SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS IN ATTORNEY DISCIPLINARY MATTERS

SEPTEMBER 29, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED SEPTEMBER 29, 2023

_____	252/22	CA 21 00883	TAMMY SPENCER V ADNAN SIDDIQUI
_____	592	TP 23 00496	DOE 1 V STATE UNIVERSITY OF NEW YORK AT BUFFALO
_____	593	TP 23 00552	MICHELLE GABBARD V NEW YORK STATE OFFICE OF CHILDR
_____	594	KA 21 00850	PEOPLE V COURTNEY MCDONELL
_____	597	KA 20 00328	PEOPLE V BRANDON JONES
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_____	602	CAF 21 01810	Mtr of IVVORIE-ANN W.
_____	604	CA 22 01303	ERIE COUNTY MEDICAL CENTER V CATHY J. BYSTRAK
_____	607	CA 22 01425	DONALD E. WILKINS V STEVEN WRIGHT
_____	609	CA 22 00917	SANDRA MYERS V BRIAN KARASZEWSKI, M.D.
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_____	612	CA 22 01313	CELLINO LAW, LLP V LOONEY INJURY LAW PLLC
_____	613	CA 22 01320	CELLINO LAW, LLP V LOONEY INJURY LAW PLLC
_____	614	KA 21 00695	PEOPLE V GAMEL WILLIAMS
_____	615	KA 21 00696	PEOPLE V GAMEL WILLIAMS
_____	616	KA 22 01212	PEOPLE V GAMEL WILLIAMS
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_____	621	KA 15 00164	PEOPLE V DAYQUANE T. COLEY
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_____	648	CA 22 01725	COBRA INDUSTRIAL MAINTENANCE, LLC V COLONY INSURANCE COMPANY
_____	649	CA 22 01952	SARAH HAYES V HILLSIDE FAMILY OF AGENCIES
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_____	652	CA 22 01358	SHERYL L. LEWCZYK V SAFECO INSURANCE COMPANY OF AM
_____	657	CA 22 01794	A. S. V ERIE COUNTY
_____	659	KA 21 00382	PEOPLE V MICHAEL J. CISKIEWIC
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_____	672	CAF 22 00534	Mtr of CARTER B.
_____	679	CA 22 01311	THOMAS R. WHELAN V BUFFALO MUNICIPAL HOUSING AUTHO
_____	684	KA 22 00807	PEOPLE V MARCUS CURRINGTON
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_____	688	KA 21 00158	PEOPLE V JA'QUON SNELL
_____	689	KA 21 01272	PEOPLE V LEVERT J GILES
_____	690	CAF 21 01271	JOHN H. FREDERICK V ASHLEY R. SNYDER
_____	695	CAF 22 00282	LATISHA KEYES V MISTER WAHABBI HALTON
_____	696	CAF 22 00161	CHARLES REARDON V CYNTHIA KRAUSE
_____	703	CA 22 00832	ANGEL BLACK V STATE OF NEW YORK
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_____	719	CA 22 00570	ANTHONY CORTES V STATE OF NEW YORK
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_____	732	CAF 22 01041	Mtr of RANIYA P.
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_____	735	CA 22 00887	BRIGHTON GRASSROOTS, LLC V TOWN OF BRIGHTON ZONIN
_____	736	CA 22 01160	DANIEL CHARCHOLLA V CHANNEL 13 NEWS
_____	745	CA 23 00608	MARIA KARIMOVA V PROGRESSIVE INSURANCE COMPANY

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

252/22

CA 21-00883

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

TAMMY SPENCER, PLAINTIFF-RESPONDENT,

V ORDER

ADNAN SIDDIQUI, UNIVERSITY AT BUFFALO NEUROSURGERY, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SILBERSTEIN, AWAD & MIKLOS, P.C., GARDEN CITY (VERONICA K. SEWNARINE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 20, 2021. The order denied in part the motion of defendants Adnan Siddiqui and University at Buffalo Neurosurgery, Inc. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 28, 2023,

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

592

TP 23-00496

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

IN THE MATTER OF DOE 1, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

LIPSITZ GREENE SCIME CAMBRIA, LLP, BUFFALO (BARRY N. COVERT OF COUNSEL), AND THE LAW OFFICE OF STEPHANIE ADAMS, PLLC, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH 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 [Donna M. Siwek, J.], entered March 10, 2023), to review a determination of respondent. The determination found that petitioner had violated respondent's student code of conduct.

It is hereby ORDERED that the determination so appealed from is unanimously annulled on the law without costs, the petition is granted, and respondent is directed to expunge all references to this matter from petitioner's school record.

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner, a former student at respondent, seeks, inter alia, to annul a determination finding him responsible for a violation of the prohibition against sexual violence in respondent's student code of conduct (Code of Conduct). Following an administrative hearing and administrative appeal, respondent expelled petitioner and placed a notation on his transcript.

"Judicial scrutiny of the determination of disciplinary matters between a university and its students, or student organizations, is limited to determining whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious" (*Matter of Rensselaer Socy. of Engrs. v Rensselaer Polytechnic Inst.*, 260 AD2d 992, 993 [3d Dept 1999]; *see Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 295 AD2d 944, 944 [4th Dept 2002]).

Here, we agree with petitioner that respondent departed from its

own published rules and guidelines by adjudicating the alleged misconduct under the Code of Conduct rather than its Title IX Grievance Policy (Title IX Policy). Respondent's Title IX Policy was established pursuant to 34 CFR 106.44 (b) (1), which requires as relevant here that respondent, in response to a formal complaint, follow a grievance process that complies with 34 CFR 106.45 if it seeks to impose disciplinary sanctions against someone accused of "sexual harassment," a term that encompasses petitioner's alleged misconduct (34 CFR 106.30 [a]). Although respondent was permitted to dismiss the formal Title IX complaint against petitioner after his withdrawal from the university (*see id.* § 106.45 [b] [3] [ii]), respondent was nevertheless bound to apply the grievance procedure set forth in § 106.45 if it sought to impose a disciplinary sanction for the alleged misconduct (*see id.* § 106.44 [a]; *see also* § 106.45 [b] [1]).

We further agree with petitioner that the questioning procedure provided at the Code of Conduct hearing substantially departed from the questioning procedure set forth in the Title IX Policy, and that the departure rendered respondent's disciplinary determination arbitrary and capricious (*see generally Matter of A.E. v Hamilton Coll.*, 173 AD3d 1753, 1755 [4th Dept 2019]; *Matter of Doe v Skidmore Coll.*, 152 AD3d 932, 940 [3d Dept 2017]). Respondent's Title IX Policy, which codifies the regulatory requirements in 34 CFR 106.45 (b) (6) (i), entitles "[e]ach party's advisor [to] conduct live cross-examination of the other party or parties and witnesses . . . in real time." However, respondent made the disciplinary determination based on its Code of Conduct questioning procedure, which prohibits live cross-examination and instead limits the parties to submitting written questions to hearing officers in advance of the hearing. "Inasmuch as the United States Supreme Court has recognized that the right to ask questions of an accuser or witness is a significant and critical right" (*A.E.*, 173 AD3d at 1755; *see generally Chambers v Mississippi*, 410 US 284, 295 [1973]), and inasmuch as the application of the procedure set forth in the Code of Conduct significantly impeded that right as outlined in the Title IX Policy, we conclude that respondent failed to substantially adhere to its own published rules and guidelines. We therefore annul the determination that petitioner violated the Code of Conduct, grant the petition, and direct respondent to expunge all references to this matter from petitioner's school record.

We have considered petitioner's remaining contentions and conclude that they are without merit or are academic in light of our determination.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

593

TP 23-00552

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

IN THE MATTER OF MICHELLE M. GABBARD, PETITIONER,

V ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, MONROE COUNTY DEPT. OF SOCIAL SERVICES, AND NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, RESPONDENTS.

CHARLES D. STEINMAN, ESQ., PLLC, FAIRPORT (CHARLES D. STEINMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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 [Gail Donofrio, J.], entered November 18, 2022), to review a determination of respondent New York State Office of Children and Family Services. The determination denied petitioner’s application to amend an indicated report of maltreatment to unfounded.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

594

KA 21-00850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COURTNEY MCDONELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 17, 2019. The judgment convicted defendant upon a plea of guilty of attempted course of sexual conduct against a child.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted course of sexual conduct against a child (Penal Law §§ 110.00, 130.75 [1] [a]). We affirm.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of her challenge to the severity of her sentence (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lovines*, 208 AD3d 1639, 1639 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Defendant also contends that County Court lost jurisdiction to impose sentence based on the seven-month delay between the entry of the plea and sentencing. That contention is unpreserved for our review inasmuch as defendant did not object to the delay in County Court, nor did she move to dismiss the indictment on that ground (*see People v Guichard*, 194 AD3d 745, 745 [2d Dept 2021], *lv denied* 37 NY3d 972 [2021]; *People v Vasquez*, 168 AD3d 1185, 1186 [3d Dept 2019], *lv denied* 33 NY3d 954 [2019]; *see generally* CPL 470.05 [2]). 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]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

597

KA 20-00328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON JONES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Erie County Court (James F. Bargnesi, J.), rendered September 1, 2020. Defendant was resentenced upon his conviction of manslaughter in the first degree.

It is hereby ORDERED that the resentence 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]). Although the notice of appeal is taken from the judgment rendered January 31, 2020, and not the resentence on September 1, 2020, we exercise our discretion to treat the appeal as taken from the resentence (*see* CPL 460.10 [6]; *People v Hennigan* [appeal No. 1], 145 AD3d 1528, 1528 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017]). 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]; *People v Stephens*, 189 AD3d 2142, 2142 [4th Dept 2020]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of his resentence (*see Stephens*, 189 AD3d at 2142; *Alls*, 187 AD3d at 1515), we conclude that the resentence is not unduly harsh or severe.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

599

KA 17-02030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY THOMPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered October 26, 2016. The judgment convicted defendant upon a plea of guilty of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs and aggravated unlicensed operation of a motor vehicle 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 driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, as a class E felony (DWAI) (Vehicle and Traffic Law §§ 1192 [4-a]; 1193 [1] [c] [i] [A]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a]). We affirm.

Initially, as defendant contends and as the People correctly concede, defendant's waiver of the right to appeal is invalid. Here, there is no basis in the record upon which to conclude that County Court "ensured 'that . . . defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Robbins*, 213 AD3d 1278, 1279 [4th Dept 2023]). In addition, the court mischaracterized the waiver as an "absolute bar" to the taking of an appeal (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Marshall*, 214 AD3d 1360, 1361 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023]).

Defendant also contends that his plea was not knowingly,

voluntarily, and intelligently entered and that the allocution with respect to DWAI was factually insufficient. Although his voluntariness contention would survive even a valid waiver of the right to appeal (*see People v Nelson*, 206 AD3d 1703, 1703-1704 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *People v Barzee*, 204 AD3d 1422, 1422 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *see generally People v Seaberg*, 74 NY2d 1, 10 [1989]), defendant failed to move to withdraw his plea or to vacate the judgment of conviction on the grounds now advanced on appeal, and therefore he failed to preserve his contentions for our review (*see Barzee*, 204 AD3d at 1423). We further conclude that the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case. We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

602

CAF 21-01810

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

IN THE MATTER OF IVVORIE-ANN W.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

SAMANTHA N.M., RESPONDENT-APPELLANT,
AND DONALD L.W., III, RESPONDENT.

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

CHRISTINE S. KIESEL, SAUQUOIT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered October 15, 2021, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject child.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

604

CA 22-01303

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, AND DELCONTE, JJ.

ERIE COUNTY MEDICAL CENTER CORPORATION,
PLAINTIFF-RESPONDENT,

V ORDER

CATHY J. BYSTRAK, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (JOHN A. BARGNESI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered August 11, 2022. The order, insofar as appealed from, denied the motion of defendant Cathy J. Bystrak for summary judgment dismissing the complaint.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

607

CA 22-01425

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

DONALD E. WILKINS AND DREMA K. WILKINS,
PLAINTIFFS,

V ORDER

STEVEN WRIGHT, STEVEN WRIGHT, DOING BUSINESS
AS SJW CONSTRUCTION, SJW CONSTRUCTION, LLC,
AND S&J CONSTRUCTION AND REMODELING, LLC,
DEFENDANTS-RESPONDENTS.

