SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 10, 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 JUNE, 10, 2022

==

________	284/19	CA 18 01769	PANAMA CENTRAL SCHOOL DISTRICT V EVERGUARD SURFACING, INC.
________	20	CA 21 00759	IBUKUN OGUNBEKUN V STRONG MEMORIAL HOSPITAL
________	66	CA 20 01599	MIRANDA HOLDINGS, INC. V TOWN BOARD OF THE TOWN O
________	98	CA 20 01491	DANIEL J. BECK V CITY OF NIAGARA FALLS
________	153	TP 21 00557	ERIN GARDNER V CITY OF WATERTOWN
________	178	KA 17 01043	PEOPLE V FRANKLIN C. LEONARD
________	189	CA 21 00536	UTICA MUTUAL INSURANCE COMPANY V ABEILLE GENERAL INSURANCE CO.
________	191	CA 21 00335	VINCENT D. VIRTUOSO V NIAGARA MOHAWK POWER CORPORA
________	207	CA 21 00533	KIM EHLENFIELD V JASON W. KINGSBURY
________	210	CA 21 00924	JOSEPH J. TIMPANO V NEW YORK CENTRAL MUTUAL FIRE I
________	231	CA 21 00469	JAMES A. FOX V JAMES W. MCCLELLAN
________	246	KA 17 00561	PEOPLE V ANTHONY D. SESSION
________	261	KA 20 01435	PEOPLE V MONTRA HODGE
________	283	KA 19 01307	PEOPLE V SAMAR K. BARRON
________	293	CA 21 00744	THE WALTON & WILLET STONE BLOCK, L V CITY OF OSWEGO COMMUNITY DEVELOPMEN T OFFICE
________	313	OP 21 01638	BRANDON MCNAIR V SCOTT D. MCNAMARA
________	329	KA 19 02028	PEOPLE V DWAYNE NELSON
________	330	KA 19 02029	PEOPLE V DWAYNE NELSON
________	347	TP 21 01572	CRAIG A. DENNSTEDT V THE APPEALS BOARD OF ADMINIST
________	353	KA 14 02137	PEOPLE V QUEST FREEMAN
________	389	KA 17 02130	PEOPLE V DENNIS L. COLES
________	396	CAF 21 00834	Mtr of WILLIAM
________	397	CAF 21 01735	DOUGLAS W. M. V AMANDA Y. D.
________	398	CAF 21 01736	ELEANOR T. H. V AMANDA Y. D.

________	402	CA 21 01479	AMY NEWMAN V CITY OF TONAWANDA
________	412	KA 18 01957	PEOPLE V TYQUAN JOHNSON
________	413	KA 20 00932	PEOPLE V HASSAN NELSON
________	422	CA 21 00830	S & J PROPERTIES OF WATERTOWN, LLC V THE MAIN STREET AMERICA GROUP
________	449	CA 21 01072	MATTHEW L. BEDIENT V EARL T. WADHAMS, INC.
________	464	KA 19 02336	PEOPLE V JAMAL D. MOBLEY
________	467	KA 20 00292	PEOPLE V KENNETH MOUNTZOUROS
________	468	KA 20 00661	PEOPLE V PRESTON L. THOMPSON
________	469	KA 18 01094	PEOPLE V CORWIN L. COLEMAN
________	472	KA 16 00332	PEOPLE V GERALD T. HARRIS
________	475	CA 21 01093	JOHN M. PENDERGRASS V ANTHONY ANNUCCI
________	476	CA 21 01377	LEE LAMENDOLA V ABDULAZIZ ALHARBI
________	484	KA 17 00693	PEOPLE V ASON S. BARNES
________	489	KA 18 02069	PEOPLE V LAWRENCE GAINES
________	490	KA 19 01031	PEOPLE V RASHLEIGH AUSTIN
________	492	CAF 20 01287	BRANDY FOWLER V ERIC FOWLER
________	505	TP 21 00886	MARK DUBLINO V STEWART T. ECKERT
________	508	KA 18 01833	PEOPLE V JUAN LUIS-GARCIA
________	523.1	TP 21 01346	SAMAH AHMED V MICHAEL P. HEIN
________	550	KA 18 00302	PEOPLE V SAMUEL D. DEVINE
________	553	KA 13 00797	PEOPLE V JAMES A. TORRANCE
________	554	KA 17 00928	PEOPLE V JKENDRIC AGEE
________	555	KA 17 02218	PEOPLE V RONNIE BUNTON
________	556	CAF 21 01180	Mtr of MCKINLEY H.-W.
________	557	CAF 21 01452	Mtr of MCKINLEY H.-W.

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

20
CA 21-00759
PRESENT: WHALEN, P.J., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IBUKUN OGUNBEKUN, PLAINTIFF-APPELLANT,

V ORDER

STRONG MEMORIAL HOSPITAL, DR. SAM HUBER,
DR. TELVA OLIVARES AND DR. ERIC CAINE,
DEFENDANTS-RESPONDENTS.

IBUKUN OGUNBEKUN, PLAINTIFF-APPELLANT PRO SE.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 16, 2020. The order denied the motion of plaintiff to vacate a prior order and granted the cross motion of defendants insofar as it sought an award of attorneys' fees.

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

66
CA 20-01599
PRESENT: PERADOTTO, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF MIRANDA HOLDINGS, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V — MEMORANDUM AND ORDER

TOWN BOARD OF THE TOWN OF ORCHARD PARK AND
TOWN OF ORCHARD PARK,
RESPONDENTS-DEFENDANTS-APPELLANTS.

BARCLAY DAMON LLP, BUFFALO (ARI M. GOLDBERG OF COUNSEL), FOR
RESPONDENTS-DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR
PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 26, 2020 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, annulled respondents-defendants' Local Law No. 5 of 2019.

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

Memorandum: Petitioner-plaintiff (petitioner) is a developer who had requested the approval of respondents-defendants Town of Orchard Park and Town Board of the Town of Orchard Park (Town Board) (collectively, respondents) for a proposed commercial structure that included a restaurant with a drive-through window. Petitioner subsequently commenced this hybrid article 78 proceeding and action for declaratory judgment and money damages seeking, inter alia, to invalidate Local Law No. 5, which was adopted in 2019 and, among other things, prohibits the use of drive-through windows for businesses located in the Architectural Overlay District (AOD). The petition-complaint (petition) asserted five causes of action. In the first cause of action, petitioner seeks to annul Local Law No. 5 based on allegations that the Town Board failed to comply with requirements of ECL article 8 (State Environmental Quality Review Act [SEQRA]) because it did not complete any of the necessary SEQRA documentation, including failing to prepare an Environmental Assessment Form (EAF), prior to adopting Local Law No. 5.

Instead of serving an answer, respondents moved to dismiss the petition (*see* CPLR 3211 [a] [1], [7]). Supreme Court granted the

motion in part, dismissed the second and fifth causes of action, and denied the motion with respect to the remaining three causes of action. Additionally, the court granted judgment to petitioner on the first cause of action and annulled Local Law No. 5, stating in its oral decision that "this is a Type 1 action" and that the Town Board violated SEQRA by failing to complete a full EAF. Respondents appeal and we affirm.

Initially, respondents contend that the court erred in granting judgment to petitioner on the first cause of action inasmuch as respondents had not yet answered the petition (*see generally* CPLR 7804 [f]). We reject that contention. Where, as here, the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it "clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer," the court may reach the merits of the petition and grant petitioner judgment thereon without giving respondents a further opportunity to answer the petition (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102 [1984]; *see Matter of Laurel Realty, LLC v Planning Bd. of Town of Kent*, 40 AD3d 857, 860 [2d Dept 2007], *lv denied* 9 NY3d 809 [2007]).

We further reject respondents' contention that the court erred in determining that they failed to comply with the requirements of SEQRA prior to adopting Local Law No. 5. Respondents contend that they properly classified the action as unlisted because Local Law No. 5 does not affect the allowable uses of properties in the AOD and instead merely regulates the design of properties by prohibiting a type of window. Thus, respondents contend that, because the adoption of Local Law No. 5 was an unlisted action, they properly completed the requisite short form EAF. We reject that contention. Local Law No. 5 provides that "Drive-Though Windows," defined "as those windows which allow for service of food and other services or product from a window in a structure which allows for such service without the patron leaving his or her vehicle," are "hereby prohibited in the [222-acre AOD]." With that language, the law defines drive-through windows by describing their *use*—namely, to allow the transfer of food between a structure and a vehicle—and not by describing their appearance, style, or design. Thus, the adoption of that law was a Type I action inasmuch as the law "change[d] [an] allowable use[] within [the AOD], affecting 25 or more acres" (6 NYCRR 617.4 [b] [2]), and respondents were therefore required to complete a full EAF "to determine the significance" of the action (6 NYCRR 617.6 [a] [2]). Because respondents completed only a short EAF, they failed to comply with the procedural requirements of SEQRA (*see Centerville's Concerned Citizens v Town Bd. of Town of Centerville*, 56 AD3d 1129, 1130 [4th Dept 2008]). Inasmuch as "SEQRA requires strict adherence to its procedural requirements, [respondents'] failure to comply with those procedural requirements cannot be deemed harmless" (*Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1313 [4th Dept 2005], *lv dismissed* 7 NY3d 803 [2006]), and "respondents' failure[] in this regard compel[s] annulment of Local Law No. [5] in its entirety" (*State of New York v Town of Horicon*, 46

AD3d 1287, 1290 [3d Dept 2007]).

Finally, we note that petitioner contends in its brief that the court erred in granting those parts of respondents’ motion seeking to dismiss the second and fifth causes of action. Because petitioner did not cross appeal from the judgment, it is precluded from obtaining affirmative relief (*see Matter of Baker Hall v City of Lackawanna Zoning Bd. of Appeals*, 109 AD3d 1096, 1097 [4th Dept 2013]; *see generally Hecht v City of New York*, 60 NY2d 57, 61 [1983]). We therefore do not address petitioner’s contentions with respect to those causes of action.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

98

CA 20-01491

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

DANIEL J. BECK AND DEBRA BECK,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
AND M&M PROPERTY ENTERPRISES, INC.,
DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, ATTORNEYS AND COUNSELORS AT LAW, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 6, 2020. The order denied the motion of defendant M&M Property Enterprises, Inc., for summary judgment dismissing the complaint and all cross claims against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 26, 2022,

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

153

TP 21-00557

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

IN THE MATTER OF ERIN GARDNER, PETITIONER,

V ORDER

CITY OF WATERTOWN AND KENNETH A. MIX, IN HIS CAPACITY AS WATERTOWN CITY MANAGER, RESPONDENTS.

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

SLYE LAW OFFICES, P.C., WATERTOWN (ROBERT J. SLYE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Jefferson County [James P. McClusky, J.], entered April 16, 2021) to review a determination of respondents. The determination terminated the employment of petitioner.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 13 and 15, 2022,

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

178

KA 17-01043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN C. LEONARD, DEFENDANT-APPELLANT.

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

FRANKLIN C. LEONARD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 17, 2017. The judgment convicted defendant upon a jury verdict of attempted murder in the first degree, kidnapping in the second degree, robbery in the first degree and menacing 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 attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [vii]; [b]), kidnapping in the second degree (§ 135.20), robbery in the second degree (§ 160.10 [3]), and menacing in the second degree (§ 120.14 [1]). Assuming, arguendo, that defendant preserved his contention in his main brief that the evidence with respect to his identity as the perpetrator is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that the contention is without merit. At trial, two witnesses identified defendant as the perpetrator, and defendant's identity was also " 'established by a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was the perpetrator' " (*People v Daniels*, 125 AD3d 1432, 1433 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015], *reconsideration denied* 26 NY3d 928 [2015]; *see People v Geroyianis*, 96 AD3d 1641, 1642-1643 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012], *reconsideration denied* 19 NY3d 1102 [2012]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention in his main brief that the

verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The issues of credibility and identification, including the weight to be given to any inconsistencies in the testimony of the various eyewitnesses, " 'were properly considered by the jury and there is no basis for disturbing its determinations' " (*People v Kelley*, 46 AD3d 1329, 1330 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]).

Defendant's contention in his main brief that Supreme Court erred in refusing to suppress his statements to the police is moot because the People did not introduce those statements at trial (*see People v Lewis*, 192 AD3d 1532, 1533 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]; *People v Coleman*, 134 AD3d 1555, 1557 [4th Dept 2015], *lv denied* 27 NY3d 963 [2016]).

Contrary to defendant's further contention in his main brief, the imposition of consecutive terms of imprisonment on the kidnapping and robbery counts is not illegal (*see generally People v McKnight*, 16 NY3d 43, 47-50 [2010]) and, contrary to his contention in his pro se supplemental brief, his sentence is not unduly harsh or severe.

Defendant's remaining contentions in his main and pro se supplemental briefs are either unpreserved for our review or without merit.

Finally, we note that the certificate of conviction and uniform sentence and commitment form incorrectly reflect that defendant was convicted of attempted murder in the first degree under Penal Law §§ 110.00, 125.27 (1) (g), and those documents must therefore be amended to reflect that he was convicted under Penal Law §§ 110.00, 125.27 (1) (a) (vii); (b) (*see People v Morrow*, 167 AD3d 1516, 1518 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

189
CA 21-00536
PRESENT: WHALEN, P.J., SMITH, NEMOYER, WINSLOW, AND BANNISTER, JJ.

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ABEILLE GENERAL INSURANCE CO., NOW KNOWN AS
21ST CENTURY NATIONAL INSURANCE CO., ET AL.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS-RESPONDENTS.

NORTON ROSE FULBRIGHT US LLP, NEW YORK CITY (JOHN F. FINNEGAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

HUNTON ANDREWS KURTH LLP, WASHINGTON, D.C. (SYED S. AHMAD, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 22, 2021. The order, among other things, denied the motion of defendants-appellants and the cross motion of plaintiff for partial summary judgment.

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

> It is ADJUDGED AND DECLARED that plaintiff is not entitled to recover from defendants-appellants reimbursement under the reinsurance contracts for defense costs paid by plaintiff to Burnham Corporation in the underlying actions under the umbrella policies of insurance,

and as modified the order is affirmed without costs.

Memorandum: Plaintiff, Utica Mutual Insurance Company, issued primary policies and umbrella policies of insurance to nonparty Burnham Corporation (Burnham) covering, as relevant to this appeal, a period from 1977 to 1983. Plaintiff obtained from defendants reinsurance coverage for the same period related to the umbrella policies. Burnham was sued by individuals who were allegedly injured by exposure to a boiler that was manufactured by Burnham and that contained asbestos (underlying actions). There is no dispute that, with respect to the underlying actions, plaintiff paid defense costs and losses to Burnham under the primary insurance policies. A dispute

arose between plaintiff and Burnham regarding plaintiff's obligation to pay defense costs and losses under the umbrella policies once the coverage under the primary insurance policies was exhausted. Plaintiff and Burnham entered into a settlement whereby plaintiff agreed to pay defense costs and losses under the umbrella policies for those occurrences that had triggered coverage under the then-exhausted primary policies. Plaintiff, in turn, sought reimbursement from defendants for those costs under the reinsurance policies. Defendants refused to pay, contending that plaintiff was not obligated under the umbrella policies to pay and, thus, the reinsurance contracts were not triggered.

Plaintiff thereafter commenced this action, asserted causes of action for breach of contract and declaratory judgment, and sought, inter alia, enforcement of the reinsurance policies. Defendants-appellants (hereafter, defendants) moved for partial summary judgment seeking a declaration that plaintiff may not recover from defendants any of the disputed defense costs plaintiff paid under the umbrella policies to defend Burnham in the underlying actions. Plaintiff cross-moved for partial summary judgment on the amended complaint insofar as the amended complaint sought a finding that defendants breached their obligations to pay certain amounts billed by plaintiff under the reinsurance contracts and a declaration that defendants are obligated to pay their respective shares of plaintiff's "future expense billings." Supreme Court agreed with defendants that the unambiguous terms of the umbrella policies established that the disputed defense costs were not covered under those polices and thus were likewise not covered under the reinsurance policies. Nevertheless, the court denied the motion and the cross motion, finding that issues of fact existed regarding the follow-the-settlements doctrine. Defendants appeal, and plaintiff cross-appeals.

