficient" to support the court's denial of defendant's challenge for cause (*People v Berry*, 43 AD3d 1365, 1366 [4th Dept 2007], *lv denied* 9 NY3d 1031 [2008] [internal quotation marks omitted]; *see People v Guzman*, 76 NY2d 1, 5 [1990]; *People v Chohan*, 254 AD2d 124, 124 [1st Dept 1998], *lv denied* 92 NY2d 1030 [1998]).

We also reject defendant's contention that the court erred in precluding him from cross-examining police witnesses about the scope of the investigation into the underlying crimes—i.e., if the police investigated whether the items stolen during the burglaries had been pawned. "[T]he trial court has broad discretion to limit cross-examination where questions are repetitive, irrelevant or only marginally relevant, concern collateral issues, or threaten to mislead the jury" (*People v Pena*, 113 AD3d 701, 702 [2d Dept 2014], *lv denied* 22 NY3d 1201 [2014]; *see also People v Baker*, 294 AD2d 888, 889 [4th Dept 2002], *lv denied* 98 NY2d 708 [2002]). However, "[c]urtailment [of cross-examination] will be judged improper when it keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony" (*People v Smith*, 12 AD3d 1106, 1106 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005] [internal quotation marks omitted]). Here, the court did not abuse its discretion in limiting as irrelevant defense counsel's inquiry into the police investigation because there was no evidence that the stolen property had ever been pawned or that the post-burglary sale of the stolen property somehow called into question defendant's identity as the perpetrator of the burglaries (*see People v Porter*, 184 AD3d 1014, 1018 [3d Dept 2020], *lv denied* 35 NY3d 1069 [2020]; *Smith*, 12 AD3d at 1106; *cf. People v Snow*, 185 AD3d 1400, 1402-1403 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *see generally Baker*, 294 AD2d at 889). Even assuming, arguendo, that the court erred in limiting defendant's cross-examination on the subject of the police investigation, we conclude that any such error is harmless (*see Crimmins*, 36 NY2d at 241-242; *People v Gannon*, 174 AD3d 1054, 1061 [3d Dept 2019], *lv denied* 34 NY3d 980 [2019]).

Finally, contrary to defendant's further contention, we conclude that the sentence in each appeal is not unduly harsh or severe.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-00694

PRESENT: WHALEN, P.J., NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA J. DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 17, 2017. The judgment convicted defendant upon a jury verdict of burglary in the second degree (three counts).

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

Same memorandum as in *People v Johnson* ([appeal No. 1] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 20-00095

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

IN THE MATTER OF ISABELLA S.

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

MEMORANDUM AND ORDER

NICOLE S., 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 (Michael L. Hanuszczak, J.), entered January 8, 2020 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from that part of an order adjudging that she neglected the subject child. We agree with the mother that Family Court's finding of neglect is not supported by the requisite preponderance of the evidence, and we therefore reverse the order insofar as appealed from and dismiss the petition. "[A] party seeking to establish neglect must show, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]; *Matter of Chance C. [Jennifer S.]*, 165 AD3d 1593, 1594 [4th Dept 2018]). In considering whether the requisite minimum degree of care was provided, "[c]ourts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing" (*Nicholson*, 3 NY3d at 370). Here, the evidence at the fact-finding hearing establishes that the mother acknowledged her mental health issues and had been compliant with treatment following her discovery that she was pregnant (*cf. Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]); that she never acted inappropriately around the child (*cf.*

Matter of Thomas B. [Calla B.], 139 AD3d 1402, 1403-1404 [4th Dept 2016]); and that she was engaged in a supportive housing program that would allow her to care for the child, thereby limiting any extended need for foster care (*cf. Matter of Trebor UU.*, 279 AD2d 735, 737 [3d Dept 2001]). We therefore find insufficient evidence that any actual or imminent harm to the child is " 'clearly attributable' " to any act or failure to act on the mother's part (*Nicholson*, 3 NY3d at 370). In light of our conclusion, the mother's remaining contention is academic.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-00598

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

RONALD J. REUKAUF, SR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COLLEEN KRAFT, FORMERLY KNOWN AS
COLLEEN M. REUKAUF, DEFENDANT-RESPONDENT.

WILLIAM R. HITES, BUFFALO, FOR PLAINTIFF-APPELLANT.

Appeal from an amended order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 6, 2019. The amended order, inter alia, distributed the retirement benefits of plaintiff.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by vacating the sixth ordering paragraph and substituting therefor the provision that defendant is awarded 23.86% of plaintiff's gross monthly annuity accrued over all months of his service to his employer, and as modified the amended order is affirmed without costs.

Memorandum: In this postjudgment matrimonial proceeding, plaintiff appeals from an "Amended Court Order Acceptable for Processing" (amended order) that, inter alia, directed the United States Office of Personnel Management (OPM) to pay defendant her marital share of plaintiff's Civil Service Retirement System pension. The amended order is similar in effect to a qualified domestic relations order (QDRO). Although no appeal lies as of right from a QDRO (*see Andress v Andress*, 97 AD3d 1151, 1152 [4th Dept 2012]; *Cuda v Cuda* [appeal No. 2], 19 AD3d 1114, 1114 [4th Dept 2005]), we nevertheless treat the notice of appeal as an application for leave to appeal and grant the application (*see Cuda*, 19 AD3d at 1114).

Plaintiff contends that Supreme Court erred in determining that defendant's share of plaintiff's pension benefit should be calculated by applying the *Majauskas* formula (*see Majauskas v Majauskas*, 61 NY2d 481, 489-491 [1984]) to plaintiff's total gross monthly annuity because the parties' oral stipulation limited defendant's share to 50% of that part of the pension that accrued during the parties' marriage. We reject that contention. "A QDRO obtained pursuant to a [stipulation of settlement] 'can convey only those rights . . . which the parties [agreed to] as a basis for the judgment' " (*Duhamel v Duhamel* [appeal No. 2], 4 AD3d 739, 741 [4th Dept 2004]; *see McCoy v Feinman*, 99 NY2d 295, 304 [2002]). A stipulation of settlement that is "incorporated but not merged into a judgment of divorce is a

contract subject to the principles of contract construction and interpretation" (*Anderson v Anderson*, 120 AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015] [internal quotation marks omitted]; *see Walker v Walker*, 42 AD3d 928, 928 [4th Dept 2007], *lv dismissed* 9 NY3d 947 [2007]). If the stipulation is "complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms" (*Anderson*, 120 AD3d at 1560 [internal quotation marks omitted]). A stipulation is unambiguous where it is not "reasonably susceptible of more than one interpretation," and in making such a determination, "the court should examine the entire [stipulation] and consider the relation of the parties and the circumstances under which it was executed" (*Roche v Lorenzo-Roche*, 149 AD3d 1513, 1514 [4th Dept 2017] [internal quotation marks omitted]).

Here, we conclude that both parties expressly agreed in the oral stipulation that plaintiff's benefits would be distributed "[i]n accordance with the *Majauskas* formula." That oral stipulation was an unambiguous expression of the parties' intent to follow *Majauskas*, and nothing said by plaintiff's counsel during the colloquy that led to the stipulation casts doubt on that aspect of the parties' agreement (*see Matter of Gursky v Gursky*, 93 AD3d 1127, 1127-1128 [3d Dept 2012]; *Elwell v Elwell*, 34 AD3d 1337, 1338 [4th Dept 2006]; *Hoke v Hoke*, 27 AD3d 1055, 1055 [4th Dept 2006]). By referring to *Majauskas*, even without further elaboration, the parties made clear to the court the formula to which they were stipulating (*see Gursky*, 93 AD3d at 1128).

We agree with plaintiff, however, that the amended order conflicts with the court's written decision insofar as the sixth ordering paragraph of the amended order purports to award defendant 23.86% of a former spouse survivor annuity under 5 USC § 8341 (h) (1). The stated percentage represents defendant's share of plaintiff's gross monthly annuity, as calculated by the court pursuant to the *Majauskas* formula, but the court in its decision made no award to defendant of a former spouse survivor annuity, which, had it been awarded, would have expressly conflicted with the parties' agreement. Where, as here, there is a conflict between the decision and the order, the decision controls, and we therefore modify the amended order accordingly (*see Curry v Curry*, 14 AD3d 646, 647 [2d Dept 2005]; *see generally Matter of KC B. Mench v Majerus*, 188 AD3d 1651, 1652 [4th Dept 2020]; *Waul v State of New York*, 27 AD3d 1114, 1115 [4th Dept 2006], *lv denied* 7 NY3d 705 [2006]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00261

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

LINDA QUINONES AND ANGEL BILBRAUT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARINER HOUSING DEVELOPMENT FUND COMPANY, INC.,
CRM RENTAL MANAGEMENT, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 29, 2021. The order denied the motion of defendants Mariner Housing Development Fund Company, Inc., and CRM Rental Management, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint is dismissed against defendants-appellants.

Memorandum: In this slip and fall negligence action, defendants-appellants (defendants) appeal from an order that denied their motion for summary judgment dismissing the amended complaint against them. We agree with defendants that they established their entitlement to judgment as a matter of law on their storm in progress affirmative defense (*see Battaglia v MDC Concourse Ctr., LLC*, 34 NY3d 1164, 1165-1166 [2020]). In opposition, plaintiffs failed to raise a triable issue of fact (*see id.* at 1166; *Glover v Botsford*, 109 AD3d 1182, 1183-1184 [4th Dept 2013]). We therefore reverse the order and grant the motion. Defendants' remaining contention is academic in light of our determination.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-00526

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

NATIONAL AIR CARGO, INC., NATIONAL AIR CARGO HOLDINGS, CHRIS ALF, PERSONALLY, PLAINTIFFS-APPELLANTS, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

JENNER & BLOCK, LLP, HARTER, SECREST & EMERY, LLP, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. (APPEAL NO. 1.)

HANTMAN & ASSOCIATES, NEW YORK CITY (ROBERT J. HANTMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR DEFENDANT-RESPONDENT JENNER & BLOCK, LLP.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT HARTER, SECREST & EMERY, LLP.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered October 16, 2020. The order granted the motions of defendants Jenner & Block, LLP and Harter, Secrest & Emery, LLP to dismiss the complaint against them.