MAIN STREET AMERICA ASSURANCE CO.,
NONPARTY-APPELLANT.

PILLINGER MILLER TARALLO, LLP, ELMSFORD (DANIEL O. DIETCHWEILER OF COUNSEL), FOR NONPARTY-APPELLANT.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered February 9, 2022. The order recused a law firm from its representation of defendant Steven Wright, doing business as SJW Construction, and directed Main Street America Assurance Co. to appoint independent counsel selected by defendant Steven Wright to appear and defend the case with the costs and reasonable attorney's fees to be borne by Main Street America Assurance Co.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

609

CA 22-00917

PRESENT: WHALEN, P.J., MONTOUR, OGDEN, AND DELCONTE, JJ.

SANDRA MYERS AND DAVID MYERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

BRIAN KARASZEWSKI, M.D., INVISION HEALTH, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

HURWITZ FINE P.C., BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 30, 2022. The order, among other things, denied the motion of defendants Brian Karaszewski, M.D. and Invision Health, LLC for summary judgment dismissing all claims against them.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

610

CA 22-01798

PRESENT: WHALEN, P.J., MONTOUR, OGDEN, AND DELCONTE, JJ.

SANDRA MYERS AND DAVID MYERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

BRIAN KARASZEWSKI, M.D., INVISION HEALTH, LLC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

HURWITZ FINE P.C., BUFFALO (STEPHEN M. SORRELS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 30, 2022. The order, among other things, precluded defendants Brian Karaszewski, M.D. and Invision Health, LLC from asserting their cross-claims and CPLR article 16 defense against certain defendants.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

612

CA 22-01313

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

IN THE MATTER OF CELLINO LAW, LLP, AND
CELLINO & BARNES, P.C.,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

LOONEY INJURY LAW PLLC, AND JOHN W.
LOONEY, ESQ., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CELLINO LAW, LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 2, 2022. The order denied respondents' motion to, inter alia, disqualify the Supreme Court Justice assigned to this case.

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

Memorandum: These consolidated appeals relate to a dispute between law firms over attorneys' fees arising from legal services provided to a plaintiff in a personal injury action. In appeal No. 1, respondents appeal from an order that, inter alia, denied that part of their motion seeking disqualification of the Supreme Court Justice assigned to this case. In appeal No. 2, respondents appeal from an order that, after a hearing, apportioned them 5% of the net contingent attorneys' fee and apportioned the remaining 95% to petitioners. We affirm in both appeals.

With respect to appeal No. 1, we conclude that Supreme Court did not abuse its discretion in denying the motion insofar as it sought recusal. Where, as here, there is no "legal disqualification, . . . a [j]udge is generally the sole arbiter of recusal . . . , and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion" (*Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021] [internal quotation marks omitted]; *see People v Moreno*, 70 NY2d 403, 405-406 [1987]; *Matter of Indigo S. [Rajea S.T.]*, 213 AD3d 1205, 1205 [4th Dept 2023]). On this record, we conclude that there is nothing

demonstrating "any bias on the court's part [that] unjustly affected the result to the detriment of [respondents] or that the court [had] a predetermined outcome of the case in mind during the hearing" (*Matter of Cameron ZZ. v Ashton B.*, 183 AD3d 1076, 1081 [3d Dept 2020], *lv denied* 35 NY3d 913 [2020] [internal quotation marks omitted]; *see Allison*, 199 AD3d at 1491-1492; *see generally* 22 NYCRR 100.3 [E] [1]). Thus, we perceive no abuse of discretion by the court in denying respondents' motion insofar as it sought disqualification (*see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1669-1670 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]). We have considered respondents' remaining contention in appeal No. 1 and conclude that it does not warrant reversal or modification of that order.

With respect to appeal No. 2, we reject respondents' contention that the court abused its discretion in allocating the attorneys' fees award. In fixing the percentages to be awarded to petitioners and respondents, the court properly considered the amount of time each of the involved firms spent on the case, the nature of the work performed, the relative contributions of counsel, the quality of the services rendered, and the amount recovered (*see Tarolli v Jervis B. Webb Co.*, 195 AD3d 1385, 1385 [4th Dept 2021]; *Cellino & Barnes, P.C. v York* [appeal No. 2], 170 AD3d 1658, 1658-1659 [4th Dept 2019]; *see generally Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

613

CA 22-01320

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

IN THE MATTER OF CELLINO LAW, LLP, AND CELLINO & BARNES, P.C., PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

LOONEY INJURY LAW PLLC, AND JOHN W. LOONEY, ESQ., RESPONDENTS-APPELLANTS. (APPEAL NO. 2.)

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CELLINO LAW, LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 1, 2022. The order, inter alia, determined and allocated the parties' respective shares of attorneys' fees earned in an underlying personal injury action.

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

Same memorandum as in *Matter of Cellino Law, LLP v Looney Injury Law PLLC* ([appeal No. 1] — AD3d — [Sept. 29, 2023] [4th Dept 2023]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

614

KA 21-00695

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAMEL WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 8, 2019. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from four judgments convicting him, upon his pleas of guilty, of various crimes. In appeal No. 1, defendant was convicted of burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, defendant was convicted of attempted burglary in the third degree (§§ 110.00, 140.20), petit larceny (§ 155.25), and two counts of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). In appeal No. 3, defendant was convicted of four counts of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). In appeal No. 4, defendant was convicted of two counts of attempted burglary in the second degree (§§ 110.00, 140.25 [2]). We affirm in each appeal.

As defendant contends and the People correctly concede in each appeal, 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]; *People v Cole*, 201 AD3d 1360, 1360-1361 [4th Dept 2022]; *People v Porterfield*, 192 AD3d 1662, 1662 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]). Nevertheless, we conclude that the sentence in each appeal is not unduly harsh or severe.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

615

KA 21-00696

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAMEL WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 8, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree, petit larceny and attempted burglary in the second degree (two counts).

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

Same memorandum as in *People v Williams* ([appeal No. 1] — AD3d — [Sept. 29, 2023] [4th Dept 2023]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

616

KA 22-01212

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAMEL WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 8, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (four counts).

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

Same memorandum as in *People v Williams* ([appeal No. 1] — AD3d — [Sept. 29, 2023] [4th Dept 2023]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

617

KA 22-01213

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAMEL WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 8, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts).

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

Same memorandum as in *People v Williams* ([appeal No. 1] — AD3d — [Sept. 29, 2023] [4th Dept 2023]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

619

KA 21-01539

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR CEPEDA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 1, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm. Preliminarily, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Pinet*, 201 AD3d 1370, 1370 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]; *People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

We conclude that County Court did not abuse its discretion in declining to adjudicate defendant a youthful offender (*see People v Simpson*, 182 AD3d 1046, 1047 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). In addition, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him such status (*see Simpson*, 182 AD3d at 1047; *People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]; *cf. Keith B.J.*, 158 AD3d at 1161). Finally, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

621

KA 15-00164

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAYQUANE T. COLEY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Francis A. Affronti, J.), rendered September 16, 2014. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree, assault in the second degree, and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the second degree (§ 120.05 [6]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), stemming from defendant shooting one victim and shooting and killing a second victim during a purported drug transaction. Defendant contacted the first victim to purchase marihuana and, when the two victims arrived in a vehicle at the scheduled location, defendant entered the back seat of the vehicle and shot the victims.

Defendant contends that his right to confrontation was violated when Supreme Court denied his motion to preclude reference to statements made by the codefendant. The codefendant told the investigators that, inter alia, he gave defendant a gun before defendant entered the victims' vehicle. The investigators confronted defendant with those statements during their interview with defendant, and a recording of that interview was introduced in evidence. We agree with defendant that the court erred in denying the motion. " '[T]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted' " (*People v Reynoso*, 2 NY3d 820, 821 [2004]). In opposing the motion, the People argued, and the court agreed, that

the codefendant's statements were admissible for the nonhearsay purpose of showing the state of mind of the investigators, specifically, that the investigators wanted to get defendant to admit to something (*see generally id.*). But there was no reason to show the investigators' state of mind when they were questioning defendant using the codefendant's statements; their state of mind was simply not relevant to any issue in the case. Unlike in *Reynoso*, nothing was said by defense counsel during opening statements that required the jury to consider the investigators' state of mind when using the codefendant's statements (*cf. People v Reynoso*, 309 AD2d 769, 770-771 [2d Dept 2003], *affd* 2 NY3d 820 [2004]). In addition, contrary to the further contention of the People, the codefendant's statements were not relevant to show the circumstances surrounding the interrogation and why the interrogation proceeded because at trial the defense did not raise issues concerning the voluntariness of defendant's statement or the length or circumstances of the interrogation (*cf. People v Glover*, 195 AD2d 999, 999 [4th Dept 1993], *lv denied* 82 NY2d 849 [1993]). In addition, unlike in the other cases cited by the court, defendant here did not make any further admissions after being confronted with the codefendant's statements (*cf. People v Davis*, 87 AD3d 1332, 1335 [4th Dept 2011], *lv denied* 18 NY3d 858 [2011], *reconsideration denied* 18 NY3d 956 [2012]; *People v Lewis*, 11 AD3d 954, 955 [4th Dept 2004], *lv denied* 3 NY3d 758 [2004]). Here, after being confronted with the codefendant's statements, defendant simply stated that the codefendant was lying.

We therefore conclude that the court erred in denying the motion inasmuch as no relevant nonhearsay purpose for introducing the codefendant's statements was identified (*see People v McEaddy*, 41 AD3d 877, 879 [3d Dept 2007]). We nevertheless conclude that the error is harmless (*see People v Douglas*, 4 NY3d 777, 779 [2005]; *People v Green*, 43 AD3d 1279, 1280-1281 [4th Dept 2007], *lv denied* 9 NY3d 1034 [2008]). The evidence was overwhelming, and there was no reasonable possibility that the error contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). In addition to the testimony of the first victim, who identified defendant as the person who shot him and the second victim, there was surveillance video showing a man entering and exiting the victims' vehicle, and defendant admitted to the investigators that he was the person depicted in the video entering and exiting the vehicle. Further, in a recorded jail call made shortly after his interview with the police, defendant told a third party that the police "have the video" and have "everything that happened."

Defendant next contends that the court erred in failing to comply with the procedure set forth in *People v O'Rama* (78 NY2d 270 [1991]) with respect to jury note No. 8 inasmuch as the court did not advise defense counsel of the note. We reject that contention. The note requested the first victim's written statement to an investigator, which was not admitted in evidence. Thus, "the note only necessitated the ministerial action of informing the jury that a requested item was not in evidence" (*People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]; *see People v Edwards*, 191 AD3d

1377, 1378 [4th Dept 2021], *lv denied* 36 NY3d 1119 [2021]), and the *O'Rama* procedure was not implicated because the request was ministerial in nature (*see People v Nealon*, 26 NY3d 152, 161 [2015]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

623

KA 19-01367

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN COLON, DEFENDANT-APPELLANT.

JESSICA KULPIT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered April 16, 2019. The judgment convicted defendant upon a jury verdict 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 a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, County Court did not err in denying defendant's request to charge the jury on manslaughter in the second degree (§ 125.15 [1]). Although manslaughter in the second degree is a lesser included offense of murder in the second degree (§ 125.25 [1]), i.e., the charge for which defendant was originally indicted (*see* CPL 1.20 [37]; *People v Rivera*, 23 NY3d 112, 120 [2014]; *People v Alvaradoajcuc*, 142 AD3d 1094, 1094 [2d Dept 2016], *lv denied* 28 NY3d 1122 [2016]; *see generally People v Benson*, 265 AD2d 814, 815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]), there is no reasonable view of the evidence that would support the idea that defendant's conduct in firing seven rounds into a vehicle at close range was reckless and did not evidence an intent to kill or to cause serious physical injury (*see generally People v Glover*, 57 NY2d 61, 64 [1982]). Three of the bullets struck the victim, killing him almost instantly, while the other bullets struck the victim's vehicle in close proximity to where the victim was sitting.