Addressing first the cross appeal, we reject plaintiff's contention that the court erred in applying New York law and not Pennsylvania law to its analysis of the umbrella policies, the latter being the location of Burnham's facility and the main location of the insured risk. "[B]ecause New York is the forum state, i.e., the action was commenced here, 'New York's choice-of-law principles govern the outcome of this matter' " (*Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 60 [4th Dept 2009]). "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz—New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). "If no conflict exists, then the court should apply the law of the forum state in which the action is being heard" (*Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd* 3 NY3d 577 [2004]). Here, plaintiff failed to establish the existence of "any conflict between New York and Pennsylvania law with respect to the issues raised in the [cross] motion, and therefore we need not engage in any choice of law analysis" (*Farnham v MIC Wholesale Ltd.*, 176 AD3d 1605, 1606 [4th Dept 2019]).

Contrary to plaintiff's further contention on the cross appeal,

we conclude that the court properly determined that defendants established that their interpretation of the umbrella policies, i.e., that those policies did not cover defense costs in the underlying actions inasmuch as those costs were covered by the primary insurance policies, is the only fair construction thereof (*see Albert Frassetto Enters. v Hartford Fire Ins. Co.*, 144 AD3d 1556, 1557 [4th Dept 2016]; *cf. Utica Mut. Ins. Co. v McAteer & FitzGerald, Inc.*, 78 AD3d 1612, 1612 [4th Dept 2010]; *see generally Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923 [4th Dept 1994]). We consider first the language of the umbrella policies (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 162, 162 [1990]), which provides that: "With respect to *any occurrence not covered by* the policies listed in the schedule of underlying insurance or any other insurance collectible by the insured, but covered by the terms and conditions of this policy (including damages wholly or partly within the amount of the retained limit), the company shall: (a) defend any suit against the insured . . ." (emphasis added). As the Second Circuit determined in *Utica Mut. Ins. Co. v Munich Reins. Am., Inc.* (7 F4th 50, 57 [2d Cir 2021] [*Munich*]), "[t]he phrase 'occurrence not covered by' unambiguously refers to the umbrella policy's . . . coverage of risks that were not already insured under the primary policy." There is no dispute here that the primary policies covered Burnham's defense costs in the underlying actions.

Plaintiff urges this Court to interpret the provision to mean that the defense costs are covered under the umbrella policies because they ceased being covered under the primary policies once the primary policies had been exhausted. However, as in *Munich*, we conclude that "neither the umbrella nor the primary polic[ies] suggest[] that an occurrence is no longer a 'covered' risk after exhaustion; what ceases is the obligation to pay for liabilities arising from the risks that are covered" (*id.* at 57-58). Although plaintiff notes certain differences between the umbrella policies at issue here and those in *Munich* (*see Utica Mut. Ins. Co. v Clearwater Ins. Co.*, 2022 WL 823932 *5 [ND NY, Mar. 18, 2022, No. 6:13-CV-1178 (GS/TWD)]), the differences are not material to, and do not alter, the unambiguous meaning of the phrase "occurrence not covered by." Thus, the unambiguous terms of the umbrella policies establish that defendants were not required to reimburse plaintiff under the reinsurance contracts for the disputed defense costs related to the underlying actions.

With respect to the appeal, we agree with defendants that, contrary to the court's determination, the follow-the-settlements doctrine does not alter the analysis. It is undisputed that the reinsurance policies at issue each contain a follow-the-settlements clause. Where it applies, the follow-the-settlements doctrine "ordinarily bars challenge by a reinsurer to the decision of [the cedent] to settle a case for a particular amount" (*United States Fid. & Guar. Co. v American Re-Ins. Co.*, 20 NY3d 407, 418 [2013], *rearg denied* 21 NY3d 923 [2013]). Specifically, under that doctrine, "a reinsurer is required to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it. A reinsurer cannot second guess the good faith liability determinations made by its reinsured . . . The rationale behind this

doctrine is two-fold: first, it meets the goal of maximizing coverage and settlement and second, it streamlines the reimbursement process and reduces litigation” (*Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd’s of London*, 96 NY2d 583, 596 [2001] [internal quotation marks omitted]). There are, however, limitations to the doctrine. The follow-the-settlements doctrine “insulates a reinsured’s liability determinations from challenge by a reinsurer unless they are fraudulent, in bad faith, or the payments are clearly beyond the scope of the original policy or in excess of [the reinsurer’s] agreed-to exposure” (*Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 121 [1st Dept 2007], *lv denied* 10 NY3d 711 [2008] [internal quotation marks omitted]; *see also North River Ins. Co. v ACE Am. Reins. Co.*, 361 F3d 134, 141 [2d Cir 2004]). Here, the reimbursement sought by plaintiff from defendants was beyond the scope of coverage in the umbrella policies and, thus, the follow-the-settlements doctrine does not apply under the circumstances (*see Utica Mut. Ins. Co. v Fireman’s Fund Ins. Co.*, 957 F3d 337, 347 [2d Cir 2020]; *cf. Christiania Gen. Ins. Corp. of N.Y. v Great Am. Ins. Co.*, 979 F2d 268, 280 [2d Cir 1992]).

We have considered plaintiff’s remaining contentions and conclude that they are without merit. We therefore modify the order by granting defendants’ motion and granting judgment in their favor declaring that plaintiff is not entitled to recover from defendants reimbursement under the reinsurance contracts for defense costs paid by plaintiff to Burnham in the underlying actions under the umbrella policies of insurance.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

191
CA 21-00335
PRESENT: WHALEN, P.J., SMITH, NEMOYER, WINSLOW, AND BANNISTER, JJ.

VINCENT D. VIRTUOSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION, NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, NATIONAL GRID USA SERVICE COMPANY, INC., AND NATIONAL GRID USA SERVICE COMPANY, INC., DOING BUSINESS AS NATIONAL GRID, DEFENDANTS-RESPONDENTS.

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

BARCLAY DAMON, LLP, BUFFALO (RYAN C. ALTIERI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered February 22, 2021. The order granted the motion of defendants for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he allegedly sustained after he received an electrical shock while clearing brush inside an electrical substation owned by his employer, who is not a party to this action. He appeals from an order granting defendants' motion for summary judgment dismissing the complaint. We affirm.

Contrary to plaintiff's contention, defendants met their initial burden on the motion of establishing that there was no dangerous or defective condition in their equipment and that they maintained their equipment in reasonable care (*see Rentz v Long Is. Light. Co.*, 289 AD2d 466, 466-467 [2d Dept 2001]; *White v Niagara Mohawk Power Corp.*, 197 AD2d 906, 906-907 [4th Dept 1993]; *cf. generally Miner v Long Is. Light. Co.*, 40 NY2d 372, 379-380 [1976]). Plaintiff contends that Supreme Court erred in granting the motion because defendants' expert failed to assume the truth of plaintiff's deposition testimony. We reject that contention (*cf. Ebbole v Nagy*, 169 AD3d 1461, 1462 [4th Dept 2019]; *cf. generally Jeannette S. v Williot*, 179 AD3d 1479, 1482 [4th Dept 2020]). To the contrary, in this common-law negligence

action arising from an allegedly dangerous condition on the premises, defendants did not dispute plaintiff's testimony describing the incident and submitted evidence establishing that they did not own or operate any of the equipment in the area where plaintiff testified that he was injured. Consequently, defendants "establish[ed] as a matter of law that they did not exercise any supervisory control over the general condition of the premises [in that area, and] that they neither created nor had actual or constructive notice of the dangerous condition on the premises" (*Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017 [4th Dept 2011]; *see Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1434 [4th Dept 2015]; *Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011]). Plaintiff failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

207

CA 21-00533

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

KIM EHLENFIELD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JASON W. KINGSBURY AND MAUREEN P. MORAN,
DEFENDANTS-RESPONDENTS.

WEBSTER & DUBS, P.C., KENMORE (JOSHUA E. DUBS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FIDELITY NATIONAL LAW GROUP, NEW YORK CITY (VANESSA ELLIOTT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 23, 2021. The judgment, among other things, granted defendants' cross motion for summary judgment, dismissed plaintiff's complaint and issued a declaration with respect to defendants' counterclaim.

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

Memorandum: When Robert E. Bardwell (decedent) died, he was survived by his brother, Richard J. Bardwell (brother). In his will, decedent named the brother as executor of the estate and left various items to plaintiff, including a property in Buffalo. Plaintiff was, at various times, represented by three separate attorneys. With the knowledge and alleged consent of plaintiff and her first two attorneys, the brother sold the property to defendants via an executor's deed (deed). After satisfying the mortgage on the property, the brother placed the net proceeds from the sale into the estate's account while waiting for the time period for creditors to make claims to pass. Once that time period passed, the brother asked plaintiff, through the attorney who was representing her at that time, to sign a release from liability before paying her the sum she was due.

At the time of distribution, and after paying all of the estate's expenses, debts and other obligations, the estate was left with a sum of money considerably less than the amount the estate received after selling the property and satisfying the mortgage. Plaintiff thereafter consulted with the third attorney, after which she refused to sign the release and commenced this action against defendants, i.e., the buyers of the property, seeking to have the deed declared

void ab initio, to obtain quiet title to the property and to be adjudged the owner of the property. Plaintiff also sought a declaration that defendants have no interest in the property and a money judgment against defendants for costs and attorney's fees.

After plaintiff moved for summary judgment on the complaint, defendants filed a cross motion seeking, inter alia, summary judgment on their counterclaim for quiet title and a declaration that their ownership interest in the property is free and clear of any interest on the part of plaintiff. Supreme Court, inter alia, denied plaintiff's motion, granted defendants' cross motion, dismissed the complaint and declared that the deed is valid and that defendants are the owners of the property "free and clear of any claim by" plaintiff. We now affirm.

Although plaintiff correctly contends that, inasmuch as the bequest of the property to her was a specific bequest, her interest in the property vested immediately upon decedent's death (*see Matter of Van Houten*, 18 App Div 306, 308 [2d Dept 1897], *affd sub nom. Matter of Pye*, 154 NY 773 [1898]; *Matter of Ballesteros*, 20 AD3d 414, 415 [2d Dept 2005]), we note that "the vesting of title was subject to the execut[or]'s power under the will to sell the real property to satisfy the estate's debts and obligations" (*Ballesteros*, 20 AD3d at 415; *see* EPTL 13-1.3 [c]; *DiSanto v Wellcraft Mar. Corp.*, 149 AD2d 560, 562-563 [2d Dept 1989], *lv denied* 75 NY2d 703 [1990]). It is well settled, however, that an executor cannot sell such specifically devised property pursuant to EPTL 13-1.3 (c) "without leave of [Surrogate's Court]" (*Matter of Barich*, 27 Misc 3d 1234[A], 2010 NY Slip Op 51028[U], *3 [Sur Ct, Dutchess County 2010], *mod on other grounds* 91 AD3d 769 [2d Dept 2012]; *see* EPTL 11-1.1 [b] [5] [E]). There is no dispute that the brother did not seek leave of the Surrogate before selling the property to defendants.

We nevertheless conclude that, contrary to plaintiff's contention, defendants established on their cross motion that the sale was valid inasmuch as plaintiff and her first two attorneys affirmatively consented to the sale. The day after decedent died, plaintiff sent a message to the brother about selling the property. Both of her initial attorneys knew of and affirmatively approved of the sale, and plaintiff's consent to that sale is evidenced by the terms set forth in the various emails and text messages exchanged between plaintiff, the brother and their attorneys. It is well established that "e-mails exchanged between counsel, which contain[ ] their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds" and can be the basis of a binding agreement (*Williamson v Delsener*, 59 AD3d 291, 291 [1st Dept 2009]).

We further conclude that, in opposition to the cross motion, plaintiff failed to raise a triable issue of fact with respect to that issue (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Plaintiff submitted an affidavit in which she averred that she never "consent[ed] to transfer of the property," and defendants

submitted portions of plaintiff's deposition wherein plaintiff testified that her two initial attorneys, who admittedly acted on her behalf in agreeing to the sale of the property by the brother, either acted without her knowledge or were "tricked" into agreeing to the sale. Although, as a general matter, "credibility is an issue that should be left to a fact finder at trial, 'there are of course instances where credibility is properly determined as a matter of law' " (*Sexstone v Amato*, 8 AD3d 1116, 1117 [4th Dept 2004], *lv denied* 3 NY3d 609 [2004]; *see Finley v Erie & Niagara Ins. Assn.*, 162 AD3d 1644, 1645-1646 [4th Dept 2018]). We conclude that plaintiff's "self-serving [affidavit and] deposition testimony . . . , which [are] contrary to all other evidence," including plaintiff's own prior messages consenting to the sale of the property, permit the granting of summary judgment in favor of defendants on their cross motion based on the validity of the sale (*Holmes v McCrea*, 186 AD3d 1043, 1045 [4th Dept 2020]; *see Finley*, 162 AD3d at 1646).

In any event, contrary to plaintiff's further contention, defendants established on their cross motion that they were bona fide purchasers for value and, as such, are entitled to summary judgment on the cross motion on that basis. "A bona fide purchaser is 'one who purchases real property in good faith, for valuable consideration, without actual or record notice of another party's adverse interests in the property and is the first to record the deed or conveyance' " (*SRP 2012-4, LLC v Chan*, 176 AD3d 1628, 1629-1630 [4th Dept 2019]; *see Unity Elec., Co., Inc. v William Aversa 2012 Trust*, 193 AD3d 792, 794 [2d Dept 2021]). Plaintiff contends that defendants had a duty to inquire merely because the sale was consummated via an executor's deed. We reject that contention and conclude that plaintiff did not raise any triable issues of fact in opposition to the cross motion concerning defendants' duty to inquire (*cf. Petrizzo v Kochersberger*, 148 Misc 2d 478, 479 [Sur Ct, Suffolk County 1990]).

Contrary to plaintiff's additional contention, the documents conveying the interest in the property to defendants are not void ab initio. Generally, "[i]f documents purportedly conveying a property interest are void, they convey nothing, and a subsequent bona fide purchaser or bona fide encumbrancer for value receives nothing" (*First Natl. Bank of Nev. v Williams*, 74 AD3d 740, 742 [2d Dept 2010]; *see Jiles v Archer*, 116 AD3d 664, 666 [2d Dept 2014]; *see generally Faison v Lewis*, 25 NY3d 220, 225-226 [2015], *rearg denied* 26 NY3d 946 [2015]). If the documents purportedly conveying a property interest are merely voidable, however, then bona fide purchasers for value who lack knowledge of fraud by the grantor or affecting the grantor's title are generally protected in their title (*see Matter of Shau Chung Hu v Lowbet Realty Corp.*, 161 AD3d 986, 988-989 [2d Dept 2018]; *see also Lembeck & Betz Eagle Brewing Co. v Sexton*, 184 NY 185, 191 [1906]).