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

Memorandum: Plaintiff National Air Cargo, Inc. (NAC) is a freight forwarding company, and plaintiff National Air Cargo Holdings (NACH) owns NAC. Plaintiff Chris Alf is the principal shareholder of NAC and NACH and, at all relevant times, was the chair, chief executive officer, and president of NAC. NAC was found liable on a breach of contract claim in an underlying action against it in the United States District Court for the Central District of California. Plaintiffs commenced this action alleging, inter alia, professional negligence/legal malpractice and seeking damages purportedly arising from the representation of NAC by defendant Jenner & Block, LLP (JB) in the underlying action and the representation of NAC by defendant Harter, Secrest & Emery, LLP (HSE) in NAC's subsequent bankruptcy proceeding. Plaintiffs alleged that JB and HSE negligently failed to review whether the judgment rendered against NAC in the underlying action was covered by the directors' and officers' liability insurance

policies issued to NAC and to advise NAC accordingly. JB and HSE thereafter each moved pursuant to CPLR 3211 to dismiss plaintiffs' complaint against them. In appeal No. 1, plaintiffs appeal from an order of Supreme Court that granted both motions. In appeal No. 2, plaintiffs appeal from a subsequent order of the same court that granted HSE's motion. In appeal No. 3, plaintiffs appeal from an order and judgment of the same court that granted JB's motion.

Preliminarily, the order in appeal No. 1 is subsumed in the subsequent final order in appeal No. 2 and the subsequent order and judgment in appeal No. 3; we therefore dismiss appeal No. 1 (*see Matter of Tehan [Tehan's Catalog Showrooms, Inc.]* [appeal No. 2], 144 AD3d 1530, 1531 [4th Dept 2016]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *see also* CPLR 5501 [a] [1]). We also note at the outset that plaintiffs do not challenge on appeal the court's grant of those parts of the motions seeking dismissal of their causes of action for breach of fiduciary duty, breach of contract, and unjust enrichment, nor do they challenge on appeal the court's grant of that part of HSE's motion seeking dismissal of the professional negligence/legal malpractice cause of action against it insofar as asserted by NACH and Alf. We therefore conclude that any challenges to those parts of the orders are deemed abandoned (*see Armstrong v United Frontier Mut. Ins. Co.*, 181 AD3d 1332, 1333 [4th Dept 2020]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We affirm in appeal Nos. 2 and 3.

In appeal No. 2, we conclude that the court properly dismissed on the ground of documentary evidence the professional negligence/legal malpractice cause of action against HSE insofar as asserted by NAC (*see* CPLR 3211 [a] [1]). A motion to dismiss a complaint based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). In support of its motion, HSE submitted the engagement letter between HSE and NAC. "An attorney may not be held liable for failing to act outside the scope of a retainer" (*Attallah v Milbank, Tweed, Hadley & McCloy, LLP*, 168 AD3d 1026, 1028 [2d Dept 2019]; *see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 435 [2007]). Here, HSE met its burden of establishing by documentary evidence that the scope of its legal representation did not include a review of the insurance policies for possible coverage of the judgment in the underlying action. The engagement letter stated that HSE's engagement did "not include responsibility either for review of [NAC's] insurance policies to determine the possibility of coverage for any . . . claims that have [been] or may be asserted against [NAC] or for notification of [NAC's] insurance carriers concerning the matter." Because review of NAC's liability insurance policies to determine their potential applicability to the judgment in the underlying action fell outside the scope of HSE's engagement, the court properly granted HSE's motion with respect to the professional negligence/legal malpractice cause of action against HSE insofar as asserted by NAC (*see Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849, 850 [2d Dept 2009]).

In appeal No. 3, we conclude that the court properly dismissed the professional negligence/legal malpractice cause of action against JB, insofar as asserted by NAC, on the ground of judicial estoppel. The "doctrine of judicial estoppel may bar a party from pursuing claims which were not listed in a previous bankruptcy proceeding" (*Moran Enters., Inc. v Hurst*, 160 AD3d 638, 640 [2d Dept 2018], *lv denied* 32 NY3d 908 [2018], *rearg denied* 32 NY3d 1195 [2019]; *see Popadyn v Clark Constr. & Prop. Maintenance Servs., Inc.*, 49 AD3d 1335, 1336 [4th Dept 2008]). Here, at the time NAC filed for bankruptcy, it failed to list a potential legal malpractice claim against JB as an asset and obtained a bankruptcy discharge. We conclude that "[t]he failure of . . . [NAC] to disclose a cause of action as an asset in a prior bankruptcy proceeding, the existence of which [NAC] knew or should have known existed at the time, deprive[s] [NAC] of the legal capacity to sue subsequently on that cause of action" (*Green v Associated Med. Professionals of NY, PLLC*, 111 AD3d 1430, 1432 [4th Dept 2013] [internal quotation marks omitted]). Contrary to the court's determination, however, JB failed to establish that the doctrine of judicial estoppel applies with respect to NACH or Alf, because JB failed to establish as a matter of law that NACH or Alf, as non-debtors, were in privity with NAC (*see In re Avaya Inc.*, 573 BR 93, 103-104 [SD NY 2017]).

Nonetheless, with respect to appeal No. 3, we conclude that JB is entitled to dismissal of the professional negligence/legal malpractice cause of action against it, insofar as asserted by NACH and Alf, for failure to state a cause of action (*see* CPLR 3211 [a] [7]). Plaintiffs' complaint does not allege the existence of an attorney-client relationship between JB and NACH or Alf (*see Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 [2d Dept 2013]) and, instead, alleges only that JB gave negligent advice to NAC. While NACH and Alf submitted an affidavit of Alf attempting to remedy that deficiency, the affidavit does not specifically address JB's representation of NACH or Alf in the matter giving rise to this lawsuit (*cf. Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In light of our determination, we do not reach the issue whether JB provided documentary evidence that " 'utterly refute[d] [NACH's and Alf's] factual allegations, conclusively establishing a defense as a matter of law' " (*Matter of Mixon v Wickett*, 196 AD3d 1094, 1095 [4th Dept 2021], quoting *Goshen*, 98 NY2d at 326).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-00527

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

NATIONAL AIR CARGO, INC., NATIONAL AIR CARGO HOLDINGS, CHRIS ALF, PERSONALLY, PLAINTIFFS-APPELLANTS, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

JENNER & BLOCK, LLP, ET AL., DEFENDANTS, AND HARTER, SECREST & EMERY, LLP, DEFENDANT-RESPONDENT. (APPEAL NO. 2.)

HANTMAN & ASSOCIATES, NEW YORK CITY (ROBERT HANTMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS LLP, BUFFALO (VINCENT E. DOYLE, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered November 4, 2020. The order granted the motion of defendant Harter, Secrest & Emery, LLP to dismiss plaintiffs' complaint against it.

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

Same memorandum as in *National Air Cargo, Inc. v Jenner & Block, LLP* ([appeal No. 1] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00529

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

NATIONAL AIR CARGO, INC., NATIONAL AIR CARGO HOLDINGS, CHRIS ALF, PERSONALLY, PLAINTIFFS-APPELLANTS, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

JENNER & BLOCK, LLP, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 3.)

HANTMAN & ASSOCIATES, NEW YORK CITY (ROBERT J. HANTMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered November 6, 2020. The order and judgment granted the motion of defendant Jenner & Block, LLP to dismiss plaintiffs' complaint against it.

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

Same memorandum as in *National Air Cargo, Inc. v Jenner & Block, LLP* ([appeal No. 1] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-00970

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DURELL MURRAY, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON 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 (Victoria M. Argento, J.), rendered November 29, 2018. The judgment convicted defendant upon a jury verdict of kidnapping in the second degree, burglary in the second degree (two counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for kidnapping in the second degree under count one of the indictment to a determinate term of 15 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, one count of kidnapping in the second degree (Penal Law § 135.20) and two counts of burglary in the second degree (§ 140.25 [1] [d]; [2]). Contrary to defendant's contention, his conviction of those crimes is supported by legally sufficient evidence (*see People v Dodt*, 61 NY2d 408, 411 [1984]; *People v Govan*, 268 AD2d 689, 690 [3d Dept 2000], *lv denied* 94 NY2d 920 [2000]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Moreover, viewing the evidence in light of the elements of kidnapping in the second degree and burglary in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict convicting defendant of those crimes is not against the weight of the evidence (*see People v Harriott*, 128 AD3d 470, 470 [1st Dept 2015], *lv denied* 26 NY3d 1008 [2015]; *People v Balcom*, 171 AD2d 1028, 1028-1029 [4th Dept 1991], *lv denied* 78 NY2d 920 [1991]; *see also People v Goldsmith*, 127 AD2d 293, 295-296 [3d Dept 1987], *lv denied* 70 NY2d 711 [1987]). Contrary to defendant's contention, the jury's decision to acquit him of kidnapping in the second degree in relation to the victim's son "does not provide [us] with the power to overturn [the jury's] verdict" convicting defendant of kidnapping in the second

degree in relation to the victim herself (*People v Nichols*, 163 AD3d 39, 45 [4th Dept 2018] [internal quotation marks and emphasis omitted]; *see People v Rayam*, 94 NY2d 557, 561-563 [2000]).

We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case. Thus, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence on count one of the indictment to a determinate term of 15 years' imprisonment, to be followed by the five years' postrelease supervision imposed by County Court (*see generally* CPL 470.15 [6] [b]). Defendant's remaining contentions do not warrant reversal or further modification of the judgment.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-00564

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIELLE WEBBER, DEFENDANT-APPELLANT.

TUPCHIK LEGAL GROUP, PLLC, BUFFALO (LANA V. TUPCHIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered April 8, 2019. The judgment convicted defendant upon her plea of guilty of assault in the first degree (two counts) and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of two counts of assault in the first degree (Penal Law § 120.10 [1], [3]) and one count of criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude her challenges to the youthful offender determination or to the severity of the sentence (*see People v Hahn*, 199 AD3d 1467, 1467 [4th Dept 2021]; *People v Wilson*, 197 AD3d 1006, 1007 [4th Dept 2021], *lv denied* 37 NY3d 1100 [2021]), we conclude that those challenges lack merit.