Generally, where a defendant fires multiple shots at a victim from close range, there is no reasonable view of the evidence that the defendant's conduct was unintentional (*see e.g. People v Bailey*, 181 AD3d 1172, 1174 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]; *People v Ware*, 303 AD2d 173, 174 [1st Dept 2003], *lv denied* 100 NY2d 543 [2003]). Here, however, defendant contends that, inasmuch as shots

were fired from one moving vehicle into another moving vehicle, there is a reasonable view of the evidence that would support the determination that his acts were reckless. We reject that contention. The testimony and other evidence established that defendant saw the victim's vehicle traveling on a roadway, sped up and strategically positioned his vehicle next to the victim's moving vehicle, matched his vehicle's speed to the speed of the victim's vehicle, rolled down his passenger window and, from close range, fired up to seven times at the victim (*see e.g. Bailey*, 181 AD3d at 1174; *People v Stanford*, 87 AD3d 1367, 1368 [4th Dept 2011], *lv denied* 18 NY3d 886 [2012]; *People v Seeler*, 63 AD3d 1595, 1596 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *cf*. *People v Quick*, 187 AD3d 1612, 1612-1613 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]). In our view, those actions evidence an intent to kill or seriously injure the victim and not, as defendant suggests, an intent to merely scare him.

We reject defendant's further contention that the court erred in denying his motion for a mistrial after a prosecution witness provided *Molineux* testimony that had not been the subject of any pretrial notices or hearings. "[T]he decision [whether] to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292 [1981]; *see People v Brooks*, 214 AD3d 1425, 1426 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]; *People v McGee*, 194 AD3d 1454, 1455 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]). Here, we conclude that "the court did not abuse its discretion in denying defendant's motion for a mistrial and instead sustaining defendant's objection to the improper testimony, striking it from the record, and providing the jury with a curative instruction directing them to disregard the improper testimony, which the jury is presumed to have followed" (*Brooks*, 214 AD3d at 1426 [internal quotation marks omitted]; *see McGee*, 194 AD3d at 1455).

Finally, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction of manslaughter in the first degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, 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 Bleakley*, 69 NY2d at 495).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

626

KA 22-00020

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS L. BRYANT, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM 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 (Brian D. Dennis, J.), rendered November 30, 2021. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for resentencing in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant pleaded guilty and was placed on interim probation on October 13, 2020. At the scheduled sentencing date of September 21, 2021, County Court indicated to the parties that, based on information it received from an interim probation summary report prepared by defendant's probation officer, the court wanted to hold a hearing on whether defendant had complied with the terms of interim probation. A hearing was held on November 3, 2021, and defendant was sentenced on November 30, 2021 to a period of probation.

Defendant contends that the court lost jurisdiction to impose sentence based on the length of time that elapsed between the guilty plea and the sentencing hearing. Initially, we note that defendant does not contend that sentencing was unreasonably delayed in violation of CPL 380.30 (1) (*see generally People v Drake*, 61 NY2d 359, 364-367 [1984]; *People v Reyes*, 15 AD3d 868, 869 [4th Dept 2005], *amended on rearg* 16 AD3d 1179 [4th Dept 2005]). Rather, relying on CPL 390.30 (6), defendant contends that the court lacked jurisdiction to sentence him more than one year from the date of conviction. CPL 390.30 provides in relevant part that, "[i]n any case where the court determines that a defendant is eligible for a sentence of probation,

the court, after consultation with the prosecutor and upon the consent of the defendant, may adjourn the sentencing to a specified date and order that the defendant be placed on interim probation supervision. *In no event may the sentencing be adjourned for a period exceeding one year from the date the conviction is entered*, except that upon good cause shown, the court may, upon the defendant's consent, extend the period for an additional one year where the defendant has agreed to and is still participating in a substance abuse treatment program in connection with a . . . drug court" (CPL 390.30 [6] [a] [emphasis added]). We reject defendant's contention inasmuch as nothing in CPL 390.30 (6) (a) states that a failure to sentence a defendant within one year of the date of conviction is a jurisdictional defect or that sentencing after that one-year period is prohibited (*see generally People v Velez*, 19 NY3d 642, 647-648 [2012]; *People v Manor*, 134 AD3d 1400, 1401 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]; *People v Langenbach*, 106 AD3d 1338, 1338 [3d Dept 2013], *lv denied* 21 NY3d 1043 [2013]).

Defendant next contends that the purported five-year period of probation imposed by the court at sentencing is unduly harsh and severe and should be reduced to three years (*see* Penal Law §§ 70.70 [2] [b]; 65.00 [3] [a] [i]). Although the certificate of conviction states that the period of probation is five years, the court did not specify the length of the term of probation at sentencing. We therefore modify the judgment by vacating the sentence and remitting the matter to County Court for resentencing (*see People v Petrangelo*, 159 AD3d 1559, 1560 [4th Dept 2018]). In light of our determination, defendant's challenge to the sentence is academic.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

627

KA 17-00937

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD K. BAKER, DEFENDANT-APPELLANT.

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

RONALD K. BAKER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered March 10, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated assault upon a police officer or a peace officer.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11). We affirm.

Preliminarily, as defendant contends in his main brief and as the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Supreme Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Shanks*, 37 NY3d 244, 253 [2021]; *People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends in his main brief that the police engaged in improper pre-*Miranda* custodial interrogation and, as a result, his post-*Miranda* statements should have been suppressed. Defendant failed

to preserve that contention for our review, however, because he did not raise that particular ground in either his suppression motion or at the hearing (*see People v Panton*, 27 NY3d 1144, 1145 [2016]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Caballero*, 23 AD3d 1031, 1032 [4th Dept 2005], *lv denied* 6 NY3d 846 [2006]). Defendant's related contention in his main brief that he was denied effective assistance of counsel by defense counsel's failure to seek suppression of his statements on *Miranda* grounds does not survive his guilty plea inasmuch as defendant "failed to demonstrate that the plea bargaining process was infected by the allegedly ineffective assistance or that he entered the plea because of defense counsel's allegedly poor performance" (*People v Alsaifullah*, 162 AD3d 1483, 1485-1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]; *see People v Williams*, 210 AD3d 1507, 1507-1508 [4th Dept 2022], *lv denied* 39 NY3d 1081 [2023]; *see generally People v Petgen*, 55 NY2d 529, 534-535 [1982], *rearg denied* 57 NY2d 674 [1982]).

Defendant further contends in his main brief that he was deprived of a reasonable opportunity to advance his arguments in support of his pro se motion to withdraw his guilty plea. We reject that contention. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[s] largely in the discretion of the Judge to whom the motion is made' " (*People v Brown*, 14 NY3d 113, 116 [2010], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Manor*, 27 NY3d 1012, 1013-1014 [2016]). "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present [their] contentions and the court should be enabled to make an informed determination" (*Tinsley*, 35 NY2d at 927). Here, the record establishes that defendant was afforded such an opportunity and that the court was able to make an informed determination of the motion (*see People v Weems*, 203 AD3d 1684, 1684 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]; *People v Soriano*, 178 AD3d 1376, 1377 [4th Dept 2019], *lv denied* 34 NY3d 1163 [2020]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]).

Defendant's contention that he was coerced into pleading guilty by an overcharge in the indictment and by the court's emphasis on the potential sentence that could be imposed after a trial is not preserved for our review because defendant did not raise those particular arguments in his motion to withdraw the plea (*see People v Saccone*, 211 AD3d 1520, 1522 [4th Dept 2022], *lv denied* 39 NY3d 1113 [2023]; *People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]). 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]). To the extent that defendant asserted in his motion that he was pressured into accepting the plea by defense counsel, that assertion is "belied by his statements during the plea proceeding[ ]" and, in addition, defendant's "conclusory and unsubstantiated claim[s] of innocence [are] belied by his admissions during the plea colloquy" (*People v Garner*, 86 AD3d 955, 955 [4th Dept

2011]; *see People v Haffiz*, 19 NY3d 883, 884-885 [2012]; *Sparcino*, 78 AD3d at 1509).

Defendant also contends that his guilty plea should be vacated because his factual recitation did not affirmatively establish each and every element of the crime. Defendant failed to preserve for our review that challenge to the factual sufficiency of the allocution, and we conclude that this case does not fall within the rare exception to the preservation requirement (*see People v Barnes*, 206 AD3d 1713, 1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *see generally People v Lopez*, 71 NY2d 662, 665-666 [1988]). In any event, defendant's contention lacks 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]; *see Barnes*, 206 AD3d at 1715).

Contrary to defendant's contention in his main brief, we conclude that the sentence is not unduly harsh or severe. Finally, we have considered the remaining contentions in defendant's main brief and the contentions in his pro se supplemental brief, and we conclude that none warrants reversal or modification of the judgment.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

631

CA 22-01790

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF THE ESTATE OF JOAN K. ALMENDINGER,
DECEASED.

SANDRA FLANDERS, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

CHARLES NILSSON, OBJECTANT-APPELLANT.

BRENNA BOYCE, PLLC, HONEOYE FALLS (DAVID C. SIELING OF COUNSEL), FOR OBJECTANT-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), dated April 14, 2022. The order granted the motion of petitioner for summary judgment and admitted to probate decedent's will dated March 12, 2012.

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

Memorandum: Objectant appeals from an order that granted petitioner's motion for summary judgment dismissing his objections to the probate of decedent's will based on, inter alia, allegations of undue influence, and admitted decedent's will to probate. We conclude that Surrogate's Court properly granted the motion inasmuch as petitioner met her initial burden and objectant failed to raise a triable issue of fact in opposition (*see Matter of Bodkin* [appeal No. 3], 128 AD3d 1526, 1528 [4th Dept 2015]; *Matter of Alibrandi*, 104 AD3d 1175, 1177-1178 [4th Dept 2013]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Objectant's contention that petitioner's motion was premature is raised for the first time on appeal and is therefore not properly before us (*see Dunn v Covanta Niagara I, LLC* [appeal No. 1], 181 AD3d 1340, 1340 [4th Dept 2020]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, objectant "failed to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of" another party (*Nationwide Affinity Ins. Co. of Am. v Beacon Acupuncture, P.C.*, 175 AD3d 1836, 1837 [4th Dept 2019] [internal quotation marks omitted]). Objectant's remaining

contentions are raised for the first time on appeal and are therefore not properly before us (*see generally Ciesinski*, 202 AD2d at 985).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

639

KA 22-00963

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN J. FELDER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 21, 2022. The judgment convicted defendant upon a plea of guilty of attempted sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]), defendant contends that he did not receive effective assistance of counsel with respect to his guilty plea. We reject that contention. Although defense counsel admitted in an affirmation in support of defendant's motion to withdraw his guilty plea that, at the time of the plea, defense counsel was ignorant of a particular prior decision relating to the People's burden at trial on the element of forcible compulsion, the record reveals that defense counsel was aware of the basic principles of criminal law and procedure applicable to the crime and thus could effectively counsel defendant as to whether it was in defendant's best interest to accept the plea (*cf. People v Butler*, 94 AD2d 726, 726 [2d Dept 1983]).

We further reject defendant's contention that County Court erred in denying his motion to withdraw his guilty plea. Awareness of the particular prior decision would have provided defendant "with little or no reason to reject a favorable plea offer and go to trial" (*People v Kinney*, 107 AD3d 563, 564 [1st Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *see generally People v Nellons*, 187 AD3d 1574, 1575-1576 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

643

KA 22-01603

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. CARUSO, JR., DEFENDANT-APPELLANT.

LAW OFFICE OF JAMES L. RIOTTO, II, ROCHESTER (WILLIAM M. SWIFT OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY R. FRIESEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered May 3, 2022. The judgment convicted defendant, upon a jury verdict, of strangulation 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 strangulation in the second degree (Penal Law § 121.12), arising from an incident of escalating aggression directed at the victim after defendant arrived at the victim's home, at her invitation, following their meeting for the first time at a bar earlier in the day. We affirm.

Defendant contends that he was denied his due process rights to a fair trial and to present a defense because the People violated their obligations under *Brady v Maryland* (373 US 83 [1963]) and CPL article 245 by failing to timely disclose that the victim had provided defendant with cocaine at her home. We reject that contention.