Here, the evidence submitted on the motion and cross motion established that the deed is not void ab initio but, at most, voidable. Although it is well settled that "[a] deed based on forgery or obtained by false pretenses is void ab initio" (*Cruz v Cruz*, 37 AD3d 754, 754 [2d Dept 2007]; *see Jiles*, 116 AD3d at 666), plaintiff

does not contend that the deed was based on forgery or obtained by false pretenses. Rather, plaintiff merely contends that the brother lacked the authority to sell the property. Even if we assume, arguendo, that plaintiff is correct on the issue of the brother's authority, "sales of property by executors falling within certain prohibitions of a long public policy are voidable and not void" (*Mayer v Crandall*, 285 App Div 723, 728 [3d Dept 1955]). As a result, defendants, as bona fide purchasers, are protected against rescission under the circumstances of this case (*see Matter of Raccioppi*, 128 AD3d 838, 839 [2d Dept 2015]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

210

CA 21-00924

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

JOSEPH J. TIMPANO, AS TEMPORARY ADMINISTRATOR
OF THE ESTATE OF YAE YAR, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT,
HASAN KO, ET AL., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF JENNIFER S. ADAMS, YONKERS (PAUL G. HANSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SCHMITT & LASCURETTES, LLC, UTICA (TOD M. LASCURETTES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 4, 2021 in a declaratory judgment action. The judgment granted the motion of plaintiff for leave to reargue and, upon reargument, granted plaintiff’s motion for summary judgment and declared that defendant New York Central Mutual Fire Insurance Company is obligated to provide coverage to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying plaintiff’s motion for summary judgment and vacating the declaration, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff, as temporary administrator of the estate of Yae Yar (decedent), commenced this action seeking a declaration that defendant New York Central Mutual Fire Insurance Company (New York Central) is obligated to defend and indemnify plaintiff in certain underlying personal injury actions pursuant to an automobile insurance policy issued by New York Central to decedent. The underlying personal injury actions that were commenced against decedent sought damages for injuries allegedly sustained by the passengers of the vehicle decedent was driving when that vehicle collided with another vehicle. The vehicle that decedent was driving at that time was owned by his son. New York Central denied coverage

and disclaimed liability on the ground that coverage was excluded under the policy. New York Central appeals from a judgment that granted plaintiff's motion for leave to reargue his prior motion for summary judgment on the complaint against New York Central and, upon reargument, granted the motion for summary judgment and declared that New York Central is required to provide coverage to plaintiff under its policy.

We reject New York Central's contention that Supreme Court erred in granting plaintiff's motion for leave to reargue. The court acted within its discretion in granting leave to reargue on the ground that it had overlooked or misapprehended the facts (*see generally Andrea v du Pont de Nemours & Co.* [appeal No. 2], 289 AD2d 1039, 1040-1041 [4th Dept 2001], *lv denied* 97 NY2d 609 [2002]; *Dixon v New York Cent. Mut. Fire Ins. Co.*, 265 AD2d 914, 914 [4th Dept 1999]).

We agree with New York Central, however, that the court erred, upon reargument, in granting plaintiff's motion for summary judgment. Initially, we conclude that the court erred in determining that New York Central's amended disclaimer letter failed to apprise plaintiff that New York Central was relying on Exclusion B.2. of the liability coverage part of the policy. That exclusion, insofar as relevant here, excludes coverage for the use of any vehicle, other than the covered vehicle listed on the declarations page of the policy, which is "[f]urnished or available for [decedent's] regular use." Where an insurer disclaims coverage, "the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]; *see Wraight v Exchange Ins. Co.* [appeal No. 2], 234 AD2d 916, 917-918 [4th Dept 1996], *lv denied* 89 NY2d 813 [1997]). Here, the amended disclaimer letter stated that the vehicle driven by decedent was not listed in the policy as a covered automobile, and that New York Central was advised that the vehicle was "furnished and/or available for [decedent's] regular use," which was sufficient to apprise plaintiff that New York Central was disclaiming coverage based on Exclusion B.2.

We further conclude that questions of fact exist whether that exclusion applies under the circumstances in this case (*see Tuttle v State Farm Mut. Auto. Ins. Co.*, 149 AD3d 1477, 1479 [4th Dept 2017]). "In determining whether a vehicle was furnished or available for the regular use of the named insured, '[f]actors to be considered . . . are the availability of the vehicle and frequency of its use by the insured' " (*Newman v New York Cent. Mut. Fire Ins. Co.*, 8 AD3d 1059, 1060 [4th Dept 2004]; *see Konstantinou v Phoenix Ins. Co.*, 74 AD3d 1850, 1851-1852 [4th Dept 2010], *lv denied* 15 NY3d 712 [2010]). "The applicability of the policy exclusion to a particular case must be determined in light of the 'purpose of [the] provision [of coverage] for a nonowned vehicle not [furnished or available] for the regular use of the insured [which] is to provide protection to the insured for the occasional or infrequent use of [a] vehicle not owned by him or her[,] and [which coverage] is not intended as a substitute for insurance on vehicles furnished for the insured's regular use' " (*Newman*, 8 AD3d at 1060; *see New York Cent. Mut. Fire Ins. Co. v*

Jennings, 195 AD2d 541, 542-543 [2d Dept 1993]).

Here, plaintiff submitted in support of the motion for summary judgment a statement made by decedent’s son that decedent had used the vehicle in question two or three times before the day of the accident, that the keys were kept by the “key station” in their home, and that decedent could have used the car anytime it was in the driveway if the son was not using it. Plaintiff, however, also submitted the son’s deposition testimony, wherein the son testified that he had purchased the vehicle approximately five to six months before the accident and that decedent had driven it only once. He further testified that decedent could not use the vehicle without first asking for permission. Inasmuch as plaintiff’s own submissions on his motion for summary judgment raise triable issues of fact concerning the availability of the vehicle and decedent’s use of the vehicle, we conclude that denial of that motion is required, “regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We therefore modify the order accordingly.

Entered: June 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

231
CA 21-00469
PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND BANNISTER, JJ.

JAMES A. FOX, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES W. MCCLELLAN, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 11, 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: Plaintiff commenced this action seeking damages for injuries he sustained when he was struck by a vehicle operated by defendant. At the time of the accident, plaintiff was a member of a crew working on a road construction project. Defendant appeals from an order that denied his motion for summary judgment dismissing the amended complaint. We affirm.

We reject defendant's contention that Supreme Court erred in denying the motion insofar as it sought summary judgment dismissing the amended complaint based on the application of the emergency doctrine. The emergency doctrine " 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context' . . . , provided the actor has not created the emergency" (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). "The existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact" (*Dalton v Lucas*, 96 AD3d 1648, 1649 [4th Dept 2012]; *see Andrews v County of Cayuga*, 96 AD3d 1477, 1479 [4th Dept 2012]).

In support of his motion, defendant submitted, inter alia, his own deposition testimony, wherein he testified that, while he was

driving northbound on the roadway in question, he observed construction work and a dump truck blocking his lane of travel. Defendant then “edged or coasted” up to the dump truck as it was backing into the southbound lane. As he passed the dump truck in the northbound lane, defendant’s vehicle struck plaintiff. Defendant conceded that he never observed plaintiff before his vehicle struck plaintiff. We conclude that defendant’s submissions failed to establish as a matter of law that he was confronted with a sudden and unexpected emergency situation to which he did not contribute (*see White v Connors*, 177 AD3d 1250, 1252 [4th Dept 2019]; *Jablonski v Jakaitis*, 85 AD3d 969, 970 [2d Dept 2011]; *see also Anderson v Krauss*, 204 AD2d 1074, 1075 [4th Dept 1994]). Thus, the court properly denied that part of defendant’s motion for summary judgment dismissing the amended complaint pursuant to the emergency doctrine, regardless of the sufficiency of plaintiff’s opposition papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We have considered defendant’s remaining contentions and conclude that they do not warrant modification or reversal of the order.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

246

KA 17-00561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY D. SESSION, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Thomas R. Morse, A.J.), rendered January 27, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree, and attempted robbery in the first degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that County Court erred in denying his pro se motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30), arguing that the People's total period of unreadiness for trial exceeded six months. Preliminarily, it is undisputed that defendant's contention is properly before us. Although defendant's third counsel effectively took the position that defendant did not have a meritorious statutory speedy trial claim, defendant's pro se motion maintained that dismissal was warranted because the People violated his statutory right to a speedy trial. "Because a criminal defendant is not entitled to hybrid representation, . . . the decision to entertain [a pro se] motion[filed by a represented defendant] lies within the sound discretion of the trial court" (*People v Rodriguez*, 95 NY2d 497, 500 [2000]; *see People v Johnson*, 195 AD3d 1420, 1420-1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]). Here, the court exercised its discretion in entertaining defendant's pro se motion, allowed him to argue the merits, and made specific rulings with respect to whether the periods of delay now challenged on appeal were chargeable to the People. We thus conclude that defendant's challenges to the court's speedy trial calculations are preserved for our review (*see* CPL 470.05 [2]).

With respect to the merits, "[i]n felony cases such as this one, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (CPL 30.30 [1] [a]). Whether the People have satisfied this obligation is generally determined by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]). "[A] defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]). The People then "bear the burden of demonstrating sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]; *see Allard*, 28 NY3d at 45).

Here, the criminal action was commenced on February 28, 2014, when the felony complaints were filed (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]; *People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]). Inasmuch as defendant was charged with a felony, the People were permitted no more than six calendar months of delay or, in this case, 181 days (*see* CPL 30.30 [1] [a]; *Cortes*, 80 NY2d at 207 n 3; *People v Minwalkulet*, 198 AD3d 1290, 1291 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]). There is no dispute that defendant met his initial burden "of alleging that the People were not ready for trial within the statutorily prescribed time period" (*Allard*, 28 NY3d at 45; *see* CPL 30.30 [1] [a]; *People v Anderson*, 188 AD3d 1699, 1699 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]), thereby shifting the burden to the People to demonstrate "sufficient excludable time" (*Kendzia*, 64 NY2d at 338).

Regarding the period of prereadiness delay, defendant contends, and the People do not dispute, that the People should be charged with 31 days. We agree. Defendant was charged by felony complaints on February 28, 2014, and the People announced readiness for trial after defendant was arraigned on the indictment on April 1, 2014. The day the felony complaints were filed is excluded from the time calculations (*see People v Stiles*, 70 NY2d 765, 767 [1987]; *Harrison*, 171 AD3d at 1482), and thus the period of prereadiness delay is 31 days. Additionally, there is no basis to exclude from the prereadiness period the three days between an arraignment purportedly scheduled for March 1, 2014, and the actual arraignment in Rochester City Court on March 4, 2014. Inasmuch as the entire 31-day period occurred before the People declared themselves ready, the People "had the burden of establishing their entitlement to have [any] delay excluded from their readiness time" (*Cortes*, 80 NY2d at 216). The People failed to meet that burden here because, as the court recognized, they did not provide any transcript to substantiate the claim that defendant had refused to attend the March 1 arraignment (*see id.*). Nor did the People's submission in opposition contain "an unequivocal statement by someone with firsthand knowledge" that defendant refused to appear for that arraignment (*People v Collins*, 82 NY2d 177, 182 [1993]).

Next, with respect to the postreadiness periods, defendant contends that the court properly determined that the People were chargeable with 79 days between their first request for a trial adjournment, made on February 23, 2015, and their second request for an adjournment, made on May 12, 2015. We agree with defendant that, under our case law applying CPL 470.15 (1) along with *People v LaFontaine* (92 NY2d 470 [1998], *rearg denied* 93 NY2d 849 [1999]) and its progeny, we have no power to review the court's determination that the People are chargeable with that delay (*see e.g. Minwalkulet*, 198 AD3d at 1291; *People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]; *cf. People v Salgado*, 27 AD3d 71, 72-75 [1st Dept 2006], *lv denied* 6 NY3d 838 [2006]).

Defendant further contends that the People are chargeable with the entire 83-day period following their second request for an adjournment and that the court erred in concluding that the People were not chargeable with 49 days of that delay that accrued after defendant filed a grievance against his second counsel. Addressing first the contested post-grievance period, we note that the court concluded that the 49 days between June 15, 2015, when defendant filed the grievance, and August 4, 2015, when the court relieved defendant's second counsel from the representation, were not chargeable to the People because the filing of the grievance "resulted in new counsel having to be appointed," i.e., that period was excluded on the ground that "defendant [was] without counsel through no fault of the court" (CPL 30.30 [4] [f]). We agree with defendant that the court's determination is erroneous. " '[T]here is no rule requiring that a defendant who has filed a grievance against his attorney be assigned new counsel' " (*People v Tucker*, 139 AD3d 1399, 1400 [4th Dept 2016]), i.e., the filing of a grievance does not automatically sever the attorney-client relationship. Instead, following the filing of a grievance, " '[a] court [is] required to make an inquiry to determine whether defense counsel [can] continue to represent defendant in light of the grievance' " (*id.*). Here, the court did not address the grievance and relieve second counsel due to the conflict of interest resulting from the grievance until August 4, 2015. For purposes of CPL 30.30 (4) (f), "a person is not 'without counsel' where [he or] she has an 'appointed' attorney" (*People v Alvarez*, 194 AD3d 618, 620 [1st Dept 2021], *lv denied* 37 NY3d 970 [2021]; *see People v Rouse*, 12 NY3d 728, 729 [2009]). Inasmuch as defendant still had an appointed attorney in the period between the filing of the grievance and the determination that second counsel would be relieved, the court's determination that defendant was without counsel, and thus that the 49-day period was not chargeable to the People, lacks legal support (*see Rouse*, 12 NY3d at 729; *Alvarez*, 194 AD3d at 620).

Based on the foregoing, the propriety of the court's denial of defendant's pro se statutory speedy trial motion depends on whether the 83-day delay following the second adjournment—specifically the period from May 13, 2015, to August 4, 2015—should have been excluded because the second adjournment was requested or consented to by second counsel (CPL 30.30 [4] [b]) or was the result of an exceptional circumstance (CPL 30.30 [4] [g]). The court, however, did not rule on whether that period was excludable on those grounds because it

determined that its exclusion of the post-grievance period was dispositive in favor of the People regardless of the reason for the second adjournment. We are thus " 'precluded from affirming on [either of] the ground[s mentioned above] inasmuch as the court did not rule on th[ose] issue[s]' " (*People v Kniffin*, 176 AD3d 1601, 1601-1602 [4th Dept 2019]). Indeed, where, as here, "the record does not reflect that the court ruled on a part of a motion, the failure to rule on that part cannot be deemed a denial thereof" (*People v Thomas*, 173 AD3d 1845, 1846 [4th Dept 2019]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine defendant's pro se motion by ruling on the abovementioned outstanding issues (*see generally People v Ballowe*, 173 AD3d 1666, 1668 [4th Dept 2019]; *Thomas*, 173 AD3d at 1846; *People v Jones*, 114 AD3d 1272, 1272 [4th Dept 2014]).

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

261
KA 20-01435
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MONTRA HODGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 15, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is 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: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and assault in the second degree (§ 120.05 [3]), defendant contends that County Court erred in refusing to suppress, as the product of an unlawful search and seizure following a traffic stop, a loaded firearm found on his person and his statements to the police. We agree with defendant.

Preliminarily, however, we reject defendant’s contention that the police officers who conducted the traffic stop of a truck in which defendant was the passenger inordinately prolonged the detention. “A traffic stop constitutes a limited seizure of the person of each occupant” (*People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995]). “For a traffic stop to pass constitutional muster, the officer’s action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance” (*id.*).

Here, we conclude that the police “did not inordinately prolong the detention beyond what was reasonable under the circumstances”

(*People v Edwards*, 14 NY3d 741, 742 [2010], *rearg denied* 14 NY3d 794 [2010]; *see People v Huddleston*, 160 AD3d 1359, 1361 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *cf. Banks*, 85 NY2d at 562-563). The record establishes that, upon observing a violation of the Vehicle and Traffic Law, an officer initiated a lawful traffic stop of the truck that was occupied by an unlicensed driver and defendant, who were hauling a load for an employer in an attached trailer. The officer then properly directed the driver to exit the vehicle (*see People v Garcia*, 20 NY3d 317, 321 [2012]; *People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]). The officer spent the first half of the temporary detention—approximately 25 minutes—promptly investigating the identity of the driver, which included searching a Department of Motor Vehicles database, questioning the driver about his real name, calling the employer to verify the identities of the occupants, and ultimately discovering that the driver had repeatedly provided a false name and date of birth, which resulted in his arrest and the subsequent discovery of a controlled substance on his person for which he did not have a prescription.