We reject defendant's contention that County Court failed to make the necessary determination whether she was eligible for youthful offender treatment. "Although a youth convicted of an armed felony is eligible for youthful offender status only where the court determines that there are mitigating circumstances bearing directly upon the manner in which the crime was committed or that the defendant's participation in the crime was relatively minor" (*People v Dhillon*, 143 AD3d 734, 735 [2d Dept 2016]; *see* CPL 720.10 [3]; *People v Middlebrooks*, 25 NY3d 516, 524-526 [2015]), here, no such determination was required inasmuch as defendant was not convicted of an armed felony and was therefore an eligible youth (*see* CPL 1.20 [41]; 720.10 [1], [2] [a] [ii]; *People v Crimm*, 140 AD3d 1672, 1673

[4th Dept 2016]; *see also People v Meridy*, 196 AD3d 1, 6 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]). We further conclude that the court did not abuse its discretion in denying defendant's request for youthful offender status (*see People v McDaniels,* 19 AD3d 1071, 1072 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]; *People v Weston*, 275 AD2d 915, 915 [4th Dept 2000], *lv denied* 95 NY2d 971 [2000]) and we decline to grant defendant's request to exercise our interest of justice jurisdiction to afford her that status (*see People v Lang*, 178 AD3d 1362, 1363 [4th Dept 2019]; *Weston*, 275 AD2d at 915).

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

Finally, defendant's contention that the court erred in imposing the maximum restitution surcharge of 10% would survive even a valid waiver of the right to appeal where, as here, the court fails to advise the defendant before waiving the right to appeal of the potential range of the surcharge that could be imposed as part of the requirement to pay restitution (*see People v Schultz*, 117 AD3d 1560, 1560 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014]). Although defendant failed to preserve that contention for our review (*see People v Kosty*, 122 AD3d 1408, 1409 [4th Dept 2014], *lv denied* 24 NY3d 1220 [2015]; *Schultz*, 117 AD3d at 1560-1561; *People v Kirkland*, 105 AD3d 1337, 1338 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]), we nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We conclude that the court erred in imposing the 10% surcharge because there was no " 'filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in [this] particular case exceeds five percent of the entire amount of the payment or the amount actually collected' " (*Schultz*, 117 AD3d at 1561, quoting Penal Law § 60.27 [8]). We therefore modify the judgment accordingly.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 09-00351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WESLEY MOLINA CIRINO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 29, 2008. The judgment convicted defendant upon a jury verdict of aggravated murder.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of aggravated murder (Penal Law § 125.26 [1] [a] [i]; [b]), arising from the fatal shooting of a police officer while the officer was conducting a traffic stop of a vehicle operated by the eyewitness to the shooting. We affirm.

By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because the testimony of the eyewitness was incredible as a matter of law (*see People v Wilcher*, 158 AD3d 1267, 1267-1268 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, that contention lacks merit. Contrary to defendant's contention, the eyewitness's initial reluctance to identify the shooter as defendant, with whom he was very familiar, was adequately explained, and the eyewitness's testimony was corroborated by other evidence, including defendant's inculpatory statements to the police and fellow inmates (*see People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *People v Smith*, 173 AD3d 414, 414 [1st Dept 2019], *lv denied* 34 NY3d 938 [2019]; *People v Walker*, 279 AD2d 696, 698 [3d Dept 2001], *lv denied* 96 NY2d 869 [2001]). Contrary to defendant's further assertions, we conclude that the eyewitness's testimony was " 'not [otherwise] incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*Wilcher*, 158 AD3d at 1268).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence, . . . the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*id.*; *see generally People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Romero*, 7 NY3d 633, 642-643 [2006]). Contrary to defendant's assertion, we also conclude that "the [i]ssues of identification and credibility, including the weight to be given to inconsistencies in testimony, were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*Thomas*, 176 AD3d at 1640 [internal quotation marks omitted]).

We reject defendant's further contention that County Court erred in refusing to suppress a particular statement that he made to the police. Defendant sought in his omnibus motion suppression of various statements that he made to the police, including the subject statement on the ground that it was the product of custodial interrogation conducted without the benefit of *Miranda* warnings. Initially, inasmuch as the court, following a suppression hearing, denied that part of defendant's motion in its entirety while simultaneously finding that defendant was in custody on an unrelated charge at the time of the interview that produced the subject statement, the record demonstrates that "the unarticulated predicate for the . . . court's evidentiary ruling" was that the statement was not the product of police interrogation (*People v Nicholson*, 26 NY3d 813, 817 [2016]). It is well settled that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]; *see People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]). Here, we conclude that the record of the suppression hearing demonstrates that the interview "did not constitute a process of interrogation to which *Miranda* is applicable" (*Huffman*, 41 NY2d at 34), inasmuch as defendant's statements were not "in response to interrogation, i.e., words or actions by police that were intended or likely to elicit an incriminating response" (*People v Wearen*, 19 AD3d 1133, 1134 [4th Dept 2005], *lv denied* 5 NY3d 834 [2005] [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that the People elicited testimony about a prior bad act that exceeded the scope of the court's pretrial ruling (*see People v King*, 181 AD3d 1233, 1235 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]; *People v Bastian*, 83 AD3d 1468, 1469 [4th Dept 2011], *lv denied* 17 NY3d 813 [2011]), 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]; *King*, 181 AD3d at 1235). Contrary to defendant's alternative contention, any error by defense counsel in failing to

object to that testimony was not " 'so egregious and prejudicial' as to deprive defendant of a fair trial" (*People v Cummings*, 16 NY3d 784, 785 [2011], *cert denied* 565 US 862 [2011]; *see People v Molyneaux*, 49 AD3d 1220, 1222 [4th Dept 2008], *lv denied* 10 NY3d 937 [2008]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant further contends that the People improperly introduced, without obtaining an advance ruling and in violation of *People v Molineux* (168 NY 264 [1901]), testimony of an inmate that defendant admitted to committing prior uncharged crimes. Contrary to defendant's contention, the record establishes that the People properly obtained a ruling on the admissibility of the inmate's testimony before he took the stand (*see People v Small*, 12 NY3d 732, 733 [2009]; *People v Ventimiglia*, 52 NY2d 350, 362 [1981]). Relatedly, we conclude that defendant's challenge to the admissibility of the inmate's testimony is preserved for our review. Although the discussion regarding the admissibility of that testimony occurred off the record, defense counsel and the court later acknowledged on the record that the discussion had occurred before the inmate took the stand and that the court had issued a ruling expressly determining that such testimony was admissible (*see People v Torres* [appeal No. 1], 97 AD3d 1125, 1125-1126 [4th Dept 2012], *affd* 20 NY3d 890 [2012]; *People v Caban*, 14 NY3d 369, 373 [2010]; *People v Patterson*, 176 AD3d 1637, 1638 [4th Dept 2019], *lv denied* 34 NY3d 1080 [2019]). Thus, inasmuch as the record establishes that "the trial [court] was made aware, before [it] ruled on the issue, that the defense wanted [it] to rule otherwise, preservation was adequate" (*Caban*, 14 NY3d at 373; *see Torres*, 97 AD3d at 1126; *Patterson*, 176 AD3d at 1638). Nonetheless, even assuming, arguendo, that the court erred in admitting the challenged testimony, we conclude that such error is harmless (*see People v Casado*, 99 AD3d 1208, 1211-1212 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]; *see generally People v Frankline*, 27 NY3d 1113, 1115 [2016]; *People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct on summation is not preserved for our review (*see* CPL 470.05 [2]; *People v Kims*, 24 NY3d 422, 440 [2014]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also failed to preserve for our review his challenge under CPL 310.30 to the court's handling of and response to certain jury notes (*see* CPL 470.05 [2]; *People v Mays*, 85 AD3d 1700, 1700 [4th Dept 2011], *affd* 20 NY3d 969 [2012]). Defendant nevertheless contends that preservation is not required because a mode of proceedings error occurred during jury deliberations when, in defendant's absence, the trial judge met in the jury room with the prosecutors and defense counsel to observe a technician show the jury how to use the provided equipment and computer program to play the video recording of a police interview of defendant that the jury had requested. At that time, the trial judge explained that the equipment was going to be set up in response to the jury's request, that the technician would show how to operate the technology, that the jury could adjust the shades in the

room if it needed, and that menus for lunch would be provided shortly. We reject defendant's contention. It is well settled that "a defendant's absence during nonministerial instructions, in violation of CPL 310.30, affects the mode of proceedings prescribed by law" (*People v Rivera*, 23 NY3d 827, 831 [2014]). Here, the record establishes that defendant, along with defense counsel and the prosecutors, was present when the court read and discussed with the parties the proposed response to both the jury's initial note and its clarifying note, during which time defense counsel suggested that the jury be given the option to view the video recording in the jury room, and was also present when the court explained to the jury how it would proceed with fulfilling the request, i.e., by allowing the jury to view the video recording in the jury room after the technician set up the technology and explained its operation to the jury (*see* CPL 310.30; *see generally Rivera*, 23 NY3d at 831). Contrary to defendant's contention, defendant's subsequent absence, when the trial judge went into the jury room with the prosecutors and defense counsel, did not "affect[] the mode of proceedings prescribed by law" (*Rivera*, 23 NY3d at 831), inasmuch as the communications therein were "ministerial and therefore do[ ] not fall within the ambit of a supplemental jury instruction" (*id.* at 832; *see Mays*, 20 NY3d at 971; *People v Harris*, 76 NY2d 810, 811-812 [1990]).

Contrary to defendant's related contention, the technician's task of setting up the entire requested video in a playable format through the computer and audio-visual equipment and his communication with the jury about the operation of that technology were ministerial, and thus there was "no improper delegation of judicial authority" and no mode of proceedings error in that regard (*People v Bonaparte*, 78 NY2d 26, 31 [1991]; *see Mays*, 20 NY3d at 970; *People v Davis*, 260 AD2d 726, 729-730 [3d Dept 1999], *lv denied* 93 NY2d 968 [1999]).