Contrary to defendant's assertion, we conclude that the information that the victim provided defendant with cocaine at her home was not suppressed by the prosecution and, consequently, there was no *Brady* violation with respect thereto. "Evidence is not suppressed where the defendant 'knew of, or should reasonably have known of, the evidence and its exculpatory [or impeaching] nature' " (*People v LaValle*, 3 NY3d 88, 110 [2004], quoting *People v Doshi*, 93 NY2d 499, 506 [1999]). Here, defendant "knew or should have known that he [had been provided with] drugs" by the victim (*LaValle*, 3 NY3d at 110). In any event, even assuming, arguendo, that the People were required to disclose that information, we conclude that defendant was not prejudiced by any delay in disclosure because the record

establishes that he was "given a meaningful opportunity to use the allegedly exculpatory [or impeaching] material to cross-examine the People's witnesses or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *see People v Thomas*, 158 AD3d 1135, 1135 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *People v Dillon*, 34 AD3d 1230, 1230 [4th Dept 2006], *lv denied* 8 NY3d 879 [2007]). There is "no reasonable possibility that the outcome of the trial would have differed had the [information] been [disclosed sooner]" (*People v Scott*, 88 NY2d 888, 891 [1996]; *see Thomas*, 158 AD3d at 1135-1136).

Similarly, even assuming, arguendo, that the People did not "expeditiously notify" defendant when, subsequent to the service and filing of their original and supplemental certificates of compliance, they learned from the victim that she had provided defendant with cocaine (CPL 245.60; *see* CPL 245.20 [1] [k]), we conclude that County Court did not err in refusing to impose a remedy or sanction because defendant failed to show that he was prejudiced by the belated disclosure (*see* CPL 245.80 [1] [former (a)]). In addition, we note that defendant had reasonable time to prepare and respond to the ostensibly new information (*see id.*).

We also reject defendant's related contention that the court erred in denying his motion seeking a mistrial or, alternatively, to strike the testimony of the victim when the prosecutor, after jury deliberations began, corrected her earlier misstatement to the court about when the People became aware that the victim had provided defendant with cocaine. Contrary to defendant's contention, there is no indication in the record that the prosecutor intentionally misled the court with her initial statement inasmuch as the prosecutor, at that time, merely did not accurately recall the date of the subject pretrial conversation with the victim or whether the victim had disclosed that she had provided the cocaine, nor does the record establish that defendant suffered any prejudice given that the prosecutor simply corrected her earlier misstatement to reflect that the People had been aware of the victim's conduct one day earlier than initially reported (*see People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]; *People v Smith*, 28 AD3d 204, 205 [1st Dept 2006], *lv denied* 7 NY3d 763 [2006]; *see generally People v Nelson*, 144 AD2d 714, 716 [3d Dept 1988], *lv denied* 73 NY2d 894 [1989]).

Defendant further contends that the People violated their obligations under *Brady* and CPL 245.20 (1) (l) by failing to timely disclose their ostensible implied promise not to prosecute the victim for providing defendant with cocaine. We conclude that defendant's contention lacks merit inasmuch as the record establishes that "there was no agreement with [the victim]—tacit or otherwise" (*People v Giuca*, 33 NY3d 462, 474 [2019]).

Next, defendant contends that the People violated their obligation under *Brady* by failing to provide him with the victim's purported mental health records. We reject that contention. The record establishes that "[t]he People provided defendant with all materials in their possession that indicated that the victim had

received psychiatric treatment [and been prescribed medications]" and, "[b]ecause the People did not possess the [purported] psychiatric records requested by defendant, their failure to produce them is not a *Brady* violation" (*People v Sealey*, 239 AD2d 864, 865 [4th Dept 1997], *lv denied* 90 NY2d 910 [1997]; *see People v Sims*, 167 AD2d 952, 952 [4th Dept 1990]). Defendant's related contentions that the People were obligated to ascertain the existence of any mental health records and disclose them pursuant to CPL 245.20 (1) (k) and (2) were specifically raised for the first time in his posttrial CPL 330.30 motion, and therefore those contentions are not preserved for our review (*see generally People v Padro*, 75 NY2d 820, 821 [1990], *rearg denied* 75 NY2d 1005 [1990], *rearg dismissed* 81 NY2d 989 [1993]; *People v Owens*, 149 AD3d 1561, 1562 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). We decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the People violated *Brady* and CPL 245.20 (1) (p) by failing to disclose the victim's ostensible out-of-state "conviction" for driving while intoxicated (DWI). Inasmuch as defendant raised that contention for the first time in his posttrial CPL 330.30 motion, it is not preserved for our review (*see Owens*, 149 AD3d at 1562; *People v Jones*, 90 AD3d 1516, 1517 [4th Dept 2011], *lv denied* 19 NY3d 864 [2012]; *see generally Padro*, 75 NY2d at 821). In any event, defendant's contention lacks merit. The only information in the record with respect to the incident establishes that the victim's DWI charge was "dropped," and thus there was no "judgment[] of conviction" regarding that incident that the People were required to disclose (CPL 245.20 [1] [p]; *see generally People v Elmore*, 211 AD3d 1536, 1538 [4th Dept 2022]). Additionally, the record establishes that the People made "a diligent, good faith effort to ascertain the existence" of any such record of conviction by reviewing documentation of the victim's criminal history, which revealed no prior out-of-state DWI conviction (CPL 245.20 [2]; *see People v Robbins*, 206 AD3d 1069, 1072-1073 [3d Dept 2022], *lv denied* 39 NY3d 942 [2022]; *see also* CPL 245.20 [1] [k]; 245.55 [1]).

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

644

KA 19-02345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERTO REYES, ALSO KNOWN AS ALBERTO EBARADO GUTIERREZ-REYES, DEFENDANT-APPELLANT.

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered November 7, 2019. The judgment convicted defendant upon his plea of guilty of manslaughter in the first 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 his guilty plea of two counts of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his plea was not knowing, intelligent and voluntary because County Court failed to advise him that he could be subject to deportation if he pleaded guilty (*see People v Peque*, 22 NY3d 168, 197 [2013], *cert denied* 574 US 840 [2014]). We conclude that defendant's contention is not preserved for our review (*see* CPL 470.05 [2]), and that, under the circumstances of this case, the narrow exception to the preservation doctrine does not apply (*see People v Chelley*, 120 AD3d 987, 988 [4th Dept 2014]; *cf. Peque*, 22 NY3d at 182-183).

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as the People concede, we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

646

KA 20-00982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE HOLLIS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER 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 February 27, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts), reckless endangerment in the first 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: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), one count of reckless endangerment in the first degree (§ 120.25), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). Defendant's conviction of the weapon possession and reckless endangerment counts stems from his conduct in firing a gun toward two people outside a convenience store and striking a glass door of the store. The incident was depicted on the store's surveillance video. His conviction of the drug paraphernalia counts resulted from a search warrant executed at defendant's girlfriend's house, where the police recovered a backpack containing drug paraphernalia.

Defendant failed to preserve for our review his contention that Supreme Court erred in allowing a police officer to testify that a person depicted on the surveillance video was defendant (*see People v Johnson*, 192 AD3d 1612, 1615 [4th Dept 2021]; *People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001], *lv denied* 97 NY2d 733 [2002]). He also failed to preserve for our review his related contention that the police identification should have been the subject of a CPL 710.30 notice (*see People v McFadden*, 189 AD3d 2086, 2088 [4th Dept 2020], *lv*

denied 36 NY3d 1099 [2021]; *People v Murphy*, 28 AD3d 1096, 1096 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that he was deprived of a fair trial by the admission in evidence of the surveillance video, a compilation video prepared by the People, and text messages retrieved from a cellular phone located near the crime scene. By stipulating to the admission of those items in evidence, however, defendant waived his present contention (*see People v Britton*, 213 AD3d 1326, 1326-1327 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]; *People v Serrano*, 164 AD3d 1658, 1659 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018]). Contrary to defendant's further contention, he was not denied effective assistance of counsel based on counsel's failure to object and stipulation. Defendant's identification was not an issue in this case; defendant admitted to the police that he had been involved in the shooting. Defense counsel admitted during his opening statement that defendant was depicted on the surveillance video, but he argued that defendant had been justified in shooting at the two men. In addition, defense counsel used the surveillance video in support of the justification defense. Defendant thus failed to establish the absence of strategic or other legitimate explanations for defense counsel's alleged failures (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Briggs*, 124 AD3d 1320, 1321 [4th Dept 2015], *lv denied* 25 NY3d 1198 [2015]; *People v Johnson*, 30 AD3d 1042, 1043 [4th Dept 2006], *lv denied* 7 NY3d 790 [2006], *reconsideration denied* 7 NY3d 902 [2006]).

Defendant's contentions that the evidence with respect to reckless endangerment is legally insufficient to support the conviction because the People did not disprove the defense of justification beyond a reasonable doubt and that the evidence with respect to the two counts of criminal possession of a weapon is legally insufficient because defendant only borrowed the weapon to protect himself are not preserved for our review inasmuch as defendant failed to move for a trial order of dismissal on those grounds (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Brown*, 194 AD3d 1399, 1400 [4th Dept 2021]; *People v Lasher*, 163 AD3d 1424, 1425 [4th Dept 2018], *lv denied* 32 NY3d 1005 [2018]; *People v Alexander*, 161 AD3d 762, 763 [2d Dept 2018], *lv denied* 31 NY3d 1144 [2018]). We reject defendant's contention that his conviction on the counts of criminally using drug paraphernalia is based on legally insufficient evidence of his constructive possession. 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 had constructive possession of the drug paraphernalia (*see People v Torrance*, 206 AD3d 1722, 1723 [4th Dept 2022]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, the backpack containing the drug paraphernalia was found in a bedroom closet, and mail belonging to defendant was also found in that bedroom. In addition, defendant admitted to the police that the backpack belonged to him (*see People v Ramos-Carrasquillo*, 197 AD3d 1000, 1002 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). In particular, contrary to defendant's contention with respect to the reckless endangerment count, the jury's rejection of the justification defense is not contrary to the weight of the evidence (*see People v Macon*, 217 AD3d 1415, 1416 [4th Dept 2023], *lv denied* 40 NY3d 935 [2023]). The jury could reasonably have found based on the surveillance videos that defendant fired at the two men before one of them returned fire, and thus the jury was entitled to conclude that defendant was the initial aggressor and was therefore not justified in using deadly physical force against the two men (*see People v St. John*, 215 AD3d 1267, 1268 [4th Dept 2023]; *see generally* Penal Law § 35.15 [1] [b]). Further, the jury could reasonably have found based on the surveillance videos that defendant, with a gun in his hand, was waiting outside the store for the two men to arrive, and thus the jury could reasonably have concluded that defendant failed to satisfy his duty to retreat (*see St. John*, 215 AD3d at 1268; *People v Estrada*, 1 AD3d 928, 928-929 [4th Dept 2003], *lv denied* 1 NY3d 627 [2004]; *see generally* § 35.15 [2] [a]).

Defendant contends that the court erred in its charge on justification by failing to include the "evidence of threats" addendum to the CJI charge for Justification: Use of Deadly Force in Defense of a Person and by including the duty to retreat addendum to that charge (*see generally People v T.P.*, 216 AD3d 1469, 1470 [4th Dept 2023]). We reject those contentions. In any event, inasmuch as there was overwhelming evidence disproving the justification defense and no reasonable possibility that the verdict would have been different had the charge been given as requested by defendant, any error in the court's justification charge was harmless (*see People v Petty*, 7 NY3d 277, 286 [2006]).

To the extent that defendant contends that he was improperly penalized for exercising his right to a trial, that contention is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Fudge*, 104 AD3d 1169, 1170 [4th Dept 2013], *lv denied* 21 NY3d 1042 [2013]). Finally, defendant's sentence is not unduly harsh or severe.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

648

CA 22-01725

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

COBRA INDUSTRIAL MAINTENANCE, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

COLONY INSURANCE COMPANY, DEFENDANT-APPELLANT.

LONDON FISCHER LLP, NEW YORK CITY (JAMES WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered September 19, 2022. The order denied defendant's motion seeking leave to file a second motion for summary judgment.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

649

CA 22-01952

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

SARAH HAYES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HILLSIDE FAMILY OF AGENCIES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (M. IBRAHIM TARIQ OF COUNSEL), FOR DEFENDANT-APPELLANT.

