SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 26, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JULY 26, 2024

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_____	521	CA 23 00748	RESETARITIS CONSTRUCTION CORPORATIO V NORFOLK SOUTHERN RAILWAY COMPANY
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

94/23

KA 20-00330

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN KING, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SUSAN M. NORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered February 20, 2020. The judgment convicted defendant upon a jury verdict of assault in the second degree, criminal possession of a weapon in the third degree, endangering the welfare of a child (two counts), menacing in the second degree (two counts), menacing a police officer or peace officer and resisting arrest. The judgment was reversed by order of this Court entered May 5, 2023 (216 AD3d 1400), and defendant on August 1, 2023 was granted leave to appeal to the Court of Appeals from the order of this Court, and the Court of Appeals on June 18, 2024 reversed the order and remitted the case to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (— NY3d — [June 18, 2024]).

Now, upon remittitur from the Court of appeals and having considered the facts and issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that upon remittitur from the Court of Appeals, the judgment so appealed from be and the same hereby is unanimously modified on the law by directing that the definite sentences imposed on counts 4 and 5 of the indictment shall run concurrently with each other and with the sentences imposed on the remaining counts of the indictment and as modified the judgment is affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v King*, — NY3d —, 2024 NY Slip Op 03322 [June 18, 2024], *revg* 216 AD3d 1400 [4th Dept 2023]). We previously reversed the judgment convicting defendant, upon a jury verdict, of, inter alia, one count of assault in the second degree (Penal Law

§ 120.05 [2]), two counts of endangering the welfare of a child (§ 260.10 [1]), and one count of menacing a police officer or peace officer (§ 120.18); granted that part of defendant's motion seeking to dismiss the indictment pursuant to CPL 30.30; and dismissed the indictment (*King*, 216 AD3d at 1408). The conviction arose from a series of events during which defendant, among other things, stabbed his estranged wife several times. A majority of this Court concluded that the People were not timely ready for trial because, despite the People's prior declaration of readiness, "upon the effective date of CPL article 245, the People were returned to a state of unreadiness, and the People's subsequent attempt to serve and file a certificate of compliance did not occur until after the time to declare trial readiness had expired" (*id.* at 1401-1402). One Justice dissented, concluding that the People complied with their obligations to be ready for trial as required under the prior version of CPL 30.30 when they announced their trial readiness and that the new legislation did not affect that prior state of readiness (*King*, 216 AD3d at 1408-1409 [Ogden, J., dissenting]). The Court of Appeals reversed our order reversing the judgment and dismissing the indictment, stating that the "People [were] not required to fulfill a prerequisite to declaring trial readiness when they ha[d] already validly declared ready for trial" and, thus, the People were not chargeable for any delay after the effective date of the amendments and remained within the applicable statutory speedy trial limit (*King*, — NY3d at —, 2024 NY Slip Op 03322, *2). The Court of Appeals remitted the matter to this Court "for consideration of the facts and issues raised but not determined" previously (*id.*).

We reject defendant's contention that Supreme Court abused its discretion in refusing to impose sanctions for the prosecutor's failure to disclose in a timely manner recordings of 911 calls and photographs (*see* CPL former 240.20 [1] [c]; *People v Benitez*, 221 AD2d 965, 966 [4th Dept 1995], *lv denied* 87 NY2d 970 [1996]). Here, the prosecutor complied with the discovery statute then in effect, and defendant failed to establish that any delay in disclosure substantially prejudiced him (*see People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]; *People v Cooper*, 134 AD3d 1583, 1585 [4th Dept 2015]).

We reject defendant's further contention that the evidence is legally insufficient to support the conviction of menacing a police officer or peace officer. Defendant's intent may be inferred from the totality of his conduct (*see People v Ferguson*, 177 AD3d 1247, 1248 [4th Dept 2019]), which included brandishing a large knife, swinging the knife and refusing multiple commands to drop the knife. Thus, contrary to defendant's contention, there is a valid line of reasoning and permissible inferences from which a rational jury could have found that defendant intentionally placed or attempted to place the subject police officer in reasonable fear of physical injury (*see* Penal Law §§ 10.00 [9]; 120.18; *People v Thomas*, 174 AD3d 1430, 1431-1432 [4th Dept 2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]),

we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We also reject defendant's contention that the sentence is unduly harsh and severe. We agree with defendant, however, that the court erred in directing that the definite sentences imposed on the two counts of endangering the welfare of a child shall run consecutively to each other and to the sentences imposed on the remaining counts (*see* Penal Law § 70.35; *People v Abuhamra*, 107 AD3d 1630, 1631 [4th Dept 2013], *lv denied* 22 NY3d 1038 [2013]). We therefore modify the judgment accordingly.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

95/23

KA 21-01800

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALVIN KING, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SUSAN M. NORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Now, upon the Court's own motion,

It is hereby ORDERED that the memorandum and order entered May 5, 2023 (216 AD3d 1410 [4th Dept 2023]) is vacated and the following memorandum and order is substituted therefor:

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered November 17, 2021. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL article 440.

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

Memorandum: Defendant appeals, by permission of this Court, from an order that denied his motion pursuant to CPL 440.10 seeking to vacate his judgment of conviction on the ground that he was denied effective assistance of counsel. Specifically, defendant asserted in his motion papers that defense counsel was ineffective in failing to make a pretrial motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). We agree with defendant that Supreme Court erred to the extent that it denied defendant's motion as procedurally barred (*see People v Franklin*, 206 AD3d 1610, 1611-1612 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). We nonetheless conclude that the court properly denied the motion on the merits. Trial counsel " 'cannot be deemed ineffective for failing to pursue a strategy or defense that had little or no chance of success' " (*id.* at

1612; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

298

KA 17-01950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARON BELL, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

ARON BELL, DEFENDANT-APPELLANT PRO SE.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered July 9, 2015. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree (two counts), assault in the second degree (two counts), burglary in the first degree (two counts), criminal possession of a weapon in the second degree, criminal mischief in the fourth degree, criminal trespass in the second degree, criminal contempt in the second degree and endangering the welfare of a child (four counts).

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the second degree (§ 120.05 [2]), and burglary in the first degree (§ 140.30 [1], [2]), one count of criminal possession of a weapon in the second degree (§ 265.03 [3]), and four counts of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends in his main brief that count 1 of the indictment, charging attempted murder in the second degree, and count 3, charging assault in the second degree, were rendered duplicitous by the trial testimony that purportedly established two distinct shootings at the relevant victim. We reject that contention. With respect to each count, we conclude that defendant " 'in an uninterrupted course of conduct directed at a single victim, violate[d] a single provision of the Penal Law' " and therefore " 'commit[ted] but a single crime' " (*People v Flanders*, 25 NY3d 997,

1000 [2015]).

Contrary to defendant's contentions in his main and pro se supplemental briefs, his conviction of both counts of attempted murder in the second degree is supported by legally sufficient evidence (*see People v Pearson*, 192 AD3d 1555, 1555 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]). Additionally, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in the main brief that the verdict with respect to the challenged counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends in the main brief that his conviction of criminal possession of a weapon is unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant failed to raise a constitutional challenge before County Court, however, and therefore any such contention is unpreserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Davidson*, 98 NY2d 738, 739-740 [2002]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]). As defendant correctly concedes, his "challenge to the constitutionality of [the] statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, 41 NY3d 35, 42-51 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention in the main brief, the court did not err in denying defendant's request for an adjournment following the People's disclosure of additional physical evidence. "The decision whether to grant an adjournment lies in the sound discretion of the trial court . . . and the court's exercise of that discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Tripp*, 177 AD3d 1409, 1411 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020] [internal quotation marks omitted]). Defendant has made no showing of prejudice, especially given that defendant acknowledges that the People did not use the relevant physical evidence at trial.

In light of defendant's resentencing, we do not consider his challenge to the severity of the original sentence, and we dismiss the appeal from the judgment to that extent (*see People v Richardson*, 128 AD3d 1377, 1379 [4th Dept 2015], *lv denied* 25 NY3d 1206 [2015]).

To the extent that defendant challenges the resentence, that challenge is not properly before us because defendant did not take an appeal from the resentence (*see People v Kuras*, 49 AD3d 1196, 1197 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]).

We have reviewed defendant's remaining contentions in his main

and pro se supplemental briefs and conclude that none warrants modification or reversal of the judgment.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

315

KA 20-00239

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL SHAW, ALSO KNOWN AS SAV, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 16, 2019. The judgment convicted defendant upon a jury verdict of murder in the first degree (two counts), murder in the second degree (two counts), attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing those parts convicting defendant of murder in the second degree under counts 3 and 4 of the indictment and dismissing those counts and by directing that the sentences imposed on counts 7 and 8 run concurrently with the sentences imposed on counts 1, 2, 5, and 6, and as modified the judgment is affirmed.

Memorandum: Defendant was convicted following a jury trial of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), two counts of murder in the second degree (§ 125.25 [1]), one count each of attempted murder in the second degree (§§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), and three counts of criminal possession of a weapon (CPW) in the second degree (§ 265.03 [1] [b]; [3]). The conviction stems from an incident during which defendant fired 13 shots from a 9mm handgun in a parking lot. Five of the bullets struck a sedan, killing the two occupants. Three shots were fired into an SUV that was parked next to the sedan; the sole occupant of the SUV was struck and paralyzed as a result of her injuries.

As defendant contends and the People correctly concede, counts 3 and 4 of the indictment, charging him with murder in the second degree, must be dismissed as lesser inclusory offenses of counts 1 and 2 of the indictment, charging him with murder in the first degree (*see People v Beard*, 189 AD3d 2097, 2099 [4th Dept 2020], *lv denied* 36 NY3d

1095 [2021]; *People v Clayton*, 175 AD3d 963, 967 [4th Dept 2019]; *see generally* CPL 300.40 [3] [b]). We therefore modify the judgment accordingly.

As defendant further contends and the People correctly concede, County Court erred in directing that the sentences imposed for CPW in the second degree under counts 7 and 8 of the indictment run consecutively to the sentences imposed for murder in the first degree, attempted murder in the second degree, and assault in the first degree under counts 1, 2, 5, and 6 of the indictment inasmuch as there was no evidence presented that defendant possessed the gun independently of his intent to use it in the shooting (*see People v Alligood*, 192 AD3d 1508, 1510 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *People v Boyd*, 192 AD3d 1659, 1661 [4th Dept 2021]; *People v Tripp*, 177 AD3d 1409, 1410-1411 [4th Dept 2019], *lv denied* 34 NY3d 1133 [2020]; *see generally People v Brown*, 21 NY3d 739, 750-752 [2013]; *People v Wright*, 19 NY3d 359, 365 [2012]). We therefore further modify the judgment by directing that the sentences imposed on counts 7 and 8 of the indictment shall run concurrently with the sentences imposed on counts 1, 2, 5, and 6.

Relying on *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), defendant contends that his conviction for CPW in the second degree under counts 8 and 9 of the indictment (Penal Law § 265.03 [3]) is unconstitutional. Defendant failed to preserve that contention for our review (*see People v Cabrera*, 41 NY3d 35, 39 [2023]; *People v Nixon*, 222 AD3d 1384, 1385 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Ocasio*, 222 AD3d 1364, 1365 [4th Dept 2023]; *People v Clinton*, 222 AD3d 1427, 1428 [4th Dept 2023]; *see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

Defendant next contends that, as a result of unconstitutional law enforcement conduct, evidence obtained on the date of his arrest—specifically, his statements and a gun—should have been suppressed as fruit of the poisonous tree. In particular, defendant contends that a law enforcement SWAT team violated his constitutional rights when it broke down the fence surrounding the apartment building where defendant had been an overnight guest of a tenant, directed him to exit the residence, and coerced the tenant into consenting to a search of the apartment, during which officers found the gun used in the shooting hidden in a toilet tank. Defendant also contends that his constitutional rights were violated because law enforcement officers intentionally avoided obtaining an arrest warrant in order to skirt New York's indelible right to counsel rules (*see* NY Const, art I, § 6; *see generally People v Doll*, 21 NY3d 665, 671-672 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]; *People v Bing*, 76 NY2d 331, 338-339 [1990], *rearg denied* 76 NY2d 890 [1990]).

As a preliminary matter, we conclude that, inasmuch as defendant's statement "was not admitted into evidence . . .[,] defendant's contention that the statement was the fruit of [an] unlawful [search or] arrest is purely academic" (*People v Wilson*, 131 AD2d 526, 526 [2d Dept 1987], *lv denied* 70 NY2d 719 [1987], *reconsideration denied* 70 NY2d 939 [1987]). We therefore do not address any issues related to the statement.

We reject defendant's contention that his right to counsel was violated when the officers did not first obtain an arrest warrant inasmuch as "there [i]s nothing illegal about the police going to [a] defendant's apartment and requesting that he [or she] voluntarily come out" (*People v Garvin*, 30 NY3d 174, 180 [2017], *cert denied* — US —, 139 S Ct 57 [2018] [internal quotation marks omitted]).

As defendant correctly concedes, he failed to preserve for our review his contention that the law enforcement SWAT team's incursion into the curtilage of the apartment building constituted a warrantless entry into a protected space (*see People v Hayes*, 185 AD3d 1419, 1420 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Guerrero*, 151 AD3d 1875, 1875-1876 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]), and we decline to exercise our power to review the merits of that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's related contention that he was denied effective assistance of counsel based on defense counsel's failure to raise that issue inasmuch as defendant failed to demonstrate that his "underlying contention 'would be meritorious upon appellate review' " (*People v Bloom*, 149 AD3d 1462, 1463 [4th Dept 2017], *lv denied* 30 NY3d 947 [2017]). A fenced-in yard is part of the curtilage of a home, and warrantless entry into that area is, subject to certain exceptions, a violation of the Fourth Amendment (*see People v Morris*, 126 AD3d 813, 814 [2d Dept 2015], *lv denied* 25 NY3d 1168 [2015]; *see also United States v Dunn*, 480 US 294, 300 [1987]). New York has recognized that a person who has standing to challenge the search of an apartment also has standing to challenge a warrantless entry onto the *apartment's* curtilage (*see People v Hill*, 153 AD3d 413, 416 [1st Dept 2017], *affd* 33 NY3d 1076 [2019]), but federal courts have recognized that "when considering what counts as curtilage, courts have distinguished single-unit and multi-unit buildings and that [i]n a modern urban multifamily apartment house, the area within the curtilage is necessarily more limited than in the case of a rural dwelling subject to one owner's control" (*United States v Wills*, 634 F Supp 3d 14, 19 [D Conn 2022] [internal quotation marks omitted]; *see United States v Arboleda*, 633 F2d 985, 992 [2d Cir 1980], *cert denied* 450 US 917 [1981]). In the case of an apartment house, "a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his [or her] exclusive control" (*Commonwealth v Thomas*, 358 Mass 771, 775, 267 NE2d 489, 491 [1971]; *see Arboleda*, 633 F2d at 992). Moreover, as an overnight guest, defendant's privacy interest "could not reasonably extend beyond the interior area where he spent the night" (*People v Perretti*, 278 AD2d 597, 599 [3d Dept 2000], *lv denied* 96 NY2d 762 [2001]). It is questionable whether defendant would have had standing

to challenge the entry into the curtilage. The evidence does not establish if the fenced-in area was particular to the tenant's rental unit or the entire lot containing multiple buildings. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, defense counsel successfully moved to reopen the hearings to raise additional contentions that might warrant suppression (*cf. People v Rose*, 129 AD3d 1631, 1632 [4th Dept 2015], *lv denied* 27 NY3d 1005 [2016]).

Defendant further contends that he was improperly arrested in violation of *Payton v New York* (445 US 573 [1980]). As an overnight guest of the apartment, defendant had standing to raise the *Payton* challenge (*see Minnesota v Olson*, 495 US 91, 96-97 [1990]; *see also People v Carey*, 162 AD3d 1476, 1477 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]; *but see People v Ortiz*, 83 NY2d 840, 842-843 [1994]). An arrest outside of a residence can, in certain situations, constitute a *Payton* violation (*see Garvin*, 30 NY3d at 209 [Rivera, J., dissenting]; *see also Fisher v City of San Jose*, 558 F3d 1069, 1074-1075 [9th Cir 2009]; *United States v Saari*, 272 F3d 804, 807-808 [6th Cir 2001]) and, under the circumstances of this case, we conclude that there was a *Payton* violation. Here, the number of officers, their attire in tactical SWAT gear, and their manner of entry constitute "coercive circumstances suggesting that defendant was submitting to authority" by leaving the apartment (*People v Benton*, 13 AD3d 97, 97 [1st Dept 2004], *lv denied* 4 NY3d 761 [2005]; *cf. People v Minley*, 68 NY2d 952, 953-954 [1986]; *see generally Kaupp v Texas*, 538 US 626, 631 [2003]). We thus conclude that defendant's exit from the residence was " 'a mere submission to a claim of lawful authority' " (*Kaupp*, 538 US at 631) rather than a voluntary exit from the premises.

Nevertheless, suppression of the gun is not required. The remedy for a *Payton* violation is "suppression of any evidence obtained from defendant following that violation 'unless the taint resulting from the violation has been attenuated' " (*People v Box*, 145 AD3d 1510, 1515 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017], quoting *People v Harris*, 77 NY2d 434, 437 [1991]), and a tenant's "valid consent [can] attenuate[ ] any initial illegality" in the constructive entry (*People v Espinal*, 161 AD3d 556, 558 [1st Dept 2018], *lv denied* 32 NY3d 1064 [2018]; *see People v Priest*, 227 AD2d 574, 574-575 [2d Dept 1996], *lv denied* 88 NY2d 992 [1996]).

Contrary to defendant's contention, we conclude that the tenant's consent was voluntarily given. The factors we review in order to determine whether a person's consent to search is voluntary include "the temporal proximity of the consent to the arrest, the presence or absence of intervening circumstances, whether the police purpose underlying the illegality was to obtain the consent or the fruits of the search, whether the consent was volunteered or requested, whether the [person] was aware [they] could decline to consent, and particularly, the purpose and flagrancy of the official misconduct" (*People v Borges*, 69 NY2d 1031, 1033 [1987]).

Although the tenant's consent was given close in time to defendant's arrest, the tenant was not the subject of that arrest and, in any event, temporal proximity "is not dispositive of attenuation" (*Matter of Leroy M.*, 16 NY3d 243, 247 [2011], *cert denied* 565 US 842 [2011]). The officers took time to inform the tenant about the situation, and the evidence at the suppression hearing established that they were expressing a belief that a gun might be in the residence and did not "intentionally misle[a]d her into giving consent to search" (*People v Sweat*, 170 AD3d 1659, 1660 [4th Dept 2019]). Moreover, at the hearing, the tenant testified for the prosecution that she voluntarily consented to the search out of a desire to have a gun removed from her residence, where a minor child resided. The tenant never claimed, in or out of court, that her consent to search was anything but voluntary, and we reject defendant's contention that the tenant's testimony at the hearing is unworthy of belief. We thus conclude that the court properly refused to suppress the gun recovered from the residence.

Defendant contends that the evidence is legally insufficient to establish attempted murder in the second degree and assault in the first degree and that the verdict with respect to those counts is against the weight of the evidence. We review both contentions based on the jury charge as given without objection or exception (*see People v Prindle*, 16 NY3d 768, 770 [2011]; *People v Danielson*, 9 NY3d 342, 349 [2007]). Viewing the evidence in the light most favorable to the People, as we must when reviewing the legal sufficiency of the evidence (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude, contrary to defendant's contention, that the evidence with respect to those counts is legally sufficient to establish defendant's intent to cause death (*see* Penal Law §§ 110.00, 125.25 [1]) and resultant serious physical injury (*see* § 120.10 [1]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). It is well settled that such intent " 'may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Badger*, 90 AD3d 1531, 1532 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]) and, here, defendant fired multiple shots from close range at the SUV in which the victim was a passenger. Furthermore, viewing the evidence in light of the elements of those crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's final contention, the sentence, as modified, is not unduly harsh or severe.