Finally, defendant failed to preserve for our review his further contention that the court violated CPL 310.20 (1) (*see* CPL 470.05 [2]; *People v Mills*, 188 AD3d 1655, 1656 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021]), 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]; *Mills*, 188 AD3d at 1656).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-01572

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL B. COLLIER, ALSO KNOWN AS MICHAEL B. COLLIER, SR., ALSO KNOWN AS MICHAEL BERNARD COLLIER, ALSO KNOWN AS MICHAEL COLLIER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered February 25, 2019. The judgment convicted defendant upon a nonjury verdict of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]). We affirm. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that County Court erred in refusing to provide a missing witness instruction pertaining to the victim of the alleged assault. Even assuming, arguendo, that defendant's request was timely (*see People v Carr*, 14 NY3d 808, 809 [2010]; *People v Butler*, 192 AD3d 1701, 1704 [4th Dept 2021], *amended on rearg* 196 AD3d 1093 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]; *People v Fuqua*, 122 AD3d 1249, 1251 [4th Dept 2014]), we conclude that the court properly denied defendant's request because he failed to establish any of the requirements necessary to support the charge (*see generally People v Smith*, 33 NY3d 454, 458-459 [2019]; *People v Brown*, 139 AD3d 1178, 1179 [3d Dept 2016]). But even assuming, arguendo, that the court erred in denying the request, we conclude that any error is harmless inasmuch as the evidence of guilt is overwhelming and there is no

significant probability that defendant would have been acquitted but for the error (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021]; *People v Abdul-Jaleel*, 142 AD3d 1296, 1296-1297 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]).

Finally, defendant waived his present contention that the court erred in admitting in evidence the surveillance video depicting the crime because, at trial, he consented to the admission of that evidence (*see People v Serrano*, 164 AD3d 1658, 1659 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018]; *People v Hutchings*, 142 AD3d 1292, 1294 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *People v Santos-Sosa*, 233 AD2d 833, 833 [4th Dept 1996], *lv denied* 89 NY2d 988 [1997]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 20-01214

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

IN THE MATTER OF NATHAN N., MILES N., THOMAS N., ISAAC N. AND NAOMI N.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

CHRISTOPHER R.N. AND MELISSA J.N., RESPONDENTS-APPELLANTS.

MEMORANDUM AND ORDER

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT CHRISTOPHER R.N.

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

MEGAN E. O'LEARY, MOUNT MORRIS, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Livingston County (Kevin Van Allen, J.), entered August 13, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject children.

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

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

We reject the contention of the father that petitioner failed to establish that it exercised diligent efforts, as required by Social Services Law § 384-b (7) (a), to encourage and strengthen the parent-child relationship. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parents to overcome problems that prevent the discharge of the child[ren] into their care, and informing the parents of their child[ren's] progress" (*Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]; *see Matter of Hannah W. [William W.]*, 182 AD3d 1032, 1033 [4th Dept 2020]). Here, petitioner established by clear and convincing evidence

(*see* § 384-b [3] [g] [i]) that it fulfilled its duty to exercise diligent efforts to encourage and strengthen respondents' relationships with the children (*see Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1597 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]) by providing appropriate services to respondents, including parenting education, mental health counseling, budgeting and communication training, and scheduling regular visitation with the children (*see Hannah W.*, 182 AD3d at 1033).

We further conclude that, contrary to respondents' contentions, petitioner established that, despite those diligent efforts, respondents permanently neglected the children because they "failed to plan appropriately for the child[ren]'s future" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). "It is well settled that, to plan substantially for a child's future, 'the parent must take meaningful steps to correct the conditions that led to the child's removal' " (*id.*; *see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]). Here, respondents failed to take such meaningful steps inasmuch as they failed to successfully complete the programs and services that were made available to them and, despite petitioner's efforts, respondents did not progress to a point where unsupervised visits could occur (*see Matter of Jase M. [Holly N.]*, 190 AD3d 1238, 1241 [3d Dept 2021], *lv denied* 37 NY3d 901 [2021]; *Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]).

Contrary to respondents' contentions, Family Court (Van Allen, J.) did not abuse its discretion in refusing to issue a suspended judgment. "A suspended judgment is a brief grace period designed to prepare the parent to be reunited with the children" (*Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1663 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019] [internal quotation marks omitted]; *see* Family Ct Act § 633; *Matter of Michael B.*, 80 NY2d 299, 310-311 [1992]) and "may be warranted where the parent has made sufficient progress in addressing the issues that led to the child[ren]'s removal from custody" (*Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1311 [4th Dept 2021]). Here, the evidence at the dispositional hearing established that the children had been removed from respondents' care for over two years and, during that time, as noted above, respondents failed to make substantial progress in addressing the issues that led to the removal of the children and still had only supervised visits with the children. We therefore conclude that the court properly determined that a suspended judgment was unwarranted (*see id.*).

We reject respondents' contentions that, prior to the fact-finding hearing, Family Court (Cohen, J.) abused its discretion when it denied their requests for an adjournment. "The grant or denial of a motion for an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Dixon v Crow*, 192 AD3d 1467, 1467 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021] [internal quotation marks omitted]), and we conclude that the court did not abuse its discretion. We note that neither the mother nor the father demonstrated any prejudice that they sustained as a result of

the denial of their requests for an adjournment (*see generally id.* at 1468). Although respondents contend that they needed more time to review voluminous discovery materials, the record establishes that the court told respondents that it would permit them to recall any witness for additional cross-examination upon further review of the provided discovery, and it is clear from the record that counsel used the provided discovery during the extensive and thorough cross-examination of petitioner's witnesses.

Similarly, we reject respondents' contention that the court (Cohen, J.) abused its discretion in refusing to recuse itself. "Absent a legal disqualification, . . . a [j]udge is generally the sole arbiter of recusal . . . , and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion" (*Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021] [internal quotation marks omitted]; *see People v Moreno*, 70 NY2d 403, 405-406 [1987]; *People v Warren*, 100 AD3d 1399, 1400 [4th Dept 2012]). Here, nothing in the record establishes that "any bias on the court's part unjustly affected the result to the detriment of [respondents] or that the court [had] a predetermined outcome of the case in mind during the hearing" (*Matter of Cameron ZZ. v Ashton B.*, 183 AD3d 1076, 1081 [3d Dept 2020], *lv denied* 35 NY3d 913 [2020] [internal quotation marks omitted]; *see Allison*, 199 AD3d at 1491-1492). We perceive no abuse of discretion by the court in denying respondents' recusal motion (*see Tripi v Alabiso*, 189 AD3d 2060, 2061 [4th Dept 2020]; *Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

120

CA 20-01448

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

ST. JOSEPH'S HOSPITAL HEALTH CENTER AND
ST. JOSEPH'S MEDICAL, P.C.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PATRICK ADCOCK, M.D., SCOTT ALLAN, M.D., MARK BILLINSON, M.D., NINA DAVULURI, AS EXECUTOR OF THE ESTATE OF CHAUDHURY DAVULURI, M.D., MARK J. EMERICK, M.D., AMY KASPEREK, P.A., JEFFREY LAPE, P.A., SARAH LEO, N.P., HANNAH LOVALLO, SEAN LOVALLO, ATUL MAINI, M.D., MEHDI MARVASTI, M.D., MARYANN E. MILLAR, M.D., BRYNNE NOSKO, P.A., NAVPRIYA OBEROI, M.D., ANTHONY S. OLIVIA, M.D., BALASUBRAMANIAM SIVAKUMAR, M.D., CAROL MELINDA STEVENS, D.O., ANTHONY STIRPE, P.A., DIANE TSCHUDI, P.A., ARTHUR VERCILLO, M.D., TRAVIS P. WEBB, M.D., KELLY ANN WOODS, N.P., VINCENT GEMELLI, P.A., LAURA MARTIN, DO,
DEFENDANTS-RESPONDENTS,
MEDICAL LIABILITY MUTUAL INSURANCE COMPANY,
ET AL., DEFENDANTS.

COSTELLO COONEY & FEARON, PLLC, SYRACUSE (JENNIFER L. WANG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NOLAN HELLER KAUFFMAN LLP, ALBANY (BRIAN DEINHART OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PATRICK ADCOCK, M.D., JEFFREY LAPE, P.A., SARAH LEO, N.P., HANNAH LOVALLO, SEAN LOVALLO, BRYNNE NOSKO, P.A., ANTHONY STIRPE, P.A., AND KELLY ANN WOODS, N.P.

COHEN, COMPAGNI, BECKMAN, APPLER & KNOLL, PLLC, SYRACUSE (ANDREW M. KNOLL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SCOTT ALLAN, M.D., MARK BILLINSON, M.D., NINA DAVULURI, AS EXECUTOR OF THE ESTATE OF CHAUDHURY DAVULURI, M.D., MARK J. EMERICK, M.D., AMY KASPEREK, P.A., ATUL MAINI, M.D., MEHDI MARVASTI, M.D., MARYANN E. MILLAR, M.D., NAVPRIYA OBEROI, M.D., ANTHONY S. OLIVIA, M.D., BALASUBRAMANIAM SIVAKUMAR, M.D., CAROL MELINDA STEVENS, D.O., DIANE TSCHUDI, P.A., ARTHUR VERCILLO, M.D., TRAVIS P. WEBB, M.D., VINCENT GEMELLI, P.A., AND LAURA MARTIN, D.O.