SARAH HAYES, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered May 31, 2022. The order, insofar as appealed from, denied defendant's cross-motion for summary judgment dismissing the complaint.

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

Same memorandum as in *Hayes v Hillside Family of Agencies* ([appeal No. 2] – AD3d – [Sept. 29, 2023] [4th Dept 2023]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

650

CA 22-01953

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

SARAH HAYES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HILLSIDE FAMILY OF AGENCIES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (M. IBRAHIM TARIQ OF COUNSEL), FOR DEFENDANT-APPELLANT.

SARAH HAYES, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 2, 2022. The order, insofar as appealed from, granted defendant's motion seeking leave to reargue its cross-motion for summary judgment and upon reargument, the court adhered to its original determination.

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

Memorandum: Plaintiff commenced this action alleging that defendant's termination of her employment constituted discrimination based on her status as a victim of domestic violence in violation of the Human Rights Law (*see* Executive Law § 296 [1] [a]). Plaintiff's employment was terminated after a senior employee of defendant received an anonymous phone call alleging that plaintiff was using drugs while at work and plaintiff subsequently refused to take a drug test. In appeal No. 1, defendant appeals from that part of an order that denied its cross-motion for summary judgment dismissing the complaint. In appeal No. 2, defendant appeals from that part of an order that, upon reargument, adhered to the prior decision denying the cross-motion.

At the outset, we note that the appeal from the order in appeal No. 1 must be dismissed inasmuch as that order was superseded by the order in appeal No. 2 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

In appeal No. 2, we agree with defendant that Supreme Court erred in denying its cross-motion for summary judgment dismissing the complaint, inasmuch as defendant established its entitlement to judgment as a matter of law (*see generally Forrest v Jewish Guild for*

the Blind, 3 NY3d 295, 305 [2004]). Even assuming, arguendo, that plaintiff established a prima facie case of discrimination based on her status as a domestic violence victim, we conclude that defendant met its initial burden on the cross-motion by establishing "legitimate, independent, and nondiscriminatory reasons to support its employment decision" (*Matter of Miller Brewing Co. v State Div. of Human Rights*, 66 NY2d 937, 938 [1985]; *see generally Davis v School Dist. of City of Niagara Falls*, 4 AD3d 866, 867 [4th Dept 2004]; *Roundtree v School Dist. of City of Niagara Falls*, 294 AD2d 876, 877-878 [4th Dept 2002]). Here, defendant submitted admissible evidence that it had reasonable suspicion to believe that plaintiff was using drugs while at work, that it was defendant's policy to drug test employees in such circumstances, and, further, that if the employee refused to submit to the test, the employee would be terminated. In opposition, plaintiff failed to raise an issue of fact whether defendant's proffered reasons for discharging her were pretextual (*see generally Roundtree*, 294 AD2d at 878). Although plaintiff raised a question of fact whether defendant had knowledge that she was a victim of domestic violence, plaintiff failed to demonstrate any causal relationship between her status as a domestic violence victim and her termination that could conceivably demonstrate that the termination occurred under circumstances giving rise to an inference of discrimination (*see generally Forrest*, 3 NY3d at 308).

We further agree with defendant that the court erred in concluding that a question of fact exists whether defendant was required to accommodate plaintiff's status as a domestic violence victim under Executive Law § 296 (22). That provision states that it is "an unlawful discriminatory practice for an employer to refuse to provide a reasonable accommodation to an employee who is known by the employer to be a victim of domestic violence" (§ 296 [22] [c] [1]) and provides an exhaustive list of accommodations (*see* § 296 [22] [c] [2]). Even assuming, arguendo, that the provision applies retroactively to the time of plaintiff's termination, delaying a drug test or otherwise modifying the job policy to permit refusal of the drug test is not within the accommodations list. Moreover, to the extent the court determined that a question of fact exists whether plaintiff suffered from a mental disability resulting from domestic violence (*see* § 296 [22] [c] [6]), such a condition was not alleged in the complaint nor is it supported in the record (*see generally Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1473 [4th Dept 2010]).

We therefore reverse the order insofar as appealed from in appeal No. 2, grant defendant's cross-motion, and dismiss the complaint.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

652

CA 22-01358

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

SHERYL L. LEWCZYK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAFECO INSURANCE COMPANY OF AMERICA, DOING BUSINESS AS SAFECO INSURANCE, SAFECO INSURANCE COMPANY OF INDIANA, DEFENDANTS-APPELLANTS, AND CITY OF BUFFALO, DEFENDANT-RESPONDENT.

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

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Craig D. Hannah, J.), entered August 26, 2022. The judgment, inter alia, denied the motion of defendant Safeco Insurance Company of America, doing business as Safeco Insurance, for summary judgment and granted the cross-motions of plaintiff and defendant City of Buffalo for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the cross-motions are denied, the motion is granted insofar as declaratory relief was sought, and judgment is granted in favor of defendant Safeco Insurance Company of America, doing business as Safeco Insurance, as follows:

> It is ADJUDGED and DECLARED that plaintiff and defendant City of Buffalo can recover their claims only within the applicable policy's single limit of bodily injury liability of $100,000.

Memorandum: Plaintiff was on duty as a police officer for defendant City of Buffalo (City) when she sustained injuries in a two-vehicle accident. Plaintiff commenced an action against the driver and the owner of the other motor vehicle (tortfeasors), which was insured under a policy issued to the owner by defendant Safeco Insurance Company of America, doing business as Safeco Insurance (Safeco). For bodily injury liability, the policy provided coverage of $100,000 for each person and $300,000 for each occurrence. A

passenger in plaintiff's vehicle also commenced an action against the tortfeasors, and the tortfeasors commenced a third-party action against, inter alia, plaintiff and the City for contribution and indemnification. The City answered and asserted, inter alia, a counterclaim against the tortfeasors, pursuant to General Municipal Law § 207-c (6), for reimbursement of sums it had paid to plaintiff for lost wages and for medical treatment and hospital care.

Safeco notified plaintiff and the City that their claims must be settled from the single per person policy limit of $100,000. Plaintiff, the City, and Safeco (the parties) entered into a settlement agreement and release pursuant to which plaintiff and the City released the tortfeasors and Safeco from liability in exchange for certain payments from Safeco to plaintiff and the City that aggregated to $100,000. The parties stipulated, however, that plaintiff would commence a declaratory judgment action to determine whether the $100,000 per person limit of liability for bodily injury applied separately to her claim and that of the City. The parties agreed that, if it was determined that the policy limit applied separately to the claims, additional settlement monies would be paid.

Plaintiff thus commenced this declaratory judgment action to determine the application of the policy limit of liability to her claim and the City's claim. Safeco moved for summary judgment seeking, inter alia, a declaration that plaintiff and the City can recover their claims only within Safeco's single limit of bodily injury liability of $100,000, and plaintiff and the City separately cross-moved for, inter alia, summary judgment seeking a declaration that the liability limits in the Safeco policy apply separately to plaintiff's bodily injury claim and to the City's statutory claim for reimbursement of benefits paid to or on behalf of plaintiff. Supreme Court denied the motion and granted the cross-motions. The court declared that the City's "statutory claims for reimbursement of benefits paid to or on behalf of [plaintiff] give rise to a separate and distinct claim from [plaintiff's] bodily injury claims under the liability limits contained in [Safeco's] insurance policy and trigger a second, distinct application of the 'per person' policy limits under the Safeco policy." Safeco appeals and we reverse.

It is well settled that " '[a]s with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court' " (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 681-682 [2017]; *see Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986], *rearg denied* 69 NY2d 707 [1986]). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]).

We agree with Safeco that the policy is not ambiguous and that there is a $100,000 policy limit for "each person" sustaining bodily injury. The policy provides that the limit of bodily injury liability

for "each person" is the "maximum limit of liability for *all* damages, including damages for care, loss of services or death, resulting from any one auto accident" for bodily injury not resulting in death of "any one person" (emphasis added). The City here asserted a claim against the tortfeasors pursuant to General Municipal Law § 207-c (6), which creates a cause of action for municipalities for reimbursement of "such sum or sums actually paid as salary or wages and or for medical treatment and hospital care as against any third party against whom the police officer shall have a cause of action for the injury sustained or sickness caused by such third party." The municipality's right to recover "is derived from its insured employee's cause of action in negligence against the person causing such injury," and the "right to bring the direct action is bottomed on the employee's cause of action in negligence" (*City of Buffalo v Maggio*, 21 NY2d 1017, 1018 [1968]). We conclude that the City's statutory claim and plaintiff's claim both result from the injuries sustained by plaintiff and are both included in the same $100,000 per person limit of liability in the policy (*see generally Moore v Ewing*, 9 AD3d 484, 489 [2d Dept 2004]).

Contrary to plaintiff's and the City's contentions, our decision in *City of Syracuse v Williams* (45 AD3d 1491 [4th Dept 2007]) does not compel a different result. In that case, we concluded that a police officer's release of the defendants from liability arising out of a motor vehicle accident did not preclude the City of Syracuse from proceeding against the defendants pursuant to General Municipal Law § 207-c (6) (*id.* at 1491). As we explained, section 207-c (6) granted the City of Syracuse the right to commence an action in its own name and not as a subrogee of the injured officer (*see id.* at 1492). Here, however, there is no dispute that the City has the right to bring an action in its own name.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

657

CA 22-01794

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

A.S., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY, ET AL., DEFENDANTS,
AND BERKSHIRE FARM CENTER AND SERVICES FOR YOUTH,
DEFENDANT-APPELLANT.

GIRVIN & FERLAZZO, P.C., ALBANY (DANIEL S.L. RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HERMAN LAW, NEW YORK CITY (STUART S. MERMELSTEIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered November 4, 2022. The order denied the motion of defendant Berkshire Farm Center and Services for Youth to dismiss the amended complaint against it.

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

Memorandum: On July 12, 2021, plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that she was sexually abused in approximately 1988 by her foster father while she was placed in a foster home. Plaintiff named as defendants Erie County (County) and "DOES 1-10," which were described as entities providing foster care services in the County. In May 2022, plaintiff moved, inter alia, to amend the complaint to substitute defendant Berkshire Farm Center and Services for Youth (Berkshire) for "DOE 1" as a defendant pursuant to CPLR 1024. Supreme Court granted the motion, and plaintiff filed a supplemental summons and amended complaint. Berkshire then moved to dismiss the amended complaint against it pursuant to CPLR 3211 (a) (5) and (8). The court denied the motion, and we now affirm.

Contrary to Berkshire's contention, plaintiff satisfied the requirements of CPLR 1024 to substitute it for "DOE 1" in the complaint. "Under CPLR 1024, the description of the unknown party must be sufficiently complete to fairly apprise that entity that it is the intended defendant" (*Olmsted v Pizza Hut of Am., Inc.*, 28 AD3d 855, 856 [3d Dept 2006]; *see Thas v Dayrich Trading, Inc.*, 78 AD3d 1163, 1165 [2d Dept 2010]; *Carmer v Odd Fellows*, 66 AD3d 1435, 1436 [4th Dept 2009]). In addition, the plaintiff "must show that [they]

made ‘timely efforts to identify the correct party before the statute of limitations expired’ ” (*Justin v Orshan*, 14 AD3d 492, 492-493 [2d Dept 2005]; *see Walker v Hormann Flexon, LLC*, 153 AD3d 997, 998 [3d Dept 2017]; *Luckern v Lyonsdale Energy Ltd. Partnership*, 229 AD2d 249, 253 [4th Dept 1997]).

We conclude that the complaint adequately described Berkshire such that, from that description, it would have known that it was an intended defendant (*see Rogers v Dunkirk Aviation Sales & Serv., Inc.*, 31 AD3d 1119, 1120 [4th Dept 2006]; *see generally Carmer*, 66 AD3d at 1436). In the complaint, plaintiff alleged that she was abused by her foster father when she was placed in foster care with a family in Erie County, but that she was unable to recall the name of the foster father because of her young age at the time of the abuse and the trauma caused by the abuse. The complaint further alleged that the abuse occurred in “approximately 1988,” when plaintiff was about 14 years old, and it described “DOE 1” as an entity that contracted with the County to provide foster care services.