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent. I conclude that the tenant's consent to search the apartment was not voluntary, and even assuming, arguendo, that her consent was voluntary, I conclude that it was not sufficiently attenuated from the violation pursuant to *Payton v New York* (445 US 573 [1980]) to purge the taint of the illegality.

Initially, my colleagues and I agree that defendant had standing

to raise his *Payton* challenge (*see Minnesota v Olson*, 495 US 91, 96-97 [1990]; *but see People v Ortiz*, 83 NY2d 840, 842-843 [1994]), and we further agree that a *Payton* violation occurred (*cf. People v Benton*, 13 AD3d 97, 97-98 [1st Dept 2004], *lv denied* 4 NY3d 761 [2005]; *see generally Kaupp v Texas*, 538 US 626, 631 [2003]).

In my view, however, the tenant's consent was not voluntary. "Official coercion, even if deviously subtle, nullifies apparent consent" (*People v Gonzalez*, 39 NY2d 122, 124 [1976]). "Whether consent has been voluntarily given or is only a yielding to overbearing official pressure must be determined from the circumstances" (*id.* at 128). The People bear the heavy burden of establishing that the consent was voluntary (*see id.*).

The record before us makes clear that the tenant was not free to leave. Immediately before the tenant gave her consent, officers—with guns drawn—ordered her to lie on the ground. She was then grabbed, handcuffed, and placed in the back of a police vehicle. While the tenant sat in the back of the police vehicle, a lieutenant stated, "You don't want to be arrested," and when she responded, he proceeded to tell her to "just chill out." She was allowed to leave the police vehicle only after she consented to the search. Although the tenant later testified that she gave consent to search, the record concerning the events at the time of the consent "lacks support for the conclusion . . . that [she] voluntarily consented" to the search of her home (*People v Freeman*, 29 NY3d 926, 928 [2017]).

Even if I could agree with my colleagues that the People met their heavy burden of establishing the voluntariness of the tenant's consent, I would conclude that the consent was not sufficiently attenuated from the *Payton* violation. Contrary to the position taken by my colleagues, voluntariness is not dispositive on the issue of attenuation (*see People v Borges*, 69 NY2d 1031, 1033-1034 [1987]).

Here, the temporal proximity of the violation and the consent does not support a finding that the consent was sufficiently attenuated (*cf. People v Suarez*, 137 AD3d 676, 677 [1st Dept 2016], *lv denied* 27 NY3d 1139 [2016]; *People v Santos*, 3 AD3d 317, 317 [1st Dept 2004], *lv denied* 2 NY3d 746 [2004]), and there are no circumstances to support the conclusion that the tenant's consent resulted from "an intervening independent act of a free will" (*Brown v Illinois*, 422 US 590, 598 [1975] [internal quotation marks omitted]; *see e.g. Santos*, 3 AD3d at 317). Rather, the consent was *requested* by officers after, as noted above, they placed the tenant on the ground while they had their guns drawn, then grabbed her, handcuffed her, and placed her in the back of a police vehicle. The People also failed to establish that the tenant was given the right to refuse.

Finally, the underlying purpose for the police conduct, although legal, is particularly flagrant and offends notions of justice. It is undisputed that the reason the police did not seek an arrest warrant in advance was because they did not want defendant's right to counsel to attach. In other words, the police allowed defendant—a person they

believed at the time to be armed and dangerous—to remain in the community for the purpose of circumventing his right to counsel. Ironically, the People on appeal insist that defendant should not be given any opportunity to ever live again in the community and must, instead, spend the rest of his life in prison without the possibility of parole.

Consequently, I conclude that County Court erred in refusing to suppress the gun. That error, however, was harmless with respect to the conviction for murder in the first degree, attempted murder in the second degree, and assault in the first degree under counts 1, 2, 5, and 6 of the indictment, all of which stem from the shooting. For those counts, the jury had, among other evidence linking defendant to the shooting, a positive identification of defendant by the victim and another eyewitness (*see People v Cotton*, 184 AD3d 1145, 1146 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]). With respect to the conviction for criminal possession of a weapon in the second degree under count 9 of the indictment, which stems from defendant's possession of the gun on the date of his arrest, there was no other evidence that defendant possessed a loaded and operable handgun on that date. Consequently, I would further modify the judgment by dismissing that count.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00127

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

DREAMCO DEVELOPMENT CORP., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CRANESVILLE BLOCK COMPANY, INC., DEFENDANT-RESPONDENT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINMAN, HOWARD & KATTELL LLP, ALBANY (PAUL C. MARTHY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered December 12, 2022. The order, insofar as appealed from, denied those parts of the motion of plaintiff for summary judgment on the breach of contract cause of action and dismissing the second counterclaim.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted in part with respect to the first cause of action and the second counterclaim, and the second counterclaim is dismissed.

Memorandum: Plaintiff and defendant signed a one-page "independent contractor and consultant" contract pursuant to which plaintiff agreed to sell certain minimum amounts of concrete on behalf of defendant (minimum) in return for monthly payments. During the term of the contract, defendant ceased making its monthly payments to plaintiff and terminated the contract, claiming that plaintiff had sold less than 10% of the minimum and failed to provide defendant with an adequate assurance that it could sell the remaining quantity by the end of the contract term.

Plaintiff thereafter commenced this action for, among other things, breach of contract. Defendant answered asserting counterclaims and affirmative defenses, including a counterclaim for breach of contract based upon plaintiff's failure to provide adequate assurance of its ability to perform its obligation under the contract (second counterclaim). Plaintiff thereafter moved for summary judgment on its breach of contract cause of action and dismissing defendant's counterclaims. Supreme Court denied the motion. As limited by its brief, plaintiff appeals from the order to the extent that it denied those parts of the motion seeking summary judgment on the breach of contract cause of action and dismissing the second

counterclaim, and we reverse the order insofar as appealed from.

The dispositive issue before this Court is whether defendant was justified in demanding "adequate assurance of due performance" from plaintiff pursuant to UCC 2-609 (1). If article 2 of the UCC applies and if "adequate assurance is not forthcoming, repudiation is deemed confirmed, and the nonbreaching party is allowed to take reasonable actions as though a repudiation had occurred" (*Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 464 [1998]). Article 2 of the UCC applies only to agreements that are "predominantly . . . for the sale of goods, as opposed to the furnishing of services" (*Golisano v Vitoch Interiors Ltd.*, 150 AD3d 1629, 1630 [4th Dept 2017] [internal quotation marks omitted]; *see Levin v Hoffman Fuel Co.*, 94 AD2d 640, 640 [1st Dept 1983], *affd* 60 NY2d 665 [1983]; *Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482, 486 [1977]). "In determining whether a contract is for the sale of property or services the main objective sought to be accomplished by the contracting parties must be looked for" (*Ben Constr. Corp. v Ventre*, 23 AD2d 44, 45 [4th Dept 1965]; *see also Perlmutter v Beth David Hosp.*, 308 NY 100, 104-105 [1954], *rearg denied* 308 NY 812 [1955]).

Here, plaintiff met its initial burden on the motion of establishing that the contract was not predominately for the sale of goods. Pursuant to the contract, plaintiff agreed to provide services to defendant, i.e., to sell the concrete. The contract did not require plaintiff to purchase any products from defendant. Plaintiff therefore demonstrated that the UCC did not apply here, that defendant did not have the right to demand adequate assurance of performance (*see* UCC 2-609; *see generally Norcon Power Partners*, 92 NY2d at 464) and that defendant breached the agreement when it failed to remit its monthly payment according to the terms of the contract. Defendant failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]). We reject defendant's assertion that plaintiff failed to preserve its contention that the UCC is not applicable.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01742

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

RAYKEISHA M. ROUSE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE DEPARTMENT OF PUBLIC WORKS,
CITY OF SYRACUSE, CHRISTOPHER RODRIGUEZ,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

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

SUSAN R. KATZOFF, CORPORATION COUNSEL, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Rory A. McMahon, J.), dated October 12, 2023. The order denied the motion of plaintiff to dismiss the fifteenth affirmative defense from the answer of defendants City of Syracuse Department of Public Works, City of Syracuse and Christopher Rodriguez.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the fifteenth affirmative defense asserted by defendants City of Syracuse Department of Public Works, City of Syracuse, and Christopher Rodriguez is dismissed.

Memorandum: Plaintiff commenced this action to recover for injuries she sustained when the car in which she was a passenger collided with a recycling truck. At the time of the collision, the driver of the recycling truck, defendant Christopher Rodriguez, was proceeding along his route. Rodriguez and defendants City of Syracuse Department of Public Works and City of Syracuse (collectively, defendants) answered and asserted as a fifteenth affirmative defense that they were insulated from legal action by the provisions of Vehicle and Traffic Law § 1103.

Plaintiff thereafter moved pursuant to CPLR 3211 (b) to strike defendants' fifteenth affirmative defense. Supreme Court converted the motion to one for summary judgment pursuant to CPLR 3211 (c). After additional briefing, the court determined that Vehicle and Traffic Law § 1103 applied to the facts of the case and denied the motion. Plaintiff appeals, and we reverse.

We agree with plaintiff that the court erred in denying her motion inasmuch as she met her initial burden of demonstrating that Vehicle and Traffic Law § 1103 (b) does not apply as a matter of law and defendants failed to raise a triable issue of fact in opposition.

Vehicle and Traffic Law § 1103 (b) provides that the rules of the road do not apply to "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" (*see Riley v County of Broome*, 95 NY2d 455, 462 [2000]). "[T]he law was intended to exempt from the rules of the road all teams and vehicles that 'build highways, repair or maintain them, paint the pavement markings, remove the snow, sand the pavement and do similar work' . . . Thus, the exemption turns *on the nature of the work being performed* (construction, repair, maintenance or similar work)—not on the nature of the vehicle performing the work" (*id.* at 464 [emphasis added]).

Inasmuch as municipal refuse collection does not involve building, repairing, or maintaining highways, painting pavement markings, removing snow, sanding the pavement, or doing other similar work (*see id.*) and is "a task which one would anticipate could be accomplished while obeying the rules of the road" (*Qosaj v Village of Sleepy Hollow*, 223 AD3d 29, 35 [2d Dept 2023]), we conclude that Vehicle and Traffic Law § 1103 does not apply to the facts presented here (*see Guzman v Bowen*, 38 AD3d 837, 837-838 [2d Dept 2007]). In reaching that conclusion, we note that the 2016 amendment to Vehicle and Traffic Law § 117-a (L 2016, ch 293, § 1)—which broadened the definition of "hazard vehicle" to include sani-vans and waste collection vehicles—did not broaden the scope of work that would constitute "engag[ing] in work on a highway" (§ 1103 [b]).

Vehicle and Traffic Law § 1103 (b) further provides that section 1202 (a)—which regulates stopping, standing, and parking—does not apply to "hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway" (*see Riley*, 95 NY2d at 462). That provision, however, does not shield defendants from the allegations of negligence raised by plaintiff, i.e., violations of the right-of-way provisions of Article 26 of the Vehicle and Traffic Law, including, inter alia, sections 1140, 1142 (a), and 1146 (b).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01173

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY J. HINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered August 17, 2021. The judgment convicted defendant upon a guilty plea of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 560-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Brooks*, 188 AD3d 1630, 1630 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]). That valid waiver forecloses review of defendant's request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Latimore*, 179 AD3d 1551, 1551-1552 [4th Dept 2020], *lv denied* 35 NY3d 971 [2020]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00613

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

THEODORE POTEMPA AND KEVIN POTEMPA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TARA POTEMPA, DEFENDANT-APPELLANT.

FELT EVANS, LLP, CLINTON (KENNETH L. BOBROW OF COUNSEL), FOR DEFENDANT-APPELLANT.

NORMAN P. DEEP, CLINTON, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered March 9, 2023. The order, among other things, denied in part defendant's motion to, inter alia, dismiss the amended complaint.

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

Memorandum: The parties to this action are adult siblings who have had an acrimonious history, and defendant lives with the parties' mother (mother). Prior to the commencement of this action, plaintiff Kevin Potempa and a nonparty brother (brother) commenced a Mental Hygiene Law article 81 proceeding seeking to have a guardian appointed for the mother. Kevin Potempa and the brother then entered into a stipulation of settlement with the mother whereby Kevin Potempa and the brother withdrew the petition in exchange for, among other things, formalized contact between the mother and plaintiffs.

Plaintiffs subsequently commenced this action against defendant asserting in their complaint causes of action for defamation and negligent infliction of emotional distress. Defendant moved, inter alia, to dismiss the complaint for failure to state a cause of action. In opposition to the motion, plaintiffs conceded that they did not have a viable cause of action for defamation, and they served an amended complaint asserting a single cause of action for negligent infliction of emotional distress based on allegations that defendant "commenced a systematic course of conduct to destroy the relationship between [plaintiffs] and their mother." In addition, plaintiffs both submitted affidavits in which they made averments to the effect that, despite the stipulation formalizing their contact with the mother, defendant had prevented them from having contact with her.

Defendant then moved, inter alia, to dismiss the amended complaint for failure to state a cause of action, and plaintiffs opposed. Supreme Court, in its decision on that motion, noted that, at oral argument, it had raised a question "whether the amended complaint, as amplified by [plaintiffs' affidavits], adequately stated a claim for tortious interference with a contract," and further noted that the parties thereafter submitted briefing on that question. The court then determined, inter alia, that plaintiffs do not have a cause of action for negligent infliction of emotional distress, but do have a cause of action for tortious interference with contract. Defendant now appeals from an order that denied the motion to dismiss the amended complaint in part by, inter alia, ordering that the "amended complaint and affidavits set forth a prima facie cause of action for tortious interference with a contract." We affirm.

Defendant contends that the court erred in determining that plaintiffs have a cause of action for tortious interference with contract inasmuch as plaintiffs failed to allege that they had a business relationship with a third party and failed to plead pecuniary damages. On a motion to dismiss pursuant to CPLR 3211, a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In reviewing a motion under CPLR 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . and the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*Leon*, 84 NY2d at 88 [internal quotation marks omitted]). Contrary to defendant's contention, unlike tortious interference with business relations, the elements of tortious interference with contract do not require a business relationship between the plaintiff and a third party (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *Canandaigua Natl. Bank & Trust Co. v Acquest S. Park, LLC*, 170 AD3d 1663, 1664-1665 [4th Dept 2019]; *cf. Munno v City of Rochester*, 197 AD3d 925, 925-926 [4th Dept 2021]; *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part & denied in part* 14 NY3d 736 [2010]). Also contrary to defendant's contention, unlike a breach of contract action, in "an action . . . for tortious interference, . . . the elements of damages . . . would be those recognized under the more liberal rules applicable to tort actions" (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 197 n 6 [1980]). According plaintiffs "the benefit of every possible favorable inference" (*Leon*, 84 NY2d at 87), we conclude that the court properly determined that plaintiffs have a cause of action for tortious interference with contract.

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

Finally, plaintiffs' contention concerning the negligent infliction of emotional distress cause of action is not properly

before us inasmuch as they did not cross-appeal from the order (*see Hecht v City of New York*, 60 NY2d 57, 63 [1983]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 20-01037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered December 11, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts 1, 2 and 3 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) in connection with the shooting death of the victim. We note by way of background that defendant was originally tried in June 2019 and, during that first trial, the jury was able to reach a verdict only with respect to two counts of menacing in the second degree (§ 120.14 [1]), of which defendant was acquitted. This appeal is from a judgment convicting him, following a new trial, of the charges upon which the original jury had deadlocked.

Defendant's challenge to the sufficiency of the evidence is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not specifically directed at the alleged errors asserted on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Streeter*, 166 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 32 NY3d 1210 [2019]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Muhammad*, 204 AD3d 1402, 1403 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's challenge to the constitutionality of Penal Law § 265.03 (1) (b) and (3) in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) is not preserved for our review (*see* CPL 470.05 [2]; *People v Cabrera*, 41 NY3d 35, 42 [2023]; *People v Ocasio*, 222 AD3d 1364, 1365 [4th Dept 2023]). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

Defendant further contends that the People were collaterally estopped at the second trial from introducing certain evidence related to the menacing counts of which he was previously acquitted, and that County Court committed reversible error in permitting such evidence. At his second trial, the People were permitted to introduce in their case-in-chief, over defendant's objection, the testimony of an eyewitness that, during a confrontation in a park that occurred prior to the shooting, defendant had pulled out a gun and waved it at the victim, and had cocked the gun and pointed it at the eyewitness. We agree with defendant that, under the circumstances here, the People were collaterally estopped by the earlier verdict from presenting evidence at defendant's second trial concerning the alleged display of a gun during the earlier confrontation at the park (*see People v O'Toole*, 22 NY3d 335, 338 [2013]; *People v Acevedo*, 69 NY2d 478, 486-487 [1987]).

The doctrine of collateral estoppel "operates in a criminal prosecution to bar relitigation of issues necessarily resolved in defendant's favor at an earlier trial" (*Acevedo*, 69 NY2d at 484). "[W]here the People have had a full and fair opportunity to contest issues, but have failed, it would be inequitable and harassive to again permit the prosecution to establish these same matters, as if the first trial had never taken place" (*id.* at 485). Only those facts that were "necessarily decided" by a prior acquittal will have collateral estoppel effect in a subsequent prosecution (*id.* at 487). Although it may "normally be impossible to ascertain the exact import of a verdict," we are charged with giving "a practical, rational reading to the record of the first trial" to determine "whether a rational jury could have grounded its decision on an issue other than that which the defendant seeks to foreclose from consideration" (*id.* [internal quotation marks omitted]; *see generally People v Brandi E.*, 105 AD3d 1341, 1342-1343 [4th Dept 2013], *lv denied* 22 NY3d 1154 [2014]).

Here, the two menacing counts alleged that defendant intentionally placed or attempted to place another person in reasonable fear of physical injury, serious physical injury, or death by displaying what appeared to be a firearm, on the basis of his alleged actions at the park shortly before the murder. The eyewitness's testimony at the first trial was the only evidence supporting the menacing counts. Although the People assert that the first jury could have concluded that defendant, despite displaying a gun, did not have the requisite intent to commit menacing in the

second degree, we reject that assertion inasmuch as the evidence did not support a theory that defendant was motivated by self-defense. Rather, in acquitting defendant of the menacing counts, the first jury must have concluded that the portion of the eyewitness's testimony relating to defendant's display of the gun at the park was not credible. "Unlike many other criminal cases, this one was devoid of alternative possibilities" (*Acevedo*, 69 NY2d at 487 [internal quotation marks omitted]; *see O'Toole*, 22 NY3d at 338).

The People further assert that collateral estoppel should not apply because, in their view, "the murder stemmed from the earlier menacing," thereby rendering the eyewitness's testimony about the prior display of a gun essential to the judgment in the second trial. We reject that assertion, and "perceive no unreasonable difficulty that jeopardizes the jury's truth-seeking function by the application of collateral estoppel here" (*People v Williams*, 163 AD3d 1418, 1420 [4th Dept 2018] [internal quotation marks omitted]). The details regarding defendant's alleged display of the gun at the park were, with respect to the second trial, matters of "evidentiary fact"; they were not in any way essential to convict defendant of either the murder or weapon possession counts (*O'Toole*, 22 NY3d at 338 [internal quotation marks omitted]). Indeed, the incident in the park occurred almost two hours before the shooting. With respect to the murder and weapon possession counts, the eyewitness's testimony about the incident in the park provided only background information and a potential motive for the shooting two hours later; omitting the testimony regarding defendant's earlier display of the gun in the park would not have affected the eyewitness's account of what happened during the shooting, especially because the eyewitness remained free to testify that an argument with defendant compelled him and the victim to leave the park (*see generally Williams*, 163 AD3d at 1420).