Thereafter, the officer and backup officers who had arrived at the scene appropriately continued the temporary detention by asking defendant whether he had identification such as a license. Indeed, "[w]here, as here, a police officer makes a legitimate traffic stop, a request for identification of a passenger constitutes a minimal intrusion that is reasonable where the driver is unable to provide identification or a valid driver's license" (*People v Jones*, 8 AD3d 897, 898 [3d Dept 2004], *lv denied* 3 NY3d 708 [2004]). Inasmuch as defendant did not produce a license, and the driver had been arrested, there was no licensed driver available to remove the vehicle from the interstate highway (*see generally Huddleston*, 160 AD3d at 1360), and the officer therefore called the employer, who indicated that he would arrive shortly to retrieve the vehicle. While waiting for the employer, the officer returned to his patrol vehicle and diligently completed paperwork on his computer, which included various tickets and accusatory instruments, an incident report, and database searches (*see People v Rainey*, 49 AD3d 1337, 1339 [4th Dept 2008], *lv denied* 10 NY3d 963 [2008]; *cf. Banks*, 85 NY2d at 561-563). Moreover, although the police then engaged in a discussion of how to proceed with the traffic stop that lasted several minutes, it was not unreasonable for the police to thereafter return to request that defendant exit the truck (*see Edwards*, 14 NY3d at 742; *see generally Garcia*, 20 NY3d at 321). Although the traffic stop lasted over 45 minutes, we conclude that, "based on the evolution of the stop, . . . [the] detention [was] reasonably related in scope and length to the escalating series of events so as to justify such detention" (*People v Blanche*, 183 AD3d 1196, 1199 [3d Dept 2020], *lv denied* 35 NY3d 1064 [2020]; *see also Edwards*, 14 NY3d at 742).

We nonetheless agree with defendant that the officers, after directing that defendant exit the truck, improperly attempted to perform a pat frisk of defendant's person that was not supported by the requisite level of suspicion. 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 Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]; *see People v De Bour*, 40 NY2d 210, 215, 222-223 [1976]; *People v Savage*, 137 AD3d 1637, 1638 [4th Dept 2016]). Here, the police were entitled to direct defendant to exit the truck "as a precautionary measure and without particularized suspicion" (*Garcia*, 20 NY3d at 321; *see Robinson*, 74 NY2d at 775; *People v Ross*, 185 AD3d 1537, 1538 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *People v Ford*, 145 AD3d 1454, 1455 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]). However, "the propriety of a [subsequent] frisk is not automatic"; rather, in the absence of probable cause for believing that the defendant is guilty of a crime, the police "must have knowledge of some fact or circumstance that supports a reasonable suspicion that the [defendant] is armed or poses a threat to safety" (*People v Batista*, 88 NY2d 650, 654 [1996]; *see People v Shuler*, 98 AD3d 695, 696 [2d Dept 2012]; *People v Everett*, 82 AD3d 1666, 1666 [4th Dept 2011]).

Here, the police proceeded to an attempted frisk by approaching the passenger side of the truck, opening the door, and directing defendant to exit the truck so that, as they informed defendant, they could perform a frisk of his person (*see People v William II*, 98 NY2d 93, 97 [2002]). The attempted frisk was unlawful, however, because the record establishes that the police did not have " 'knowledge of some fact or circumstance that support[ed] a reasonable suspicion that . . . [defendant was] armed or pose[d] a threat to [their] safety' " (*Everett*, 82 AD3d at 1666, quoting *Batista*, 88 NY2d at 654; *see Ford*, 145 AD3d at 1455-1456). Furthermore, even though defendant, despite being instructed to leave his coat in the truck, grabbed the coat, threw it onto one of the officers, and fled in the grassy area by the side of the interstate highway, instead of submitting to the frisk of his person, the police lacked probable cause to arrest defendant for obstructing governmental administration in the second degree based on his alleged obstruction of the officers' attempted frisk, because that police conduct was not authorized (*see People v Lupinacci*, 191 AD2d 589, 590 [2d Dept 1993]; *see also People v Sumter*, 151 AD3d 556, 557 [1st Dept 2017]; *People v Perez*, 47 AD3d 1192, 1193-1194 [4th Dept 2008]). Moreover, while the officers had also indicated to defendant that they were going to perform a search of the truck, the People did not rely below on the theory that defendant was properly arrested for obstructing a lawful search of the truck, nor, as the dissent states, did the court "explicitly base[] its decision on that theory." We thus conclude that, as "an appellate court[, we] may not uphold a police action on a theory not argued before the suppression court" (*People v Lloyd*, 167 AD2d 856, 856 [4th Dept 1990]; *see People v Johnson*, 64 NY2d 617, 619 n 2 [1984]; *People v Dodt*, 61 NY2d 408, 416 [1984]). Contrary to the court's determination and the People's contention, the officers had no other valid basis upon which to arrest defendant. We therefore conclude that the court should have suppressed the loaded firearm seized from defendant's person upon his arrest and his subsequent statements to the police.

Based on the foregoing, defendant's plea must be vacated and, because our determination results in the suppression of all evidence in support of the charged crime of criminal possession of a weapon in

the second degree (*see People v Suttles*, 171 AD3d 1454, 1455 [4th Dept 2019]; *People v Mobley*, 120 AD3d 916, 919 [4th Dept 2014]) and because the officers were not engaged at the time of the alleged assault in the performance of "a lawful duty" necessary to support the charged crime of assault in the second degree (Penal Law § 120.05 [3]; *see People v Voliton*, 190 AD2d 764, 766-767 [2d Dept 1993], *affd* 83 NY2d 192 [1994]), the indictment must be dismissed. We therefore reverse the judgment, vacate the plea, grant those parts of defendant's omnibus motion seeking suppression of physical evidence and statements, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to affirm in the following memorandum: We dissent. The officers were entitled to pursue and arrest defendant because he committed the offense of obstructing governmental administration by interfering with the officers' lawful search of the vehicle. We agree with the majority that the police did not inordinately prolong the traffic stop, that they properly requested defendant's identification, and that they properly asked defendant to exit the vehicle. However, rather than walk away from what was an otherwise lawful search of the vehicle, defendant threw his coat at one of the officers and attempted to flee the scene. By that disruptive conduct of throwing his coat, defendant "attempt[ed] to prevent a public servant from performing an official function," namely, the lawful vehicle search (Penal Law § 195.05), and provided the officers with probable cause to arrest him for obstructing governmental administration in the second degree (*see People v Graham*, 54 AD3d 1056, 1058 [2d Dept 2008]). The officers obtained such probable cause before they conducted the search of defendant's person, which revealed the loaded firearm and before they obtained statements from defendant, and thus County Court properly refused to suppress the firearm and statements (*see generally People v Cooper*, 85 AD3d 1594, 1595 [4th Dept 2011], *affd* 19 NY3d 501 [2012]; *People v Malone*, 289 AD2d 1011, 1011 [4th Dept 2001], *lv denied* 97 NY2d 757 [2002]). We would therefore affirm.

Although the majority concludes that we cannot reach the issue of probable cause arising from obstructing a lawful search of the vehicle, the record reflects that this issue was raised at the suppression hearing, and indeed it formed the basis of the court's suppression decision. Thus, relying on a theory of obstructing governmental administration as to the vehicle search would not require this Court to rely "on a factual theory not argued by the People below" (*People v Johnson*, 64 NY2d 617, 619 n 2 [1984]; *cf. People v Lloyd*, 167 AD2d 856, 856-857 [4th Dept 1990]), and the suppression court explicitly based its decision on that theory (*cf. People v Dodt*, 61 NY2d 408, 416 [1984]).

We take no position on whether the police could have lawfully searched defendant's person *before* defendant threw the coat, nor need we consider that question, because it does not alter the suppression calculus. Regardless of whether a possible search of defendant would have been lawful had defendant not interfered with the search of the vehicle by throwing his coat at an officer, the throwing of the coat

provided the officer with probable cause to arrest, prior to the search, which in turn authorized a search incident to arrest (*see generally People v Lewis*, 89 AD3d 1485, 1485 [4th Dept 2011]). The fact that defendant might have also attempted to prevent a distinct unlawful act by the police in no way negates the fact that he, by the same conduct, attempted to prevent a lawful function.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

283
KA 19-01307
PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

SAMAR K. BARRON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN 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 July 20, 2017. The judgment convicted defendant, upon a plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). Preliminarily, we note that defendant's "waiver of his right to appeal was invalid . . . and, in any event, [would] not bar his contention that [County] Court failed to properly consider youthful offender treatment" (*People v Dhillon*, 143 AD3d 734, 735 [2d Dept 2016]). On the merits, as the People correctly concede, we agree with defendant that the court erred in determining that he was ineligible for youthful offender status (*see People v Graham*, 202 AD3d 1482, 1482-1483 [4th Dept 2022]). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state on the record a determination whether defendant should be afforded youthful offender status (*see id.* at 1483).

We have reviewed defendant's contentions regarding his motion to withdraw his plea of guilty and the voluntariness of that plea and conclude that they do not warrant reversal or modification of the judgment.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

284/19
CA 18-01769
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

PANAMA CENTRAL SCHOOL DISTRICT,
PLAINTIFF-RESPONDENT,

V ORDER

EVERGUARD SURFACING, CO., INC., RW CONSTRUCTION, INC.,
DEFENDANTS,
FIRST NATIONAL INSURANCE COMPANY OF AMERICA AND
LIBERTY MUTUAL GROUP, INC., DEFENDANTS-APPELLANTS.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (STEPHEN J. STACHOWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND DEFENDANT RW CONSTRUCTION, INC.

HARRIS BEACH PLLC, BUFFALO (KIRSTIE A. MEANS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

R. THOMAS RANKIN, JAMESTOWN, FOR DEFENDANT EVERGUARD SURFACING, CO., INC.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered December 8, 2017. The order, insofar as appealed from, denied the motion of defendants First National Insurance Company of America and Liberty Mutual Group, Inc., for summary judgment dismissing the complaint against them.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 5, 2022,

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

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

293

CA 21-00744

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

THE WALTON & WILLET STONE BLOCK, LLC, FOWLER GARDELLA CONSTRUCTION, LLC, AND THOMAS J. MILLAR, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF OSWEGO COMMUNITY DEVELOPMENT OFFICE, CITY OF OSWEGO AND CAMELOT LODGE, LLC, DEFENDANTS-RESPONDENTS.

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF OSWEGO COMMUNITY DEVELOPMENT OFFICE AND CITY OF OSWEGO.

DIMARTINO LAW OFFICE, OSWEGO (ANTHONY J. DIMARTINO, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT CAMELOT LODGE, LLC.

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered April 19, 2021. The order, among other things, dismissed the second amended complaint.

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

Memorandum: This case has been before us on two prior occasions (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 175 AD3d 882 [4th Dept 2019], *appeal dismissed* 34 NY3d 1145 [2020]; *Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off. & City of Oswego*, 137 AD3d 1707 [4th Dept 2016]). Plaintiffs now appeal from an order that, inter alia, granted the cross motion of defendants City of Oswego and City of Oswego Community Development Office (collectively, City defendants) for summary judgment dismissing the second amended complaint against them, granted the motion of defendant Camelot Lodge, LLC (Camelot) for summary judgment dismissing the second amended complaint against it, and denied plaintiffs' cross motion insofar as it sought to extend the notice of pendency. We affirm.

On appeal, plaintiffs do not challenge any of the grounds upon which Supreme Court actually granted the City defendants' cross motion. Instead, plaintiffs' arguments concerning that cross motion

relate exclusively to tangential issues that did not impact the court's determination thereof. Thus, by failing to address the basis for the court's decision, plaintiffs "effectively abandoned" any challenge to the granting of the City defendants' cross motion (*Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]; *see Miller v Miller*, 189 AD3d 2089, 2094-2095 [4th Dept 2020]; *Barnett v DiSalvo*, 187 AD3d 1548, 1549 [4th Dept 2020]). Moreover, inasmuch as specific performance "is an equitable remedy for a breach of contract, rather than a separate cause of action" (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]; *see M & E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dept 2020]; *Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 86 [1st Dept 2013]), the dismissal of plaintiffs' breach of contract cause of action against the City defendants necessarily precludes any award of specific performance against Camelot (*see generally SJSJ Southold Realty, LLC v Fraser*, 150 AD3d 920, 922 [2d Dept 2017]; *Finkelman v Wood*, 203 AD2d 236, 237 [2d Dept 1994]). Although plaintiffs also asserted a declaratory judgment cause of action, no declaration is necessary under these circumstances (*see Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142, 1144 [4th Dept 2009]; *Main Evaluations v State of New York*, 296 AD2d 852, 853 [4th Dept 2002], *appeal dismissed and lv denied* 98 NY2d 762 [2002]). Finally, given its dismissal of the underlying action, the court properly denied plaintiffs' cross motion insofar as it sought to extend the notice of pendency (*see Alvaro v Faracco*, 85 AD3d 1072, 1073 [2d Dept 2011]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

313
OP 21-01638
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF BRANDON MCNAIR, PETITIONER,

V   MEMORANDUM AND ORDER

SCOTT D. MCNAMARA AND HON. MICHAEL L. DWYER,
RESPONDENTS.

REBECCA L. WITTMAN, UTICA, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit a certain criminal prosecution.

It is hereby ORDERED that said petition is unanimously granted without costs and judgment is granted in favor of petitioner as follows:

> "It is ADJUDGED that respondents are prohibited from retrying petitioner on Indictment No. 2020-185."

Memorandum: Petitioner commenced this original CPLR article 78 proceeding in this Court seeking a writ of prohibition barring his retrial on the ground of double jeopardy. We agree with petitioner that the petition should be granted.

Petitioner was charged by an indictment with various weapons offenses, and a jury trial commenced before County Court (Dwyer, J.) on November 1, 2021. The jury was selected and sworn, and three witnesses testified. The next day was Election Day and the trial was recessed. On the morning of November 3, Judge Dwyer's secretary notified petitioner's counsel that the Judge had a cold, he wanted to make sure it was not COVID-19, he would not be in that day, and the jury would be sent home. Petitioner's counsel was notified several days later that the matter would be scheduled for a retrial on November 15.

At a court appearance on November 12, the parties and the court made a record of the circumstances that had occurred since the start of the original trial. Judge Dwyer explained that, on Election Day, he had become ill with "a bad head cold, a bad chest cold, and . . .

chills." He contacted his physician, who scheduled him for a COVID-19 test the following day. Early in the morning of November 3, the Judge contacted the Administrative Judge in his Judicial District, who instructed him not to return to the courthouse until he had received a negative COVID-19 test result. Judge Dwyer had the COVID-19 test that afternoon and was told he would have the results in three to five days. The Judge explained that "for that reason, there was a de facto mistrial because [he] was not able to come in." He received a negative COVID-19 test result two days after his test.

The Judge stated that he believed that a mistrial was necessary because it was physically impossible for him to come to court and proceed with the trial. He also noted that, when the jury was selected, he had told them that the trial would conclude on November 3 or, at the latest, the following day. When petitioner's counsel objected and suggested that the trial could have been postponed or a different judge could have stepped in, the court responded "[t]hat is not possible," reasoning that another judge would not have been familiar with the testimony that had already been presented. The court clarified that the mistrial was declared as of November 3, the day the jury was sent home.