Appeal from an amended order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 23, 2020. The amended order, among other things, granted defendants-respondents' motions for summary judgment and denied plaintiffs' cross motion for

summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting judgment in favor of defendants-respondents as follows:

> It is ADJUDGED and DECLARED that defendants-respondents are the sole and exclusive owners of the cash consideration paid to them as a result of the demutualization and conversion of defendant Medical Liability Mutual Insurance Company,

and as modified the amended order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration of the rights and obligations of the parties with respect to demutualization proceeds issued by defendant Medical Liability Mutual Insurance Company to defendants-respondents when it converted from a mutual insurance company to a stock insurance company. We conclude that, for reasons stated in its amended decision, Supreme Court properly granted defendants-respondents' motions seeking, inter alia, summary judgment on their counterclaims and denied plaintiffs' cross motion for, among other things, summary judgment on the complaint. The court erred, however, in failing to declare the rights of the parties, and we therefore modify the amended order by making the requisite declaration (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

XAVIER A. LOWRY, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered August 4, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]). Viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that the verdict is not against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's *Batson* argument is without merit, particularly given County Court's own observations about the body language and demeanor of the prospective juror (*see People v Johnson*, 73 AD3d 578, 579 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]; *People v Carter*, 38 AD3d 1256, 1256-1257 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]). Finally, defendant's *Wade* argument "is moot inasmuch as th[e relevant] witness did not identify defendant at trial" (*People v Cormack*, 170 AD3d 1628, 1629 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019]; *see* CPL 470.05 [1]; *People v Johnston*, 192 AD3d 1516, 1520 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

151

KA 16-02356

PRESENT: WHALEN, P.J., LINDLEY, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE J. SINGLETON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 26, 2016. The appeal was held by this Court by order entered March 19, 2021, decision was reserved, and the matter was remitted to Supreme Court, Monroe County, for further proceedings (192 AD3d 1536 [4th Dept 2021]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and three counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1], [2], [3]). We previously held this case, reserved decision, and remitted the matter to Supreme Court "for further proceedings as [were] necessary to satisfy the requirements of *Batson*" (*People v Singleton*, 192 AD3d 1536, 1538 [4th Dept 2021] [internal quotation marks omitted]). Upon remittal, the court heard arguments from defense counsel as to why the People's proffered race-neutral reason for striking the prospective juror at issue was pretextual, after which it determined that there had been no *Batson* violation. We affirm.

Contrary to defendant's contention in his supplemental brief, the court did not err in denying his *Batson* challenge. "At step one [of a *Batson* challenge], the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the

peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*People v Bridgeforth*, 28 NY3d 567, 571 [2016]; *see People v Pescara*, 162 AD3d 1772, 1772-1773 [4th Dept 2018]). "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility" (*Snyder v Louisiana*, 552 US 472, 477 [2008]), and a "trial court's determination whether a proffered race-neutral reason is pretextual is accorded great deference on appeal" (*People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019] [internal quotation marks omitted]; *see People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]; *People v Larkins*, 128 AD3d 1436, 1441-1442 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]). On this record, we see no reason to disturb the court's determination that the prosecutor's proffered race-neutral reason for challenging the prospective juror at issue was not pretextual.

We further conclude that defendant received effective assistance of counsel. Simple disagreement with strategies or tactics does not satisfy a defendant's burden of establishing ineffective assistance of counsel (*see People v Flores*, 84 NY2d 184, 187 [1994]). As long as a defense is based on a "reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 713 [1998]; *see People v Lane*, 60 NY2d 748, 750 [1983]). The evidence, the law, and the circumstances of a particular case should be "viewed in totality and as of the time of the representation," and if they reveal "that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). What constitutes effective assistance of counsel varies according to the unique circumstances of each case (*see id.* at 146). Here, defendant received meaningful representation. Defendant was acquitted of the only violent felony offense charged in the indictment. Moreover, defense counsel made appropriate pretrial motions, obtained and conducted a suppression hearing, presented opening and closing arguments, raised appropriate objections throughout the trial, effectively cross-examined the prosecution witnesses, and presented a cogent defense in which defendant and others testified (*see generally People v Goncalves*, 283 AD2d 1005, 1005 [4th Dept 2001], *lv denied* 96 NY2d 918 [2001]).

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

159

KA 20-00079

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISZON C. RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered September 13, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the second degree and criminal contempt in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and criminal contempt in the first degree (§ 215.51 [c]), defendant contends that his waiver of the right to appeal is invalid and his sentence is unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is unenforceable, we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

161

CAF 20-00677

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

IN THE MATTER OF ROBERT L. AND KRISTIN L.,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT,
AND JUSTIN W., RESPONDENT.
(APPEAL NO. 1.)

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

MICHAEL D. WERNER, WATERTOWN, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered January 31, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioners visitation with the subject child.

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

Same memorandum as in *Matter of Robert L. v Jefferson County Dept. of Social Servs.* ([appeal No. 2] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

162

CAF 20-00678

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

IN THE MATTER OF ROBERT L. AND KRISTIN L.,
PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENT-RESPONDENT,
AND JUSTIN W., RESPONDENT.
(APPEAL NO. 2.)

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

MICHAEL D. WERNER, WATERTOWN, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered January 31, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition insofar as it sought custody of the subject child and granted the petition insofar as it sought visitation with the subject child.

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

Memorandum: Petitioners are the maternal grandparents of the subject child. In July 2017, the child was removed from respondent father's care after the father shot and killed the child's mother. The child was placed in the custody of respondent Jefferson County Department of Social Services (DSS) and in the care of foster parents. Shortly after the commencement of a severe abuse proceeding against the father pursuant to Family Court Act article 10, petitioners filed a petition seeking custody of or visitation with the child pursuant to article 6. In appeal No. 1, petitioners appeal from an order of Family Court that, inter alia, granted the petition insofar as it sought visitation and established a progressive visitation schedule. In appeal No. 2, petitioners appeal from an order of the same court and entered on the same date that, inter alia, again granted the petition insofar as it sought visitation and denied the petition insofar as it sought custody.

Initially, we dismiss appeal No. 1 inasmuch as the order in that

appeal is duplicative of the order in appeal No. 2 (*see generally Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Contrary to petitioners' further contention, the court did not err in determining the issue of custody. Here, as in any other custody case, a " 'custody determination by the trial court must be accorded great deference and should not be disturbed where . . . it is supported by a sound and substantial basis in the record' " (*Sorce v Sorce*, 16 AD3d 1077, 1077 [4th Dept 2005]; *see Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1275 [4th Dept 2005]). Additionally, it is well settled that a "nonparent relative of the child does not have 'a greater right to custody' than the child's foster parents" (*Matter of Matthew E. v Erie County Dept. of Social Servs.*, 41 AD3d 1240, 1241 [4th Dept 2007]; *see Matter of Gordon B.B.*, 30 AD3d 1005, 1006 [4th Dept 2006]). At the custody hearing, the DSS caseworker and the child's therapist testified regarding the child's home environment with the foster parents, indicated that the child was appropriately cared for by the foster parents, and further opined that removing the child from his foster parents could cause the child to regress in his development (*see Matter of Gladys B. v Albany County Dept. of Social Servs.*, 274 AD2d 689, 690 [3d Dept 2000]; *see also Carl G.*, 24 AD3d at 1275). We therefore conclude that the record supports the court's determination that it is in the best interests of the child to remain in the custody of DSS and the care of the foster parents rather than to be placed in the custody of petitioners (*see Carl G.*, 24 AD3d at 1275).

Petitioners also contend that the court erred in failing to grant them more visitation with the child under the progressive visitation schedule set by the court. We reject that contention inasmuch as the schedule issued by the court has a sound and substantial basis in the record (*see generally Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *Matter of Talbot v Edick*, 159 AD3d 1406, 1407 [4th Dept 2018]). Finally, we have reviewed petitioners' remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

180

CAF 21-01261

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

IN THE MATTER OF LIVINGSTON COUNTY SUPPORT COLLECTION UNIT, ON BEHALF OF MICHAEL P. YUSKO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JEANA L. SANSOCIE, RESPONDENT-RESPONDENT.

JOHN M. LOCKHART, GENESEO, FOR PETITIONER-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated February 4, 2021 in a proceeding pursuant to Family Court Act article 4. The order denied the petitioner's objections to an order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting petitioner's objections in part and vacating the amount of respondent's child support obligation, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Livingston County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner, acting on behalf of the father of the subject children, appeals from an order denying its objections to the order of the Support Magistrate that, among other things, granted in part the petition for an upward modification of respondent mother's child support obligation. We agree with petitioner that the Support Magistrate erred in deviating from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA) (Family Ct Act § 413) and that Family Court therefore should have granted the father's objections with respect to that part of the Support Magistrate's order.

It is well settled that "[s]hared custody arrangements do not alter the scope and methodology of the CSSA" (*Bast v Rossoff*, 91 NY2d 723, 732 [1998]). Indeed, the Court of Appeals has "explicitly reject[ed] the proportional offset formula" whereby the noncustodial parent's child support obligation would be reduced based upon the amount of time that he or she actually spends with the child (*id.*). To the contrary, a court must calculate the basic child support obligation under the CSSA, and then must order the noncustodial parent to pay his or her "pro rata share of the basic child support

obligation, unless it finds that amount to be 'unjust or inappropriate' " (*id*. at 727; *see* Family Ct Act § 413 [1] [f], [g]).

Here, there is a shared custody arrangement in which the father is the primary custodial parent, and the Support Magistrate determined that, because the children spent approximately 50% of the parenting time with the mother and because the mother incurred expenses for the children's "food, clothing, shelter, utilities, cell phones, transportation[,] and extracurricular activities" during the times they were with her, she should be granted a variance from the presumptive support obligation. That was error. Although "extraordinary expenses incurred by the non-custodial parent in exercising visitation" with a child not on public assistance may support a finding that the presumptive support obligation is unjust or inappropriate (Family Ct Act § 413 [1] [f] [9] [i]), "[t]he costs of providing suitable housing, clothing and food for [a child] during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount" (*Matter of Ryan v Ryan*, 110 AD3d 1176, 1180-1181 [3d Dept 2013]; *see Matter of Firenze v Firenze*, 181 AD3d 1198, 1199 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *Matter of Mitchell v Mitchell*, 134 AD3d 1213, 1215-1216 [3d Dept 2015]), "nor is the cost of entertainment, including sports, an extraordinary visitation expense for purposes of calculating child support" (*Firenze*, 181 AD3d at 1199; *see Matter of Jerrett v Jerrett*, 162 AD3d 1715, 1717 [4th Dept 2018]). Thus, we conclude that the Support Magistrate's determination "was merely another way of [improperly] applying the proportional offset method" (*Ryan*, 110 AD3d at 1180; *see Matter of Livingston County Dept. of Social Servs. v Hyde*, 196 AD3d 1071, 1072 [4th Dept 2021]; *see generally Bast*, 91 NY2d at 732). The remaining grounds upon which the Support Magistrate relied in granting the variance have no support in the record (*see Jerrett*, 162 AD3d at 1717). To the extent that the Support Magistrate determined that the father's expenses were substantially reduced as a result of the mother's expenditures during extended visitation (*see* § 413 [1] [f] [9] [ii]), we agree with petitioner that there is no support in the record for that determination (*see Juneau v Juneau*, 240 AD2d 858, 859 [3d Dept 1997], *lv denied* 90 NY2d 812 [1997], *rearg denied* 91 NY2d 922 [1998]).