Furthermore, we conclude that the error in admitting the testimony regarding defendant's display of a gun at the park was not harmless (*cf. People v Stinson*, 234 AD2d 111, 112 [1st Dept 1996], *lv denied* 89 NY2d 1101 [1997]; *see also Acevedo*, 69 NY2d at 489; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). Even assuming, arguendo, that the proof of defendant's guilt, without reference to the error, is overwhelming, it cannot be said that there is no reasonable possibility that the erroneously admitted evidence might have contributed to defendant's conviction (*see Crimmins*, 36 NY2d at 237; *see generally People v Goodman*, 69 NY2d 32, 37-38 [1986]). We thus conclude that a new trial is required on counts 1, 2 and 3 of the indictment (*see generally People v Jackson*, 126 AD3d 1508, 1510 [4th Dept 2015]).

We have considered defendant's contentions relating to the court's suppression ruling and conclude that those contentions are without merit. In light of our determination to grant a new trial on

counts 1, 2 and 3 of the indictment, we do not address defendant's remaining contentions.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

392

CA 23-01406

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

107/115 NORTH WASHINGTON STREET, LLC,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

IRWIN PROPERTIES, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HARRIS BEACH PLLC, BUFFALO (ALLISON B. FIUT OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered August 10, 2023. The order granted the motion of plaintiff for a preliminary injunction enjoining defendant from interfering with its use of certain property, on condition that plaintiff post an undertaking in the amount of $5,000, denied that part of the cross-motion of defendant seeking to dismiss plaintiff's first cause of action and enjoined plaintiff from installing a third bay door on its property.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's application seeking that the injunctive relief in favor of defendant be conditioned upon defendant providing an undertaking and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking a judgment declaring that an express easement burdening defendant's property permits plaintiff's customers to park along the side of plaintiff's building and access loading bay doors (first cause of action) and that plaintiff has a prescriptive easement burdening defendant's property that permits plaintiff's customers to park along the side of its building. Plaintiff moved for, among other things, a preliminary injunction precluding defendant from interfering with any use of the express easement, and defendant cross-moved, inter alia, to dismiss the first cause of action and for an order quieting title and declaring that plaintiff is "enjoin[ed] [from] use and installation of bay doors along [d]efendant's property" and that the parking abutting plaintiff's building is "for passenger vehicles only." Supreme Court granted plaintiff's motion, granted defendant a preliminary injunction precluding plaintiff from installing a third bay door, and otherwise

denied defendant's cross-motion. In addition, the court granted defendant's application seeking that the injunctive relief in favor of plaintiff be conditioned upon plaintiff providing an undertaking, but denied the application of plaintiff seeking such a condition upon defendant receiving injunctive relief. Plaintiff appeals, and defendant cross-appeals.

Contrary to plaintiff's contention on appeal, we conclude that the court did not abuse its discretion in granting defendant a preliminary injunction "thereby preserving the status quo pending a determination on the merits" (*Young v Crosby*, 87 AD3d 1308, 1309 [4th Dept 2011]). Although defendant's notice of cross-motion did not specifically seek a preliminary injunction, it sought a declaration that plaintiff is enjoined from installing any further bay doors and also requested "such other and further relief as th[e] [c]ourt deem[ed] just and proper," and the issue of a preliminary injunction to maintain the status quo was before the court on plaintiff's motion (*cf. Northside Studios v Treccagnoli*, 262 AD2d 469, 469-470 [2d Dept 1999]). However, the court erred "in issuing the injunction without requiring defendant to give an undertaking" (*Perlbinder v Board of Mgrs. of the E. 53rd St. Condominium*, 134 AD3d 459, 460 [1st Dept 2015]; *see also TDA, LLC v Lacey*, 202 AD3d 1474, 1476 [4th Dept 2022]; *see generally* CPLR 6312 [b]). We therefore modify the order accordingly and remit the matter to Supreme Court to fix the amount of the undertaking (*see Karabatos v Hagopian*, 39 AD3d 930, 932 [3d Dept 2007]).

With respect to defendant's cross-appeal, we conclude that the court properly denied that part of defendant's cross-motion seeking to dismiss the first cause of action. The complaint states a cause of action for declaratory relief as to the extent of the express easement under RPAPL article 15 (*see generally* RPAPL 1515; *Matter of Kerri W.S. v Zucker*, 202 AD3d 143, 154 [4th Dept 2021], *lv dismissed* 38 NY3d 1028 [2022]; *Meyer v Stout*, 45 AD3d 1445, 1447 [4th Dept 2007]).

We further conclude that " 'factual issues preclude a summary determination of the parties' rights' " with respect to the easement (*Matter of 16 Main St. Prop., LLC v Village of Geneseo*, 225 AD3d 1204, 1208 [4th Dept 2024]; *see generally Kerri W.S.*, 202 AD3d at 154-155). While both plaintiff and defendant relied upon the purportedly plain and unambiguous language of the easement agreement to support their respective construction of that agreement, " 'the[ir] intricate effort[s] . . . to explain the meaning of [the easement agreement] demonstrate[ ] the lack of clarity and the ambiguity of the language' thereof" (*Birdsong Estates Homeowners Assn., Inc. v D.P.S. Southwestern Corp.*, 101 AD3d 1735, 1736 [4th Dept 2012]; *see Rivera-Ortiz v Cook*, 225 AD3d 1145, 1147 [4th Dept 2024]). Where, as here, "the language of [an easement agreement] is ambiguous, its construction presents a question of fact [that] may not be [summarily] resolved by the court" (*Cooling Tower Specialties, Inc. v Yaro Enters., Inc.*, 67 AD3d 1445, 1445 [4th Dept 2009] [internal quotation

marks omitted]; *see generally 16 Main Street Prop., LLC*, 225 AD3d at 1208).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

396

CA 23-00523

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

OAKSHIRE PROPERTIES, LLC, NORTH AMERICAN PERISHABLES COMPANY, LLC, OAKSHIRE NATURALS GP, LLC, OAKSHIRE NATURALS, LP, AND GARY SCHROEDER, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ARGUS CAPITAL FUNDING, LLC, PARK AVENUE RECOVERY, LLC, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

MURRAY LEGAL, PLLC, MINEOLA (CHRISTOPHER R. MURRAY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COSTIGAN LAW PLLC, NEW YORK CITY (WILLIAM COSTIGAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered March 3, 2023. The order, insofar as appealed from, denied in part the motion of defendants Argus Capital Funding, LLC, and Park Avenue Recovery, LLC, to dismiss the amended complaint against them.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, to vacate an ex parte judgment taken by confession. The litigation arises from an "Agreement for the Purchase and Sale of Future Receipts" (agreement) entered into between an affiliate of plaintiffs—nonparty Oakshire Mushroom Sales, LLC (Oakshire)—and defendant Argus Capital Funding, LLC (Argus), which purported to sell $554,850 of Oakshire's future receipts for $411,000, less a $10,995 origination fee. Pursuant to the agreement, Argus was entitled to automatically withdraw daily payments of $2,935.71 from Oakshire's bank account, which it represented to be 15% of Oakshire's average sales. The agreement was secured by a personal guarantee from Oakshire's principal, as well as by an affidavit in confession of judgment signed by the principal on behalf of himself, Oakshire and all of its affiliated entities. Although the agreement contained a provision requiring monthly reconciliation of the withdrawn daily payments with the specified percentage of the future receipts, the provision also stated that Argus's failure to reconcile the payments would not constitute a breach of the agreement and, further, that any

prospective adjustment to the amount of the daily payments would be in the sole discretion of Argus. The agreement further stated that a default on the part of Oakshire would occur where, inter alia, "two or more [automatic withdrawal] transactions attempted by [Argus] within one calendar month are rejected by [the] bank," immediately accelerating the entire amount due and authorizing the ex parte filing of the confession of judgment. On December 18, 2018, Oakshire notified Argus that it had experienced a significant decrease in sales and requested a downward adjustment to the daily payment amount. Argus did not consent to the requested reduction and, two days later, filed an ex parte action in the Ontario County Clerk's Office for a judgment by confession against Oakshire, its principal and all of its affiliated entities, for the remaining balance of $319,993.20, plus $105,822.75 in attorney's fees, costs and disbursements, which was granted. Shortly thereafter, Oakshire and one of its affiliated entities filed for bankruptcy protection.

Plaintiffs subsequently commenced this action seeking, among other relief, to vacate the judgment by confession against them, alleging that the underlying transaction was not a sale of future receipts but, rather, a loan that contained a criminally usurious interest rate (*see generally* Penal Law § 190.40). Argus and defendant Park Avenue Recovery, LLC (collectively, defendants) moved to dismiss the amended complaint against them pursuant to CPLR 3211 on the grounds that, inter alia, the causes of action sounding in fraudulent inducement and fraud were not pleaded with the specificity required by CPLR 3016, and documentary evidence established that the underlying transaction was not a usurious loan. Supreme Court granted the motion with respect to the two causes of action for usury, which it determined were barred by the one-year statute of limitations under CPLR 215 (6), and denied the motion with respect to the remaining causes of action. Defendants appeal, and we affirm.

"In assessing 'a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . [W]e accept the facts as alleged in the complaint as true, accord plaintiff[s] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Pottorff v Centra Fin. Group, Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]; *see Bratge v Simons*, 167 AD3d 1458, 1461 [4th Dept 2018]).

Contrary to defendants' contention, the allegations in plaintiffs' causes of action for fraudulent inducement and fraud that defendants misrepresented the underlying transaction as a sale of future receivables, and not a usurious loan, " 'sufficiently pleaded the elements of fraud . . . and supplied sufficient detail to satisfy the specific pleading requirements of CPLR 3016 (b)' " (*Baird v Baird*, 221 AD3d 1465, 1467 [4th Dept 2023]; *see Pottorff*, 192 AD3d at 1553-1554). Additionally, contrary to defendants' contention with respect to all of the causes of action that were not dismissed by the motion court, we conclude that the allegations in the amended complaint that the underlying transaction is a usurious loan are sufficient to survive a motion to dismiss. "When determining whether a transaction

is a loan, substance—not form—controls" (*Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 334 [2021]; *see Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 895 [2d Dept 2006]), and the transaction "must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it" (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665 [2d Dept 2020] [internal quotation marks omitted]). The primary question is "whether the [purported lender] is absolutely entitled to repayment under all circumstances [because, u]nless a principal sum advanced is repayable absolutely, the transaction is not a loan" (*Samson MCA LLC v Joseph A. Russo M.D. P.C./IV Therapeutics PLLC* [appeal No. 2], 219 AD3d 1126, 1128 [4th Dept 2023] [internal quotation marks omitted]). There are generally three factors that must be weighed to determine whether a repayment is absolute: "(1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy" or go out of business (*id.* [internal quotation marks omitted]; *see LG Funding, LLC*, 181 AD3d at 666).

Accepting the allegations in the amended complaint here as true and according plaintiffs the benefit of every possible favorable inference, we conclude that each of the factors weighs in favor of determining that repayment was absolute. First, although there is a reconciliation provision in the agreement, the provision appears illusory inasmuch as Argus may not be subject to any consequences for failing to comply with its terms and, further, Argus has sole discretion to adjust the amount of the daily payments. Second, it appears that there was an implied finite term in the agreement inasmuch as plaintiffs allege that the daily payment amount was set to ensure that Argus's targeted return would be met in a predetermined period of time as opposed to having been set based on the specified percentage of Oakshire's sales. Third, it appears that Argus had a means of recourse in the event Oakshire went out of business inasmuch as the agreement allowed Argus, in its sole discretion, to continue making daily payment withdrawals even if the daily payment amount exceeded Oakshire's sales, thereby providing Argus with a means to compel an event of "default" upon which it could then immediately accelerate the entire debt and file a confession of judgment against Oakshire's affiliated entities and personal guarantor. We therefore conclude that the amended complaint sufficiently alleges that the transaction is a loan subject to usury laws (*see Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]; *cf. Samson MCA LLC*, 219 AD3d at 1128; *see also Crystal Springs Capital, Inc. v Big Thicket Coin, LLC*, 220 AD3d 745, 746-747 [2d Dept 2023]; *LG Funding, LLC*, 181 AD3d at 666).

Defendants' remaining contentions were raised for the first time in their motion reply papers. "In general, [t]he function of [motion] reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169-1170 [4th Dept 2020] [internal quotation marks omitted]).

Nonetheless, a court may, in the exercise of its discretion, consider an argument raised for the first time in a party's motion reply papers where "the offering party's adversaries responded to the newly presented claim or evidence" (*id.* at 1170 [internal quotation marks omitted]) or where such claim or evidence "presents a purely legal question that appears on the face of the record and could not have been avoided had it been properly raised" (*Cummins v Lune*, 151 AD3d 1258, 1260 n [3d Dept 2017]).

Inasmuch as defendants' contention that plaintiffs' cause of action seeking to vacate the judgment by confession pursuant to CPLR 5015 (a) (3) fails to state a cause of action is a purely legal argument apparent on the face of the record that could not be avoided if properly raised, we exercise our discretion to reach its merits (*see Cummins*, 151 AD3d at 1260 n; *see generally Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 422 [2013]). Although defendants are correct that CPLR 5015 (a) (3) "is not a cause of action" in itself but, rather, merely the procedural means for making a motion to vacate a judgment or order (*NRO Boston LLC v CapCall LLC*, 2020 NY Slip Op 34510[U], *2 [Sup Ct, Westchester County 2020]), the proper mechanism for seeking to vacate a judgment by confession is, as plaintiffs commenced here, a separate plenary action (*see Ace Funding Source, LLC v Myka Cellars, Inc.*, 191 AD3d 624, 625 [2d Dept 2021]), and the allegations in plaintiffs' amended complaint state a cognizable cause of action to vacate the judgment of confession insofar as it alleges fraud, misrepresentation, misconduct and falsity of an affidavit submitted in support of the judgment by confession (*see e.g. Weinstein v Pollack*, 208 AD2d 615, 617-618 [2d Dept 1994]; *Scheckter v Ryan*, 161 AD2d 344, 345 [1st Dept 1990]; *Bufkor, Inc. v Wasson & Fried*, 33 AD2d 636, 636-637 [4th Dept 1969]).

Inasmuch as plaintiffs did not have an opportunity to respond before the motion court to the other contentions raised for the first time in defendants' motion reply papers, and they do not present purely legal questions that appear on the face of the record and could not have been avoided if properly raised, they are not properly before this Court (*see Dusch*, 184 AD3d at 1172; *Jackson v Vatter*, 121 AD3d 1588, 1589 [4th Dept 2014]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

397

CA 23-00339

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

IN THE MATTER OF FREEDOM FOUNDATION,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERSON COUNTY, RESPONDENT-APPELLANT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (KARI K. FAHRENBACH OF COUNSEL), FOR RESPONDENT-APPELLANT.

SHELLA ALCABES, OLYMPIA, WASHINGTON, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered January 20, 2023, in a proceeding pursuant to CPLR article 78. The judgment, among other things, granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by dismissing the petition and as modified the judgment is affirmed without costs.

Memorandum: Petitioner is a not-for-profit organization whose alleged purpose is to "promote individual liberty, free enterprise, and limited, accountable government." Petitioner made a request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) seeking "information for each Jefferson County employee who is currently employed in a position covered by a collective bargaining agreement with CSEA/AFSCME Local 1000." With respect to each employee, petitioner sought the employee's first name, middle name, last name, gender, public office address, job title, hire date, agency or department, work email address "or naming convention and domain," work telephone number, and bargaining unit. In addition, petitioner sought "to receive the responsive information electronically in machine-readable format." Respondent's County Administrator denied the request pursuant to Public Officers Law §§ 87 (2) (b) and 89 (2) (b) (iii) as "an unwarranted invasion of personal privacy," because the "requested information [was] not relevant to the employees' performance of their official duties and would be used for fund[-]raising or solicitation purposes." After petitioner's administrative appeal was denied, petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondent to grant the FOIL request. Respondent answered, contending that the request was properly denied pursuant to Public Officers Law §§ 87 (2) (b) and 89 (2) (b) (iii). Respondent now appeals from a judgment that, inter

alia, granted the petition based on, among other things, Supreme Court's conclusion that petitioner's stated purpose in obtaining the requested information—i.e., to educate workers "as to the rights they have regarding membership in their union"—was not a purpose that involved engaging in "solicitation" within the meaning of Public Officers Law § 89 (2) (b) (iii).

"FOIL imposes a broad duty of disclosure on government agencies," and "[a]ll agency records are presumptively available for public inspection and copying" unless one of the statutory exemptions applies, thereby permitting the agency to withhold the records (*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 109 [1992]; *see* Public Officers Law §§ 84, 87 [2]; *Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1401, 1403 [4th Dept 2022]). The exemptions are to be "narrowly construed," and the burden rests on the agency to demonstrate that an exemption applies (*Hanig*, 79 NY2d at 109; *see* Public Officers Law § 89 [4] [b]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]). However, although "FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government," the exemptions contained within FOIL must "be given their natural and obvious meaning where such interpretation is consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL" (*Matter of Federation of N.Y. State Rifle & Pistol Clubs v New York City Police Dept.*, 73 NY2d 92, 96 [1989] [internal quotation marks omitted]). In order "to invoke one of the exemptions of [Public Officers Law §] 87 (2), the agency must articulate particularized and specific justification for not disclosing requested documents" (*Gould*, 89 NY2d at 275 [internal quotation marks omitted]; *see Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-463 [2007]; *New York Civ. Liberties Union*, 210 AD3d at 1403).

"Against that backdrop, an agency may decline disclosure of records [that], 'if disclosed[,] would constitute an unwarranted invasion of personal privacy' " (*Matter of Hepps v New York State Dept. of Health*, 183 AD3d 283, 287 [3d Dept 2020], *lv dismissed & denied* 37 NY3d 1001 [2021], quoting Public Officers Law § 87 [2] [b]). That personal privacy exemption "incorporates a nonexhaustive list of categories of information that [the legislature has determined] would statutorily constitute unwarranted invasions of personal privacy if disclosed" (*id.*), including, as relevant here, the "release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes" (§ 89 [2] [b] [iii]).

Here, the dispositive issue—i.e., the meaning of the term "solicitation"—is an issue of pure statutory interpretation and, therefore, we "need not accord any deference to the agency's determination" (*Matter of DeVera v Elia*, 32 NY3d 423, 434 [2018] [internal quotation marks omitted]; *see Matter of Schwabler v DiNapoli*, 194 AD3d 1235, 1236 [3d Dept 2021]; *see generally D'Angelo v D'Angelo*, 89 AD3d 1424, 1424-1425 [4th Dept 2011]). "When presented with a question of statutory interpretation, a court's primary

consideration is to ascertain and give effect to the intention of the [l]egislature" (*Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019] [internal quotation marks omitted]). The Court of Appeals has "long held that the statutory text is the clearest indicator of legislative intent, and that a court should construe unambiguous language to give effect to its plain meaning" (*id.* [internal quotation marks omitted]; *see Ashley M. v Marcinkowski*, 207 AD3d 1093, 1095 [4th Dept 2022]). "In the absence of a statutory definition, [courts should] construe words of ordinary import with their usual and commonly understood meaning, and in that connection . . . dictionary definitions [may serve] as useful guideposts in determining the meaning of a word or phrase" (*Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 NY3d 1, 7 [2019] [internal quotation marks omitted]). "Where the statutory language is unambiguous, a court need not resort to legislative history" (*Walsh*, 34 NY3d at 524; *see Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 173 [2019]). Further, a statute "must be construed as a whole and . . . its various sections must be considered together and with reference to each other" (*Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012], *rearg denied* 20 NY3d 983 [2012] [internal quotation marks omitted]).

The term "solicitation" is not defined in the Public Officers Law. Respondent contends that the court erred in narrowly construing that term to include only those activities that are intended to result in financial gain to the party requesting the information via FOIL and that, under the circumstances here, petitioner's FOIL request was for solicitation purposes within the meaning of Public Officers Law § 89 (2) (b) (iii). We agree.

"Solicitation" is a word of "ordinary import," and thus it should be given its "usual and commonly understood meaning" (*Nadkos, Inc.*, 34 NY3d at 7). Black's Law Dictionary defines "solicitation" as "[t]he act or an instance of requesting or seeking to obtain something; a request or petition," and also defines the term as "[a]n attempt or effort to gain business" (Black's Law Dictionary [12th ed 2024], solicitation). Merriam-Webster defines "solicit" as, inter alia, "to make petition to," "to approach with a request or plea," or "to urge" (Merriam-Webster.com Dictionary, solicit).