Initially, Scott D. McNamara (respondent) correctly acknowledges that double jeopardy is a ground for obtaining the remedy of a writ of prohibition. "[W]hen a defendant is about to be prosecuted in violation of his [or her] constitutional right against double jeopardy, . . . the harm that he [or she] would suffer—prosecution for a crime for which he [or she] cannot constitutionally be tried—is so great and the ordinary appellate process so inadequate to redress that harm, that prohibition will lie to raise the claim" (*Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]; *see People v Michael*, 48 NY2d 1, 7 [1979]). Respondent also correctly acknowledges that jeopardy had attached at the time the court declared a mistrial (*see* CPL 40.20 [1]; 40.30 [1] [b]; *People v Ferguson*, 67 NY2d 383, 387-388 [1986]).

"[T]he Double Jeopardy Clause protects criminal defendants from multiple prosecutions for the same offense" (*Matter of Gorghan v DeAngelis*, 7 NY3d 470, 473 [2006]). "[W]hen a mistrial is granted over the defendant's objection or without the defendant's consent, double jeopardy will, as a general rule, bar retrial" (*Matter of Davis v Brown*, 87 NY2d 626, 630 [1996]). "However, the right to have one's case decided by the first empaneled jury is not absolute, and a mistrial granted as the product of manifest necessity will not bar a retrial" (*id.*; *see Hall v Potoker*, 49 NY2d 501, 505 [1980]; *Michael*, 48 NY2d at 9; *see also* CPL 280.10 [3]). A court "must exercise sound discretion to assure that, taking all relevant circumstances into account, there was manifest necessity for the declaration of a mistrial without defendant's consent" (*Matter of Enright v Siedlecki*, 59 NY2d 195, 200 [1983]; *see Michael*, 48 NY2d at 9).

We agree with petitioner that there was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte (*see Michael*, 48 NY2d at 10-11). The record

establishes that the court did not consider the alternatives to a mistrial, such as a continuance (*see id.* at 9-11) or substitution of another judge (*see People v Thompson*, 90 NY2d 615, 616-617, 621 [1997]; *see also People v Hampton*, 21 NY3d 277, 287 [2013]). "[I]f the judge acts so abruptly as to not permit consideration of the alternatives . . . or otherwise acts irrationally or irresponsibly . . . or solely for convenience of the court and jury . . . , retrial will be barred" (*Enright*, 59 NY2d at 200; *see Ferguson*, 67 NY2d at 388; *Michael*, 48 NY2d at 9-11). "The court has the duty to consider alternatives to a mistrial and to obtain enough information so that it is clear that a mistrial is actually necessary" (*Ferguson*, 67 NY2d at 388). The declaration of a mistrial on November 3 was not necessary. At that time, the Judge knew he was scheduled to have a COVID-19 test that afternoon. If the result was negative, he could have returned to the courtroom as soon as he was provided with the result. If it was positive, he may have been out for a longer time, but could have reassessed the situation after receiving the test results. It was an abuse of discretion to grant a mistrial without the consent of petitioner and without considering the available alternatives (*see Michael*, 48 NY2d at 11; *cf. Hall*, 49 NY2d at 506-507).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

329

KA 19-02028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE NELSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 15, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (§ 220.16 [12]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The two pleas were entered in a single plea proceeding.

Even assuming, arguendo, that defendant’s waiver of the right to appeal is invalid (*see People v Lopez*, 196 AD3d 1157, 1157 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]), we reject defendant’s contention in appeal No. 2 that Supreme Court abused its discretion by directing that the sentence imposed in that appeal run consecutively to the sentence imposed in appeal No. 1 (*see People v Washington*, 124 AD3d 1388, 1388 [4th Dept 2015], *lv denied* 25 NY3d 954 [2015]; *see also People v Graham*, 171 AD3d 1559, 1561 [4th Dept 2019], *lv denied* 33 NY3d 1069 [2019]).

Defendant further contends in both appeals that he was denied effective assistance of counsel. To the extent that defendant contends that his attorney was ineffective for failing to address off-the-record discussions regarding defense strategy or the content

of off-the-record plea negotiations, those issues are based upon matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Tyes*, 160 AD3d 1447, 1448 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received . . . advantageous plea[s], and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).

Finally, contrary to defendant's contention in both appeals, we conclude that the sentences are not unduly harsh or severe, and we decline to exercise our power to reduce them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

330

KA 19-02029

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE NELSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 15, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Nelson* ([appeal No. 1] — AD3d — [June 10, 2022] [4th Dept 2022]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

347
TP 21-01572
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CRAIG A. DENNSTEDT, PETITIONER,

V MEMORANDUM AND ORDER

THE APPEALS BOARD OF ADMINISTRATIVE ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES AND MARK J.F. SCHROEDER, AS COMMISSIONER OF THE DEPARTMENT OF MOTOR VEHICLES, RESPONDENTS.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], entered February 19, 2021) to review a determination of respondents. The determination revoked the license of petitioner to operate a motor vehicle.

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

Memorandum: In this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. We confirm the determination. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The arresting officer's testimony at the hearing established that he issued the standardized warning when he informed petitioner that his refusal to submit to chemical testing would result in the immediate suspension and subsequent revocation of his license (*see* Vehicle and Traffic Law § 1194 [2] [c] [3]; *see generally People v Smith*, 18 NY3d 544, 548-549 [2012]). While the officer also testified at the hearing that he responded to a question posed by petitioner by stating that he was not confiscating petitioner's license at that exact moment and that petitioner would have a court date at some point, we conclude that such testimony did not conflict with the officer's clear and unequivocal warning regarding the effect of petitioner's refusal to submit to testing (*cf.*

Matter of Gargano v New York State Dept. of Motor Vehs., 118 AD2d 859, 860 [2d Dept 1986], *lv denied* 68 NY2d 606 [1986]; *see generally People v Cousar*, 226 AD2d 740, 741 [2d Dept 1996], *lv denied* 88 NY2d 983 [1996]; *Kowanes v State of N.Y. Dept. of Motor Vehs.*, 54 AD2d 611, 611 [4th Dept 1976]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

353
KA 14-02137
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUEST FREEMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 14, 2012. The judgment convicted defendant upon a jury verdict of attempted robbery in the first degree and assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]) and assault in the second degree (§ 120.05 [2]), defendant contends that he was denied a fair trial based on the People's failure to provide the report from testing DNA evidence in a timely manner (*see* CPL former 240.20 [1] [c]). We reject defendant's contention. As we noted in his codefendant's appeal, Supreme Court "advised the jury of the contents of the report," which was admitted in evidence (*People v Cooper*, 134 AD3d 1583, 1585 [4th Dept 2015]). We conclude that "the People's violation of their obligation did not substantially prejudice defendant" (*id.*; *see People v Watson*, 213 AD2d 996, 997 [4th Dept 1995], *lv denied* 86 NY2d 804 [1995]).

Contrary to defendant's contention, the court did not abuse its discretion in refusing to give a missing witness charge with respect to the victim. Although the victim was in the courtroom, he refused to testify. Therefore, the victim was "unavailable within the meaning of the [missing witness] rule," and the request for a missing witness charge was properly denied (*Cooper*, 134 AD3d at 1584 [internal quotation marks omitted]; *see generally People v Savinon*, 100 NY2d 192, 198 [2003]).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct on summation, but we note that he failed to

object to any of the comments he now raises on appeal, and thus his contention is not preserved for our review (*see People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]). In any event, defendant's contention is without merit. We conclude that any improper remarks made by the prosecutor did not deny defendant a fair trial (*see id.* at 1666-1667). We further conclude that for that reason defendant "was not denied effective assistance of counsel based upon defense counsel's failure to object to those remarks" (*Cooper*, 134 AD3d at 1586; *see People v Collins*, 167 AD3d 1493, 1497-1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *Smith*, 150 AD3d at 1667). Similarly, "[w]ith respect to the failure of defense counsel to obtain expert testimony regarding eyewitness identification," we conclude that defendant "has failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]" (*Cooper*, 134 AD3d at 1586 [internal quotation marks omitted]; *see People v Stanley*, 108 AD3d 1129, 1130-1131 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). To the extent that the eyewitness's testimony was inconsistent with her initial statement to police officers, "any inconsistencies merely presented issues of credibility for the jury to resolve" (*People v Withrow*, 170 AD3d 1578, 1579 [4th Dept 2019], *lv denied* 34 NY3d 940 [2019], *reconsideration denied* 34 NY3d 1020 [2019]), and we see no reason to disturb its determinations here. The eyewitness "never wavered in her testimony regarding the events or her identification of defendant" (*Cooper*, 134 AD3d at 1585 [internal quotation marks omitted]).

Finally, as defendant contends, and the People correctly concede, the court erred in failing to determine on the record whether defendant should be afforded youthful offender status. Because defendant was convicted of an armed felony offense (*see* CPL 1.20 [41]; Penal Law § 70.02 [1] [b]), the court was required to determine whether he was an eligible youth pursuant to CPL 720.10 (3) (*see People v Middlebrooks*, 25 NY3d 516, 527 [2015]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (3) and, if so, whether defendant should be afforded youthful offender status (*see People v Williams*, 185 AD3d 1456, 1457 [4th Dept 2020]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

389

KA 17-02130

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS L. COLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 6, 2017. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, because Supreme Court provided defendant with erroneous information about the scope of the waiver of the right to appeal and failed to identify that certain rights would survive that waiver, the colloquy was insufficient to ensure that the waiver was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

396
CAF 21-00834
PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF THE ADOPTION OF WILLIAM

JONATHAN A.H. AND ELEANOR T.H.,
PETITIONERS-APPELLANTS;

MEMORANDUM AND ORDER

AMANDA Y.D. AND DOUGLAS W.M.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT DOUGLAS W.M.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered April 30, 2021. The order, inter alia, dismissed the amended petition for adoption.

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

Memorandum: In appeal No. 1, petitioners-respondents Jonathan A.H. and Eleanor T.H. (petitioners) appeal from an order that determined that the consent of respondent-petitioner Douglas W.M. (father) is required for the adoption of William, his biological son (*see generally* Domestic Relations Law § 111). In appeal No. 2, petitioners appeal from an order that awarded custody of the child to the father, and in appeal No. 3, petitioners appeal from an order that dismissed their custody petition.

Contrary to petitioners' contention in these consolidated appeals, there is a sound and substantial basis to support the determination of Family Court that the father demonstrated "his willingness to take parental responsibility" (*Matter of Raquel Marie X.*, 76 NY2d 387, 402 [1990], *cert denied* 498 US 984 [1990]). "[A] father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship" (*id.* at 403).

Here, the father " 'did everything possible to manifest and establish his parental responsibility' under the circumstances . . . He publicly acknowledged his paternity from the outset of the pregnancy . . . , and, although he did not pay any expenses in connection with the pregnancy or the birth," he testified that all of those expenses were paid by the military (*Matter of Matthew D.*, 31 AD3d 1103, 1104 [4th Dept 2006], *lv dismissed* 7 NY3d 837 [2006], quoting *Raquel Marie X.*, 76 NY2d at 409). Moreover, prior to the child's birth, the father pursued paternity testing and requested and received from the mother a commitment that he could have custody of the child, and actively began purchasing "items" in anticipation of obtaining custody of the child upon birth. Based on the mother's commitment, the father enlisted the help of his military commanding officers to obtain custody of his child (*see Matthew D.*, 31 AD3d at 1104), and made plans for relatives or family friends to help care for the child until his enlistment in the military ended.

We thus respectfully disagree with our dissenting colleague and conclude that the father established his ability to assume custody of the child. Contrary to the position of the dissent and petitioners, custody and housing are separate and distinct concepts. A parent who lacks housing for a child is not legally precluded from obtaining custody. Certainly, active military members should not lose custody of a child due to their service to our country. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That temporary inability to provide housing should not preclude them from asserting their custodial rights to the children where, as here, they have established their intent to embrace their parental responsibility.

Here, as in *Matthew D.*, the record supports the court's findings that the father "reasonably and sincerely believed that the biological mother would not surrender the child for adoption . . . , and that she frustrated his efforts to become involved with the child" (*Matthew D.*, 31 AD3d at 1105; *see Matter of Kiran Chandini S.*, 166 AD2d 599, 601 [2d Dept 1990]). The evidence at the hearing established that the mother lied to the father, telling him that she would give him custody of the child; misled petitioners into believing that the father did not want the child, even though she knew that he was aggressively pursuing custody; and misled the courts by filing a false affidavit stating that no one was holding himself out as the father (*see Matter of Isabella TT. [Dalton C.]*, 127 AD3d 1330, 1332-1333 [3d Dept 2015], *lv denied* 25 NY3d 913 [2015]).

Where, as here, there is a basis in the record to support a court's determination whether a father's consent is required, we will not disturb that determination (*see Matter of Ashton*, 254 AD2d 773, 773 [4th Dept 1998], *lv denied* 92 NY2d 817 [1998]; *see also Matthew D.*, 31 AD3d at 1104; *see generally Raquel Marie X.*, 76 NY2d at 408-409). We have reviewed petitioners' remaining contentions in these consolidated appeals and conclude that none warrants modification or reversal of any of the orders.

All concur except SMITH, J.P., who dissents and votes to reverse

in accordance with the following memorandum: I respectfully dissent because I disagree with the majority that respondent-petitioner Douglas W.M. (father) was a consent father within the meaning of Domestic Relations Law § 111 (1) (e). To the contrary, I would reverse in all three appeals, make a finding in appeal No. 1 that the father was a notice father whose consent to the adoption of the child was not required under section 111 (1) (d), and dismiss the petitions in appeal Nos. 2 and 3 (*see generally Matter of Kevin W. v Monique T.*, 38 AD3d 672, 673 [2d Dept 2007], *lv denied* 9 NY3d 803 [2007]). In the seminal case on this issue, the Court of Appeals stated that a consent father, i.e., "an unwed father who has been physically unable to have a full custodial relationship with his newborn child[,] is . . . entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child" (*Matter of Raquel Marie X.*, 76 NY2d 387, 402 [1990], *cert denied* 498 US 984 [1990]; *see Matter of Robert O. v Russell K.*, 80 NY2d 254, 263-264 [1992]). In order to be entitled to such protection, however, a father " 'not only must assert his interest promptly (bearing in mind the child's need for early permanence and stability) but also must manifest his ability and willingness to assume custody' during the six months prior to the child's placement" for adoption (*Matter of Seasia D.*, 10 NY3d 879, 880 [2008], *rearg denied* 11 NY3d 752 [2008], *cert denied* 555 US 1046 [2008]; *see Matter of Lily R.*, 283 AD2d 901, 903 [4th Dept 2001], *lv dismissed* 96 NY2d 936 [2001]). Therefore, the father was required to demonstrate both his willingness and his ability to assume custody of the child (*see e.g. Matter of Isabella TT. [Dalton C.]*, 127 AD3d 1330, 1333 [3d Dept 2015], *lv denied* 25 NY3d 913 [2015]; *cf. Matter of Russell R. v Friends In Adoption, Inc.*, 64 AD3d 912, 913 [3d Dept 2009], *lv denied* 13 NY3d 710 [2009]).