Although this Court has the power to make a determination whether the presumptive support obligation is unjust or inappropriate (*see generally Riemersma v Riemersma*, 84 AD3d 1474, 1477 [3d Dept 2011]), we are unable to make such a determination here because the record lacks an evidentiary basis for doing so (*see generally Matter of Kay v Cameron*, 270 AD2d 939, 940 [4th Dept 2000]). We therefore modify the order by granting the objections in part and vacating the amount of respondent's child support obligation, and we remit the matter to Family Court for a determination of respondent's support obligation

upon an adequate record.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

182

CAF 19-00066

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

IN THE MATTER OF JULIETTE R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JORDAN R.T., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 14, 2018 in a proceeding pursuant to Family Court Act article 10. The order found that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Juliette R. (Jordan R.T.)* ([appeal No. 2] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

183

CAF 19-01743

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

IN THE MATTER OF JULIETTE R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JORDAN R.T., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered September 6, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed respondent under the supervision of petitioner for a period of one year.

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

Memorandum: In appeal No. 1, respondent father appeals from an order entered after a fact-finding hearing that, inter alia, adjudicated that he neglected the subject child. In appeal No. 2, the father appeals from an order of disposition that, among other things, placed the father under the supervision of petitioner for one year and released the child to the custody of non-respondent mother.

As an initial matter, the father's appeal from the order in appeal No. 1 must be dismissed inasmuch as the appeal from the dispositional order in appeal No. 2 brings up for review the propriety of the fact-finding order in appeal No. 1 (*see Matter of Lil B. J.-Z. [Jessica N.J.]* [appeal No. 2], 194 AD3d 1413, 1413-1414 [4th Dept 2021]; *Matter of Jaime D. [James N.]* [appeal No. 2], 170 AD3d 1524, 1525 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]). Further, the father's appeal from the order in appeal No. 2 insofar as it concerns the disposition must be dismissed as moot because that part of the order has expired by its terms (*see Lil B. J.-Z.*, 194 AD3d at 1414; *Jaime D.*, 170 AD3d at 1525; *Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1136 [4th Dept 2013]). The father "may nevertheless challenge the underlying neglect adjudication because it constitutes a permanent stigma to a parent and may, in future proceedings, affect a

parent's status" (*Jamie D.*, 170 AD3d at 1525 [internal quotation marks omitted]).

Contrary to the father's contention with respect to the neglect adjudication, we conclude that petitioner established by a preponderance of the evidence that the child's physical, mental or emotional condition had been or was "in imminent danger of becoming impaired as a result of the failure of [the father] . . . to exercise a minimum degree of care" (Family Ct Act § 1012 [f] [i]; *see generally Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). Petitioner established that the father "made repeated unfounded allegations of sexual [and physical] abuse . . . , necessitating that the child[ ] undergo medical examinations and interviews regarding intimate issues" (*Matter of Tyler W. [Janice B.]*, 149 AD3d 968, 969 [2d Dept 2017]; *see Matter of Leilani D. [Linsford D.]*, 190 AD3d 478, 478 [1st Dept 2021]; *Matter of Elizabeth W. [Theresa W.]*, 74 AD3d 1787, 1788 [4th Dept 2010], *lv denied* 16 NY3d 704 [2011]; *Matter of Morgan P.*, 60 AD3d 1362, 1362 [4th Dept 2009]) and that the father inappropriately questioned the child about the alleged abuse (*see Tyler W.*, 149 AD3d at 969).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

197

KA 20-01368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH HICKS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), entered September 25, 2020. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends, and the People correctly concede, that County Court erred in assessing five points against him under risk factor 9 based on a misdemeanor marihuana conviction from Florida. The People failed to establish by "the requisite clear and convincing evidence" (*People v Wilson*, 186 AD3d 1066, 1067 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]) that the crime for which defendant was convicted in Florida is "tantamount to a crime under New York law" (*People v Perez*, 35 NY3d 85, 87 [2020], *rearg denied* 35 NY3d 986 [2020]; *see generally People v Bean*, 190 AD3d 622, 622 [1st Dept 2021], *lv denied* 36 NY3d 913 [2021]). Our deduction of five points from defendant's score on the risk assessment instrument does not affect his presumptive risk level, which remains at level one.

Defendant next contends that the court, in granting the People's request for an upward departure to risk level two, failed to consider all of the alleged mitigating factors that he cited at the SORA hearing. We reject that contention. Although the court noted two of defendant's proffered mitigating factors in its decision and did not expressly reference the third, it does not necessarily follow that the court failed to consider all three factors when it granted the People's request. We conclude that the court properly determined that

the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the risk assessment guidelines, that the aggravating factors outweighed the mitigating factors, and that the totality of the circumstances warranted an upward departure to avoid an under-assessment of defendant's dangerousness and risk of sexual recidivism (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

198

KA 21-01076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. JACKSON, DEFENDANT-APPELLANT.

FRANCIS M. CIARDI, ROCHESTER, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Steuben County Court (Chauncey J. Watches, J.), entered January 27, 2020. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We affirm.

Contrary to defendant's contention, County Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse. The SORA guidelines justify the addition of 15 points under risk factor 11 "if an offender has a substance abuse history or was abusing drugs . . . or alcohol at the time of the offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006] [Guidelines]; *see People v Palmer*, 20 NY3d 373, 376 [2013]; *People v Turner*, 188 AD3d 1746, 1746-1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]). "A history of substance abuse within the meaning of risk factor 11 exists only when there is a pattern of drug or alcohol use in [the] defendant's history" (*People v Kowal*, 175 AD3d 1057, 1057 [4th Dept 2019] [internal quotation marks omitted]). Here, the People established by clear and convincing evidence that defendant was abusing alcohol at the time he committed the underlying offense, and that he had failed to complete a course for alcohol abuse treatment after developing an admittedly heavy drinking problem about a year before the underlying offense. Those facts warranted the assessment of points under risk factor 11 (*see Palmer*, 20 NY3d at 377-378; *People v Stewart*, 199 AD3d 1479, 1480 [4th Dept 2021]; *Turner*, 188 AD3d at 1747).

We reject defendant's further contention that the court erred in assessing 10 points against him under risk factor 12 for failure to accept responsibility (*see* Guidelines at 15-16). Although defendant

pleaded guilty to the crime underlying the SORA determination, and made some statements to the probation officer preparing the presentence report wherein he admitted his guilt and accepted responsibility, there was evidence that those statements to the probation officer were rehearsed and not genuine, and defendant made other conflicting statements suggesting that he blamed the victim for the underlying offense (*see People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *People v Havens*, 144 AD3d 1632, 1632-1633 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]; *People v Noriega*, 26 AD3d 767, 767 [4th Dept 2006], *lv denied* 6 NY3d 713 [2006]). Thus, "[t]he court properly concluded that defendant's statement[s] did not reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*Vasquez*, 149 AD3d at 1585 [internal quotation marks omitted]; *see People v Askins*, 148 AD3d 1598, 1598-1599 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v Jamison*, 137 AD3d 1742, 1743 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]). To the extent defendant argues that he was not afforded due process because the court did not engage in adequate fact-finding with respect to its assessment of points under risk factor 12, we conclude that his contention is unpreserved for our review because he did not assert at the hearing that his due process rights were being violated (*see People v Mejia*, 189 AD3d 900, 901 [2d Dept 2020], *lv denied* 37 NY3d 910 [2021]; *Turner*, 188 AD3d at 1746; *People v Akinpelu*, 126 AD3d 1451, 1452 [4th Dept 2015], *lv denied* 25 NY3d 912 [2015]).

Finally, defendant's contention that a downward departure from his presumptive risk level was warranted is without merit inasmuch as he failed to prove at the SORA hearing, by a preponderance of the evidence, a "mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Guidelines at 4; *see People v Mann*, 177 AD3d 1319, 1320 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]). Even assuming, arguendo, that defendant surmounted the first two steps of the analysis (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), upon weighing the mitigating circumstance against the aggravating circumstances, we conclude that the court did not abuse its discretion in denying the request for a downward departure because the totality of the circumstances demonstrates that "defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism" (*People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see People v Butler*, 129 AD3d 1534, 1535 [4th Dept 2015], *lv denied* 26 NY3d 904 [2015]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

199

KA 17-01337

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW DOUGLAS, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 6, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and assault in the third degree (§ 120.00 [1]). Defendant was acquitted of the remaining two counts of the indictment. Defendant contends that Supreme Court erred in denying his *Batson* challenge with respect to the prosecutor's exercise of a peremptory strike on a prospective juror. We agree.

Pursuant to *Batson v Kentucky* (476 US 79 [1986]) and its progeny, "a three-step protocol [is] to be applied when a defendant challenges the use of peremptory strikes during voir dire to exclude potential jurors for pretextual reasons. At step one, the movant must make a prima facie showing that the peremptory strike was used to discriminate; at step two, if that showing is made, the burden shifts to the opposing party to articulate a non-discriminatory reason for striking the juror; and finally, at step three, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination" (*People v Bridgeforth*, 28 NY3d 567, 571 [2016]; *see People v Pescara*, 162 AD3d 1772, 1772-1773 [4th Dept 2018]).

Initially, the issue whether defendant established a prima facie

case of discrimination at step one of the *Batson* inquiry was rendered moot by the court's ruling " 'on the ultimate question of intentional discrimination' " (*People v Payne*, 88 NY2d 172, 182 [1996], quoting *Hernandez v New York*, 500 US 352, 359 [1991]; *see People v Smocum*, 99 NY2d 418, 423 [2003]; *People v Burroughs*, 299 AD2d 969, 970 [4th Dept 2002]; *cf. People v Smouse*, 160 AD3d 1353, 1355-1356 [4th Dept 2018]).