In its administrative appeal, petitioner indicated that it "does not use the names of public employees for solicitation or fund-raising purposes." Rather, according to petitioner, it "contacts public employees to inform them of their constitutional rights." In its brief on this appeal, petitioner asserts that the court properly "recognized . . . that [petitioner] does not engage in solicitation when it informs public employees of their rights not to be in a public-sector union" and that the court properly applied "a definition of solicitation as a financial benefit or 'fund[-]raising.' " However, the dictionary definitions of "solicitation" do not include as a requirement an element of *financial* gain. Thus, petitioner's urged interpretation of "solicitation" runs contrary to the term's "usual and commonly understood meaning" (*Nadkos, Inc.*, 34 NY3d at 7 [internal quotation marks omitted]). Further, it is well settled

that, "[w]henever possible, statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous" (*Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]). If we were to interpret the term "solicitation" as requiring a financial benefit to the solicitor for purposes of Public Officers Law § 89 (2) (b) (iii), it would impermissibly render the use of the term "fund-raising" within the same provision unnecessary.

It is evident here that petitioner's intent, which "drives [our] analysis" (*Matter of New York State United Teachers v Brighter Choice Charter School*, 15 NY3d 560, 565 [2010]), in requesting the employees' names, contact information, and union status, is to contact union members to urge them to opt out of union membership. Indeed, petitioner states in its brief on appeal that it "contacts public employees for the purposes of its educational mission through . . . a project" that it calls " 'Opt-Out Today.' " There is no indication that petitioner "intends to use the names to, for example, expose governmental abuses or evaluate governmental activities" (*id.*). Nor, as petitioner asserts, does the "natural and obvious meaning" we assign to the term "solicitation" conflict "with the legislative intent and . . . general purpose and manifest policy underlying FOIL" (*Federation of N.Y. State Rifle & Pistol Clubs*, 73 NY2d at 96). "If anything, it is precisely *because* no governmental purpose is served by public disclosure of this information that section 87 (2) (b)'s privacy exemption falls squarely within FOIL's statutory scheme" (*New York State United Teachers*, 15 NY3d at 564-565 [internal quotation marks omitted]).

Based on the foregoing, we agree with respondent that the court erred in concluding that the statutory privacy exemption under Public Officers Law § 89 (2) (b) (iii) does not apply and, inasmuch as that exemption applies, we conclude that the court should have dismissed the petition on that basis. We therefore modify the judgment accordingly.

In light of our determination, we need not address respondent's remaining contentions.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

407

CAF 22-01977

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

IN THE MATTER OF KIARA F.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNDSEY M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

LISA A. BOWMAN, PINEHURST, NORTH CAROLINA, FOR PETITIONER-RESPONDENT.

CYNTHIA B. BRENNAN, AUBURN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), dated November 14, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Steven S. (Lyndsey M.)* ([appeal No. 2] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

412

CAF 22-01978

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

IN THE MATTER OF STEVEN S. AND SYRENITY S.

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LYNDSEY M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

LISA A. BOWMAN, PINEHURST, NORTH CAROLINA, FOR PETITIONER-RESPONDENT.

CYNTHIA B. BRENNAN, AUBURN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), dated November 14, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition with respect to the older child is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal Nos. 1 and 2, respondent mother appeals from orders of fact-finding and disposition adjudicating the subject children in those appeals to be permanently neglected and ordering that the children be placed in the custody of an authorized agency and the maternal grandmother, who had filed a petition for custody pursuant to Family Court Act article 6 during the pendency of the permanent neglect proceeding.

Initially, the mother's appeal from the order in appeal No. 2 insofar as it concerns the disposition with respect to the older child in that appeal must be dismissed as moot because that child has reached the age of 18 (*see Matter of Phoenix E.P.-W. [Felicita P.]*, 225 AD3d 875, 876 [2d Dept 2024]). "Nevertheless, the [mother's] challenge[ ] to the Family Court's finding[ ] that [she] permanently neglected the [older] child[ ] [is] not academic, since a finding of permanent neglect constitutes a permanent and significant stigma that might indirectly affect the [mother's] status in future proceedings" (*id.* [internal quotation marks omitted]; *see Matter of Nikole V. [Norman V.]*, 224 AD3d 1102, 1102 [3d Dept 2024], *lv denied* 41 NY3d 909 [2024]; *Matter of Desirea F. [Angela H.]*, 217 AD3d 1064, 1065 n 4 [3d

Dept 2023], *lv denied* 40 NY3d 908 [2023]; *see also Matter of Cameron J.S. [Elizabeth F.]*, 214 AD3d 1355, 1356 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]).

The mother contends in both appeals that the court erred in ordering that the children be placed in the custody of the maternal grandmother pursuant to Family Court Act § 1055, which addresses the placement of a child following an adjudication of neglect (*see* § 1052 [a] [iii]), rather than Family Court Act article 6, which addresses custody determinations in custody and permanent neglect proceedings. Although the court erroneously stated in its oral decision that it was "plac[ing] the children in the maternal grandmother's care pursuant to Family Court Act § 1055," it clarified in both its oral decision and in the orders that it was granting the maternal grandmother's article 6 petition.

In addition, we reject the mother's contention in both appeals that her due process rights were violated because she was not provided with sufficient notice that petitioner sought to terminate her parental rights. That contention is belied by the record, which contains repeated instances in which the mother was notified that petitioner sought to terminate her parental rights and supported the maternal grandmother's custody petition.

The mother further contends in both appeals that petitioner was required to change the permanency goal to adoption prior to petitioning to terminate her parental rights in order to avoid concurrent permanency goals that were inherently contradictory. Even assuming, arguendo, that this contention is preserved, we conclude that it is without merit. Under the Family Court Act, "[a]t the conclusion of each permanency hearing, the court shall . . . determine and issue its findings, and enter an order of disposition in writing: (1) directing that the placement of the child be terminated and the child returned to the parent . . . ; or (2) where the child is not returned to the parent . . . : (i) whether the permanency goal for the child should be approved or modified and the anticipated date for achieving the goal. The permanency goal may be determined to be: (A) return to parent; (B) placement for adoption with the local social services official filing a petition for termination of parental rights; (C) referral for legal guardianship; (D) permanent placement with a fit and willing relative; or (E) placement in another planned permanent living arrangement" (§ 1089 [d]).

Here, the court did not impose concurrent permanency goals (*cf. Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098-1099 [3d Dept 2012]). Rather, the goal remained return to parent. Additionally, an agency "is permitted to evaluate and plan for other potential future goals where reunification with a parent is unlikely . . . , and [s]imultaneously considering adoption and working with a parent is not necessarily inappropriate" (*Matter of Anastasia S. [Michael S.]*, 121 AD3d 1543, 1544 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014] [internal quotation marks omitted]; *see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Maryann Ellen F.*, 154 AD2d 167, 170 [4th Dept 1990],

appeal dismissed 76 NY2d 773 [1990]).

The mother contends in both appeals that petitioner failed to establish that it exercised the requisite diligent efforts to encourage and strengthen the parent-child relationship (*see* Social Services Law § 384-b [7] [a]). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parents to overcome problems that prevent the discharge of the child[ren] into their care, and informing the parents of their child[ren]'s progress" (*Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1391 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023] [internal quotation marks omitted]; *see Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). "An agency which has tried diligently to reunite a [parent] with [their] child but which is confronted by an uncooperative or indifferent parent is deemed to have fulfilled its duty" (*Star Leslie W.*, 63 NY2d at 144; *see Matter of Cheyenne C. [James M.]* [appeal No. 2], 185 AD3d 1517, 1519 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *Matter of Nassau County Dept. of Social Servs. v Diana T.*, 207 AD2d 399, 401 [2d Dept 1994]). "Petitioner is not required to guarantee that the parent succeed in overcoming his or her predicaments . . . , and the parent must assume a measure of initiative and responsibility" (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018] [internal quotation marks omitted]). Here, the record establishes "by clear and convincing evidence that, although petitioner made affirmative, repeated, and meaningful efforts to assist [the mother], its efforts were fruitless because [the mother] was utterly uncooperative" (*Cheyenne C.*, 185 AD3d at 1519 [internal quotation marks omitted]). Indeed, the testimony and the exhibits submitted by petitioner demonstrate that, although petitioner attempted to maintain contact with the mother and to work with her toward her service plan goals, the mother failed to cooperate in any meaningful manner.

Finally, we have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the orders.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

413

CA 23-01734

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

DION DEFEDERICIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VINCE'S PIZZA PLUS, INC., DEFENDANT-RESPONDENT.

LAW OFFICE OF CHRISTOPHER W. MCMASTER, WILLIAMSVILLE (F. BRENDAN BURKE, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 3, 2023. The order denied the motion of plaintiff for a default judgment and granted the cross-motion of defendant for an extension of time to file an answer to the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover wages he allegedly was not paid while employed as the manager of defendant's pizzeria. Following motion practice, plaintiff filed and served an amended complaint, which defendant did not answer within the required time. Plaintiff's counsel inquired as to the status of the answer to the amended complaint, but received no response from defendant's attorney. Several months later, plaintiff moved for a default judgment pursuant to CPLR 3215. Defendant opposed plaintiff's motion and cross-moved for an extension of time to file an answer to the amended complaint pursuant to CPLR 2004 and 3012. Supreme Court denied plaintiff's motion and granted defendant's cross-motion. Plaintiff appeals, and we now reverse.

Here, defendant does not dispute that plaintiff established "his entitlement to default judgment against [ ] defendant[ ] by submitting 'proof of service of the summons and the [amended] complaint, the facts constituting the claim, and . . . defendant['s] default' " (*Sutton v Williamsville Suburban, LLC*, 174 AD3d 1467, 1468 [4th Dept 2019], *lv dismissed* 34 NY3d 1091 [2020]). Thus, to successfully oppose plaintiff's motion, defendant had the burden of establishing a reasonable excuse for the default and a meritorious defense to the action (*see id.*; *see also Butchello v Terhaar*, 176 AD3d 1579, 1580

[4th Dept 2019]).

It is well settled that admissible evidence is required to establish a potentially meritorious defense; answers that are not verified by anyone with personal knowledge of the facts or affirmations of an attorney without personal knowledge are insufficient as a matter of law (*see Sutton*, 174 AD3d at 1468; *Jian Hua Tan v AB Capstone Dev., LLC*, 163 AD3d 937, 938-939 [2d Dept 2018]; *ABS 1200, LLC v Kudriashova*, 60 AD3d 1164, 1165-1166 [3d Dept 2009]; *see generally Conti v City of Niagara Falls Water Bd.*, 82 AD3d 1633, 1634 [4th Dept 2011]). Inasmuch as defendant relied upon the affirmation of its attorney, who lacked personal knowledge, and its proposed answer was not verified by anyone with personal knowledge of the facts (*see Sutton*, 174 AD3d at 1468), the court erred in denying the motion. Further, inasmuch as defendant's cross-motion also required a showing of a meritorious defense, we conclude that the court erred in granting the cross-motion (*see id.* at 1468-1469). Contrary to the dissent's suggestion, the court did not exercise its discretion to dispense with the requirement that defendant file an answer to the amended complaint. That relief was not sought below and defendant did not raise that contention on appeal.

All concur except DelConte, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would vote to affirm. "Generally, a defendant is required to file a new answer in response to an amended complaint . . . Nonetheless, a trial court has discretion to vary or dispense with the answer requirement . . . This discretion may be exercised without a formal request from the parties" (*Bahar v Sanieoff*, 210 AD3d 459, 460 [1st Dept 2022]; *see Triolo v Greenwood*, 216 AD3d 1035, 1036 [2d Dept 2023]; *see generally* CPLR 3025 [d]). In my view, under the circumstances of this case, Supreme Court was "soundly within its discretion" to deny plaintiff's motion for a default judgment based on defendant's four-month delay in responding to the amended complaint and to grant defendant's cross-motion for an extension of time to file an answer (*Bahar*, 210 AD3d at 460).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

415

CA 23-01146

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

GRETCHEN REVERE AND KEVIN REVERE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT P. BURKE, D.O., ET AL., DEFENDANTS,
STELLA M. CASTRO, M.D., AND ASTHMA & ALLERGY
ASSOCIATES, P.C., DEFENDANTS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (C. TAYLOR PAYNE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 28, 2023. The order granted the motion of plaintiffs to set aside a verdict with respect to defendants Stella M. Castro, M.D., and Asthma & Allergy Associates, P.C., and ordered a new trial.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the jury verdict is reinstated.

Memorandum: After Gretchen Revere (plaintiff) presented to her primary care physician (PCP) with numerous symptoms including the loss of taste and smell, the PCP referred plaintiff to allergist Stella M. Castro, M.D. of Asthma & Allergy Associates, P.C. (collectively, defendants). Following an initial evaluation during which Castro noted certain impressions about plaintiff's symptoms, Castro began plaintiff on a trial of nasal steroids and ordered skin allergen testing. Although plaintiff appeared three days later to complete the skin allergen testing, she failed to appear for a scheduled follow-up appointment to determine the effectiveness of the nasal steroids and did not thereafter return to Castro's practice. Castro was unaware that plaintiff failed to appear for her follow-up appointment—scheduled with a nurse practitioner at the practice—until years later, after plaintiffs commenced suit.

A benign brain tumor was later discovered in plaintiff's frontal lobe, and plaintiffs subsequently commenced this medical malpractice action seeking damages for injuries allegedly sustained by plaintiff as a result of defendants' failure to discover the tumor at an earlier

time, among other claims. Plaintiffs specifically alleged, as relevant here, that defendants departed from the standard of care by failing to engage in appropriate follow up, planning, and treatment and by failing to communicate with other healthcare providers. Plaintiffs did not allege that Castro failed to supervise or monitor her staff; nor did they allege that Castro was otherwise negligent in failing to learn of the missed appointment. Following motion practice, the only remaining claims against Asthma & Allergy Associates, P.C. (practice) were vicarious liability claims based on Castro's conduct.

Following trial, the jury returned a verdict in favor of defendants. Plaintiffs moved pursuant to CPLR 4404 (a) to set aside the verdict with respect to defendants, and Supreme Court granted the motion and ordered a new trial on the ground that the jury could not have reached its verdict with respect to defendants on any fair interpretation of the evidence. The court reasoned that there was unanimity among the medical experts who testified at trial that Castro was required under the applicable standard of care to report to the PCP that plaintiff had failed to appear for her follow-up appointment and that Castro thus never completed her evaluation. Defendants now appeal, contending, among other things, that the verdict was supported by a fair interpretation of the evidence and that the court erred in granting plaintiffs' motion.

" 'It is well settled that a jury verdict will be set aside as against the weight of the evidence only when the evidence at trial so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence' " (*Monzon v Porter*, 173 AD3d 1779, 1780 [4th Dept 2019]). While the resolution of a motion to set aside a verdict as against the weight of the evidence "is addressed to the sound discretion of the trial court, . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*Ruddock v Happell*, 307 AD2d 719, 720 [4th Dept 2003]; *see McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016]; *Sauter v Calabretta*, 103 AD3d 1220, 1220 [4th Dept 2013]). "[I]t is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 222 AD3d 1436, 1438-1439 [4th Dept 2023] [internal quotation marks omitted]; *see McMillian*, 136 AD3d at 1343-1344; *Sauter*, 103 AD3d at 1220).

Here, we agree with defendants that the jury's verdict was supported by a fair interpretation of the evidence. There was ample evidence supporting the conclusion that Castro should have reported plaintiff's missed appointment to the PCP had she known about it. However, it is undisputed that Castro was not aware of plaintiff's failure to follow up with the practice until well after this lawsuit was commenced. Inasmuch as plaintiffs made no claim and submitted no evidence that Castro was negligent in failing to learn of the missed appointment or that the practice was negligent for failing to inform

Castro of the no-show—or failing to themselves contact the PCP—the jury's verdict is supported by a fair interpretation of the evidence and the court erred in setting it aside.

Defendants' remaining contentions are academic in light of the foregoing.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

417

CA 23-01219

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

KAMAR BOATMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, DEFENDANT-RESPONDENT.

CAITLIN ROBIN & ASSOCIATES PLLC, NEW YORK CITY (CAITLIN A. ROBIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Rory A. McMahon, J.), entered July 10, 2023. The order and judgment granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff appeals from an order and judgment granting the motion of defendant to dismiss the complaint in its entirety. While plaintiff was under the supervision of the Onondaga County Department of Probation, plaintiff was allegedly sexually abused by his probation officer on at least nine separate occasions in various locations, including in his home, in the probation officer's home, behind a school, and in a hotel. Plaintiff brought an action against the probation officer asserting causes of action for, inter alia, intentional infliction of emotional distress (IIED). Plaintiff also commenced this action against defendant, asserting causes of action for vicarious liability under the doctrine of respondeat superior; negligent hiring, supervising, disciplining, and training; and negligent infliction of emotional distress (NIED). Supreme Court granted defendant's motion to dismiss the complaint in its entirety after determining that the probation officer was not acting within the scope of her employment at the time of the alleged abuse.

Plaintiff contends that the court erred in granting the motion with respect to the first cause of action upon determining that the probation officer was not acting within the scope of her employment at the time of the alleged abuse. We reject that contention. "Under the common-law doctrine of respondeat superior, an employer . . . may be

held vicariously liable for torts, including intentional torts, committed by employees acting within the scope of their employment" (*Rivera v State of New York*, 34 NY3d 383, 389 [2019]). "Liability attaches 'for the tortious acts of . . . employees only if those acts were committed in furtherance of the employer's business and within the scope of employment' " (*id.*, quoting *Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 484 [2014]). "Thus, if an employee for purposes of [their] own departs from the line of . . . duty so that for the time being [their] acts constitute an abandonment . . . of service, the [employer] is not liable" (*id.* [internal quotation marks omitted]). It is well settled that "[a] sexual assault perpetrated by an employee is not in furtherance of an employer's business and is a clear departure from the scope of employment, having been committed for wholly personal motives" (*Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1360 [2d Dept 2019]; *see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 250-251 [2002]; *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; *Browne v Lyft, Inc.*, 219 AD3d 445, 447 [2d Dept 2023]).

Here, even assuming, arguendo, that plaintiff's factual allegations are true, we conclude that "no reasonable factfinder could conclude that the [sexual abuse] constituted action taken within the scope of employment" (*Rivera*, 34 NY3d at 389; *see generally Cascardo v Snitow Kanfer Holtzer & Millus, LLP*, 100 AD3d 674, 675 [2d Dept 2012]). Rather, "the gratuitous and utterly unauthorized [sexual abuse alleged by plaintiff is] so egregious as to constitute a significant departure from the normal methods of performance of the duties of a [probation] officer as a matter of law" (*Rivera,* 34 NY3d at 391). The probation officer's alleged sexual abuse of plaintiff was "completely divorced from the employer's interest" (*id.*; *see generally N.X.*, 97 NY2d at 251-252; *Judith M.*, 93 NY2d at 933).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the second and third causes of action, and we therefore modify the order and judgment accordingly. Although plaintiff may not sue defendant under a theory of respondeat superior, he "may seek redress . . . on other tort theories" (*Rivera*, 34 NY3d at 392; *see also A.M. v Holy Resurrection Greek Orthodox Church of Brookville*, 190 AD3d 470, 471 [1st Dept 2021], *lv dismissed* 37 NY3d 1100 [2021]; *Doe v Westfall Health Care Ctr.*, 303 AD2d 102, 110 [4th Dept 2002]).

Defendant contends that we may nevertheless dismiss the remainder of plaintiff's claims because there was a prior action pending between the same parties and involving the same claims and because plaintiff's NIED claim is barred by res judicata (*see* CPLR 3211 [a] [4], [5]). Although we may consider those alternative grounds for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1129 [4th Dept 2022]; *Summers v City of Rochester*, 60 AD3d 1271, 1273 [4th Dept 2009]), we conclude that neither ground has merit.