Here, I agree with the majority that the father established his willingness to assume custody of the child, and that the mother frustrated his attempts to obtain custody. Nevertheless, I disagree with the majority's conclusion that the father established his ability to do so. To the contrary, the father, who was honorably serving in the United States Army, took no steps to put himself in a position to provide care for the child. During the pertinent time period, the father initially lived in an army barracks and then was deployed to an overseas active zone, and indeed he testified by telephone on two occasions, first from an overseas deployment and thereafter from a temporary assignment in the State of Texas. There is no indication in the record that he made any attempt to obtain military housing that would permit him to provide care for the child, tried to place the child on his health insurance plan, paid more than inconsequential parts of the mother's birth and pregnancy expenses, or obtained any food, clothing or accessories necessary to care for a child. His only plan for providing care for the child, which was not set forth until the time of the hearing, well outside the "the six months prior to the child's placement" (*Seasia D.*, 10 NY3d at 880; *see Raquel Marie X.*, 76 NY2d at 402; *Matter of Baby Boy O. [Robert—Kyle S.M.]*, 181 AD3d 606, 606-607 [2d Dept 2020]), was merely a nebulous indication that his girlfriend or his father could care for the child until he was able to assume custody. Of course, his commendable military service and

housing is no obstacle to obtaining custody, but the father was nonetheless required to show that he could care for the child, or demonstrate that he was able to obtain such care, and I conclude that he failed to do so. Thus, I conclude that Family Court erred in concluding that the child should be taken from the only home he has ever known, and where he remains to this day pursuant to the stay pending the determination of these appeals that was issued by this Court.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

397
CAF 21-01735
PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF DOUGLAS W.M.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AMANDA Y.D., RESPONDENT,
ELEANOR T.H. AND JONATHAN A.H.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

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

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered November 22, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted legal and physical custody of the subject child to petitioner Douglas W.M.

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

Same memorandum as in *Matter of William* ([appeal No. 1] — AD3d — [June 10, 2022] [4th Dept 2022]).

All concur except SMITH, J.P., who dissents and votes to reverse in accordance with the same memorandum as in *Matter of William* ([appeal No. 1] — AD3d — [June 10, 2022] [4th Dept 2022]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

398
CAF 21-01736
PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF ELEANOR T.H. AND
JONATHAN A.H., PETITIONERS-APPELLANTS,

V   MEMORANDUM AND ORDER

AMANDA Y.D. AND DOUGLAS W.M.,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT DOUGLAS W.M.

KIMBERLY A. WOOD, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (James K. Eby, R.), entered November 22, 2021 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of William* ([appeal No. 1] — AD3d — [June 10, 2022] [4th Dept 2022]).

All concur except SMITH, J.P., who dissents and votes to reverse in accordance with the same memorandum as in *Matter of William* ([appeal No. 1] — AD3d — [June 10, 2022] [4th Dept 2022]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

402
CA 21-01479
PRESENT: SMITH, J.P., CENTRA, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF AMY NEWMAN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF TONAWANDA, RICK DAVIS, AS MAYOR OF CITY OF TONAWANDA, AND CHARLES STUART, FIRE CHIEF OF CITY OF TONAWANDA, RESPONDENTS-RESPONDENTS.

THOMAS J. JORDAN, ALBANY, FOR PETITIONER-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered May 25, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the relief sought in paragraph (b) of the petition is granted.

Memorandum: Petitioner is a firefighter for respondent City of Tonawanda (City). In July 2018, petitioner injured her left shoulder while on the job when she fell down some stairs. After missing several months of work, she had surgery on her shoulder and then returned to light-duty work. In late May 2020, petitioner returned to work with no restrictions and worked the current firefighter schedule of 24-hour shifts. By the end of petitioner’s second week of work, after four shifts, she experienced increased pain in her shoulder. She saw her treating orthopedist, who provided a note stating that petitioner “cannot return to work.” Subsequently, by letter to respondent Charles Stuart, Fire Chief of the City (Fire Chief), petitioner applied for General Municipal Law § 207-a benefits. The Fire Chief, relying on medical opinions that petitioner was able to perform her duties on a “reduced schedule” of 8-hour shifts, up to 40 hours a week, concluded that petitioner was therefore not eligible for General Municipal Law § 207-a benefits and denied the application. The City thereafter scheduled petitioner for 8 hours of work per day when her crew was working its 24-hour shifts, resulting in petitioner being scheduled for fewer hours and thus receiving less pay than a firefighter working without those restrictions.

Petitioner commenced this CPLR article 78 proceeding and declaratory judgment action seeking, in effect, approval of her application for section 207-a benefits. Respondents moved to dismiss the petition, and Supreme Court granted the motion. We now reverse.

As a preliminary matter, we note that this is properly only a CPLR article 78 proceeding inasmuch as the relief sought by petitioner is available under CPLR article 78 without the necessity of a declaration (*see generally* CPLR 7801).

In reviewing respondents' determination, which was made without a hearing, "the issue is whether the action taken had a 'rational basis' and was not 'arbitrary and capricious' " (*Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013]). " 'An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts' " (*id.*; *see Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*, 159 AD3d 1561, 1562 [4th Dept 2018]). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*Ward*, 20 NY3d at 1043; *see Erie County Sheriff's Police Benevolent Assn.*, 159 AD3d at 1562).

A firefighter seeking section 207-a benefits must show "that his or her injury or illness results from the performance of his or her duties and that he or she is physically unable to perform his or her regular duties as a firefighter" (*Matter of Miserendino v City of Mount Vernon*, 96 AD3d 946, 948 [2d Dept 2012]). The regular duties of a firefighter for the City required shifts of between 10-24 hours, and the medical evidence is undisputed that petitioner could work only 8-hour shifts. Inasmuch as the evidence established that petitioner could not work the longer shifts, and she was not offered the full-time equivalent of the shorter shifts or light-duty work, the determination that she is not entitled to General Municipal Law § 207-a benefits is arbitrary and capricious. Petitioner is therefore entitled to the relief sought in paragraph (b) of the request for relief in her petition.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

412
KA 18-01957
PRESENT: SMITH, J.P., CENTRA, PERADOTTO, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYQUAN JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered April 4, 2017. The judgment convicted defendant after a nonjury trial of criminal possession of a controlled substance in the third degree (two counts) and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We affirm.

We reject defendant’s contention that Supreme Court erred in refusing to suppress physical evidence and defendant’s statements as the fruit of an unlawful search and seizure. Here, the evidence at the suppression hearing established that the action taken by the police officer was justified in its inception and at every subsequent stage of the encounter leading to defendant’s arrest (*see People v Simmons*, 30 NY3d 957, 958 [2017]; *People v White*, 117 AD3d 425, 425 [1st Dept 2014], *lv denied* 23 NY3d 1044 [2014]; *People v Carter*, 109 AD3d 1188, 1189 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]).

Contrary to defendant’s further contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant possessed heroin and cocaine with the intent to sell (*see People v Freeman*, 28 AD3d 1161, 1162 [4th Dept 2006], *lv denied* 7 NY3d 788 [2006]; *People v Bell*, 296 AD2d 836, 837 [4th Dept 2002], *lv denied* 98 NY2d 766 [2002]). In addition, viewing the evidence in light of the elements of the crimes in this

nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Freeman*, 28 AD3d at 1162; *Bell*, 296 AD2d at 837; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, even assuming, arguendo, that defendant's contention that the court punished him for exercising his right to trial is preserved for our review (*see* CPL 470.05 [2]; *see generally People v Reome*, 64 AD3d 1201, 1203 [4th Dept 2009], *affd* 15 NY3d 188 [2010]), we conclude that defendant's contention lacks merit (*see People v Huddleston*, 160 AD3d 1359, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *People v Walker*, 234 AD2d 962, 963-964 [4th Dept 1996], *lv denied* 89 NY2d 1042 [1997]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

413

KA 20-00932

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

HASSAN NELSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 7, 2020. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Preliminarily, because defendant's challenges to the voluntariness of his plea would survive even a valid waiver of his right to appeal, we need not address the validity of that waiver in this case (*see People v Gumpton*, 199 AD3d 1485, 1485 [4th Dept 2021]).

Defendant contends that his guilty plea was involuntary because County Court failed to inform him of a purported direct consequence thereof, i.e., that a new violent felony conviction in New York would result in an "automatic violation of [his] parole in . . . Virginia." We reject that contention. A court "must advise a defendant of the direct consequences of the plea" but "has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions" (*People v Catu*, 4 NY3d 242, 244 [2005]). Direct consequences consist of "the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" (*People v Harnett*, 16 NY3d 200, 205 [2011]), whereas, collateral consequences are "peculiar to the individual and generally result from the actions taken by agencies the court does not control" (*People v Ford*, 86 NY2d 397, 403 [1995]). Whether a defendant's plea to a subsequent offense will constitute a violation of that defendant's conditions of parole

and what the consequences of any such violation will be is a collateral consequence (*see People v Laury*, 156 AD3d 1473, 1473 [4th Dept 2017], *lv denied* 32 NY3d 939 [2018]; *see generally People v Monk*, 21 NY3d 27, 32-33 [2013]; *People v Belliard*, 20 NY3d 381, 385-386 [2013]).

Defendant further contends that his plea was involuntary because the court failed to provide him with a meaningful opportunity to consult with counsel with respect to the impact of his plea on extradition. Defendant did not move to withdraw his plea or to vacate the judgment of conviction on that ground, and thus that contention is unpreserved for appellate review (*see People v Davis*, 196 AD3d 1060, 1061 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, both the certificate of conviction and the uniform sentence and commitment sheet must be corrected to reflect defendant's status as a second violent felony offender rather than a second felony offender (*see People v Mobayed*, 158 AD3d 1221, 1223 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

422

CA 21-00830

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

S & J PROPERTIES OF WATERTOWN, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE MAIN STREET AMERICA GROUP,
DEFENDANT-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (VICTOR L. PRIAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE WARD FIRM, PLLC, BALDWINSVILLE (MATTHEW E. WARD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered June 3, 2021. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff owns commercial property insured by a policy issued by defendant and submitted a claim to defendant to recover damages for a bulging wall of the building. Defendant denied the claim, and plaintiff commenced this breach of contract action alleging that defendant wrongfully disclaimed coverage for damage to the property. Defendant moved for summary judgment dismissing the complaint, and Supreme Court denied the motion.

We agree with defendant that the court erred in denying its motion. Defendant met its initial burden on its motion by establishing as a matter of law that plaintiff's loss is not covered under the policy because it resulted from "deterioration," which condition was specifically excluded from coverage, and plaintiff failed to raise an issue of fact in opposition (*see Lynch v Preferred Mut. Ins. Co.*, 194 AD3d 1460, 1461 [4th Dept 2021]). Unambiguous policy provisions are to be given their plain and ordinary meaning (*see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986], *rearg denied* 69 NY2d 707 [1986]; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]), and the plain meaning of the exclusion in question "was to relieve the insurer of liability when its insured sought reimbursement for costs incurred in correcting . . . deterioration of the subject [premises]" (*Garson Mgt. Co. v Travelers*

Indem. Co. of Ill., 300 AD2d 538, 539 [2d Dept 2002], *lv denied* 100 NY2d 503 [2003]; *see Catucci*, 37 AD3d at 515). Here, both defendant's expert and plaintiff's expert opined that the wall bulged due to deterioration of the bricks from exposure to moisture and freeze-thaw cycles. The only difference was that defendant's expert opined that the wall had been deteriorating over an extended period of time, whereas plaintiff's expert opined that the deterioration occurred over two months. Either way, the damage was the result of deterioration, and thus the policy exclusion applies and defendant is entitled to summary judgment (*see 6 Montague, LLC v New Hampshire Ins. Co.*, 122 AD3d 451, 451 [1st Dept 2014]; *Catucci*, 37 AD3d at 515; *Garson Mgt. Co.*, 300 AD2d at 539).

Plaintiff's remaining contention that the order should be affirmed because defendant failed to include a copy of the insurance policy with its motion papers is raised for the first time on appeal and is therefore not properly before us (*see Matter of VanLoan* [appeal No. 2], 156 AD3d 1426, 1426 [4th Dept 2017]; *Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624 [4th Dept 2009]).

Entered: June 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

449
CA 21-01072
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

MATTHEW L. BEDIENT, PLAINTIFF-RESPONDENT,

V ORDER

EARL T. WADHAMS, INC., AND JOHN S. HILLMAN,
DEFENDANTS-APPELLANTS.

GROSS SHUMAN P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO LAW, LLP, BUFFALO (DENIS BASTIBLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered July 20, 2021. The order granted the motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 14, 2022,

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

464

KA 19-02336

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAL D. MOBLEY, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered October 2, 2019. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]) and criminal contempt in the second degree (§ 215.50 [3]). We affirm. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

467

KA 20-00292

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH MOUNTZOUROS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered March 26, 2019. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree, sexual abuse in the second degree, and forcible touching (two counts).

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, two, four and five of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, sexual abuse in the first degree (Penal Law § 130.65 [4]), arising from allegations that defendant sexually abused one of his youngest sons in 2012-2013. 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]).

Before trial, County Court granted the People's motion seeking to introduce testimony that defendant sexually abused his eldest son in the 1990s, on the ground that the earlier, uncharged conduct was admissible under the modus operandi exception to the *Molineux* rule (*see People v Molineux*, 168 NY 264 [1901]). We agree with defendant that this was error.

The "familiar *Molineux* rule states that evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]). The commonly-recognized categories of non-propensity evidence are: "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a

common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; [and] (5) the identity of the [defendant]" (*Molineux*, 168 NY at 293).

Modus operandi evidence is a means of establishing the defendant's identity as the perpetrator (*see People v Beam*, 57 NY2d 241, 250-251 [1982]). Here, even assuming, arguendo, that defendant's identity as the person who committed the crimes was not conclusively established (*cf. People v Agina*, 18 NY3d 600, 603-605 [2012]), we conclude that the similarities between the uncharged acts and the charged crimes were not "sufficiently unique to make the evidence of the uncharged crimes probative of the fact that [defendant] committed the [crimes] charged" (*Beam*, 57 NY2d at 251 [internal quotation marks omitted]; *see People v Condon*, 26 NY2d 139, 144 [1970]; *People v Walker*, 119 AD3d 1402, 1403 [4th Dept 2014]; *cf. People v Frederick*, 152 AD3d 1242, 1242-1243 [4th Dept 2017]).

We further conclude that the error in admitting the evidence is not harmless. "Under the standard applicable to nonconstitutional errors, an error is harmless if the proof of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant had the error not occurred" (*People v Williams*, 25 NY3d 185, 194 [2015]; *see People v Crimmins*, 36 NY2d 230, 242 [1975]). Here, it cannot be said that the proof of guilt, which turned primarily on an assessment of the credibility of testimony, was overwhelming (*see People v Holtslander*, 189 AD3d 1701, 1704 [3d Dept 2020]; *cf. People v Casado*, 99 AD3d 1208, 1211-1212 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]). We therefore reverse the judgment and grant a new trial on counts one, two, four and five of the indictment.

Defendant's remaining contentions are academic in light of our determination.

Entered: June 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

468
KA 20-00661
PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PRESTON L. THOMPSON, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered February 11, 2020. 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: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that, in light of his acquittal of petit larceny, his conviction is not supported by legally sufficient evidence with respect to the element of intent to commit a crime in the dwelling, and the verdict is against the weight of the evidence. We reject that contention. As relevant here, a defendant is guilty of burglary in the second degree when the defendant knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein (*id.*). Although the People need to prove only a defendant's general intent to commit a crime in the residence, not his intent to commit a specific crime (*see People v Lewis*, 5 NY3d 546, 552 [2005]; *People v Mahboubian*, 74 NY2d 174, 193 [1989]), in this case, the People expressly limited their theory of the "intent to commit a crime therein" element (§ 140.25) to larceny, and thus they had to prove that defendant intended to commit that crime (*see Lewis*, 5 NY3d at 552 n 7; *People v Shealy*, 51 NY2d 933, 934 [1980]).

Nevertheless, the People were not required to prove that defendant actually committed the intended crime of larceny (*see Mahboubian*, 74 NY2d at 193; *People v Freeman*, 103 AD3d 1177, 1177 [4th Dept 2013], *lv denied* 21 NY3d 912 [2013]), and therefore the fact that the jury acquitted defendant of petit larceny has no bearing on whether the conviction of burglary in the second degree is based on legally sufficient evidence or whether the verdict is against the weight of the evidence (*see e.g. People v Taylor*, 163 AD3d 1275, 1275-

1277 [3d Dept 2018], *lv denied* 32 NY3d 1068 [2018]; *People v Walton*, 125 AD3d 900, 901 [2d Dept 2015], *lv denied* 25 NY3d 1078 [2015]; *People v Mercado*, 102 AD3d 813, 813 [2d Dept 2013], *lv denied* 20 NY3d 1102 [2013]).