We further conclude that plaintiff demonstrated that she made a diligent inquiry and genuine efforts to ascertain the identity of Berkshire prior to the running of the statute of limitations (*see Rogers*, 31 AD3d at 1120; *Luckern*, 229 AD2d at 254). In July 2021 and again in early August 2021, prior to the expiration of the statute of limitations on August 14, 2021 (*see* CPLR 214-g), plaintiff requested that the County produce her foster care records, or, in the alternative, identify any foster care agencies responsible for her care and oversight. Plaintiff provided the County with her name and date of birth, but the County indicated that it did not have any records for plaintiff. It was not until March 2022, after plaintiff had provided the additional information of the name of another foster child who was placed in the foster home with plaintiff, that the County identified Berkshire as the authorized agency involved in plaintiff’s foster care placement. Plaintiff thus established that she made timely efforts to identify Berkshire prior to August 14, 2021. We agree with plaintiff that she was not privy to how the County’s database worked and what precise identifying information the County needed in order to locate plaintiff’s records.

In light of our determination, we need not address Berkshire’s remaining contention regarding the relation back doctrine.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

659

KA 21-00382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CISKIEWIC, 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 March 8, 2021. The judgment convicted defendant, upon his plea of guilty, of predatory sexual assault.

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 predatory sexual assault (Penal Law § 130.95 [1] [a]). We reject defendant's contention that County Court abused its discretion in denying his motion to withdraw his guilty plea without a hearing. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry 'rest[ ] largely in the discretion of the Judge to whom the motion is made' and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Manor*, 27 NY3d 1012, 1013-1014 [2016]). Contrary to defendant's contention, his "postplea protestations of . . . misunderstanding . . . and 'pressure' presented credibility issues that the court could properly resolve without a hearing" (*People v Newsome*, 140 AD3d 1695, 1695-1696 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]; *see People v Dixon*, 29 NY2d 55, 56 [1971]; *People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]).

Defendant further contends that his guilty plea was not sufficiently allocuted. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge (*see generally People v Barnes*, 206 AD3d 1713, 1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]), we conclude that it is without merit. "There is no requirement that defendant personally recite the facts underlying the crime to which he is pleading guilty" (*People v Singletary*, 307 AD2d 779, 779 [4th Dept

2003], *lv denied* 100 NY2d 599 [2003]; *see People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]; *see also People v Seeber*, 4 NY3d 780, 781 [2005]). Here, "[t]he record establishes that defendant admitted the essential elements of the . . . count[ ] of the indictment [to which he pleaded guilty,] and thus his factual allocution is legally sufficient" (*People v Dorrah*, 50 AD3d 1619, 1619 [4th Dept 2008], *lv denied* 11 NY3d 736 [2008] [internal quotation marks omitted]; *see People v Emm*, 23 AD3d 983, 984 [4th Dept 2005], *lv denied* 6 NY3d 775 [2006]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

661

KA 22-00456

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOREY RICHARDSON, DEFENDANT-APPELLANT.

LEAH R. NOWOTARSKI, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered March 23, 2022. The judgment convicted defendant upon his plea of guilty of attempted assault in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and assault in the second degree (§ 120.05 [7]). County Court initially imposed a term of interim probation in accordance with the plea agreement (*see* CPL 390.30 [6]), but then, following a hearing, revoked defendant's interim probation upon determining that he violated its conditions, and sentenced him to concurrent terms of incarceration, the longest of which is a determinate term of 11 years.

Defendant failed to preserve his contention that imposition of the conditions of his interim probation requiring him to "not be charged with a crime and . . . refrain from violation of any law" deprived him of the presumption of innocence "inasmuch as he did not object to the [conditions] or move to withdraw his guilty plea[ ] or to vacate the judgment[ ] of conviction" (*People v Bishop*, 198 AD3d 1381, 1382 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]). In any event, those were lawful presentence conditions (*see People v Anonymous*, 34 NY3d 631, 646 [2020]; *People v Reynolds*, 27 NY3d 1099, 1101 [2016]; *People v Outley*, 80 NY2d 702, 713 [1993]).

We reject defendant's contention that the court erred in determining that he violated the terms and conditions of his interim probation, thereby warranting imposition of a sentence of

incarceration. Contrary to defendant's contention, the "hearing conducted by the court was sufficient pursuant to CPL 400.10 (3) to enable the court to 'assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate' " (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008], quoting *Outley*, 80 NY2d at 712; *see People v Koons*, 187 AD3d 1638, 1639 [4th Dept 2020]), and the court's inquiry "was of sufficient depth to enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation" (*People v Butler*, 151 AD3d 1959, 1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017] [internal quotation marks omitted]; *see People v Wissert*, 85 AD3d 1633, 1633 [4th Dept 2011], *lv denied* 17 NY3d 956 [2011]). Inasmuch as the court explained the conditions of the interim probation to defendant during the plea colloquy and provided him with a written copy, which he acknowledged and signed, the court acted within its discretion in imposing a sentence of incarceration in accordance with the plea agreement upon finding that defendant failed to comply with the conditions (*see People v Mays*, 181 AD3d 874, 875 [2d Dept 2020], *lv denied* 36 NY3d 1058 [2021]; *see also Koons*, 187 AD3d at 1639; *Wissert*, 85 AD3d at 1633).

To the extent defendant contends that the sentence imposed is illegal, the contention lacks merit (*see generally People v Streeter*, 71 AD3d 1463, 1464 [4th Dept 2010], *lv denied* 14 NY3d 893 [2010]).

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

663

KA 19-00976

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEVIN MCCUTCHEON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 27, 2019. The judgment convicted defendant upon a nonjury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's conviction stems from an incident in which he shot a man in the back of the head, killing him.

Defendant contends that he was denied effective assistance of counsel because defense counsel had an actual conflict of interest. "Under the state and federal constitutions, a criminal defendant is entitled to the effective assistance of counsel, defined as 'representation that is reasonably competent, conflict-free and singlemindedly devoted to the client's best interests' " (*People v Ennis*, 11 NY3d 403, 409-410 [2008], *cert denied* 556 US 1240 [2009]). "An actual conflict exists if an attorney simultaneously represents clients whose interests are opposed . . . and, in such situations, reversal is required if the defendant does not waive the actual conflict" (*People v Sanchez*, 21 NY3d 216, 223 [2013]). Defendant contends that there was an actual conflict of interest based on defense counsel's mentoring relationship with the attorney representing defendant's accomplice, which defendant analogizes to conflicts arising from joint representation, and thus contends that County Court's failure to inquire and obtain defendant's waiver of the conflict requires reversal. We conclude that "defendant 'has not sustained his burden of establishing ineffectiveness, but that he is

not precluded from raising this issue in a CPL article 440 proceeding that would permit further factual development of the circumstances pertaining to the claimed conflict' " (*People v Brooks*, 125 AD3d 1381, 1382 [4th Dept 2015], quoting *Sanchez*, 21 NY3d at 220; *see People v Spencer*, 191 AD3d 1331, 1332-1333 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; *People v Maltese*, 148 AD3d 1780, 1783 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]).

Defendant next contends that the evidence is legally insufficient to support the conviction because the testimony of the accomplice was not sufficiently corroborated. We reject that contention. Accomplice testimony must be corroborated by evidence "tending to connect the defendant with the commission of [an] offense" (CPL 60.22 [1]). Here, several witnesses provided testimony that " 'tend[ed] to connect . . . defendant with the commission of the crime in such a way as [could] reasonably satisfy the [factfinder] that the accomplice [was] telling the truth' " (*People v Reome*, 15 NY3d 188, 192 [2010]; *see People v Lipford*, 129 AD3d 1528, 1529 [4th Dept 2015], *lv denied* 26 NY3d 1041 [2015]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). On the record before us, the testimony adduced at trial, and any inconsistencies contained therein, "merely presented issues of credibility for the factfinder to resolve" (*People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *see 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 the court's credibility determinations here.

To the extent defendant contends that he was penalized for exercising his right to a trial, that contention is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Hendricks*, 214 AD3d 1466, 1467 [4th Dept 2023], *lv dismissed* 40 NY3d 929 [2023]). In any event, it is without merit (*see People v Roberts*, 213 AD3d 1348, 1350-1351 [4th Dept 2023], *lv denied* 40 NY3d 930 [2023]; *People v Becraft*, 140 AD3d 1706, 1706 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]). Finally, the sentence is not unduly harsh or severe.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

672

CAF 22-00534

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

IN THE MATTER OF CARTER B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HEATHER B., RESPONDENT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (HENRY W. JONES, IV, OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered February 22, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent had violated the terms and conditions of the suspended judgment and transferred her guardianship and custody rights with respect to the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order by which Family Court, inter alia, revoked a suspended judgment entered upon her admission that she had permanently neglected the subject child and terminated her parental rights with respect to that child. We affirm. There is a sound and substantial basis in the record to support the court's determination that the mother failed to comply with the terms of the suspended judgment and that the child's interests were best served by terminating the mother's parental rights (*see Matter of Jerimiah H. [Kiarra M.]*, 213 AD3d 1298, 1298-1299 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Terry L.G.*, 6 AD3d 1144, 1145 [4th Dept 2004]; *see generally Matter of Michael S. [Charle S.]*, 182 AD3d 1053, 1054 [4th Dept 2020], *lv denied* 35 NY3d 911 [2020]). The mother's contention that her due process rights were violated is unpreserved for our review and in any event is without merit (*see Matter of Giovanni K. [Dawn K.]*, 68 AD3d 1766, 1767 [4th Dept 2009],

lv denied 14 NY3d 707 [2010]; *see generally Matter of Jessica J.*, 44 AD3d 1132, 1133 [3d Dept 2007]).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

679

CA 22-01311

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

THOMAS R. WHELAN AND JENNIFER S. WHELAN,
PLAINTIFFS-APPELLANTS,

V ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY,
DEFENDANT-RESPONDENT.

THE CAVALL LAW FIRM PLLC, WILLIAMSVILLE (DIANA B. CAVALL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 10, 2022. The order denied plaintiffs' motion for partial summary judgment on the issue of liability.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

684

KA 22-00807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS CURRINGTON, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), dated December 30, 2021. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 15 points under risk factor 11 on the risk assessment instrument (RAI) for his purported history of steroid abuse. We agree.

Initially, we note that, although defendant contended before the court that steroids are not within the class of drugs contemplated by SORA as warranting an assessment of points under risk factor 11 (*cf. People v Niles*, 159 AD3d 1175, 1176-1177 [3d Dept 2018]), he has not raised that contention on appeal, and thus that contention is deemed abandoned (*see People v Richardson*, 197 AD3d 878, 879 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022]) and we do not address it (*see generally People v Weber*, — NY3d —, — n 1, 2023 NY Slip Op 03301, *3 n 1 [2023]).

As relevant to the merits of this case, a sex offender is assessed 15 points under risk factor 11 if the sex offender "has a substance abuse history *or* was abusing drugs . . . at the time of the offense" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006] [emphasis added]; *see People v Palmer*, 20 NY3d 373, 376 [2013]; *Richardson*, 197 AD3d at 879; *People v Turner*,

188 AD3d 1746, 1746-1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]). Consequently, "the points are properly assessed where the People establish a history of substance abuse by clear and convincing evidence . . . inasmuch as [a]n offender need not [have been] abusing . . . drugs at the time of the instant offense to receive points for that risk factor" (*Turner*, 188 AD3d at 1747 [internal quotation marks omitted]; *see generally* Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571 [2009]).