With respect to step two, the prosecutor stated that the reason that he exercised a peremptory challenge on the prospective juror at issue was due to "her answer as to why she wanted to sit on the jury." Specifically, the prosecutor explained that the prospective juror expressed an "odd interest in the defendant's right to remain silent, right to testify," and that "[t]he way she answered the question . . . was very strange." However, as the People correctly concede on appeal, the statements the prosecutor attributed to the prospective juror at issue were, in fact, made by a prospective juror upon whom defendant exercised a peremptory strike. Because "a proffered race-neutral reason cannot withstand a *Batson* objection where it is based on a statement that the prospective juror did not in fact make" (*People v Coleman*, 195 AD3d 1411, 1413 [4th Dept 2021]; *see generally People v Fabregas*, 130 AD3d 939, 941-942 [2d Dept 2015]; *People v Dalhouse*, 240 AD2d 420, 422 [2d Dept 1997], *lv denied* 91 NY2d 871 [1997]), "an equal protection violation was established" (*Smocum*, 99 NY2d at 422; *see Smouse*, 160 AD3d at 1355). We therefore reverse the judgment and grant a new trial on courts one and four of the indictment (*see Coleman*, 195 AD3d at 1413; *see generally People v Mallory*, 121 AD3d 1566, 1568 [4th Dept 2014]). In view of our determination, we do not address defendant's remaining contentions.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

200

KA 17-01373

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONTIEZ L. WEEMS, 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 (John L. DeMarco, J.), rendered April 5, 2017. The judgment convicted defendant upon a plea of guilty of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), we reject defendant's contention that County Court erred in denying without an evidentiary hearing his pro se motion to withdraw his guilty plea. "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his [or her] contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Strasser*, 83 AD3d 1411, 1411 [4th Dept 2011]). Here, the record establishes that defendant was afforded such an opportunity and that the court was able to make an informed determination of the motion (*see People v Soriano*, 178 AD3d 1376, 1377 [4th Dept 2019], *lv denied* 34 NY3d 1163 [2020]). Contrary to defendant's related contention, the court did not abuse its discretion in failing to substitute new counsel (*see People v Weinstock*, 129 AD3d 1663, 1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

201

KA 17-02131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEYONI ADAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Stephen T. Miller, A.J.), rendered November 16, 2017. The judgment convicted defendant upon a plea of guilty of arson in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing in accordance with the following memorandum: On appeal from a judgment convicting her upon her plea of guilty of arson in the fourth degree (Penal Law § 150.05 [1]), defendant challenges aspects of her sentence. We agree with the People, however, that defendant's challenges are academic because the sentence must be vacated on account of County Court's failure to properly pronounce the sentence during the sentencing proceeding (*see generally People v Cleveland*, 177 AD3d 1382, 1382-1383 [4th Dept 2019]).

CPL 380.20 provides that a court "must pronounce sentence in every case where a conviction is entered." That statutory requirement is "unyielding" (*People v Sparber*, 10 NY3d 457, 469 [2008]; *see People v Belcher-Cumba*, — AD3d —, —, 2022 NY Slip Op 00691, *1 [3d Dept 2022]; *Cleveland*, 177 AD3d at 1383). A violation of CPL 380.20 "may be addressed on direct appeal notwithstanding [any] valid waiver of the right to appeal or the defendant's failure to preserve the issue for appellate review" (*Cleveland*, 177 AD3d at 1383; *see People v Guadalupe*, 129 AD3d 989, 989 [2d Dept 2015]; *see generally People v Fuller*, 57 NY2d 152, 156 [1982]). "When the sentencing court fails to orally pronounce a component of the sentence, the sentence must be vacated and the matter remitted for resentencing in compliance with the statutory scheme" (*Cleveland*, 177 AD3d at 1383; *see People v Petrangelo*, 159 AD3d 1559, 1560 [4th Dept 2018]).

Here, although the certificate of conviction states that defendant was sentenced to a split sentence of a definite term of time served in jail and five years of probation, which is consistent with the sentencing promise made during the plea proceeding, the court failed to orally pronounce during the sentencing proceeding the definite term component of defendant's sentence as required by CPL 380.20 (*see People v Brady*, 195 AD3d 1545, 1546 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *People v Tyrek M.*, 183 AD3d 915, 915-916 [2d Dept 2020]; *Cleveland*, 177 AD3d at 1383). We therefore modify the judgment by vacating defendant's sentence, and we remit the matter to County Court for resentencing (*see Brady*, 195 AD3d at 1546; *Cleveland*, 177 AD3d at 1383; *Petrangelo*, 159 AD3d at 1560). Upon remittal, the court should address defendant's assertion that her probationary term must be reduced by the period of time served in jail (*see* Penal Law §§ 60.01 [2] [d]; 65.00 [2]; 70.30 [3]; *People v Zephrin*, 14 NY3d 296, 299-300 [2010]) and any objections to the conditions of probation (*see generally* § 65.10 [1]; *People v Letterlough*, 86 NY2d 259, 265 [1995]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

221

KA 17-01696

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUALIN J. HUNTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 16, 2017. The judgment convicted defendant upon a plea of guilty of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]), defendant contends that he did not validly waive his right to appeal and that the postrelease supervision portion of his sentence is unduly harsh and severe. We agree with defendant that his waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver of the right to appeal. The language in the written waiver, however, is "inaccurate and misleading insofar as it purports to impose 'an absolute bar to the taking of a direct appeal' and purports to deprive defendant of [his] 'attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal' " (*People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although Supreme Court's colloquy referred to issues that would still be preserved for appeal, including "constitutional issues" and "jurisdictional issues," the court's verbal statements, "did nothing to counter the other inaccuracies set forth in the written appeal waiver" (*Hughes*, 199 AD3d at 1333). A waiver "cannot be upheld . . . on the theory that the offending language can be ignored and that [it is] enforceable based on the court's few correctly spoken terms" (*Thomas*, 34 NY3d at 566).

We nevertheless reject defendant's contention that the period of postrelease supervision was harsh and excessive. Defendant's status

as a second felony offender required that a five-year term of postrelease supervision be imposed as part of his sentence (*see* Penal Law §§ 70.06 (2), (6); 70.45 [2]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

225

KA 18-00220

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. MIGHTY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered October 4, 2017. The judgment convicted defendant after a nonjury trial of criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the indictment against defendant is dismissed and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]). As defendant contends and the People correctly concede, the evidence of possession is legally insufficient to support the conviction.

Although defendant failed to preserve that contention for our review because his motion for a trial order of dismissal was not " 'specifically directed' at" the alleged error now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Jacobs*, 195 AD3d 1434, 1435 [4th Dept 2021]), we nevertheless exercise our power to review his contention as a matter of discretion in the interest of justice, particularly in view of the People's concession (*see People v Woods*, 26 AD3d 818, 819 [4th Dept 2006], *lv denied* 7 NY3d 765 [2006]; *People v Butler*, 273 AD2d 613, 614 [3d Dept 2000], *lv denied* 95 NY2d 933 [2000]).

Where there is no evidence that the defendant actually possessed the controlled substance, the People are required to establish that the defendant "exercised 'dominion or control' over the property by a

sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* Penal Law § 10.00 [8]; *People v Williams*, 162 AD3d 1544, 1545 [4th Dept 2018]). The People may establish constructive possession by circumstantial evidence (*see People v Torres*, 68 NY2d 677, 678-679 [1986]; *People v Boyd*, 145 AD3d 1481, 1481-1482 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]), but a defendant's mere presence in the area in which contraband is discovered is insufficient to establish constructive possession (*see Boyd*, 145 AD3d at 1482). Here, inasmuch as there was no evidence, other than his mere presence, that specifically connected defendant to the places where the contraband was ultimately found, we conclude that the People "failed to prove that [he] exercised dominion and control over the contraband, and therefore failed to prove the possession element of the counts as charged" (*Williams*, 162 AD3d at 1546). We therefore reverse the judgment and dismiss the indictment (*see id.* at 1545).

In light of our determination, defendant's remaining contention is academic.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-00525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAI BETSEY-JONES, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 20, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Contrary to defendant's contention, County Court properly determined that the initial stop of the vehicle that he was driving was lawful inasmuch as the police officer who made the stop had probable cause to believe that defendant had committed a traffic violation (*see People v Robinson*, 97 NY2d 341, 350 [2001]). That officer testified at the suppression hearing that he had entered the license plate number of the vehicle in a government database, and the database report revealed that the license plate was registered to a vehicle of a different color and make, which provided the requisite justification for the stop (*see People v Lassiter*, 161 AD2d 605, 605-606 [2d Dept 1990]; *see also People v Baker*, 87 AD3d 1313, 1314 [4th Dept 2011], *lv denied* 18 NY3d 857 [2011]).

We agree with defendant, however, that the justification for the officer's initial detention ceased once defendant showed the officer the temporary registration that had been issued for the vehicle and explained that the license plates on the vehicle had recently been

transferred from another vehicle (*see People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995]). We further conclude that the record does not support the court's determination that the circumstances following the initial stop provided the officer with probable cause to believe that defendant was violating Vehicle and Traffic Law § 507 (2) (*see generally People v Hinshaw*, 35 NY3d 427, 439 [2020]). Indeed, the record does not support the court's finding that, when defendant produced a learner's permit upon being asked to produce his driver's license, the officer asked defendant to exit the vehicle due to the lack of a valid driver's license. Thus, inasmuch as "the initial justification for seizing and detaining defendant . . . was exhausted" at the time of defendant's removal from the vehicle, the evidence seized during the ensuing search of defendant's person, as well as the statements that he made to the police thereafter, should have been suppressed (*Banks*, 85 NY2d at 562; *see People v Milaski*, 62 NY2d 147, 156 [1984]). As a result, defendant's guilty plea must be vacated and the indictment must be dismissed (*see generally People v Finch*, 137 AD3d 1653, 1655 [4th Dept 2016]).

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

239

KA 19-00247

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMAJ M. D., DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an adjudication of the Ontario County Court (William F. Kocher, J.), rendered December 20, 2018. Defendant was adjudicated a youthful offender upon his plea of guilty of disseminating indecent material to minors in the second degree (four counts).