The element of "intent to commit a crime therein" may be inferred from defendant's conduct and the surrounding circumstances (*see People v Jackson*, 182 AD3d 1034, 1035 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]), including the circumstances of the entry (*see People v Bergman*, 70 AD3d 1494, 1494 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]; *People v Mainella*, 2 AD3d 1330, 1330 [4th Dept 2003], *lv denied* 2 NY3d 742 [2004], *reconsideration denied* 3 NY3d 660 [2004]). Here, the jury could infer defendant's intent to commit larceny in the residence from the evidence that he broke a window to enter the residence; he walked throughout the residence, as shown by the blood droplets he left in multiple locations; and he ransacked the residence (*see Freeman*, 103 AD3d at 1177; *Bergman*, 70 AD3d at 1494). Viewing the evidence in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]; *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 jury could have found defendant's intent to commit larceny in the residence proved beyond a reasonable doubt (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court's failure to orally pronounce any award of restitution or the issuance of a money judgment during sentencing requires vacatur of a confession of judgment against defendant. We conclude, however, that the "confession[] of judgment—the amount, signing, and filing of which were not part of the court's sentence—[is] not properly before us on this appeal from [defendant's] criminal judgment of conviction" (*People v Gordon*, 191 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]).

The sentence is not unduly harsh or severe. Defendant's related contention that his sentence constitutes cruel and unusual punishment is unpreserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Gilmore*, 202 AD3d 1453, 1454 [4th Dept 2022], *lv denied* — NY3d — [2022]) and, in any event, is without merit (*see People v Verbitsky*, 90 AD3d 1516, 1516 [4th Dept 2011], *lv denied* 19 NY3d 868 [2012]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

469
KA 18-01094
PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORWIN L. COLEMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 15, 2017. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree, robbery in the third degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of robbery in the third degree and assault in the second degree and dismissing counts one and three of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the second degree (Penal Law § 160.10 [2] [a]), robbery in the third degree (§ 160.05), and assault in the second degree (§ 120.05 [6]). Preliminarily, as defendant contends and the People correctly concede, robbery in the third degree is a lesser included offense of robbery in the second degree (*see People v Best*, 120 AD3d 707, 709 [2d Dept 2014], *lv denied* 25 NY3d 987 [2015]). Moreover, although not raised by the parties, we note that assault in the second degree under section 120.05 (6) is a lesser included offense of robbery in the second degree under section 160.10 (2) (a) (*see People v Perez*, 93 AD3d 1032, 1039 [3d Dept 2012], *lv denied* 19 NY3d 1000 [2012]; *People v Lucas*, 291 AD2d 890, 890 [4th Dept 2002]). We therefore modify the judgment by reversing those parts convicting defendant of robbery in the third degree and assault in the second degree and dismissing counts one and three of the indictment (*see Best*, 120 AD3d at 709; *Lucas*, 291 AD2d at 890).

In light of our decision, we need not address defendant’s challenges to the weight and sufficiency of the evidence with respect to counts one and three. Defendant’s challenges to the legal sufficiency of the evidence supporting his conviction of robbery in

the second degree are unpreserved for appellate review (*see People v Gray*, 86 NY2d 10, 19 [1995]). Moreover, viewing the evidence in light of the elements of robbery in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict finding defendant guilty of that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

472

KA 16-00332

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD T. HARRIS, DEFENDANT-APPELLANT.

BETH A. RATCHFORD, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 22, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that County Court erred in summarily denying his pro se request to withdraw his plea of guilty without assigning new counsel to represent him. As the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as the court's explanation that the waiver would foreclose any review by a higher court "utterly 'mischaracterized the nature of the right [that] defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1228-1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]).

Nevertheless, we reject defendant's contention that the court erred in denying without a hearing his pro se request to withdraw his guilty plea. " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). Furthermore, "[o]nly 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]). Where, as here, the record establishes that the defendant was afforded such an opportunity, that the court was able to make an informed determination of the request, and that the defendant’s request was patently without merit, the court may summarily deny the motion (*see People v Smith*, 122 AD3d 1300, 1301-1302 [4th Dept 2014], *lv denied* 25 NY3d 1172 [2015]). Furthermore, we perceive no abuse of discretion in the court’s denial of the request insofar as it was based on allegations of ineffective assistance of counsel, inasmuch as, aside from defendant’s unsupported and conclusory allegations of deficient representation, “ ‘nothing in the record casts doubt on the apparent effectiveness of counsel’ ” (*People v Watkins*, 77 AD3d 1403, 1404 [4th Dept 2010], *lv denied* 15 NY3d 956 [2010]; *see People v Raghnal*, 185 AD3d 1411, 1413 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *see generally People v Kurkowski*, 117 AD3d 1442, 1443-1444 [4th Dept 2014]). Contrary to defendant’s related contention, defense counsel did not take an adverse position on defendant’s request to withdraw the guilty plea, and therefore 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: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

475

CA 21-01093

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

IN THE MATTER OF THE APPLICATION OF
JOHN PENDERGRASS, PETITIONER-APPELLANT,

V — ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 25, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 14, 2022,

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

476
CA 21-01377

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

LEE LAMENDOLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ABDULAZIZ ALHARBI, DEFENDANT-RESPONDENT.

FRANK M. BOGULSKI, BUFFALO, FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JONATHAN D. COX OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered March 18, 2021. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when a vehicle operated by defendant collided with the vehicle plaintiff was driving. Supreme Court granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under the category alleged by him, i.e., the 90/180-day category (*see* Insurance Law § 5102 [d]). Plaintiff appeals, and we affirm.

We conclude that defendant met his initial burden of establishing as a matter of law that plaintiff did not sustain a serious injury under the 90/180-day category. Defendant submitted plaintiff's medical records, which revealed no abnormal findings on the CT scan and MRI, and also submitted the report of the examining physician, who concluded that there were no objective findings associated with plaintiff's claims of headache, lightheadedness, and difficulty with concentrating that were purportedly caused by the motor vehicle accident (*see Thornton v Husted Dairy, Inc.*, 134 AD3d 1402, 1403 [4th Dept 2015]). Contrary to plaintiff's contention, defendant's submission of the medical report of the physician who performed plaintiff's neurological evaluation does not create a question of fact inasmuch as the physician's findings were based solely on plaintiff's subjective complaints (*see generally Sierson v Gacek*, 67 AD3d 1431, 1432 [4th Dept 2009], *lv denied* 14 NY3d 704 [2010]).

In opposition to the motion, plaintiff failed to raise an issue

of fact (*see Thornton*, 134 AD3d at 1403). The deposition testimony of plaintiff that he was unable to return to work and could no longer participate in certain recreational activities as a result of his injuries is insufficient to raise a triable issue of fact, in the absence of " 'a physician's affidavit substantiating the existence of a medically determined injury which caused the alleged limitation of [his] activities' " (*Dann v Yeh*, 55 AD3d 1439, 1441 [4th Dept 2008]).

Entered: June 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

484
KA 17-00693
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ASON S. BARNES, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

LINDSEY M. PIEPER, ROCHESTER, 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 7, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and robbery in the first degree (§ 160.15 [4]). We affirm. Preliminarily, because defendant's challenges to the voluntariness of his plea would survive even a valid waiver of the right to appeal, we need not address the validity of that waiver in regard to those contentions (*see People v Gumpton*, 199 AD3d 1485, 1485 [4th Dept 2021]).

Defendant contends that his guilty plea was involuntary because, during the plea colloquy, County Court referenced only his right to a trial, not his right to a jury trial. As defendant correctly concedes, he failed to preserve that contention for our review (*see People v Williams*, 185 AD3d 1535, 1535 [4th Dept 2020], *lv denied* 35 NY3d 1116 [2020]; *People v Gillens*, 134 AD3d 655, 656 [1st Dept 2015]). In any event, defendant's contention is without merit. By informing defendant during the plea colloquy that, "[b]y giving up your right to trial, you're giving up your right to make the People . . . convince 12 people unanimously beyond a reasonable doubt that you're guilty" and that "[p]leading guilty is the same as if we had that trial and the jury convicted you," the court did actually inform defendant of his right to a jury trial. Moreover, "a detailed articulation and waiver of the three rights mentioned in *Boykin* is not constitutionally mandated" (*People v Harris*, 61 NY2d 9, 19 [1983]),

and a court's "omission of the word 'jury' in discussing a defendant's right to a trial does not, by itself, vitiate the validity of a guilty plea" (*People v Ayala*, 156 AD3d 547, 547 [1st Dept 2017]; *see e.g. People v Mendez*, 148 AD3d 555, 555 [1st Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *People v Gutierrez*, 140 AD3d 407, 408 [1st Dept 2016]).

Defendant further contends that his plea was involuntary because, during the plea colloquy, the court did not advise him that he would be forfeiting his right against self-incrimination by pleading guilty. Defendant failed to preserve that contention for our review (*see Williams*, 185 AD3d at 1535; *People v Velez*, 138 AD3d 418, 418 [1st Dept 2016], *lv denied* 27 NY3d 1140 [2016]). In any event, defendant's contention is without merit. Reviewing "the record as a whole and the circumstances of the plea in its totality," we conclude that the plea was knowing, intelligent, and voluntary (*People v Tucker*, 169 AD3d 1368, 1369 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019] [internal quotation marks omitted]; *see People v Walker*, 151 AD3d 569, 569 [1st Dept 2017]).

Defendant further contends that his guilty plea to robbery in the first degree should be vacated because his factual recitation did not affirmatively establish each and every element of that crime. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the factual sufficiency of the allocution, we nevertheless conclude that defendant failed to preserve that contention for our review and that this case does not fall within the rare exception to the preservation requirement (*see People v Carbone*, 199 AD3d 1489, 1490 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]; *cf. People v Roots*, 201 AD3d 1364, 1365 [4th Dept 2022]; *see generally People v Lopez*, 71 NY2d 662, 665-666 [1988]). In any event, that contention is without merit. "[A] defendant who pleads guilty need not 'acknowledge[] committing every element of the pleaded-to offense . . . or provide[] a factual exposition for each element of the pleaded-to offense' . . . [and a] plea will not be vacated where, as here, the defendant does not negate an element of the pleaded-to offense during the colloquy or otherwise cast doubt on his or her guilt or the voluntariness of the plea" (*People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017], quoting *People v Seeber*, 4 NY3d 780, 781 [2005]).

Finally, we note that the certificate of conviction incorrectly indicates that defendant was sentenced on February 7, 2016, and it must therefore be amended to reflect the correct sentencing date of February 7, 2017 (*see People v Miller*, 199 AD3d 1342, 1344 [4th Dept 2021], *lv denied* 37 NY3d 1163 [2022]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

489
KA 18-02069
PRESENT: LINDLEY, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE GAINES, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered December 11, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm. Preliminarily, as defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends that Supreme Court's suppression ruling violated the law of the case doctrine. In particular, defendant contends that because the court stated, in the course of granting him a suppression hearing, that he had standing to seek suppression of the subject gun, it was precluded from ultimately ruling, based on the evidence adduced at the suppression hearing, that defendant lacked standing to challenge the search in which the gun was recovered. Defendant failed to preserve that contention for our review (*see Matter of Piccillo*, 43 AD3d 1344, 1344 [4th Dept 2007]; *People v Chakrabarty*, 27 AD3d 657, 658 [2d Dept 2006], *lv denied* 7 NY3d 786 [2006]; *People v Smith*, 262 AD2d 77, 78 [1st Dept 1999], *lv denied* 93 NY2d 1027 [1999]). Indeed, by expressly acknowledging in his post-hearing memorandum that the issue of standing remained open for determination, defendant affirmatively "invited th[e] ostensible error" of which he now complains (*Matter of Travelers Cas. & Sur. Co. of Am. v Erie Canal Harbor Dev. Corp.*, 189 AD3d 2074, 2076 [4th Dept

2020]). In any event, defendant's contention is without merit. The court's initial assessment of defendant's standing was based solely on the motion papers, whereas the court's ultimate ruling on defendant's standing was based on the full record developed at the suppression hearing. Under these circumstances, the law of the case doctrine does not apply (*see Matter of Hersh*, 198 AD3d 766, 770 [2d Dept 2021], *lv denied* 37 NY3d 919 [2022]; *Gitman v Martinez*, 169 AD3d 1283, 1284-1285 [3d Dept 2019]; *Martinez v Paddock Chevrolet, Inc.*, 85 AD3d 1691, 1692-1693 [4th Dept 2011]; *Smith*, 262 AD2d at 78).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

490

KA 19-01031

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHLEIGH AUSTIN, 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 (Michael L. Dwyer, J.), rendered January 22, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). As an initial matter, we conclude that defendant's waiver of the right to appeal is invalid inasmuch as both the written waiver signed by defendant and County Court's oral waiver colloquy mischaracterized the nature of the right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jones*, 186 AD3d 1069, 1070 [4th Dept 2020]).

Defendant's contention that his right to due process was violated by the court's in camera review of the search warrant application is unpreserved for our review because defendant never objected to the in camera review on that ground (*see* CPL 470.05 [2]; *see generally People v Jackson*, 203 AD3d 1680, 1682 [4th Dept 2022]; *People v Resto*, 147 AD3d 1331, 1331-1332 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]), and we decline to exercise our power to reach that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We reject defendant's contention that the court erred in refusing to suppress evidence obtained pursuant to search warrants for defendant and his apartment. The court properly concluded that the

warrants were based on probable cause, inasmuch as they were "based on[, inter alia,] firsthand information from the officer who conducted the monitored, controlled drug buy . . . with a confidential informant, thereby establishing the informant's reliability" (*People v Long*, 100 AD3d 1343, 1346 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013] [internal quotation marks omitted]). Further, the court "properly relied on the ability of [the issuing court] to assess the credibility of the confidential informant" (*People v Demus*, 82 AD3d 1667, 1667 [4th Dept 2011], *lv denied* 17 NY3d 815 [2011]; *see Long*, 100 AD3d at 1346).

Contrary to defendant's further contention, we conclude that the bargained-for sentence is not unduly harsh or severe. Finally, we note that the court misstated at sentencing that defendant was being sentenced as a second felony offender, rather than as a second felony drug offender (*see* Penal Law § 70.71 [1] [b]; *see generally People v Manners*, 196 AD3d 1125, 1127 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]). Consequently, the certificate of disposition must be amended to reflect that defendant was sentenced as a second felony drug offender (*see Manners*, 196 AD3d at 1127).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

492

CAF 20-01287

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

IN THE MATTER OF BRANDY FOWLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIC FOWLER, RESPONDENT-APPELLANT.

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

MICHELLE M. SCUDERI, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Lewis County (Anthony M. Neddo, A.J.), entered August 25, 2020 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, found that respondent had violated an order of custody and parenting time.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, determined that he violated a prior order of custody and parenting time, which provided, as relevant here, that the parties were prohibited from disparaging each other in the presence of the child in a manner that might alienate the child's affection toward the other party and that they were prohibited from discussing litigation involving the child in her presence. Contrary to the father's contention, Family Court properly determined that he violated a lawful and unequivocal mandate of the court that was in effect, that he had actual knowledge of the terms of the prior order of custody and visitation, and that his actions caused prejudice to a right of the mother (*see Matter of Ferguson v LeClair*, 191 AD3d 1380, 1381 [4th Dept 2021], *appeal dismissed* 37 NY3d 926 [2021]; *Matter of Fruchthandler v Fruchthandler*, 161 AD3d 1151, 1153 [2d Dept 2018]). The evidence established that the father had knowledge of the terms of the order, that he nonetheless spoke to the child about upcoming proceedings that might alter her custody arrangement and also told the child that the mother engaged in certain inappropriate behavior while in the child's presence, and that his actions caused the mother's relationship with the child to deteriorate. Moreover, contrary to the father's assertion, a finding of willfulness by the court was not necessary (*see Matter of Menard v Roberts*, 194 AD3d 1427, 1428 [4th Dept 2021]). We have considered the father's remaining contentions

and conclude they are without merit.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

505
TP 21-00886
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

IN THE MATTER OF MARK DUBLINO, PETITIONER,

V ORDER

STEWART T. ECKERT, SUPERINTENDENT, WENDE
CORRECTIONAL FACILITY, RESPONDENT.