Contrary to defendant's contention, there was no other action

pending "between the same parties for the same cause of action in a court of any state"; it is undisputed that plaintiff never served a complaint on defendant in any other action (CPLR 3211 [a] [4]; *see Quinones v Z & B Trucking, Inc.*, 220 AD3d 901, 902 [2d Dept 2023]; *Graev v Graev*, 219 AD2d 535, 535 [1st Dept 1995]).

Defendant further contends that, because plaintiff's cause of action for IIED in the action against the probation officer was dismissed based upon his failure to establish severe emotional distress, that issue may not be relitigated and thus the NIED cause of action must be dismissed. We reject that contention. Defendant's contention is grounded in principles of collateral estoppel, "a component of the broader doctrine of res judicata" (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; *see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party" (*Ryan*, 62 NY2d at 500). "What is controlling is the identity of the issue which has necessarily been decided in a prior action or proceeding" (*id.*) and "that there was a full and fair opportunity to contest the decision" (*Burgos v New York Presbyt. Hosp.*, 155 AD3d 598, 601 [2d Dept 2017]; *see Gramatan Home Invs. Corp.*, 46 NY2d at 485). Here, defendant failed to establish identity of issue (*see generally Baker v Muraski*, 61 AD3d 1373, 1374 [4th Dept 2009]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

419

CA 23-00179

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

FRESH AIR FOR THE EASTSIDE, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, DEFENDANTS-APPELLANTS,
CITY OF NEW YORK, DEFENDANT-RESPONDENT,
AND WASTE MANAGEMENT OF NEW YORK, L.L.C.,
DEFENDANT-APPELLANT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

HON. SYLVIA O. HINDS-RADIX, CORPORATION COUNSEL, NEW YORK CITY (JOSH LIEBMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

IVONNE NORMAN, NEW YORK CITY, FOR GREEN AMENDMENTS FOR THE GENERATIONS AND DELAWARE RIVERKEEPER NETWORK, AMICI CURIAE.

EARTHJUSTICE, NEW YORK CITY (RACHEL SPECTOR OF COUNSEL), AND NEW YORK LAWYERS FOR THE PUBLIC INTEREST (MARINDA VAN DALEN OF COUNSEL), FOR PFOAPROJECT, BROOKHAVEN LANDFILL ACTION AND REMEDIATION GROUP, SOUTH BRONX UNITE, SOUTHEAST QUEENS RESIDENTS ENVIRONMENTAL JUSTICE COALITION, AND NEWBURGH CLEAN WATER PROJECT, AMICI CURIAE.

PACE ENVIRONMENTAL LITIGATION CLINIC, WHITE PLAINS (TODD OMMEN OF COUNSEL), FOR RENSSELAER ENVIRONMENTAL COALITION, AMICUS CURIAE.

Appeals and cross-appeal from an amended order of the Supreme Court, Monroe County (John J. Ark, J.), entered December 21, 2022. The amended order granted the motions of defendants City of New York and Waste Management of New York, L.L.C., to dismiss the complaint against them and denied the motion of defendants State of New York and New York State Department of Environmental Conservation to dismiss the complaint against them.

It is hereby ORDERED that said appeal of defendant Waste

Management of New York, L.L.C. is unanimously dismissed and the amended order so appealed from is modified on the law by granting the motion of defendants State of New York and New York State Department of Environmental Conservation and dismissing the complaint in its entirety, and as modified the amended order is affirmed without costs.

Memorandum: Defendant Waste Management of New York, L.L.C. (WM) owns and operates the High Acres Landfill, which is the second largest landfill in defendant State of New York (State). Plaintiff, Fresh Air for the Eastside, Inc., a non-profit corporation comprised of over 200 members who reside within four miles of the landfill, was formed to address odors and fugitive emissions resulting from WM's allegedly inadequate operation of the landfill.

Plaintiff commenced this action against WM, the State and defendant New York State Department of Environmental Conservation (collectively, State defendants), and defendant City of New York (City) seeking declaratory and injunctive relief. Plaintiff alleges, in a single cause of action, that odors and fugitive emissions from the landfill violate its members' environmental rights under the January 1, 2022 amendment to the State Constitution (Green Amendment), which establishes that "[e]ach person shall have a right to clean air and water, and a healthful environment" (NY Const, art I, § 19). WM moved to dismiss the complaint in its entirety on, inter alia, the ground that the Green Amendment did not create a right of action against private entities. The City moved to dismiss the complaint against it on the ground that the complaint did not state a cause of action against the City, i.e., it did not allege that the City engaged in any conduct that violated the Green Amendment. State defendants moved to dismiss the complaint against them on, inter alia, the ground that, notwithstanding the Green Amendment, mandamus relief is not available to compel them to take enforcement actions against WM. Supreme Court granted the motions of WM and the City to dismiss the complaint against them and denied State defendants' motion. WM and State defendants appeal, and plaintiff cross-appeals. We now modify.

Preliminarily, WM's appeal must be dismissed inasmuch as "[a] 'party [that] has successfully obtained a[n] . . . order in [its] favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal' " (*Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015]).

With respect to plaintiff's cross-appeal as it relates to WM, plaintiff does not dispute WM's contention that the Green Amendment only "governs the rights of citizens with respect to their government and not the rights of private individuals against private individuals" (*SHAD Alliance v Smith Haven Mall*, 66 NY2d 496, 503 [1985]; *see also Downs v Town of Guilderland*, 70 AD3d 1228, 1230-1232 [3d Dept 2010], *appeal dismissed* 15 NY3d 742 [2010]). Plaintiff contends, nonetheless, that WM's operation of the landfill is so entwined with governmental policies and had such governmental character that its actions can be regarded as state action. We reject that contention. "The factors to be considered in determining whether [state action] has been shown include: 'the source of authority for the private

action; whether the State is so entwined with the regulation of the private conduct as to constitute State activity; whether there is meaningful State participation in the activity; and whether there has been a delegation of what has traditionally been a State function to a private person . . . As the test is not simply State involvement, but rather significant State involvement, satisfaction of one of these criteria may not necessarily be determinative to a finding of State action' " (*SHAD Alliance*, 66 NY2d at 505). Although the disposal of municipal solid waste has traditionally been a governmental function, the fact that landfill operation is a regulated industry and that WM's customers are predominantly municipal entities is insufficient to impute state action to WM's conduct (*see Williams v Maddi*, 306 AD2d 852, 853 [4th Dept 2003], *lv denied* 100 NY2d 516 [2003], *cert denied* 541 US 960 [2004]).

We also reject plaintiff's contention on its cross-appeal that the complaint alleges action taken by the City in violation of the rights of plaintiff's members under the Green Amendment. Rather, the complaint alleges that plaintiff's members have been deprived of clean air and a healthful environment as a result of WM's inadequate operation of the landfill, not through any improper action by the City. Thus, the complaint fails to state a cause of action against the City (*see generally Paynter v State of New York*, 100 NY2d 434, 441 [2003]).

Finally, with respect to State defendants' appeal, although the complaint "ostensibly seeks declaratory relief, it is essentially a CPLR article 78 proceeding in the nature of mandamus," seeking to compel the State to take enforcement action against a private entity (*Town of Webster v Village of Webster*, 280 AD2d 931, 933 [4th Dept 2001]; *see also Di Lorenzo v Carey*, 62 AD2d 583, 590 [4th Dept 1978], *appeal dismissed* 45 NY2d 832 [1978], *cert denied* 440 US 914 [1979]). "It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion" (*Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *see Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d 113, 118 [1st Dept 2017], *affd* 32 NY3d 1091 [2018], *cert denied* — US —, 139 S Ct 2651 [2019]). The remedy of mandamus is typically not available where, as here, a party seeks to compel an administrative agency of the State to take enforcement action against a private entity. An administrative agency's enforcement decisions are "general[ly] unsuitab[le] for judicial review" because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise" (*Heckler v Chaney*, 470 US 821, 831 [1985]; *see also United States v Texas*, 599 US 670, 679-680 [2023]). Thus, unless the administrative agency has " 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities" (*Heckler*, 470 US at 833 n 4), the responsibility for balancing those factors is " 'lodged in a network of executive officials, administrative agencies and local legislative bodies,' " and private parties—however well-intentioned—may not "interpose themselves and the courts" between the agencies and the difficult

policy determinations they must make regarding whether and when to take regulatory action (*Jones v Beame*, 45 NY2d 402, 407 [1978]). Here, the only conduct on the part of State defendants that the complaint alleges violates the constitutional right of plaintiff's members to clean air and a healthful environment is their regulatory failure to take enforcement actions against WM based on its allegedly inadequate operation of the landfill. Inasmuch as the court cannot impose mandamus relief "to compel an act in respect to which the [administrative agency] may exercise judgment or discretion" (*Klostermann v Cuomo*, 61 NY2d 525, 539 [1984] [internal quotation marks omitted]; *see also Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016]), such as an enforcement proceeding, the complaint fails to state a cause of action against State defendants (*see Matter of Community Action Against Lead Poisoning v Lyons*, 43 AD2d 201, 202-203 [3d Dept 1974], *affd* 36 NY2d 686 [1975]; *see also Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1705 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]). We therefore modify the amended order by granting State defendants' motion and dismissing the complaint in its entirety.

The parties' remaining contentions are academic in light of our determinations.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

421

KA 22-00629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DUNN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 31, 2022. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, burglary in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: In appeal No. 3, defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the first degree (Penal Law § 160.15 [3]), burglary in the first degree (§ 140.30 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (§ 265.03 [3]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty in the same plea proceeding, of promoting prison contraband in the first degree (§ 205.25 [2]) and conspiracy in the fifth degree (§ 105.05 [1]).

At the outset, we agree with defendant in appeal Nos. 1 and 2 that his purported waivers of the right to appeal are invalid inasmuch as the perfunctory inquiry made by County Court was "insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Cruz*, 182 AD3d 999, 999 [4th Dept 2020] [internal quotation marks omitted]; *see People v Soutar*, 170 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019]; *People v Wilson*, 159 AD3d 1542, 1543 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Although defendant signed a written waiver of the right to appeal, "the record establishes that [the court] did not

sufficiently explain the significance of the appeal waiver or ascertain defendant's understanding thereof" (*Wilson*, 159 AD3d at 1543 [internal quotation marks omitted]; *see People v Augello*, 222 AD3d 1398, 1399 [4th Dept 2023], *lv denied* 41 NY3d 942 [2024]), and "a written waiver does not, standing alone, provide sufficient assurance that [a] defendant is knowingly, intelligently, and voluntarily giving up [the] right to appeal" (*People v Banks*, 125 AD3d 1276, 1277 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]; *see Cruz*, 182 AD3d at 999-1000).

In appeal Nos. 1 and 2, defendant further contends that his respective guilty pleas were not voluntarily, knowingly, and intelligently entered. Defendant correctly concedes that, by failing to move to withdraw his pleas or vacate the judgments of conviction, he failed to preserve those contentions for our review (*see People v Boyde*, 224 AD3d 1306, 1306-1307 [4th Dept 2024]; *Cruz*, 182 AD3d at 1000). Neither case falls within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]), and we decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

In each of the three appeals, defendant contends that certain remarks from the court infringed on his right to self-representation. Defendant failed to preserve those contentions for appellate review (*see People v Phipps*, 168 AD3d 881, 882 [2d Dept 2019], *lv denied* 33 NY3d 952 [2019], *cert denied* — US —, 140 S Ct 245 [2019]; *People v Lucas*, 131 AD3d 875, 876 [1st Dept 2015], *lv denied* 26 NY3d 1090 [2015]). We reject defendant's related contention in each appeal that the court erred in denying his purported pretrial request to represent himself without conducting a searching inquiry. The record establishes that defendant "did not clearly and unequivocally request to proceed pro se, i.e., defendant's statements d[id] not reflect a definitive commitment to self-representation that would trigger a searching inquiry by the trial court" (*People v Burney*, 204 AD3d 1473, 1476 [4th Dept 2022] [internal quotation marks omitted]; *see People v Duarte*, 37 NY3d 1218, 1218-1219 [2022], *cert denied* — US —, 143 S Ct 136 [2022]). Rather, defendant's alleged request to proceed pro se "was made in the context of a claim expressing his dissatisfaction with his attorney" (*People v Couser*, 210 AD3d 1513, 1514 [4th Dept 2022], *lv denied* 39 NY3d 1071 [2023] [internal quotation marks omitted]; *see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v White*, 114 AD3d 1256, 1257 [4th Dept 2014], *lv denied* 23 NY3d 1026 [2014]). In any event, we conclude that defendant thereafter abandoned any request to proceed pro se inasmuch as he acquiesced to continued representation and was granted appointment of a third assigned counsel, who represented him at trial and through the subsequent plea proceeding (*see Gillian*, 8 NY3d at 88; *Couser*, 210 AD3d at 1514).

Defendant contends in each appeal that his due process and statutory speedy trial rights were violated by the court's failure to make a sufficient inquiry as to the People's actual readiness for trial under CPL 30.30 (5). Defendant failed to preserve those

contentions for our review (*see* CPL 470.05 [2]; *see generally People v Newton*, 221 AD3d 1551, 1553 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice.

Defendant further contends in appeal Nos. 1 and 3 that although the People indicated their readiness for trial, their respective certificates of compliance were invalid because they had not turned over disciplinary records for the officers involved in the underlying incidents and had therefore failed to comply with their disclosure obligations under CPL 245.20 (1) (k) (iv), thereby rendering the statement of readiness illusory and violating defendant's statutory speedy trial rights. As defendant correctly concedes, the statutory speedy trial contentions are unpreserved inasmuch as he did not challenge the validity of the certificates of compliance before the trial court and did not move to dismiss either indictment based on lack of readiness (*see People v Robinson*, 225 AD3d 1266, 1267-1268 [4th Dept 2024]; *People v Hickey*, 222 AD3d 1429, 1429 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]; *People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]).

In each appeal, defendant contends that he was denied effective assistance of counsel. To the extent that defendant's contentions survive the plea in appeal Nos. 1 and 2 (*see People v Shaw*, 222 AD3d 1401, 1403 [4th Dept 2023]; *People v Seymore*, 188 AD3d 1767, 1769 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), we conclude that, under the circumstances presented on the record, defendant has "failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings" in any of the three appeals (*People v Rojas-Aponte*, 224 AD3d 1264, 1265 [4th Dept 2024] [internal quotation marks omitted]; *see People v Dickeson*, 84 AD3d 1743, 1743 [4th Dept 2011], *lv denied* 19 NY3d 972 [2012]). Moreover, to the extent that defendant's contentions are based on matters outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claims (*see generally People v Sims*, 41 NY3d 995, 996 [2024]; *Rojas-Aponte*, 224 AD3d at 1265; *People v Parnell*, 221 AD3d 1437, 1438 [4th Dept 2023], *lv denied* 40 NY3d 1094 [2024]).

In appeal No. 3, we conclude that the sentence is not unduly harsh or severe.

Finally, in appeal No. 3, defendant contends that his conviction is not supported by legally sufficient evidence. We may not address that contention because the court did not rule on defendant's renewed motion for a trial order of dismissal, and the failure to rule cannot be deemed a denial of that motion (*see People v Keane*, 221 AD3d 1586, 1590 [4th Dept 2023]; *People v Johnson*, 192 AD3d 1612, 1615-1616 [4th Dept 2021]). We thus hold the case, reserve decision, and remit the matter in appeal No. 3 to County Court for a ruling on defendant's renewed motion for a trial order of dismissal (*see generally People v Spratley*, 96 AD3d 1420, 1421 [4th Dept 2012]). In light of our determination, we do not address defendant's contention in appeal No. 3 that the verdict is against the weight of the evidence. We further

hold the case, reserve decision, and remit the matter in appeal No. 2 to County Court to allow defendant to make any necessary motions upon the determination in appeal No. 3 (*see People v Dinkins*, 118 AD3d 559, 559-560 [1st Dept 2014]; *see also People v Vanwuyckhuyse*, 213 AD3d 1286, 1288-1289 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

422

KA 22-01822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. PERKINS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered October 18, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the seventh 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 two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and one count of criminal possession of a controlled substance in the seventh degree (§ 220.03).

Defendant contends that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment on speedy trial grounds. In particular, defendant contends that the People's certificate of compliance and statement of readiness were illusory because the People failed to provide certain law enforcement disciplinary records. We reject that contention inasmuch as "[t]he law enforcement disciplinary records at issue pertained to [an] individual[ ] who the People indicated would not be testifying at trial" (*People v Cooperman*, 225 AD3d 1216, 1219 [4th Dept 2024]). As a result, the records at issue were not subject to automatic discovery pursuant to CPL 245.20 (1) (k) (iv), which requires disclosure only of materials that tend to "impeach the credibility of a testifying prosecution witness." To the extent that defendant contends that disclosure was required under another subparagraph of CPL 245.20 (1) (k), he did not preserve that contention for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the police lacked probable cause to arrest him and that the court thus erred in refusing to suppress evidence found on his person. " 'Probable cause requires, not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction . . . , but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed' " (*People v Rose*, 2 AD3d 1324, 1325 [4th Dept 2003], *lv denied* 2 NY3d 745 [2004], quoting *People v McRay*, 51 NY2d 594, 602 [1980]). "Probable cause may be based upon the totality of knowledge possessed by a police officer from information received and events personally observed" (*People v Quarles*, 187 AD2d 200, 203 [4th Dept 1993], *lv denied* 81 NY2d 1018 [1993]). Here, probable cause to arrest defendant was supported by, inter alia, the observation of fresh footprints in the snow located around the perimeter of a store in the early hours of the morning and the recovery of a backpack in the vicinity containing, among other things, a crowbar, hypodermic needles, and a knife (*see People v Echols*, 222 AD3d 776, 777 [2d Dept 2023]; *see generally Quarles*, 187 AD2d at 203).

Viewing the evidence in light of the elements of the crime of criminal possession of a controlled substance in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict convicting him of those counts is not against the weight of the evidence with respect to the element of defendant's intent to sell (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's claim at trial that the drugs could have been for his personal use "merely raised an issue of credibility for the jury to resolve" (*People v Tolbert*, 181 AD3d 1321, 1322 [4th Dept 2020], *lv denied* 35 NY3d 1116 [2020] [internal quotation marks omitted]; *see People v Bell*, 296 AD2d 836, 837 [4th Dept 2002], *lv denied* 98 NY2d 766 [2002]).

Defendant further contends that he was deprived of a fair trial by certain of the court's rulings. Defendant failed to preserve for our review his contention that the court erred in precluding a 911 call because the court never definitely ruled on its admission (*see People v Anwar*, 151 AD3d 1628, 1629 [4th Dept 2017], *lv denied* 30 NY3d 947 [2017]; *People v Billip*, 65 AD3d 430, 431 [1st Dept 2009], *lv denied* 13 NY3d 834 [2009]). We reject defendant's contention that the court erred in precluding defense counsel from cross-examining a testifying officer about an incident involving his K-9. As the People explained, the officer was never disciplined for that incident, and we conclude that the underlying facts pertaining to the incident "had no bearing on the officer's credibility, whether in general or in this case" (*People v Williams*, 184 AD3d 442, 442 [1st Dept 2020], *lv denied* 36 NY3d 932 [2020]).

We reject defendant's contention that the prosecutor's comments during summation deprived him of a fair trial. The prosecutor's comments did not cause "such substantial prejudice to the defendant that he has been denied due process of law" (*People v Jacobson*, 60 AD3d 1326, 1328 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]

[internal quotation marks omitted]; *see People v Morrice*, 78 AD3d 1534, 1535 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). Moreover, the court "alleviated any prejudice arising from the prosecutor's comments and summation by instructing the jury that the comments and summations of the prosecutor and defense counsel do not constitute evidence" (*People v Williams*, 28 AD3d 1059, 1061 [4th Dept 2006], *affd* 8 NY3d 854 [2007]).