Here, we conclude that the People failed to prove by the requisite clear and convincing evidence that defendant had a history of substance abuse. Although the case summary presented by the People at the SORA hearing establishes that defendant was convicted under the Uniform Code of Military Justice (UCMJ) of possessing an unknown amount of testosterone and using an anabolic steroid (*see* UCMJ art 112a [10 USC § 912a]), which offense occurred nearly one year after the underlying sex offense of sexual abuse of a child (*see* UCMJ art 120b [c] [10 USC § 920b (c)]), there is "no evidence that defendant was ever screened for substance abuse issues" and " 'only very limited information about his alleged prior history of drug . . . abuse' " (*People v Coger*, 108 AD3d 1234, 1235 [4th Dept 2013]). Indeed, the sole information in the record regarding defendant's purported history of drug *abuse* is the "conclusory hearsay" statement (*People v Kowal*, 175 AD3d 1057, 1058 [4th Dept 2019]) of a correctional treatment specialist—here, a licensed marriage and family therapist—who commented in the updated treatment assessment he prepared prior to defendant's release from incarceration that defendant had "substance abuse problems with steroids pre-confinement" but that confinement had "cleaned . . . up" that problem such that defendant now understood "the repercussions of that type of abuse." Inasmuch as the only evidence that defendant abused steroids consists of a " 'hearsay statement[] that [is] vague, . . . equivocal, and otherwise unsubstantiated,' " the People failed to establish by the requisite clear and convincing evidence that defendant had a history of substance abuse (*People v Wilson*, 186 AD3d 1066, 1067 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]; *see generally Mingo*, 12 NY3d at 573; *Kowal*, 175 AD3d at 1058).

We therefore conclude that the court erred in assessing 15 points on the RAI for risk factor 11 and that defendant's score on the RAI must be reduced from 80 to 65, rendering him a presumptive level one risk. Under the circumstances of this case, we modify the order accordingly (*see e.g. People v Madonna*, 167 AD3d 1488, 1489 [4th Dept 2018]; *Coger*, 108 AD3d at 1236; *cf. Weber*, — NY3d at —, 2023 NY Slip Op 03301, *1-5). In light of our determination, defendant's remaining contention is academic.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

685

KA 18-00286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN L. CARTER, DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered December 22, 2017. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree, and endangering the welfare of a child.

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, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]), defendant contends that he was deprived of a fair trial by errors in County Court's charge to the jury with respect to the crime of course of sexual conduct against a child in the first degree. Defendant failed to preserve that contention for our review (*see People v Washington*, 173 AD3d 1644, 1645 [4th Dept 2019], *lv denied* 34 NY3d 985 [2019]; *People v Williams*, 163 AD3d 1422, 1422 [4th Dept 2018]). In any event, defendant's contention is without merit inasmuch as the court properly instructed the jury that a person is guilty of course of sexual conduct against a child in the first degree "when, over a period of time not less than three months in duration, . . . he . . . being [18] years or more, engages in two or more acts of sexual conduct . . . with a child less than [13] years of age" (*see* Penal Law § 130.75 [1] [b]; *People v Partridge*, 173 AD3d 1769, 1770 [4th Dept 2019], *lv denied* 34 NY3d 935 [2019]). We therefore also reject defendant's related contention that counsel was ineffective in failing to object to the charge (*see People v Vail*, 174 AD3d 1365, 1366 [4th Dept 2019]; *People v Humphrey*, 109 AD3d 1173, 1175 [4th Dept 2013], *lv denied* 24 NY3d 1044 [2014]).

Defendant contends that the evidence is legally insufficient to

support the conviction of course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree because the People failed to establish the duration of the abuse. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant is guilty under counts 1 and 2 of the indictment (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Testimony establishing the dates when the victims resided in different homes in the City of Rochester provided markers that, combined with the victims' testimony as to where they were abused, allowed the jury to conclude when the abuse occurred (*see People v Thornton*, 141 AD3d 936, 937 [3d Dept 2016], *lv denied* 28 NY3d 1151 [2017]; *cf*. *Partridge*, 173 AD3d at 1771).

In addition, viewing the evidence in light of the elements of the crimes of course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) and "according great deference to the jury's resolution of credibility issues" (*People v Bassett*, 55 AD3d 1434, 1436 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *Bassett*, 55 AD3d at 1436).

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

688

KA 21-00158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JA'QUON SNELL, DEFENDANT-APPELLANT.

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

JA'QUON SNELL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 15, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends in his main and pro se supplemental briefs that County Court erred in refusing to suppress evidence found in his bedroom during a warrantless search of his residence by parole officers. We reject that contention. "A search which would be unlawful if directed against an ordinary citizen may be proper if conducted against a parolee" (*People v McMillan*, 130 AD3d 651, 653 [2d Dept 2015], *affd* 29 NY3d 145 [2017]). The record supports the court's determination that the search of defendant's residence was " 'rationally and reasonably related to the performance of the parole officer[s'] dut[ies]' and was therefore lawful" (*People v Johnson*, 94 AD3d 1529, 1532 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]; *see People v Huntley*, 43 NY2d 175, 179 [1977]).

Defendant further contends in his main brief that the search was unlawful because it was not authorized or performed by defendant's parole officer, but by other parole officers. Defendant did not raise that contention in his motion papers, during the hearing, or in his posthearing submission, and it is therefore not preserved for our review (*see People v Socciarelli*, 203 AD3d 1556, 1558 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]; *People v Jackson*, 202 AD3d 1447, 1448-

1449 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]). In any event, it is without merit. The evidence at the suppression hearing established that a parole officer obtained information that defendant made a social media post depicting himself holding what appeared to be a firearm, which was a violation of his parole. The parole officer attempted to contact defendant's parole officer, but he was not on duty. The parole officer contacted his supervisor, who authorized him to conduct a search of defendant's residence with other parole officers. We conclude that the fact that the search was not authorized or conducted by defendant's assigned parole officer does not render the search unlawful (*see generally McMillan*, 29 NY3d at 148-149).

We have considered the remaining contentions in the main and pro se supplemental briefs and conclude that they are without merit.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

689

KA 21-01272

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEVERT J. GILES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered July 6, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that he did not validly waive his right to appeal. We reject that contention.

Here, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]), and we note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see generally Thomas*, 34 NY3d at 567; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). Contrary to defendant's assertion, the court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], *lv denied* 15 NY3d 920 [2010], quoting *Lopez*, 6 NY3d at 256; *see People v Slishevsky*, 149 AD3d 1488, 1489 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]). Defendant also asserts that he did not validly waive his right to appeal because the court listed several claims of error that would

survive a valid waiver but failed to explain that the list was nonexhaustive and would also include any issue involving a right of a constitutional dimension that went to the very heart of the process. That assertion lacks merit. The record establishes that the court, following the model colloquy, explained that the listed issues were "[a]mong the limited number of claims" of error that would survive a valid waiver and, contrary to defendant's suggestion, "[n]o 'particular litany' is required for a waiver of the right to appeal to be valid" (*People v Wood*, 217 AD3d 1407, 1408 [4th Dept 2023], quoting *Lopez*, 6 NY3d at 256; *see People v Parker*, 151 AD3d 1876, 1876 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). We thus conclude that defendant validly waived his right to appeal inasmuch as the record establishes that the court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Brackett*, 174 AD3d 1542, 1542 [4th Dept 2019], *lv denied* 34 NY3d 949 [2019] [internal quotation marks omitted]).

Defendant's further contention that his plea was "not voluntarily entered because [he] provided only monosyllabic responses to [the court's] questions is actually a challenge to the factual sufficiency of the plea allocution" (*People v Hendrix*, 62 AD3d 1261, 1262 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]), which is encompassed by the valid waiver of the right to appeal (*see People v Alsaifullah*, 162 AD3d 1483, 1485 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]). Defendant's valid waiver of the right to appeal also encompasses his challenges to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Kemp*, 94 NY2d 831, 833 [1999]) and to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256).

Finally, we note that the plea proceeding and the sentence reflect defendant's status as a second felony drug offender (Penal Law § 70.70 [1] [b]), and the record thus confirms that the court merely misstated during sentencing that defendant was a second felony offender rather than a second felony drug offender (*see People v Bradley*, 196 AD3d 1168, 1170-1171 [4th Dept 2021]; *People v Feliciano*, 108 AD3d 880, 881 n 1 [3d Dept 2013], *lv denied* 22 NY3d 1040 [2013]). Inasmuch as the uniform sentence and commitment form incorrectly reflects that defendant was sentenced as a second felony offender, it must be amended to reflect that he was sentenced as a second felony drug offender (*see Bradley*, 196 AD3d at 1171).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

690

CAF 21-01271

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

IN THE MATTER OF JOHN H. FREDERICK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASHLEY R. SNYDER, RESPONDENT-RESPONDENT.

CHARU NARANG, ROCHESTER, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered August 20, 2021, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole custody and primary residence of the subject child to respondent, with supervised visitation to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that modified the parties' prior order of custody and visitation by, inter alia, directing that the father's visitation with the child be supervised. We affirm.

Contrary to the father's contention, Family Court did not abuse its discretion in directing that his visitation be supervised. "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Shaffer v Woodworth*, 175 AD3d 1803, 1804 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Mountzouros v Mountzouros*, 191 AD3d 1388, 1389 [4th Dept 2021], *lv denied* 37 NY3d 902 [2021]). Here, we conclude that a sound and substantial basis in the record supports the court's determination that the father's visitation should be supervised inasmuch as the record demonstrates that certain behavior by the father "has resulted in both fear and anxiety in the child[ ]," requiring medical treatment and therapy (*Matter of Solomon v Fishman*, 180 AD3d 1051, 1053 [2d Dept 2020], *lv denied* 35 NY3d 910 [2020]; *see Matter of Madison H. [Demezz J.H.]*, 173 AD3d 458, 459 [1st Dept 2019]). The Attorney for the Child (AFC) also noted the child's refusal to visit the father based on the father's behavior and requested on behalf of the child that visitation be

supervised. "[W]hile the child's wishes are not controlling, they are entitled to considerable weight" particularly where, as here, the child's age and maturity render her input particularly meaningful (*Madison H.*, 173 AD3d at 459; *see Matter of Perry v Render*, 107 AD3d 1615, 1615 [4th Dept 2013]).

The father further contends that the AFC should have substituted his own judgment for that of the child. The father failed to preserve for our review his contention concerning the AFC's representation inasmuch as he did not make a motion to remove the AFC (*see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]). In any event, the father's contention lacks merit. "There are only two circumstances in which [AFCs are] authorized to substitute [their] own judgment for that of the child: '[w]hen the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child' " (*id.*, quoting 22 NYCRR 7.2 [d] [3]). Neither exception is implicated in this matter (*see id.*), and we thus conclude that the AFC properly advocated for the wishes of his client.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CAF 22-00282

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

IN THE MATTER OF LATISHA KEYES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MISTER WAHABBI HALTON AND VIVIAN HALTON,
RESPONDENTS-RESPONDENTS.

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

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-RESPONDENT VIVIAN HALTON.

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

Appeal from an order of the Family Court, Erie County (Margaret A. Logan, R.), entered January 18, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied and dismissed the petitions.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner mother appeals from an order that denied and dismissed her petitions seeking to modify a prior order of custody by granting her visitation with the child who is the subject of this proceeding. We affirm. "A party seeking a change in an established custody arrangement has the 'burden of establishing a change in circumstances sufficient to warrant an inquiry into whether the best interests of the child warranted a [modification of the prior order]' " (*Matter of Cole v Nofri*, 107 AD3d 1510, 1511 [4th Dept 2013], *appeal dismissed* 22 NY3d 1083 [2014]). Here, the mother failed to meet that burden. The prior order of custody was entered in 2017 upon the mother's default and at a time when a petition to terminate her parental rights on the ground of abandonment was pending. In the years since the prior order of custody was entered, the mother has had essentially no contact with the child and has made no effort to have such contact with the child. The mother's unsubstantiated testimony was insufficient to demonstrate that she completed a parenting class and a mental health evaluation (*see Matter of Paul P. v Tonisha J.*, 149 AD3d 409, 409 [1st Dept 2017]). Moreover, we conclude under the facts of this case that those factors would not constitute a change in circumstances sufficient to

warrant an inquiry into whether the best interests of the child warranted a modification of the prior order.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

696

CAF 22-00161

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

IN THE MATTER OF CHARLES REARDON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA KRAUSE, RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret A. Logan, R.), entered December 7, 2021, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of her attorney's request for an adjournment, and the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order entered upon her default that, inter alia, awarded petitioner father sole custody of the subject child, with supervised visitation to the mother. The mother contends that Family Court erred in entering the order upon her default after she appeared for the virtual evidentiary hearing on the father's petition by telephone rather than by videoconference because the court had not clearly directed her to appear visually and her attorney appeared at the hearing. We reject that contention.