MARK DUBLINO, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered June 15, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

508

KA 18-01833

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN LUIS-GARCIA, ALSO KNOWN AS INDIO,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered April 13, 2018. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Fontanez-Baez*, 195 AD3d 1448, 1449 [4th Dept 2021], *lv denied* 37 NY3d 971 [2021]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see Fontanez-Baez*, 195 AD3d at 1449). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence (*see Fontanez-Baez*, 195 AD3d at 1449), we nevertheless conclude that the sentence is not unduly

harsh or severe.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

523.1
TP 21-01346
PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

IN THE MATTER OF SAMAH AHMED, PETITIONER,

V — ORDER

MICHAEL P. HEIN, COMMISSIONER, NEW YORK STATE
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE,
RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (LARRY E. WATERS, JR., OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Diane Y. Devlin, J.], entered April 30, 2021) to review a determination of respondent. The determination, among other things, determined that petitioner had committed an intentional program violation of the Public Assistance and SNAP programs and imposed a penalty.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 7 and 9, 2022,

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

550
KA 18-00302
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL D. DEVINE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered January 5, 2018. The judgment convicted defendant upon a jury verdict of robbery in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of robbery in the third degree (Penal Law § 160.05), defendant contends that County Court erred in determining following a pretrial hearing that the bank teller who witnessed the robbery had an independent basis for her in-court identification of defendant. We reject that contention. "[E]ven when an identification is the product of a suggestive pretrial identification procedure, a witness will nonetheless be permitted to identify a defendant in court if that identification is based upon an independent source" (*People v Campbell*, 200 AD2d 624, 625 [2d Dept 1994], *lv denied* 83 NY2d 869 [1994]; *see People v Woody*, 160 AD3d 1362, 1363 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Factors to consider in determining whether a witness has a sufficiently reliable independent basis for an identification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation" (*Neil v Biggers*, 409 US 188, 199-200 [1972]; *see People v Lopez*, 85 AD3d 1641, 1641 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]). Here, the bank teller's testimony established that her attention was on defendant during the entire robbery, that she was wearing her glasses while she observed him, that defendant stood only four feet from her, and that there were no lighting issues or obstructions that interfered with her ability to see defendant (*see People v Mallory*, 126 AD2d 750,

751 [2d Dept 1987]; *People v Magee*, 122 AD2d 227, 228 [2d Dept 1986]). The bank teller received biannual training on the responsibility of bank tellers during bank robberies and employed that training to provide police with a thorough and accurate description of defendant's race, gender, and clothing (*see People v Range*, 199 AD3d 1356, 1357 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]). Consequently, the court's determination is "supported by 'sufficient evidence' in the record" (*Lopez*, 85 AD3d at 1642, quoting *People v Yukl*, 25 NY2d 585, 588 [1969], *cert denied* 400 US 851 [1970]; *see People v Williams*, 115 AD3d 1344, 1345 [4th Dept 2014]).

Defendant's contention that the conviction is not supported by legally sufficient evidence on the issue of identity is not preserved for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). 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 generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that the People failed to establish his identity as the caller in a recorded jail telephone call. The call was made from an area of the jail in which defendant was located, and the caller identified himself as "Sammie" and stated that he had "hit" an "M&T joint." Under these circumstances, we conclude that defendant's identity as the caller is amply proven by the "substance of the conversation itself" (*People v Lynes*, 49 NY2d 286, 292 [1980]; *see People v Shapiro*, 227 AD2d 506, 507 [2d Dept 1996], *lv denied* 88 NY2d 1024 [1996]). Contrary to defendant's further contention that the court erred in admitting the jail call because it was the fruit of unlawful police conduct, we conclude that the jail call " 'sought to be suppressed is the product of an independent source entirely free and distinct from proscribed police activity' " (*People v Smith*, 202 AD3d 1492, 1495 [4th Dept 2022], quoting *People v Arnau*, 58 NY2d 27, 35 [1982], *cert denied* 468 US 1217 [1984]; *see People v Ashford*, 142 AD3d 1371, 1372 [4th Dept 2016]).

We also reject defendant's contention that the court erred in admitting in evidence GPS location data generated by a device attached to currency that was taken during the robbery and recovered from defendant. Although the court concluded that the officers did not have probable cause to search defendant at that time, the court further concluded that the officers had reasonable suspicion to detain defendant, and the court properly admitted in evidence the location data that was created by the device prior to any improper conduct by the apprehending officers (*see People v Richardson*, 155 AD3d 1595, 1596 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]). Moreover, the location data was cumulative of unchallenged GPS information from defendant's ankle bracelet that was also introduced in evidence at trial (*see e.g. People v Pizarro*, 151 AD3d 1678, 1680-1681 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *People v Wilson*, 267 AD2d 1061, 1062 [4th Dept 1999], *lv denied* 94 NY2d 908 [2000]), and any error in admitting it is harmless inasmuch as the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that the

verdict would have been different if the location data had been suppressed (*see People v Jiles*, 158 AD3d 75, 81 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]; *see generally People v Allen*, 24 NY3d 441, 450 [2014]; *People v Crimmins*, 36 NY2d 230, 237 [1975]).

Finally, the sentence is not unduly harsh or severe.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

553

KA 13-00797

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. TORRANCE, DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, 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 (Alex R. Renzi, J.), rendered February 11, 2013. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), defendant contends that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. We reject those contentions. In reviewing the legal sufficiency of the evidence, we must "determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Williams*, 84 NY2d 925, 926 [1994]). To meet their burden of proving defendant's constructive possession of the drugs and drug paraphernalia, the People were required to establish that defendant "exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband [was] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* Penal Law § 10.00 [8]; *People v Ponder*, 191 AD3d 1409, 1410 [4th Dept 2021]). Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "the circumstances here provided the jury with 'a sufficient basis . . . to conclude that . . . defendant [was] guilty of constructive possession' " of the drugs and drug paraphernalia (*People v Farmer*, 136 AD3d 1410, 1412 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016], quoting *People v*

Torres, 68 NY2d 677, 679 [1986]). Here, a tote bag found in the kitchen contained drug paraphernalia and paperwork with defendant's name on it, the drugs found on the shelf in the dining room were packaged in the same distinctive baggies that were located in the tote bag, defendant admitted to police that he lived at the residence, and an officer testified that the house had the characteristics of a drug house (*see People v Tucker*, 173 AD3d 1817, 1818 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019]; *People v Holland*, 126 AD3d 1514, 1515 [4th Dept 2015], *lv denied* 25 NY3d 1165 [2015]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his contention that verdict is repugnant inasmuch as he failed to object to the alleged repugnancy before the jury was discharged (*see People v Mateo*, 194 AD3d 1342, 1345 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

554
KA 17-00928
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JKENDRIC AGEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered March 9, 2017. The judgment convicted defendant upon a jury verdict of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that County Court committed an *O'Rama* violation that constituted a mode of proceedings error when it failed to give defense counsel an opportunity for input before responding to a note from the jury (*see People v O'Rama*, 78 NY2d 270, 277-278 [1991]). We reject that contention. "[T]he *O'Rama* procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). Here, "the only reasonable interpretation of the note in question" (*People v Mitchell*, 46 AD3d 480, 480 [1st Dept 2007], *lv denied* 10 NY3d 842 [2008]) is that the jury was requesting one of two exhibits. Defendant had previously agreed to the jury charge, which instructed jurors that they could request that any of the exhibits be provided to them during deliberations (*see* CPL 310.20 [1]; *People v Gelling*, 163 AD3d 1489, 1490-1491 [4th Dept 2018], *amended on rearg* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]). The jury's request thus "was nothing more than an inquiry of a ministerial nature . . . , unrelated to the substance of the verdict . . . As a result, the judge was not required to notify defense counsel nor provide them with an opportunity to respond, as neither defense counsel nor defendant could have provided a meaningful contribution" (*People v Ochoa*, 14 NY3d 180, 188 [2010]). The court therefore acted within its discretion by

responding to the note without input from the parties inasmuch as the court’s response “was simply a request for clarification as to what the jury wanted . . . [and] conveyed no information pertaining to the law or facts of the case” (*People v Lykes*, 81 NY2d 767, 770 [1993]; *see Ochoa*, 14 NY3d at 188 [2010]).

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

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

555

KA 17-02218

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNIE BUNTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 13, 2017. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), criminal trespass in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree under count three 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 two counts of assault in the second degree (Penal Law § 120.05 [3]) and one count each of criminal trespass in the second degree (§ 140.15 [1]) and resisting arrest (§ 205.30), arising from an incident in which he caused injury to two police officers as he attempted to evade arrest for unlawfully entering a residence.

We agree with defendant that the evidence is legally insufficient to support the conviction with respect to the physical injury element of the crime of assault in the second degree as charged in count three of the indictment. " 'Physical injury' means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Although pain is subjective, the Court of Appeals has cautioned that "the Legislature did not intend a wholly subjective criterion to govern" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]; *see People v Chiddick*, 8

NY3d 445, 447-448 [2007]). Here, the officer testified that he experienced “quite a bit of pain” to his “left upper thigh/groin area” after struggling with defendant when he resisted arrest and that his pain was a 6 or 7 out of 10 on the pain scale. There was only a vague description of the injury, and no medical records for the officer were introduced in evidence (*cf. People v Thompson*, 179 AD3d 474, 474 [1st Dept 2020], *lv denied* 35 NY3d 945 [2020]). In addition, there was no testimony that the officer took any pain medication for the injury (*cf. People v Talbott*, 158 AD3d 1053, 1054 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]), and the officer did not miss any work or testify that he was unable to perform any activities because of the pain. Viewing the evidence in the light most favorable to the People (*see People v Allen*, 36 NY3d 1033, 1034 [2021]), we conclude that it is legally insufficient to establish that the officer sustained physical injury (*see People v Zalevsky*, 82 AD3d 1136, 1137 [2d Dept 2011], *lv denied* 19 NY3d 978 [2012], *reconsideration denied* 19 NY3d 1106 [2012]; *People v Winchester*, 14 AD3d 939, 941 [3d Dept 2005], *lv denied* 5 NY3d 796 [2005]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), and we therefore modify the judgment by reversing that part convicting defendant of assault in the second degree under count three of the indictment and dismissing that count of the indictment.

Contrary to defendant’s further contention, viewing the evidence in light of the elements of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to the count of assault in the second degree under count two of the indictment (*see generally Bleakley*, 69 NY2d at 495).

Finally, we reject defendant’s contention that count four of the indictment, charging him with resisting arrest, was rendered duplicitous by the testimony at trial. The evidence establishes that defendant’s multiple actions to avoid arrest constitute a single, uninterrupted crime rather than a series of distinct criminal acts (*see People v Alonzo*, 16 NY3d 267, 269-270 [2011]; *cf. People v Bennett*, 52 AD3d 1185, 1186 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

556
CAF 21-01180
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

IN THE MATTER OF MCKINLEY H.-W.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

TINA M. KASPEREK, BATAVIA, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered August 4, 2021 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Same memorandum as in *Matter of McKinley H.-W. (Daniel W.)* ([appeal No. 2] — AD3d — [June 10, 2022] [4th Dept 2022]).

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

557
CAF 21-01452
PRESENT: WHALEN, P.J., SMITH, CENTRA, LINDLEY, AND BANNISTER, JJ.

IN THE MATTER OF MCKINLEY H.-W.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

TINA M. KASPEREK, BATAVIA, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas D. Williams, J.), entered September 27, 2021 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child and placed respondent under the supervision of petitioner.

It is hereby ORDERED that said appeal insofar as it concerns the disposition is unanimously dismissed and the order is modified on the law by vacating the finding that respondent neglected the child by failing to obtain medical care and treatment for the child, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent father appeals from an order of fact-finding determining, following a hearing, that he neglected the subject child (*see* Family Ct Act § 1012 [f] [i] [A], [B]) and, in appeal No. 2, the father appeals from a subsequent order of fact-finding and disposition. As an initial matter, the father's right of direct appeal from the order of fact-finding in appeal No. 1 terminated with the entry of the order of disposition in appeal No. 2, and we therefore dismiss appeal No. 1 (*see Matter of Juliette R. [Jordan R.T.]* [appeal No. 2], 203 AD3d 1678, 1678 [4th Dept 2022]; *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1441 [4th Dept 2022]). In addition, we dismiss the appeal from the order in appeal No. 2 insofar as it concerns the disposition inasmuch as that part of the order was entered upon the father's consent (*see Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]).

Contrary to the father's contention in appeal No. 2, we conclude that petitioner established by a preponderance of the evidence that the father neglected the child. It is well settled that "a party

seeking to establish neglect must show, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* § 1012 [f] [i]; *Matter of Chance C. [Jennifer S.]*, 165 AD3d 1593, 1594 [4th Dept 2018]). Here, petitioner established by a preponderance of the evidence that the father neglected the child when he cut the bottom of the child's toe with a sword. Contrary to the father's contention, the child's out-of-court statement was adequately corroborated by, inter alia, testimony from the child's mother and petitioner's caseworker who observed the injury to the child (*see Matter of Terazay S. [Yazaret T.]*, 180 AD3d 487, 487-488 [1st Dept 2020]; *Matter of Grace M. [Leighton M.]*, 180 AD3d 912, 914 [2d Dept 2020]; *Matter of Samuel W. [Luemay F.]*, 160 AD3d 755, 756 [2d Dept 2018]), the testimony of the mother that the child and the father were in a bedroom together just minutes before the child reported the injury, and the mother's testimony that the father kept a sword in a closet in that bedroom (*see generally Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]).

We agree with the father, however, that petitioner failed to establish by a preponderance of the evidence that the father neglected the child by failing to obtain medical care and treatment for the child after he was cut, and we therefore modify the order by vacating that finding (*see generally Noah C.*, 192 AD3d at 1678). The mother testified that she and the father tended to the child's injury by washing the area with a washcloth, putting ointment on the cut, and bandaging the area. Petitioner's caseworker testified that she instructed the mother two days after the incident to have the child seen by a doctor, which she did, and the mother testified that the doctor treated the injury the same way the parents had, i.e., by cleaning it, placing ointment on it, and bandaging it. There was no testimony that the failure to seek immediate medical care impaired or threatened to impair the child's health (*see Matter of Ashlynn R. [Maria R.]*, 189 AD3d 647, 648 [1st Dept 2020]; *Matter of Vallery P. [Jondalla P.]*, 106 AD3d 575, 575 [1st Dept 2013]; *Matter of Miranda O.*, 294 AD2d 940, 941 [4th Dept 2002]; *see generally Matter of Hofbauer*, 47 NY2d 648, 656 [1979]).

Contrary to the father's further contention, petitioner established by a preponderance of the evidence that the child's mental or emotional condition was impaired or was in imminent danger of becoming impaired by his exposure to domestic violence (*see Matter of Trinity B.-S. [William R.N.]*, 198 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; *Matter of Angelia S. [Jesus S.]*, 181 AD3d 680, 681 [2d Dept 2020]; *see generally Nicholson*, 3 NY3d at 371).

We have considered the father's remaining contention and conclude

that it is without merit.

Entered: June 10, 2022

Ann Dillon Flynn
Clerk of the Court