Defendant also contends that the court penalized him for exercising his right to a trial. Defendant failed to preserve that contention for appellate review because "he did not raise the issue at the time of sentencing" (*People v Tannis*, 36 AD3d 635, 635 [2d Dept 2007], *lv denied* 8 NY3d 927 [2007]; *see People v Dorn*, 71 AD3d 1523, 1523-1524 [4th Dept 2010]; *People v Griffin*, 48 AD3d 1233, 1236-1237 [4th Dept 2008], *lv denied* 10 NY3d 840 [2008]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice.

Finally, defendant's sentence is not unduly harsh or severe. We note, however, that the amended certificate of disposition incorrectly states that defendant was sentenced to two years of postrelease supervision on the counts of criminal possession of a controlled substance in the third degree, and it must therefore be amended to reflect that he was sentenced to three years of postrelease supervision on those counts (*see People v Nevins*, 196 AD3d 1110, 1112 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

424

KA 22-00112

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEENA PERRY HARRIS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), rendered April 26, 2021. The judgment convicted defendant, upon a guilty plea, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of her challenge to the severity of her sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

425

KA 22-00396

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL BROWN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Meredith A. Vacca, J.), entered February 1, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as "[t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under th[at] risk factor" (*People v Schumacher*, 224 AD3d 1326, 1327 [4th Dept 2024] [internal quotation marks omitted]). Those statements establish that defendant has a history of marihuana and alcohol abuse. "Although defendant appears to have abstained from drug and alcohol use while incarcerated, a 'recent history of abstinence while incarcerated is not necessarily predictive of his behavior when no longer under such supervision' " (*People v Turner*, 188 AD3d 1746, 1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *see People v Cox*, 181 AD3d 1184, 1185 [4th Dept 2020], *lv denied* 35 NY3d 909 [2020]; *People v Slishevsky*, 174 AD3d 1399, 1400 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]; *see generally People v Palmer*, 20 NY3d 373, 377-378 [2013]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

426

KA 22-00628

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DUNN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 31, 2022. 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.

Same memorandum as in *People v Dunn* ([appeal No. 3] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

427

KA 22-00630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DUNN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 31, 2022. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first degree and conspiracy in the fifth degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the same memorandum as in *People v Dunn* ([appeal No. 3] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

428

KA 20-01317

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), dated September 23, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court abused its discretion in denying his request for a downward departure from his presumptive risk level. We affirm.

Even assuming, arguendo, that defendant satisfied his burden with respect to "the first two steps of the three-step analysis required in evaluating a request for a downward departure" (*People v Cornwell*, 213 AD3d 1239, 1240 [4th Dept 2023], *lv denied* 39 NY3d 916 [2023]), we conclude on this record, after applying the third step of weighing the aggravating and mitigating factors, that the totality of the circumstances demonstrates that "defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism" (*People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

430

KA 23-00392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FONTASIA TORAN, DEFENDANT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, 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 December 28, 2022. 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: On appeal from a judgment convicting her, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the evidence of intent to cause serious physical injury is legally insufficient and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish the element of intent to cause serious physical injury to the victim (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the testimony of one of the People's witnesses was not incredible as a matter of law and "any inconsistencies in that testimony merely presented a credibility issue for the jury to resolve" (*People v Fricke*, 216 AD3d 1446, 1447 [4th Dept 2023], *lv denied* 40 NY3d 928 [2023]). Defendant's contention that County Court erred in failing to instruct the jury on wholly circumstantial evidence is not preserved for our review (*see generally* CPL 470.05 [2]; *People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]). We decline to exercise our power to review that issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We also reject defendant's contention that the sentence is unduly harsh and severe. Finally, we have reviewed defendant's remaining

contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

431

KA 19-00109

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN J. HANCOCK, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE 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 (Judith A. Sinclair, J.), rendered December 3, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), kidnapping in the first degree, burglary in the first degree, robbery in the first degree, and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), and one count each of kidnapping in the first degree (§ 135.25 [3]), burglary in the first degree (§ 140.30 [4]), robbery in the first degree (§ 160.15 [4]), and robbery in the second degree (§ 160.10 [1]). We previously affirmed the judgment convicting one of his codefendants (*People v Myles*, 216 AD3d 1419 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]), and we modified the sentence and otherwise affirmed the judgment convicting his other codefendant (*People v Colon*, 192 AD3d 1567 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]).

Defendant contends that the evidence is legally insufficient and the verdict is against the weight of the evidence. We reject those contentions. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]).

Here, the evidence establishes that, on the morning that the

murder victim went missing, defendant called his nephew to inquire about purchasing a gun. At approximately 9:00 that morning, defendant met his nephew and "told [him] that whatever [defendant] had planned [had gone] south" because "his friend was trippin' or something." The nephew then went with defendant and codefendant Genesis Colon to the house where codefendant Tyshon Myles resided, and left shortly thereafter to obtain the gun. Upon the nephew's return to the residence with a small handgun, similar to the one observed by the robbery victim, defendant and his nephew entered the basement, and defendant instructed his nephew "to look toward the back of the basement," where the nephew observed Myles and the murder victim, who was alive but hogtied. Although it is true that the ankle monitor tracking and video surveillance evidence merely placed defendant with the codefendants during the morning that the murder victim went missing, the testimony of the nephew established defendant's complicity in the crimes. This is not a case where the evidence established only defendant's mere presence at the scene of the crimes (*cf. People v Slaughter*, 83 AD2d 857, 857-858 [2d Dept 1981], *affd* 56 NY2d 993 [1982]).

We conclude that, viewing the evidence in the light most favorable to the People (*see Hines*, 97 NY2d at 62; *People v Contes*, 60 NY2d 620, 621 [1983]), there is a valid line of reasoning and permissible inferences from which the jury could find that defendant, either as a principal or an accomplice, kidnapped and killed the murder victim and participated in the burglary and robbery of his girlfriend. Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

To the extent that defendant preserved for our review his contentions regarding video and photographic evidence (*see generally People v Ball*, 11 AD3d 904, 905 [4th Dept 2004], *lv denied* 3 NY3d 755 [2004], *reconsideration denied* 4 NY3d 741 [2004]), we conclude that they lack merit (*see generally People v Patterson*, 93 NY2d 80, 84 [1999]).

Entered: July 26, 2024 Ann Dillon Flynn
Clerk of the Court

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

432.1

KA 15-01495

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT L. BEAN, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (MARK D. FUNK 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 (Francis A. Affronti, J.), rendered June 9, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree, manslaughter in the first degree and gang assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of manslaughter in the first degree and dismissing count 2 of the indictment and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), manslaughter in the first degree (§ 125.20 [1]) and gang assault in the first degree (§ 120.07), defendant contends that Supreme Court applied the wrong standard in denying his *Batson* challenge with respect to a prospective juror who was peremptorily struck by the prosecutor. We reject that contention. On the second day of voir dire, the prosecutor exercised a peremptory challenge on a Black prospective juror who had not given any indication that she was biased or unqualified to serve on the jury. Defense counsel asked for an explanation for the challenge, stating that "[t]his would be the second African American or [B]lack stricken in this panel." When the court stated that "[n]umbers alone do not suffice if that's a *Batson* challenge," defense counsel responded, "I understand that numbers alone don't, but I would request an explanation." The prosecutor interjected that, because at least one if not two Black prospective jurors had already been seated as jurors, defendant had not shown a pattern of discriminatory strikes. The court denied defendant's *Batson* application without requiring the prosecutor to offer a race-neutral reason for the challenge. We conclude that the court's ruling was proper.

The relevant legal principles are well settled. "[A] defendant asserting a claim under the *Batson* formula must present a prima facie case by showing that the prosecution exercised its peremptory challenges to remove one or more members of a cognizable racial group from the venire and that there exist facts and other relevant circumstances sufficient to raise an inference that the prosecution used its peremptory challenges to exclude potential jurors because of their race" (*People v Childress*, 81 NY2d 263, 266 [1993]; *see Batson v Kentucky*, 476 US 79, 96-98 [1986]). To meet that initial burden, a defendant need not show either "a pattern of discrimination" (*People v Anthony*, 152 AD3d 1048, 1050 [3d Dept 2017], *lv denied* 30 NY3d 978 [2017] [internal quotation marks omitted]) or a "systematic approach" to striking prospective jurors based on race (*People v Herrod*, 163 AD3d 1462, 1462 [4th Dept 2018] [internal quotation marks omitted]). In the absence of a pattern of discriminatory strikes, however, the defendant must demonstrate that " 'members of the cognizable group were excluded while others with the same relevant characteristics were not' or that the People excluded members of the cognizable group 'who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution' " (*id.*, quoting *Childress*, 81 NY2d at 267; *see People v Boyd* [appeal No. 2], 184 AD3d 1151, 1152 [4th Dept 2020]).

Here, defendant failed to meet his initial burden by merely pointing out that the prosecutor had challenged two Black prospective jurors in the same panel. Defendant did not indicate how many other Black prospective jurors, if any, were included in the panel, nor did he claim that the prosecutor had challenged Black prospective jurors in prior panels. Moreover, defendant did not allege that the prosecutor failed to challenge similarly situated non-Black prospective jurors or that the prospective juror in question would be expected to be favorably inclined toward the prosecution due to her background or experience. Thus, defendant failed to make a prima facie showing of discrimination, and "the burden did not shift to the People to offer a facially neutral explanation for the challenge" (*People v Thomas*, 155 AD3d 1120, 1123 [3d Dept 2017], *lv denied* 31 NY3d 1018 [2018] [internal quotation marks omitted]). Contrary to defendant's contention, the court properly denied his *Batson* application "without further inquiry" (*Boyd*, 184 AD3d at 1153).

Defendant further contends that the court, in responding to defense counsel's objection at trial to a witness's description of defendant as a "piece of shit," disparaged defense counsel in front of the jury and thereby deprived defendant of a fair trial. We agree with defendant that the court should have been more diplomatic in its exchange with defense counsel, who showed no disrespect to the court and lodged a reasonable objection on behalf of his client. As the Court of Appeals has advised, a trial judge, in "regulating the proceedings so as to guide the jury beyond distracting influences and to a reasoned determination on the facts . . . , must be scrupulously free from and above even the appearance or taint of partiality" (*People v De Jesus*, 42 NY2d 519, 523-524 [1977]; *see generally People v Towns*, 33 NY3d 326, 331 [2019]). "Unnecessary and excessive

interference in the presentation of proof, as well as the intimidation or denigration of counsel, particularly in the jury's presence, are to be avoided" (*De Jesus*, 42 NY2d at 524). Considering that the alleged denigrating comments were isolated in nature and that the court ultimately granted defendant the relief defense counsel had requested, i.e., striking the objectionable testimony and directing the jury to disregard it, we conclude that the court's comments "did not result in the type of prejudice that would warrant reversal" (*People v Simmons*, 63 AD3d 1691, 1692 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]; *see People v Petersen*, 190 AD3d 769, 771 [2d Dept 2021], *lv denied* 36 NY3d 1123 [2021]; *People v Chase*, 265 AD2d 844, 845 [4th Dept 1999], *lv denied* 94 NY2d 902 [2000]).

Defendant's contention that the court erred in allowing the People to introduce *Molineux* evidence because, inter alia, they did not seek permission to do so prior to trial, is preserved only in part. In any event, defendant's contention lacks merit. The evidence in question was testimony from a prosecution witness who claimed to have seen defendant in possession of a knife approximately five hours before defendant allegedly used it to stab the victim. As a preliminary matter, we note that defendant's mere possession of the knife was not illegal inasmuch as it was not a switchblade knife, pilum ballistic knife, or metal knuckle knife (*see* Penal Law § 265.01). Furthermore, even assuming that defendant's possession of the knife earlier in the day could be considered a prior bad act, we note that the court made its ruling prior to the witness taking the stand, thereby giving defendant an opportunity to object (*see People v McKoy*, 217 AD3d 1396, 1399 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Cirino*, 203 AD3d 1661, 1664 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]), and "defendant did not demonstrate in any way that he was prejudiced by the timing of the ruling" (*People v Knox*, 140 AD3d 979, 980 [2d Dept 2016], *lv denied* 29 NY3d 1033 [2017]). With respect to the merits of the *Molineux* application, the court properly determined that the challenged testimony "provided background information tending to prove defendant's means of access to the murder weapon, and his identity as the [stabber]" (*People v Wells*, 141 AD3d 1013, 1019 [3d Dept 2016], *lv denied* 28 NY3d 1189 [2017]; *see generally McKoy*, 217 AD3d at 1399; *People v Lawrence*, 141 AD3d 1079, 1081 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Moreover, the court did not abuse its discretion in determining that the probative value of the evidence outweighed the potential for prejudice (*see People v Gaiter*, 224 AD3d 1384, 1385 [4th Dept 2024], *lv denied* — NY3d — [2024]; *see generally People v Alvino*, 71 NY2d 233, 242 [1987]).

As the People correctly concede, the count of manslaughter in the first degree must be dismissed as a lesser inclusory concurrent count of murder in the second degree (*see* CPL 300.30 [4]; *People v McIntosh*, 162 AD3d 1612, 1618 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]; *People v Bank*, 129 AD3d 1445, 1448-1449 [4th Dept 2015], *affd* 28 NY3d 131 [2016]). We therefore modify the judgment accordingly.

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

432

KA 22-00972

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AHMAD PRINGLE, DEFENDANT-APPELLANT.

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

AHMAD PRINGLE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 25, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of a firearm and criminal possession of a controlled substance in the seventh 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]), criminal possession of a weapon in the third degree (§ 265.02 [1]), criminal possession of a firearm (§ 265.01-b [1]), and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant contends in his main and pro se supplemental briefs that County Court erred in refusing to suppress evidence recovered from a compartment behind the dashboard of the vehicle he was driving because the items were recovered during an unlawful search that exceeded the permissible scope of the inventory search policy of the Onondaga County Sheriff's Office (OCSO). We reject that contention.

The evidence at the suppression hearing established that the deputy sheriff who conducted the inventory search "followed the procedure set forth in the applicable [policy] of the [OCSO] in conducting [that] search" (*People v Williams*, 214 AD3d 1395, 1396 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023] [internal quotation marks omitted]; *see People v Nesmith*, 124 AD3d 1325, 1326 [4th Dept 2015], *lv denied* 26 NY3d 1042 [2015]). The policy provided, in relevant

part, that during an inventory search, a deputy was to inspect all compartments of a vehicle to locate any items inside it and take note of existing damage to the vehicle and its contents in order to protect the owner's and occupants' property and shield the deputy and the OCSO from liability. The deputy here reasonably acted in compliance with that policy when, during the inventory search, he noticed that a dashboard panel for the headlight control knob was not flush with the rest of the dashboard, and he touched the knob in order to inspect it for damage. The panel was loose and fell out upon the deputy making contact with it, revealing an open compartment behind the dashboard. The deputy used a flashlight while looking into the compartment and found, inter alia, a pistol and numerous glassine envelopes containing a tan powdery substance. Inspection of the headlight control knob and the compartment behind the dashboard was reasonable (*see generally People v Padilla*, 21 NY3d 268, 273 [2013], *cert denied* 571 US 889 [2013]; *People v Morman*, 145 AD3d 1435, 1436 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]) and necessary for the deputy to fulfill the purposes of the policy to protect the property of the vehicle owner and occupants and to insulate himself and the OCSO from liability (*see Williams*, 214 AD3d at 1396).

Defendant failed to preserve for our review his contention in his main brief that the OCSO policy on inventory searches is unconstitutional because it does not sufficiently limit the discretion of searching deputies (*cf. People v Douglas*, 40 NY3d 385, 387 [2023]; *People v Tardi*, 122 AD3d 1337, 1337 [4th Dept 2014], *affd* 28 NY3d 1077 [2016]; *People v Rivera*, 60 AD3d 1390, 1391 [4th Dept 2009], *lv denied* 13 NY3d 799 [2009]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further failed to preserve for our review his contention in his main brief that, because the plea offer that the People extended prior to the suppression hearing was no longer available after the hearing and the court's plea offer required a lengthier term of imprisonment, the court penalized him for challenging the legality of the inventory search (*see generally People v Olds*, 36 NY3d 1091, 1092 [2021]; *People v Wilson*, 197 AD3d 984, 985 [4th Dept 2021], *lv denied* 37 NY3d 1100 [2021]; *People v Gorton*, 195 AD3d 1428, 1430 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]). In any event, there is no evidence that the court offered defendant a lengthier sentence than the one that the People offered prior to the hearing solely as a penalty for pursuing the hearing (*see generally Olds*, 36 NY3d at 1092; *Gorton*, 195 AD3d at 1430). Moreover, the sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions in his main brief and conclude that none requires reversal or modification of the judgment.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

434

TP 24-00181

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

IN THE MATTER OF STATE DIVISION OF HUMAN RIGHTS,
PETITIONER,

V MEMORANDUM AND ORDER

ROBERT M. WEICHERT, SUSAN WEICHERT, RESPONDENTS,
ET AL., RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR PETITIONER.

ROBERT M. WEICHERT, RESPONDENT PRO SE.

SUSAN WEICHERT, RESPONDENT PRO SE.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Danielle M. Fogel, J.], entered January 23, 2024) seeking judicial review and enforcement of the final order after hearing issued by the New York State Division of Human Rights on October 7, 2015 on the complaint of CNY Fair Housing, Inc.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is granted, and respondents Robert M. Weichert and Susan Weichert are directed to pay respondent CNY Fair Housing, Inc. the sum of $8,000 for punitive damages, with interest at a rate of 9% per annum, commencing October 7, 2015; and to pay the Comptroller of the State of New York the sum of $8,000 for a civil fine and penalty, with interest at the rate of 9% per annum, commencing October 7, 2015.

Memorandum: Petitioner, State Division of Human Rights (SDHR), commenced this proceeding pursuant to Executive Law § 298 seeking to enforce the final order of its Commissioner, which in turn adopted the "recommended findings of fact, opinion and decision, and order" of an administrative law judge (ALJ). The ALJ concluded, following a public hearing, that Robert M. Weichert and Susan Weichert (respondents) had engaged in unlawful discriminatory practices with respect to housing. The ALJ awarded respondent CNY Fair Housing, Inc. (Fair Housing) punitive damages of $8,000 and imposed a civil fine and penalty of $8,000.

We agree with SDHR that the Commissioner's determination that

respondents discriminated against Fair Housing based on disability is supported by substantial evidence (*see* Executive Law § 296 [5] [a] [1]; *Matter of Sherwood Terrace Apts. v New York State Div. of Human Rights*, 61 AD3d 1333, 1334 [4th Dept 2009]). We further agree with SDHR that the award of $8,000 in punitive damages to Fair Housing is both appropriate "as a deterrent against housing discrimination" and "is supported by the evidence" herein (*Matter of Woehrling v New York State Div. of Human Rights*, 56 AD3d 1304, 1305 [4th Dept 2008]; *see* § 297 [4] [c] [iv]; *Sherwood Terrace Apts.*, 61 AD3d at 1334), and that the $8,000 civil fine and penalty was properly imposed based on the Commissioner's determination that respondents "committed an unlawful discriminatory act" (§ 297 [4] [c] [vi]; *see Matter of Li v New York State Div. of Human Rights*, 147 AD3d 1321, 1321-1322 [4th Dept 2017]).

We have reviewed respondents' contentions and conclude that they are without merit.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

435

CA 23-00701

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

ERNEST F. THOMAS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH J. ECKHERT, III, M.D., F.A.C.S.,
AND SOUTH TOWNS SURGICAL ASSOCIATES, P.C.,
DEFENDANTS-APPELLANTS.

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

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (DEANNA D. RUSSELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered April 10, 2023. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as a result of a laparoscopic ventral hernia repair performed by Kenneth J. Eckhert, III, M.D., F.A.C.S. (defendant), during which, according to plaintiff, his bowel was perforated, resulting in the need for corrective surgery. Plaintiff asserted causes of action for medical malpractice and lack of informed consent. Defendants now appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm.