Subject to limited exceptions not applicable here, a party "may prosecute or defend a civil action in person *or* by attorney," including such an action in Family Court (CPLR 321 [a] [emphasis added]; *see* Family Ct Act § 165 [a]; *Matter of Kwasi S.*, 221 AD2d 1029, 1030 [4th Dept 1995]; Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 165). Thus, a party's "failure to appear [in person] at the hearing on [a] petition does not automatically constitute a default" (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300 [4th Dept 2007]; *see e.g. Matter of Bailey v Bailey*, 213 AD3d 1329, 1329 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th

Dept 2017]; *Matter of Daniels v Davis*, 140 AD3d 1688, 1688 [4th Dept 2016]; *see generally* CPLR 3215 [a]). Nonetheless, a party's failure to appear may, under certain circumstances, constitute a default, particularly where the party's attorney, although present, declines to participate in the hearing in the party's absence and instead elects to stand mute (*see Matter of Bianca F. [Terrald F.]*, 191 AD3d 1491, 1491 [4th Dept 2021], *lv denied* 37 NY3d 901 [2021]; *Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv dismissed in part & denied in part* 18 NY3d 854 [2011]; *cf. Matter of Clausell v Salame*, 156 AD3d 1401, 1401 [4th Dept 2017]; *Cameron B.*, 149 AD3d at 1503; *see also Matter of Jaylen Derrick Jermaine A. [Samuel K.]*, 125 AD3d 535, 536 [1st Dept 2015]; *Matter of Naomi KK. v Natasha LL.*, 80 AD3d 834, 835 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]; *Matter of Handibode v Martensen*, 71 AD3d 1145, 1145 [2d Dept 2010], *lv denied* 15 NY3d 703 [2010]).

Here, the record establishes that, during a pretrial conference weeks in advance of the scheduled hearing, the court advised the mother that she needed to appear virtually "via the [Microsoft] Teams link" to avoid the prospect of default and the mother, after initially expressing discomfort with appearing visually as opposed to telephonically only, subsequently confirmed her understanding that she was required to "appear via videoconference" for the hearing. The mother was even offered the opportunity to appear visually via computer from a kiosk in the courthouse where her attorney would also be physically present. We thus conclude that, contrary to the mother's assertion, she was adequately "warned of the consequences of failing to appear by video and was given ample time to find access to a computer or other device that would permit [her] to participate by video" (*Matter of Darlene H. v Abdus R.*, 204 AD3d 550, 551 [1st Dept 2022], *lv denied* 38 NY3d 911 [2022]).

On the date of the hearing, however, the mother did not appear visually, either via videoconference or from a computer in a kiosk at the courthouse; rather, the mother called into the proceeding by telephone. Although the mother initially complained of technical difficulties with her cell phone in her attempts to connect to the videoconference, she also conveyed that her preference was to appear at the hearing via telephone only, to which the court responded by explaining that it needed to see her in order to adequately assess her credibility (*see Matter of Ferguson v LeClair*, 191 AD3d 1380, 1380 [4th Dept 2021], *appeal dismissed* 37 NY3d 926 [2021]). The court afforded the mother an opportunity to confer with her attorney to address her failure to appear in the manner required and, upon returning to the videoconference, the mother's attorney indicated that the mother was unable to resolve the purported technical difficulties and requested an adjournment. The court, concluding that the mother had adequate warning that she needed to appear visually at the hearing and ample time to ensure that she could so appear, denied the request for an adjournment and determined that it would proceed by inquest. Inasmuch as the mother's attorney, although present, thereafter declined to participate in the inquest in the mother's absence and instead elected to stand mute, we conclude that the court properly

determined that the mother's failure to appear in the manner required constituted a default (*see Lastanzea L.*, 87 AD3d at 1356; *cf. Bianca F.*, 191 AD3d at 1491; *Cameron B.*, 149 AD3d at 1503; *see also Naomi KK.*, 80 AD3d at 835; *Handibode*, 71 AD3d at 1145).

"[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those 'matters which were the subject of contest' before the [trial court]" (*Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004], quoting *James v Powell*, 19 NY2d 249, 256 n 3 [1967], *rearg denied* 19 NY2d 862 [1967]; *see Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019]). Thus, in this appeal, review is limited to the mother's contention that the court abused its discretion in denying her attorney's request for an adjournment (*see Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386-1387 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *Matter of Martin v Martin*, 121 AD3d 693, 693-694 [2d Dept 2014], *lv denied* 26 NY3d 911 [2015]). We reject that contention. "The grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889 [2006]). Here, the mother's attorney "failed to demonstrate that the need for the adjournment . . . was not based on a lack of due diligence on the part of the mother or her attorney" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *see Matter of Grice v Harris*, 114 AD3d 1276, 1276 [4th Dept 2014]; *see generally Steven B.*, 6 NY3d at 889). Indeed, the record supports the court's determination that the mother had been adequately warned of the consequences of failing to appear visually at the virtual hearing and was afforded ample time to find access to a computer or other functional device that would permit her to participate via videoconference (*see Darlene H.*, 204 AD3d at 551). Consequently, we conclude that the court did not abuse its discretion in denying the mother's request for an adjournment (*see Grice*, 114 AD3d at 1276).

Finally, the remaining issue raised by the mother is not reviewable on appeal from the order entered upon her default because it was not a subject of contest before the court (*see Matter of Larae L. [Heather L.]*, 202 AD3d 1454, 1455 [4th Dept 2022], *lv denied* 38 NY3d 907 [2022]; *cf. DiNunzio*, 175 AD3d at 1080-1082).

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

703

CA 22-00832

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

ANGEL BLACK, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 136826.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (TAMARA B. CHRISTIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SLATER SLATER SCHULMAN LLP, MELVILLE (STEPHANIE BROSS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered April 15, 2022. The order denied in part the motion of defendant to dismiss the claim.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 12, 2023,

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

713

CAF 22-01657

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

IN THE MATTER OF DANIELLE HAYES,
PETITIONER-APPELLANT,

V ORDER

RUSSEAN FOLTS, RESPONDENT-RESPONDENT.

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

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered October 12, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, expanded the parenting time of respondent.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

714

CAF 22-01336

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

IN THE MATTER OF MICHAEL J. GEREMSKI, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STACY J. BERARDI, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered August 5, 2022, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection against respondent.

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

Memorandum: Respondent appeals from an order of protection issued in a proceeding pursuant to Family Court Act article 8 upon a finding that she committed acts constituting the family offense of harassment in the second degree against petitioner (*see* Penal Law § 240.26 [3]; *see also* Family Ct Act § 812 [1]). Initially, we note that, while the order on appeal has expired, the appeal is not moot "because the order still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision" (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]; *see Matter of Shephard v Ray*, 137 AD3d 1715, 1716 [4th Dept 2016]).

With respect to the merits, we agree with respondent that the evidence is not legally sufficient to establish that she committed the family offense in question. "A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Harvey v Harvey*, 214 AD3d 1462, 1462 [4th Dept 2023] [internal quotation marks omitted]). To establish that respondent committed acts constituting harassment in the second degree, petitioner was required to establish that respondent engaged in conduct that was intended to harass, annoy or alarm petitioner, that petitioner was alarmed or seriously annoyed by the conduct, and that the conduct served no legitimate purpose (*see* Penal Law § 240.26 [3]). Here, the evidence presented by petitioner at the hearing consisted primarily of petitioner's testimony that respondent posted

"negative posts and stuff" on social media about him including, in particular, two posts on Facebook about an unnamed "ex" that he believed referred to him, after which respondent blocked him from viewing her posts. We conclude under the circumstances of this case that the evidence presented by petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting harassment in the second degree (*see Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113-1114 [4th Dept 2012]).

In light of our determination, we do not consider respondent's remaining contention.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

719

CA 22-00570

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

ANTHONY CORTES, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 134127.)

ANDREW F. PLASSE, FLUSHING, FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Ramon E. Rivera, J.), entered February 16, 2022. The order granted the motion of defendant to dismiss the claim.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

721

CA 23-00449

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

DELINA D. CALHOUN, PLAINTIFF-APPELLANT,

V ORDER

SHERONDA M. MACLIN, ET AL., DEFENDANTS,
AND JUSTIN B. KIMBALL, DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., ROCHESTER (AARON M. ADOFF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered February 9, 2023. The order and judgment granted the motion of defendant Justin B. Kendall, sued as Justin B. Kimball, for summary judgment dismissing the complaint against him.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

732

CAF 22-01041

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF RANIYA P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

ROBERT P., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER Z. BLACKHALL, CHEEKTOWAGA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered May 9, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent permanently neglected the subject child and transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the February 25, 2022 decision at Family Court.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

733

CAF 22-01042

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF ROBERT P., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

ROBERT P., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER Z. BLACKHALL, CHEEKTOWAGA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered May 9, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent permanently neglected the subject child and transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the February 25, 2022 decision at Family Court.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

734

CAF 22-01043

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF RYAN P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

ROBERT P., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER Z. BLACKHALL, CHEEKTOWAGA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered May 9, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, adjudged that respondent permanently neglected the subject child and transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the February 25, 2022 decision at Family Court.

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

735

CA 22-00887

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

IN THE MATTER OF BRIGHTON GRASSROOTS, LLC,
PETITIONER-APPELLANT,

V ORDER

TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON OFFICE OF BUILDING INSPECTOR, TOWN OF BRIGHTON, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES,
RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR,
PETITIONERS-APPELLANTS,

V

TOWN OF BRIGHTON OFFICE OF THE BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON, NEW YORK ZONING BOARD OF APPEALS, TOWN OF BRIGHTON, DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND M&F, LLC, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 2.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (MINDY L. ZOGHLIN OF COUNSEL), FOR PETITIONER-APPELLANT BRIGHTON GRASSROOTS, LLC.

HODGSON RUSS LLP, BUFFALO (AARON M. SAYKIN OF COUNSEL), FOR PETITIONERS-APPELLANTS SAVE MONROE AVE., INC., 2900 MONROE AVE., LLC, CLIFFORDS OF PITTSFORD, L.P., ELEXCO LAND SERVICES, INC., JULIA D. KOPP, MARK BOYLAN, ANNE BOYLAN AND STEVEN M. DEPERRIOR.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS TOWN OF BRIGHTON ZONING BOARD OF APPEALS, TOWN OF BRIGHTON OFFICE OF BUILDING INSPECTOR, RAMSEY BOEHNER, IN HIS CAPACITY AS BUILDING INSPECTOR, TOWN OF BRIGHTON.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA, LLC, MARDANTH ENTERPRISES, INC., AND DANIELE MANAGEMENT, LLC, COLLECTIVELY DOING BUSINESS AS DANIELE FAMILY COMPANIES.

Appeals from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 6, 2022, in proceedings pursuant to CPLR article 78. The judgment denied in part and dismissed in part the petitions.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 7, 2023,

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

736

CA 22-01160

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

DANIEL CHARCHOLLA, PLAINTIFF-APPELLANT,

V ORDER

CHANNEL 13 NEWS, ALSO KNOWN AS 13 WHAM, AND
DEERFIELD MEDIA (ROCHESTER), INC.,
DEFENDANTS-RESPONDENTS.

LAW FIRM OF AARON M. GAVENDA, ESQ., ROCHESTER (VIVEK J. THIAGARAJAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BALLARD SPAHR LLP, NEW YORK CITY (JACQUELYN N. SCHELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered June 29, 2022. The order, inter alia, denied those parts of plaintiff's motion seeking to strike defendants' answer, seeking a default judgment, and seeking fees and costs.

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court

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

745

CA 23-00608

PRESENT: WHALEN, P.J., BANNISTER, MONTOUR, AND GREENWOOD, JJ.

MARIA KARIMOVA, PLAINTIFF-RESPONDENT,

V ORDER

PROGRESSIVE CASUALTY INSURANCE COMPANY,
DEFENDANT-APPELLANT.

HURWITZ FINE P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROSENTHAL, KOOSHOIAN & LENNON, LLP, BUFFALO (PETER M. KOOSHOIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered March 17, 2023. The order, inter alia, granted in part the motion of plaintiff to compel the disclosure of a certain prelitigation SUM claim file.

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

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

Entered: September 29, 2023

Ann Dillon Flynn
Clerk of the Court