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

Memorandum: Defendant appeals from a youthful offender adjudication based on his plea of guilty of four counts of disseminating indecent material to minors in the second degree (Penal Law § 235.21 [3]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-00635

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL FORTNER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a resentence of the Onondaga County Court (Matthew J. Doran, J.), rendered March 23, 2021. Defendant was resentenced upon a conviction of robbery in the first degree and menacing in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a resentence on his conviction, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and menacing in the second degree (§ 120.14 [1]). In appeal No. 2, defendant appeals from a resentence on his conviction, upon his plea of guilty in the same plea proceeding, of attempted robbery in the first degree (§§ 110.00, 160.15 [4]). Although defendant validly waived his right to appeal at the plea proceeding (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), that waiver does not preclude him from challenging the sentences imposed upon resentencing (*see People v Allen*, 97 AD3d 1164, 1164 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012]; *People v Gray*, 32 AD3d 1052, 1053 [3d Dept 2006], *lv denied* 7 NY3d 902 [2006]; *see also People v Jirdon*, 159 AD3d 1518, 1519 [4th Dept 2018]). We nevertheless conclude in each appeal that the resentence is not unduly harsh or severe.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

243

KA 21-00636

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL FORTNER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Onondaga County Court (Matthew J. Doran, J.), rendered March 23, 2021. Defendant was resentenced upon a conviction of attempted robbery in the first degree.

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

Same memorandum as in *People v Fortner* ([appeal No. 1] — AD3d — [Mar. 18, 2022] [4th Dept 2022]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 18-00925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAYQUAWN OUTING, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (J. SCOTT PORTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 20, 2018. The judgment convicted defendant upon a nonjury verdict of robbery 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 nonjury verdict of robbery in the second degree (Penal Law § 160.10 [1]). Defendant's conviction stems from an assault committed by defendant and the codefendant, after which defendant took the victim's cell phone, which the victim had dropped during the assault. Defendant contends that the evidence is legally insufficient to establish that he used physical force with the intent of taking the victim's property. Contrary to the People's contention, defendant's contention is preserved for our review inasmuch as, in denying defendant's motion for a trial order of dismissal, County Court "expressly decided the question raised on appeal" (CPL 470.05 [2]; *see People v Jones*, 100 AD3d 1362, 1363 [4th Dept 2012], *lv denied* 21 NY3d 1005 [2013], *cert denied* 571 US 1077 [2013]). We nevertheless reject defendant's contention.

"The applicable culpability standard—intent—require[s] evidence that, in using or threatening physical force, defendant's 'conscious objective' was either to compel his victim to deliver up property or to prevent or overcome resistance to the taking" (*People v Smith*, 79 NY2d 309, 315 [1992]; *see* Penal Law § 160.00 [1], [2]). "Intent may be established by the defendant's conduct and the circumstances" (*People v Gordon*, 23 NY3d 643, 650 [2014]). Here, the evidence established that defendant and the codefendant sideswiped the victim's parked vehicle while they were driving past the victim's house. The victim contacted the police. Defendant and the codefendant left the

scene, but returned a little later, before the police had arrived. The victim told them that he had contacted the police and took out his cell phone to document the license plate of their vehicle. Defendant punched the victim, who fell to the ground, and defendant and the codefendant continued punching and kicking him while he was on the ground. The victim tried to grab his cell phone, which had fallen on the ground, but defendant picked it up and left, taking the cell phone. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that " 'there is a valid line of reasoning and permissible inferences' " from which a rational factfinder could have found that the People proved, beyond a reasonable doubt, that defendant used physical force with intent to take the victim's cell phone (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally Smith*, 79 NY2d at 315) and that the taking was not a mere afterthought to the assault (*cf. Matter of Robert C.*, 67 AD3d 790, 792 [2d Dept 2009]; *Matter of Niazia F.*, 40 AD3d 292, 293 [1st Dept 2007]).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see Danielson*, 9 NY3d at 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00612

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

BRIAN MITCHELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PO N. LAM, M.D., AND ASSOCIATED MEDICAL PROFESSIONALS OF NY, PLLC, ALSO KNOWN AS A.M.P., DEFENDANTS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered April 1, 2021. The order denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for partial summary judgment.

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

Memorandum: In this medical malpractice action, defendants appeal from an order that denied their motion for summary judgment dismissing the complaint and that granted plaintiff's cross motion for partial summary judgment on liability on his informed consent claim. Contrary to defendants' contention, Supreme Court properly denied their motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We agree with defendants, however, that plaintiff failed to meet his initial burden on his cross motion (*see generally id.*). The court thus erred in granting that cross motion, and we therefore modify the order accordingly.

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00876

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

ANNE M. MORRIS AND ROBERT MORRIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BUFFALO GENERAL HEALTH SYSTEM,
DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT D. BARONE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 7, 2021. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking to recover damages for injuries allegedly sustained by Anne M. Morris (plaintiff) when she tripped and fell while walking on a sidewalk near an entrance to defendant's healthcare facility. As relevant to this appeal, defendant moved for summary judgment dismissing the complaint on the ground that the alleged defect was trivial as a matter of law. Supreme Court denied the motion, defendant appeals, and we affirm.

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]). Some defects, however, may be considered trivial as a matter of law (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere*, 90 NY2d at 977; *see Hutchinson*, 26 NY3d at 77), and "a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (*Trincere*, 90 NY2d at 977-978). In determining whether a defect is trivial, courts must consider "all the specific facts and circumstances of the case" (*Hutchinson*, 26 NY3d at 77), including "the width, depth, elevation, irregularity and

appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere*, 90 NY2d at 978). On a motion for summary judgment dismissing the complaint, the defendant has the initial burden of establishing "that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson*, 26 NY3d at 79).

Here, in support of the motion, defendant submitted photographs of the alleged defect, which depict a height differential between two concrete slabs on the sidewalk, but we cannot say from inspection of the photographs that the defect was trivial (*see Wiedenbeck v Lawrence*, 170 AD3d 1669, 1670 [4th Dept 2019]). Defendant also submitted deposition testimony that plaintiff tripped over a one-inch height differential between the two slabs, which under the circumstances failed to establish as a matter of law that the defect was trivial (*see Amos v School 16 Assoc., L.P.*, 189 AD3d 2100, 2101-2102 [4th Dept 2020]; *Greco v City of Buffalo*, 128 AD3d 1461, 1463 [4th Dept 2015]). We therefore conclude that defendant failed to meet its initial burden of establishing that the defect in the sidewalk was trivial and hence nonactionable (*see Hutchinson*, 26 NY3d at 82-83; *Amos*, 189 AD3d at 2101; *Aja v Richter*, 175 AD3d 952, 954 [4th Dept 2019]). Inasmuch as defendant failed to meet its initial burden, we need not consider the sufficiency of plaintiffs' opposing papers (*see Hutchinson*, 26 NY3d at 83; *Greco*, 128 AD3d at 1463; *Lupa v City of Oswego*, 117 AD3d 1418, 1419 [4th Dept 2014]).

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00305

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

JEANETTE V. POREBA-GIER AND JOSEPH R. GIER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LOUBERT S. SUDDABY, M.D., DEFENDANT-RESPONDENT.

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFFS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 7, 2021. The order granted the motion of defendant for leave to renew his motion for summary judgment and, upon renewal, granted that motion and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this medical malpractice and lack of informed consent action seeking damages for injuries allegedly sustained by Jeanette V. Poreba-Gier (plaintiff) as a result of defendant's insertion of a paddle lead stimulator in her spine for pain relief. Defendant moved for summary judgment dismissing the complaint, and Supreme Court granted the motion with respect to the medical malpractice cause of action, but denied the motion with respect to the informed consent cause of action. After additional discovery, defendant moved for leave to renew his motion for summary judgment, arguing, inter alia, that the informed consent cause of action should be dismissed because the alleged lack of informed consent was not a proximate cause of any injury. The court granted the motion for leave to renew and, upon renewal, granted defendant's motion for summary judgment in its entirety and dismissed the complaint. Plaintiffs appeal, and we affirm.

" 'To establish a cause of action for malpractice based on lack of informed consent, [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been

fully informed, and (3) that the lack of informed consent is a proximate cause of the injury' " (*Huichun Feng v Accord Physicians, PLLC*, 194 AD3d 795, 797 [2d Dept 2021]; *see* Public Health Law § 2805-d). The proximate cause element "is construed to mean that the actual procedure performed for which there was no informed consent must have been a proximate cause of the injury" (*Trabal v Queens Surgi-Center*, 8 AD3d 555, 556-557 [2d Dept 2004]) or, stated another way, " 'that the plaintiff in fact suffered an injury which medically was caused by the treatment' " (*Evart v Park Ave. Chiropractic, P.C.*, 86 AD3d 442, 443 [1st Dept 2011], *lv denied* 17 NY3d 922 [2011]).

Here, defendant met his initial burden by establishing that any lack of informed consent was not a proximate cause of any injury to plaintiff (*see Keller v Liberatore*, 134 AD3d 1495, 1497 [4th Dept 2015]; *Tsimbler v Fell*, 123 AD3d 1009, 1010-1011 [2d Dept 2014]). Defendant established that plaintiff did not sustain any injury from the disputed treatment and that the treatment did not aggravate or exacerbate plaintiff's presurgical symptoms (*see generally Flores v Flushing Hosp. & Med. Ctr.*, 109 AD2d 198, 200-201 [1st Dept 1985]). Rather than causing injury to plaintiff, the insertion of the paddle lead stimulator provided plaintiff with pain relief, albeit temporary. Defendant further established that the pain plaintiff later experienced was a result of her disabling back condition and not a result of the surgery to implant the paddle lead stimulator. In opposition to the motion, plaintiffs failed to raise a triable issue of fact (*see Gilmore v Mihail*, 174 AD3d 686, 688 [2d Dept 2019]; *Graziano v Cooling*, 79 AD3d 803, 804-805 [2d Dept 2010]; *Amodio v Wolpert*, 52 AD3d 1078, 1080 [3d Dept 2008]).

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

Entered: March 18, 2022

Ann Dillon Flynn
Clerk of the Court