Initially, we note that defendants' contention on appeal that plaintiff improperly raised a new theory of recovery in opposition to defendants' motion is not properly before this Court inasmuch as that issue was not preserved for our review (*see generally Walker v Caruana*, 175 AD3d 1807, 1807 [4th Dept 2019]).

We reject defendants' contention that Supreme Court erred in denying that part of their motion with respect to the cause of action for lack of informed consent. "To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected

not to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; *see* Public Health Law § 2805-d [1], [3]). Here, in opposition to the motion, plaintiff submitted the affirmation of an expert gastrointestinal surgeon, who averred that an open procedure would have been more appropriate in plaintiff's situation because, based on plaintiff's surgical history, it should have been expected that plaintiff had abdominal adhesions, making a laparoscopic procedure more challenging. Additionally, plaintiff testified at his deposition that defendant never informed him of alternatives to the laparoscopic procedure and that plaintiff was not aware of any at the time that he agreed to have the surgery. Thus, even assuming, arguendo, that defendants met their initial burden on the motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), we conclude that plaintiff raised issues of fact whether he was fully informed and whether he would have opted for surgery had he been fully informed (*see generally Gray v Williams*, 108 AD3d 1085, 1086-1087 [4th Dept 2013]).

We also reject defendants' contention that the court erred in denying that part of their motion with respect to plaintiff's medical malpractice cause of action. As movants, defendants "ha[d] the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). In order to meet that burden, they were required to provide " 'factual proof, generally consisting of affidavits, deposition testimony and medical records' " (*Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]; *see Cole v Champlain Val. Physicians' Hosp. Med. Ctr.*, 116 AD3d 1283, 1285 [3d Dept 2014]).

By addressing and rejecting each of plaintiff's claims through the submission of their expert's affirmation, defendants met their initial burden with respect to the alleged deviations from the accepted standard of medical care, and the burden thus " 'shift[ed] to . . . plaintiff to demonstrate the existence of a triable issue of fact . . . as to the elements on which . . . defendant[s] met the prima facie burden' " (*Bubar*, 177 AD3d at 1359). In opposition, however, plaintiff submitted the affirmation of his expert surgeon and the affirmation of an expert pathologist, both of which "squarely oppose[d]" the affirmation of defendants' expert, resulting in "a classic battle of the experts that [was] properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019]).

We have reviewed defendants' remaining contention and conclude that it does not warrant reversal or modification of the order.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

438

CA 23-00402

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

JOYCE STORM, AS POWER OF ATTORNEY FOR PAUL JANKOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS BUFFALO GENERAL HOSPITAL, DEFENDANT-RESPONDENT, WILLIAMSVILLE SUBURBAN, LLC, LEGACY HEALTH CARE, LLC, GOLDEN LIVING CENTERS, LLC, SAFIRE CARE, LLC, SAFIRE REHABILITATION OF AMHERST, LLC, W. RICHARD ZACHER, LAURA OTTERBEIN, WENDY SCHMIDT, SOLOMON ABRAMCZYK, JUDY LANDA, ARYEH RICHARD PLATSCHEK, ROBERT SCHUCK AND MOSHE STEINBERG, DEFENDANTS-APPELLANTS.

CAITLIN ROBIN & ASSOCIATES, PLLC, NEW YORK CITY (CAITLIN A. ROBIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KAYLA A. HUGHES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered February 2, 2023. The order granted the motion of defendant Kaleida Health, doing business as Buffalo General Hospital, to sanction defendants Williamsville Suburban, LLC, Legacy Health Care, LLC, Golden Living Centers, LLC, Safire Care, LLC, Safire Rehabilitation of Amherst, LLC, W. Richard Zacher, Laura Otterbein, Wendy Schmidt, Solomon Abramczyk, Judy Landa, Aryeh Richard Platschek, Robert Schuck and Moshe Steinberg, with an adverse inference charge for spoliation of evidence.

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

Memorandum: Plaintiff commenced two actions that subsequently were consolidated, seeking damages for injuries sustained by Paul Jankowski. During the course of discovery, defendant Kaleida Health, doing business as Buffalo General Hospital (Kaleida), sought Jankowski's records from Sheridan Manor, a nonparty facility where Jankowski resided and received care during the relevant time period of his injuries. When counsel for defendants-appellants (Safire Care defendants) informed Kaleida that the records had been destroyed, Kaleida moved for an order pursuant to CPLR 3126 sanctioning the Safire Care defendants by directing that an adverse inference charge

be used against them at trial. Supreme Court granted the motion, and the Safire Care defendants appeal. We affirm.

"The party seeking sanctions for spoliation of evidence has the burden of showing 'that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' " (*Page v Niagara Falls Mem. Med. Ctr.*, 167 AD3d 1428, 1430 [4th Dept 2018], *quoting Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). "Spoliation sanctions may be appropriate even if the destruction occurred through negligence rather than willfulness" (*Enstrom v Garden Place Hotel*, 27 AD3d 1084, 1086 [4th Dept 2006] [internal quotation marks omitted]; *see Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482 [1st Dept 2010]). Spoliation sanctions may be imposed upon a party even though that party did not own or control the evidence that was destroyed, so long as the party "had an opportunity to safeguard [the] evidence but failed to do so" (*Ortega v City of New York*, 9 NY3d 69, 76 n 2 [2007]; *see Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 219-220 [1st Dept 2004]; *Amaris v Sharp Elecs. Corp.*, 304 AD2d 457, 457-458 [1st Dept 2003], *lv denied* 1 NY3d 507 [2004]). "The court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence" (*Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]; *see Mahiques v County of Niagara*, 137 AD3d 1649, 1650 [4th Dept 2016]).

We conclude that Kaleida met its burden on the motion and that the court did not abuse its discretion in directing that an adverse inference against the Safire Care defendants be charged to the jury at trial. Contrary to the contention raised by the Safire Care defendants, they had the opportunity to safeguard Jankowski's records from Sheridan Manor at the commencement of the suit against them in August 2016 (*see Ortega*, 9 NY3d at 76 n 2; *Amaris*, 304 AD2d at 457-458). Under the circumstances of this case, an adverse inference charge against the Safire Care defendants is an appropriate sanction for the negligent spoliation of the evidence (*see Enstrom*, 27 AD3d at 1087).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

439

CA 23-01203

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

GILBERT LAMARR, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

BUFFALO STATE ALUMNI ASSOCIATION, INC., ET AL., DEFENDANTS.

BUFFALO STATE ALUMNI ASSOCIATION, INC., BUFFALO STATE COLLEGE FOUNDATION HOUSING CORPORATION, LP CIMINELLI, INC., AND LP CIMINELLI CONSTRUCTION CORP., THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

HUBER CONSTRUCTION, INC., THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

HUBER CONSTRUCTION, INC., FOURTH-PARTY PLAINTIFF-APPELLANT,

V

DURAFRAME, LLC, FOURTH-PARTY DEFENDANT-RESPONDENT, ET AL., FOURTH-PARTY DEFENDANT.

BARCLAY DAMON LLP, BUFFALO (CHARLES J. ENGLERT, III, OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT AND FOURTH-PARTY PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL C. O'NEILL OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (ROBERT H. FLYNN OF COUNSEL), FOR FOURTH-PARTY DEFENDANT-RESPONDENT.

Appeal and cross-appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered September 4, 2014. The order, among other things, granted the summary judgment motion of defendants-third-party plaintiffs for contractual indemnification against third-party defendant-fourth-party plaintiff, awarded defendants-third-party plaintiffs common-law indemnification against third-party defendant-fourth-party plaintiff and granted the summary judgment motion of fourth-party defendant for, inter alia,

conditional contractual indemnification against third-party defendant-fourth-party plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants-third-party plaintiffs and vacating the award of common-law indemnification to them, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action against defendants-third-party plaintiffs Buffalo State Alumni Association, Inc. and Buffalo State College Foundation Housing Corporation (collectively, Buffalo State defendants) as owners of the premises, and defendants-third-party plaintiffs LP Ciminelli, Inc. and LP Ciminelli Construction Corp. (collectively, Ciminelli defendants) as construction managers, seeking damages for injuries Gilbert Lamarr (plaintiff) sustained in two construction-site accidents. Plaintiff was an employee of third-party defendant-fourth-party plaintiff, Huber Construction, Inc. (Huber), the subcontractor hired to install exterior wall systems. Huber purchased prefabricated exterior wall panels from fourth-party defendant Duraframe, LLC (Duraframe). Plaintiff's injuries arose from handling those wall panels on two different dates approximately one month apart. Plaintiffs settled their action with the Buffalo State and Ciminelli defendants.

The Buffalo State and Ciminelli defendants moved for summary judgment on the first cause of action in the third-party complaint, for contractual indemnification against Huber. Duraframe moved, inter alia, for summary judgment seeking a conditional order of contractual indemnification against Huber. Supreme Court granted the motions and also awarded the Buffalo State and Ciminelli defendants common-law indemnification against Huber. Huber appeals, and the Buffalo State and Ciminelli defendants cross-appeal.

At the outset, we note that the court erred in sua sponte granting common-law indemnification against Huber inasmuch as the Buffalo State and Ciminelli defendants did not move for that relief (*see generally Thompson v Corbett*, 13 AD3d 1060, 1062 [4th Dept 2004]), and we therefore modify the order by vacating that award.

With respect to Huber's appeal, we agree with Huber that the court erred in granting the motion of the Buffalo State and Ciminelli defendants, and we therefore further modify the order by denying the motion. " '[T]he right to contractual indemnification depends upon the specific language of the contract' " (*Vega v FNUB, Inc.*, 217 AD3d 1475, 1479 [4th Dept 2023]; *see Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018]). The subcontract between LP Ciminelli, Inc. (LP Ciminelli) and Huber contained a contractual indemnification provision that required Huber to indemnify Buffalo State College Foundation Housing Corporation and LP Ciminelli and their agents for claims arising out of or resulting from the performance of the work, "but only to the extent caused by the negligent acts or omissions of" Huber or its "sub-subcontractors."

Initially, contrary to Huber's contention, the indemnification provision is not void and unenforceable pursuant to General Obligations Law § 5-322.1. General Obligations Law § 5-322.1 "permit[s] a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]). Where, as here, the indemnification provision limits indemnity "[t]o the fullest extent permitted by law," the provision does not violate section 5-322.1 and is enforceable (*see Feliz v Citnalta Constr. Corp.*, 217 AD3d 750, 752 [2d Dept 2023]; *Charney v LeChase Constr.*, 90 AD3d 1477, 1479 [4th Dept 2011]; *see also Clyde v Franciscan Sisters of Allegany, N.Y., Inc.*, 217 AD3d 1353, 1355 [4th Dept 2023]). Moreover, contrary to Huber's further contention, the Buffalo State and Ciminelli defendants established in support of their motion, and Huber failed to raise a triable issue in opposition, that the Ciminelli defendants did not supervise or control the work that resulted in plaintiff's injuries and were therefore not negligent (*see Vega*, 217 AD3d at 1478-1479; *Miller v Rerob, LLC*, 197 AD3d 979, 981 [4th Dept 2021]; *see generally McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1581-1582 [4th Dept 2010]).

We agree with Huber, however, that the indemnification provision required Huber to indemnify the Buffalo State and Ciminelli defendants for Huber's own negligence or that of its subcontractors, and the Buffalo State and Ciminelli defendants failed to meet their initial burden on the motion of establishing that plaintiffs' claims arose from the negligence of Huber or its subcontractors (*see Holler v Dominion Energy Transmission, Inc.*, 221 AD3d 1491, 1492 [4th Dept 2023]; *Kader v City of N.Y., Hous. Preserv. & Dev.*, 16 AD3d 461, 463 [2d Dept 2005]). Issues of fact exist whether Huber or its subcontractors were negligent and thus whether the indemnification provision was triggered (*see Hennard v Boyce*, 6 AD3d 1132, 1134 [4th Dept 2004]; *Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985 [4th Dept 2001]). Because there are questions of fact regarding whether Huber or its subcontractors were negligent, we reject the contention on the cross-appeal that the court erred to the extent that it granted only conditional contractual indemnification.

Contrary to the further contention of Huber on its appeal, the court properly granted that part of Duraframe's motion for summary judgment seeking a conditional order of contractual indemnification against Huber. Huber contends that Duraframe failed to meet its initial burden on the motion of establishing the existence of a valid contractual indemnification provision between them. We reject that contention. It is well settled that "[a]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005], *rearg denied* 5 NY3d 746 [2005]; *see Brighton Inv., Ltd. v Har-Zvi*, 88 AD3d 1220, 1222 [3d Dept 2011]). Here, Duraframe's submissions established that it sent Huber a written quotation for the prefabricated metal framing that set forth the price for the exterior wall panels and that further provided that all orders

were subject to the terms and conditions set forth, which included an indemnification provision. In response to the quotation, Huber sent a signed purchase order for the same amount to Duraframe to furnish and deliver fully assembled exterior wall panels, and Duraframe signed and accepted the purchase order. Duraframe also submitted the deposition testimony of representatives from both Huber and Duraframe, and we conclude that the testimony established as a matter of law that the parties intended to be bound by the indemnification provision contained within the quotation (*see LMIII Realty, LLC v Gemini Ins. Co.*, 90 AD3d 1520, 1521 [4th Dept 2011]). In opposition, Huber failed to raise an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

440.1

TP 23-01958

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

IN THE MATTER OF DARRYL BRADSHAW, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, RESPONDENT.

DARRYL BRADSHAW, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered November 2, 2023) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul a determination, following a tier III disciplinary hearing, that he violated, inter alia, incarcerated individual rule 100.11 (7 NYCRR 270.2 [B] [1] [ii] [assault on staff]).

We reject petitioner's contention that he did not receive adequate notice of an assault on staff charge purportedly concerning a correction officer not mentioned in the misbehavior report. Even if the Hearing Officer named the wrong correction officer in his oral disposition as being the victim of the assault on staff charge, he identified in the written determination the proper correction officer, who was the same correction officer who was identified as the victim in the misbehavior report (*see generally Matter of Green v Sticht*, 124 AD3d 1338, 1338 [4th Dept 2015], *lv denied* 26 NY3d 906 [2015]).

Contrary to petitioner's contention, the record here is sufficient to permit meaningful review of the determination. Although the hearing transcript is missing portions of the proceedings, "the gaps are not so substantial or significant as to preclude meaningful review of the . . . arguments advanced by petitioner" (*Matter of Smith v Annucci*, 217 AD3d 1306, 1306 [3d Dept 2023] [internal quotation marks omitted]; *see Matter of Santos v Annucci*, 209 AD3d 1084, 1086

[3d Dept 2022]; *see also Matter of Phillips v Annucci*, 150 AD3d 1673, 1674 [4th Dept 2017]).

Contrary to petitioner's further contention, we conclude that the misbehavior report and the video and photographic evidence constitute substantial evidence to support the determination that petitioner violated incarcerated individual rule 100.11 (*see generally Matter of Thomas v Annucci*, 193 AD3d 1356, 1357 [4th Dept 2021]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

440

CA 23-01735

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

CHARLES D. GIBSON AND THE FUNNY FARM NEW YORK, LLC,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

FARM CREDIT EAST, ACA, DEFENDANT-APPELLANT,
AND FARM FAMILY CASUALTY INSURANCE CO.,
DEFENDANT-RESPONDENT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (ERIN E. ELMOUJI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (RYAN J. MILLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered October 2, 2023. The order and judgment, insofar as appealed from, denied in part the motion of defendant Farm Credit East, ACA, for partial summary judgment against defendant Farm Family Casualty Insurance Co.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the motion of defendant Farm Credit East, ACA, in its entirety and awarding that defendant judgment against defendant Farm Family Casualty Insurance Co. in the amount of $122,400, together with interest at the rate of 9% per annum commencing February 17, 2021, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages under an insurance policy issued by defendant Farm Family Casualty Insurance Co. (Farm Family) for losses following a fire at plaintiffs' farm in July 2019. In February 2021, Farm Family issued two payments, i.e., a check in the amount of $163,313.03 made payable to both plaintiffs and defendant Farm Credit East, ACA (Farm Credit), a mortgagee with a security interest in plaintiffs' farm, as reimbursement for damage to various structures, and a check in the amount of $122,400 made payable only to plaintiffs as reimbursement for the loss of livestock. Farm Credit answered and, inter alia, asserted a cross-claim for breach of contract against Farm Family seeking to recover the insurance proceeds it claims were wrongfully paid by Farm Family to plaintiffs for the livestock, notwithstanding Farm Credit's prior notice to Farm Family of its interest in the proceeds. Subsequently, Farm Credit moved for partial summary

judgment seeking, on its cross-claim for breach of contract, a money judgment against Farm Family in the amount of $122,400, plus statutory interest at a rate of 9% per annum from February 17, 2021.

Supreme Court, inter alia, granted Farm Credit's motion in part, and Farm Credit now appeals from that part of the court's order and judgment awarding it a money judgment against Farm Family "in an amount to be determined after trial."

Farm Credit contends that the court erred in determining that triable issues of fact remain regarding the amount of damages Farm Family owes Farm Credit. We agree with Farm Credit that the court erred in failing to award Farm Credit a money judgment for $122,400, i.e., the amount on the check intended as reimbursement for the loss of livestock. Farm Family had notice of Farm Credit's secured interest in the livestock, and nevertheless issued payment to plaintiffs without regard to Farm Credit's interest. In doing so, Farm Family paid plaintiffs at its peril and assumed the hazard of resisting the equity claimed by Farm Credit (*see Rosario-Paolo, Inc. v C & M Pizza Rest.*, 84 NY2d 379, 382-383 [1994], *rearg dismissed* 85 NY2d 925 [1995]).

There is no dispute that the $122,400 check was issued relative to the loss of the livestock in which Farm Credit had a perfected security interest, and Farm Family had been placed on notice of Farm Credit's interest. Farm Credit made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" with respect to the amount of damages to which it is entitled on its breach of contract cross-claim against Farm Family (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In opposition, Farm Family failed to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). We therefore modify the order and judgment accordingly.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

443

KA 20-01659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN L. MULLIGAN, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Karen Bailey Turner, J.), rendered October 23, 2020. Defendant was resentenced upon his conviction of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant was convicted following a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]) and now appeals from a resentence with respect to that conviction. Contrary to defendant's contention, we conclude that the resentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

448

KA 22-01541

PRESENT: SMITH, J.P., LINDLEY, DELCONTE, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DINO J. CALLARA, DEFENDANT-APPELLANT.

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

ANTHONY M. BRUCE, SPECIAL PROSECUTOR, BATAVIA, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered July 6, 2022. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree and petit larceny (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [8]) and two counts of petit larceny (§ 155.25). The charges were prosecuted by a special district attorney appointed by County Court following the disqualification, upon application, of the elected district attorney for Orleans County. Defendant contends that the special district attorney lacked jurisdiction to present evidence to a grand jury, secure an indictment, and prosecute him on the indictment inasmuch as the court exceeded its authority by appointing an attorney who did not live or maintain a law office in Orleans County or an adjacent county. We agree with defendant.

"County Law § 701 (1) allows a court to appoint a special district attorney in situations where the district attorney is 'disqualified from acting in a particular case to discharge his or her duties at a term of any court' " (*Matter of Soares v Herrick*, 20 NY3d 139, 144 [2012]). The Court of Appeals, "[a]cknowledging that a court's authority under County Law § 701 'to displace a duly elected [d]istrict [a]ttorney' raises separation of power concerns, [has] cautioned that '[t]his exceptional superseder authority should not be expansively interpreted' " (*id.* at 144-145, quoting *People v Leahy*, 72 NY2d 510, 513-514 [1988]). As relevant here, section 701 (1) (a) explicitly limits the superseding authority of a court to

"appoint[ing] some attorney at law having an office in or residing in the county, or any adjoining county, to act as special district attorney." Where, as here, a court exceeds its authority by appointing a special district attorney who does not meet those statutory requirements, "[t]he indictment must be dismissed to preserve the integrity of a statute designed narrowly by its terms and by its purpose to fill emergency gaps in an elected prosecutorial official's responsibility" (*Leahy*, 72 NY2d at 513).

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

449

KA 23-00184

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BROCK GOINES, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, LACKAWANNA, 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 (Caroline Wojtaszek, J.), rendered October 28, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [3]). Prior to sentencing, defendant admitted to being a second felony offender based on a prior conviction in the state of California for burglary in the first degree and waived his right to a hearing on the issue whether that conviction equates to a felony conviction in the state of New York. Defendant subsequently moved to withdraw his plea on the ground that the California conviction did not equate to a felony in New York, but he later withdrew that motion and requested that County Court move forward with sentencing on the understanding that defendant was a nonviolent second felony offender. Defendant was sentenced accordingly.

On appeal, defendant contends that his designation as a nonviolent second felony offender is illegal because his prior California conviction is not equivalent to a New York felony. Although defendant's challenge to the legality of his sentence survives his waiver of the right to appeal (*see People v Dodson*, 194 AD3d 1409, 1409 [4th Dept 2021]), "such an argument must be preserved at the trial level, where the production and examination of foreign accusatory instruments and, conceivably, the resolution of evidentiary disputes, all in the context of comparisons with the law of other

jurisdictions, may occur" (*People v Sablan*, 177 AD3d 1024, 1025 [3d Dept 2019], *lv denied* 34 NY3d 1132 [2020] [internal quotation marks omitted]). Inasmuch as defendant did not contest the predicate felony statement during his plea or at sentencing, his contention is unpreserved for appellate review (*see Sablan*, 177 AD3d at 1025-1026; *see also People v Smith*, 73 NY2d 961, 962-963 [1989]; *Dodson*, 194 AD3d at 1409-1410). Moreover, although there is a narrow exception to the preservation rule permitting appellate review when a sentence's illegality is readily discernible from the record, this case does not fall within that narrow exception because a determination whether defendant's California conviction is the equivalent of a New York felony requires resort to outside facts, documentation, or foreign statutes (*see People v Lopez*, 164 AD3d 1625, 1625-1626 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). We note that defendant has an available avenue of relief, namely, a motion to set aside his sentence pursuant to CPL 440.20 (1), which would facilitate the development of an adequate record regarding his California conviction and "allow the New York courts to intelligently determine whether that conviction qualified as a proper predicate for enhanced sentencing in this case" (*Dodson*, 194 AD3d at 1410; *see Sablan*, 177 AD3d at 1026).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

450

KA 23-01568

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ABRAHAM SHAMMAH, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered August 30, 2023. The judgment convicted defendant upon a guilty plea of criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the motion seeking to dismiss the indictment pursuant to CPL 30.30 is granted, the indictment is dismissed, and the matter is remitted to Seneca County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [5] [i]), defendant contends that County Court erred in denying that part of his motion seeking to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). We agree.

Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]). Once a defendant has shown the existence of a delay greater than six months, the People bear the burden of proving that certain periods within that time should be excluded (*see People v Berkowitz*, 50 NY2d 333, 349 [1980]; *People v Bish*, 227 AD3d 1408, 1409 [4th Dept 2024]).

Here, defendant met his initial burden on the motion inasmuch as

he was charged by felony complaint on April 26, 2021 (*see* CPL 1.20 [17]) and the People did not announce their readiness for trial until May 25, 2022, a period of 394 days.

Moreover, we agree with defendant that the court erred in determining that the total time chargeable to the People was only 125 days inasmuch as we conclude that the People failed to meet their burden of establishing a basis to exclude from the statutory calculations the 125-day period from January 20, 2022, the date on which the defendant purportedly asked the People to "hold off" presenting the matter to the grand jury, until May 25, 2022, when the People announced readiness for trial.

The People's blanket assertion to the court that "all delays in this matter, from arrest to the People announcing readiness for trial were at the request of the defendant" was not sufficient to demonstrate why they are not chargeable with that 125-day delay (*see People v Rivera*, 72 AD2d 922, 923 [4th Dept 1979]).

Inasmuch as the total time chargeable to the People exceeds the six-month period allowed pursuant to CPL 30.30, defendant was denied his right to a speedy trial. The court thus erred in denying that part of defendant's motion seeking to dismiss the indictment (*see generally* CPL 30.30 [1] [a]).

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

451

KA 23-00294

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL A. NEY, DEFENDANT-APPELLANT.

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

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered November 21, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree and attempted rape 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 contempt in the first degree (Penal Law § 215.51 [c]) and attempted rape in the third degree (§§ 110.00, 130.25 [3]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea. We reject that contention.

"[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing [a] plea" (*People v Alexander*, 203 AD3d 1569, 1570 [4th Dept 2022], *lv denied* 38 NY3d 1031 [2022] [internal quotation marks omitted]). Furthermore, " '[o]nly in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his [or her] contentions and the court should be enabled to make an informed determination' " (*People v Harris*, 206 AD3d 1711, 1711-1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022], quoting *People v Tinsley*, 35 NY2d 926, 927 [1974]; *see People v Weems*, 203 AD3d 1684, 1684 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]). "[W]hen a motion to withdraw a plea is patently insufficient on its face, a court may simply deny the motion" (*People v Mitchell*, 21 NY3d 964, 967 [2013]; *see People v Brooks*, 187 AD3d 1587, 1589 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021]). Moreover, "a court does not abuse its

discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding" (*People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022] [internal quotation marks omitted]; *see Alexander*, 203 AD3d at 1570).

Here, defendant was provided with a reasonable opportunity to present his contentions in support of his request to withdraw the plea. However, defendant's conclusory and unsubstantiated assertions that he was innocent and pleaded guilty due to defense counsel's inadequate representation were belied by the statements that defendant made during the plea colloquy, and therefore his request was patently without merit (*see Fox*, 204 AD3d at 1453; *People v Riley*, 182 AD3d 998, 998-999 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020], *reconsideration denied* 36 NY3d 931 [2020]; *People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]). We thus perceive no abuse of discretion in the court's summary denial of defendant's request to withdraw his plea (*see Alexander*, 203 AD3d at 1570; *People v Gizowski*, 182 AD3d 989, 990 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]).

Defendant further contends that the enhanced sentence imposed following his violation of the terms of the plea agreement is unduly harsh and severe. Defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]) and, because the court advised defendant of the maximum sentence that could be imposed if he violated the plea agreement, that waiver encompasses his challenge to the severity of the enhanced sentence (*see People v VanDeViver*, 56 AD3d 1118, 1119 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]; *cf. People v Johnson*, 14 NY3d 483, 487 [2010]; *see also People v Espino*, 279 AD2d 798, 800 [3d Dept 2001]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

452

KA 20-01440

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL J. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 22, 2020. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal use of a firearm in the first degree (§ 265.09 [1] [a]). This was defendant's second trial on the same indictment. The first trial also resulted in a judgment of conviction, but the Court of Appeals reversed an order of this Court and ordered a new trial based on its determination that Supreme Court erred in refusing defendant's request for a missing witness instruction (*People v Smith*, 33 NY3d 454, 460-461 [2019], *revg* 162 AD3d 1686 [4th Dept 2018]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). We agree with defendant, however, that the court erred when it declared that the victim was unavailable to testify due to her stated intention to invoke her Fifth Amendment privilege against self-incrimination (*see* US Const Amend V; *see also* NY Const, art I, § 6). As a result of that determination, the court allowed the People to introduce in evidence the victim's testimony from the first trial

pursuant to CPL 670.10 (1), thereby precluding defense counsel from questioning the victim about various crimes she committed after the first trial and before the second trial.

Assuming, arguendo, that defendant's particular contention regarding anticipatory perjury is not preserved for our review, despite the fact that the court specifically addressed that very contention (*see* CPL 470.05 [2]), we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Shortly before the retrial, the victim informed the prosecution that she could no longer remember the identity of the shooter, notwithstanding that she was able to remember him only a few months earlier during an interview with the prosecution to prepare for the retrial. Following a *Sirois* hearing, the court determined that the People failed to establish by clear and convincing evidence that "defendant [was] directly behind" the victim's sudden inability to remember. At that point, the victim's attorney informed the court that he would direct her to invoke her Fifth Amendment privilege against self incrimination "at the beginning of her testimony." Outside the presence of the jury, the victim was called to testify and, aside from answering a question about her name, she invoked the Fifth Amendment privilege in response to any additional questions and indicated that she would do so for "any questions regarding the incident."

Defense counsel opposed any determination that the victim was unavailable, contending that her inability to remember did not make her an unavailable witness. The court noted that the issue was that the victim's *potential* testimony that she could not remember would not be truthful given that she did remember just a few months before the retrial. The victim's attorney agreed with the court's statement that the concern was for the "potential perjury" that might arise from the victim's future testimony at the retrial. The court then declared that the victim was unavailable as a witness. That was error.

"The Fifth Amendment provides that no person shall be compelled in a criminal case to be a witness against himself (or herself)" (*United States v Fridman*, 974 F3d 163, 174 [2d Cir 2020], *cert denied* — US —, 141 S Ct 2760 [2021]; *see* US Const Amend V; *see also* NY Const, art I, § 6). The Fifth Amendment privilege extends "not only to answers that are directly incriminatory but also to those that, while not themselves inculpatory, 'would furnish a link in the chain of evidence needed to prosecute the claimant' " (*United States v Greenfield*, 831 F3d 106, 114 [2d Cir 2016]; *see Ohio v Reiner*, 532 US 17, 20 [2001 per curiam]; *United States v Johnson*, — F3d —, —, 2024 WL 207868, *1 [2d Cir 2024]). The person attempting to invoke the privilege must establish that the threat of self-incrimination is "substantial and real, and not merely trifling or imaginary" (*Marchetti v United States*, 390 US 39, 53 [1968] [internal quotation marks omitted]; *see United States v Apfelbaum*, 445 US 115, 128 [1980]; *United States v DeSalvo*, 26 F3d 1216, 1221 [2d Cir 1994], *cert denied* 513 US 870 [1994]). Thus, "[b]efore a witness . . . is entitled to

remain silent, there must be a valid assertion of the [F]ifth [A]mendment privilege . . . The [trial] court must decide whether a witness' silence is justified and [must] require him [or her] to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity" (*United States v Boothe*, 335 F3d 522, 526 [6th Cir 2003], *cert denied* 541 US 975 [2004] [internal quotation marks omitted]).

Here, the record demonstrates that the victim feared not that her testimony at the retrial would reveal that her testimony from the first trial was perjurious, but that her potential future testimony—i.e., that she did not remember the identity of the shooter—would itself be perjurious. The distinction is critical inasmuch as "a future intention to commit perjury or to make false statements . . . is not by itself sufficient to create a substantial and real hazard that permits invocation of the Fifth Amendment" (*Apfelbaum*, 445 US at 131 [internal quotation marks omitted]; *see Zicarelli v New Jersey State Commn. of Investigation*, 406 US 472, 480 [1972]; *Earp v Cullen*, 623 F3d 1065, 1070-1071 [9th Cir 2010], *cert denied* 563 US 1037 [2011]).

"A witness may not claim the privilege of the [F]ifth [A]mendment out of fear that he [or she] will be prosecuted for perjury for what he [or she] is *about to say*. The shield against self-incrimination in such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told" (*United States v Whittington*, 783 F2d 1210, 1218 [5th Cir 1986], *reh denied* 786 F2d 644 [5th Cir 1986], *cert denied* 479 US 882 [1986] [emphasis added]; *see United States v Allmon*, 594 F3d 981, 987 [8th Cir 2010], *cert denied* 562 US 981 [2010]; *Boothe*, 335 F3d at 526-527). "Fear of a perjury prosecution can typically form a valid basis for invoking the Fifth Amendment only where the risk of prosecution is for perjury in the witness' *past* testimony" (*United States v Vavages*, 151 F3d 1185, 1192 n 3 [9th Cir 1998]).

"[T]he court focuses inquiry on what a truthful answer might disclose, rather than on what information is expected by the questioner" (*Zicarelli*, 406 US at 480). Simply put, the Fifth Amendment "does not permit a witness to invoke the privilege on the ground that he [or she] anticipates committing perjury sometime in the future" (*DeSalvo*, 26 F3d at 1221). There is "no doctrine of 'anticipatory perjury' " (*Apfelbaum*, 445 US at 131).

New York cases do not hold to the contrary. New York permits invocation of the Fifth Amendment where the anticipated truthful testimony would subject the witness to perjury charges based on *prior sworn testimony or sworn statements*, i.e., where the proposed testimony would be so inconsistent with earlier testimony that the witness could be charged with perjury arising from the prior testimony (*see e.g. People v Bagby*, 65 NY2d 410, 413-414 [1985]; *People v Dekenipp*, 105 AD3d 1346, 1348 [4th Dept 2013], *lv denied* 21 NY3d 1041 [2013]). That situation typically occurs when a witness recants either testimony given earlier in the same trial (*see Bagby*, 65 NY2d

at 413-414) or sworn testimony given in a prior trial or grand jury proceeding (*see e.g. People v Knowles*, 79 AD3d 16, 24 [3d Dept 2010], *lv denied* 16 NY3d 896 [2011]; *People v Whitley*, 14 AD3d 403, 404 [1st Dept 2005], *lv denied* 4 NY3d 892 [2005]).

During oral argument on appeal, the People contended for the first time that potential testimony from the victim that she could not remember who shot her would have been perjurious because it would have been "inconsistent" with her testimony from the first trial within the meaning of Penal Law § 210.20. Even if that contention were properly before us, which it is not, we would reject it on the merits. Section 210.20 provides that, "[w]here a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, where the circumstances are such that each statement, if false, is perjuriously so," the inability of the People to establish which statement is false does not preclude a prosecution for perjury. Here, the fact that the victim could not identify the shooter at the retrial does not render her testimony at the first trial "necessarily false" considering that the first trial took place approximately six years earlier and the victim had no prior relationship with the shooter.

We therefore conclude that the court erred in declaring the victim unavailable and allowing her testimony from the first trial to be read to the jury at the retrial. Inasmuch as the victim was the only person who identified defendant as the person who shot her, we cannot conclude that the evidence of defendant's guilt is overwhelming, and therefore the error cannot be deemed harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). The judgment must be reversed and the matter remitted for a new trial.

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

453

CAF 23-01600

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

IN THE MATTER OF MINDY M. FALLIN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FAISEL A. HARUNA, RESPONDENT-APPELLANT.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (CAMILLE S. BROWN OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered March 1, 2023, in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objections to an order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order denying his objections to the order of the Support Magistrate, which directed the father to pay petitioner mother child support in the amount of $1,737 per month. On appeal, the father contends that the Support Magistrate erred in imputing income to him in the amount of $100,000 for the purpose of determining his child support obligation. We affirm.

Courts have " 'considerable discretion' " to impute income to a parent in fashioning a child support award, and "a court's imputation of income will not be disturbed so long as there is record support for its determination" (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]; *see Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016]). "[T]he general rule is that child support is determined by the parents' ability to provide for their child rather than their current economic situation" (*Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019]). "[I]n determining a party's child support obligation, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1397 [4th Dept 2014] [internal quotation marks omitted]). Courts may impute income based on a party's employment history, future earning capacity, educational background, or money received from friends and relatives (*see Matter of Drake v Drake*, 185 AD3d 1382, 1383 [4th Dept 2020], *lv*

denied 36 NY3d 909 [2021]; *Matter of Deshotel v Mandile*, 151 AD3d 1811, 1812 [4th Dept 2017]; *Matter of Rohme v Burns*, 92 AD3d 946, 947 [2d Dept 2012]). Further, "where a party's account [of his or her own finances] is not believable, the court is justified in finding a true or potential income higher than that claimed" (*Elsayed v Edrees*, 141 AD3d 503, 505 [2d Dept 2016], *lv denied* 28 NY3d 908 [2016] [internal quotation marks omitted]; *see Sharlow v Sharlow*, 77 AD3d 1430, 1431 [4th Dept 2010]).

We conclude that the court's determination to impute $100,000 income to the father is supported by the evidence in the record, including evidence of the amounts that the father paid for household expenses, private school tuition, the mother's use of a vehicle, and miscellaneous child care expenses, as well as evidence of his access to financial support from his family (*see Matter of Houck v Houck*, 217 AD3d 1556, 1557 [4th Dept 2023], *lv denied* 40 NY3d 906 [2023]; *Matter of Remsen v Remsen*, 198 AD3d 658, 660 [2d Dept 2021]; *Rohme*, 92 AD3d at 947).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

455

CA 23-01752

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

ADAM GASKILL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. SHARPE, DEFENDANT-RESPONDENT,
CAUSLEY TRUCKING, INC., AND JEFFREY KEITH MADDEN,
DEFENDANTS-APPELLANTS.

LEWIS BRISBOIS BISGAARD & SMITH LLP, NEW YORK CITY (JAMES M. STRAUSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CANTOR, WOLFF, NICASTRO & HALL LLC, BUFFALO (RICHARD A. HALL, IV, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HURWITZ FINE PC, BUFFALO (ROBERT J. CAGGIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 16, 2023. The order, insofar as appealed from, denied the motion of defendants Causley Trucking, Inc., and Jeffrey Keith Madden for summary judgment and sanctions.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a motor vehicle accident while he was a front passenger in a car owned and operated by defendant Christopher M. Sharpe. The complaint alleges that the accident occurred when Sharpe backed the car out of his driveway and collided with a truck owned by defendant Causley Trucking, Inc. (Causley) that had been parked by defendant Jeffrey Keith Madden partially in the roadway across the street from Sharpe's residence.

Following joinder of issue but prior to depositions, Causley and Madden (collectively, defendants) moved for, inter alia, summary judgment dismissing the complaint against them, contending that the accident was caused solely by the negligence of Sharpe, who failed to see what was there to be seen when he backed out of his driveway. In support of the motion, defendants submitted, among other things, an affidavit from Madden, who stated that he was in the cab of the truck when the accident occurred and that the truck was parked entirely in the parking lot or driveway located on Causley's property, which was across the street from where Sharpe had backed out of the driveway.

Madden maintained that the truck was not in the roadway and had its hazard lights activated. In opposition, plaintiff submitted an affidavit in which he stated that, immediately after the accident, he observed the truck partially in the roadway with its driver's-side tires "over the culvert" and without its hazard lights activated. Supreme Court denied the motion without prejudice to renew following discovery.

On appeal, defendants contend that the court should have granted their motion insofar as it sought summary judgment dismissing the complaint against them because they met their initial burden of establishing that, even if the truck was parked in the roadway, Sharpe's negligence was the sole proximate cause of plaintiff's injuries, and plaintiff failed to raise an issue of fact in opposition. We reject defendants' contention. Although defendants established that Sharpe was negligent, a triable issue of fact exists whether they were also negligent if, as plaintiff alleges, the truck was illegally parked in the roadway at the time of the accident. Thus, questions of fact exist whether Sharpe's negligence was the sole proximate cause of the accident. It is well settled that there may be more than one proximate cause of an accident or injury (*see Mazella v Beals*, 27 NY3d 694, 706 [2016]; *Spring v Allegany-Limestone Cent. Sch. Dist.*, 221 AD3d 1474, 1479 [4th Dept 2023]), and "[a]s a general rule, issues of proximate cause are for the trier of fact" (*Standard Fire Ins. Co. v New Horizons Yacht Harbor, Inc.*, 63 AD3d 1542, 1543 [4th Dept 2009]; *see Bucklaew v Walters*, 75 AD3d 1140, 1142 [4th Dept 2010]). This case does not present an exception to the general rule.

Defendants' reliance on *Gill v Braasch* (100 AD3d 1415, 1415-1416 [4th Dept 2012]) is misplaced inasmuch as, unlike here, it was undisputed that the defendant knew prior to the accident that the plaintiff's vehicle was parked on the shoulder of the roadway. We have reviewed the remaining cases cited by defendants and find them to be factually distinguishable as well.

Finally, we have considered defendants' remaining contention and conclude that it lacks merit.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

457

CA 23-00753

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

MERCHANTS PREFERRED INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JUNIOR M. CAMPBELL, DOING BUSINESS AS
JMC QUALITY AIR, GERALD BREMMER, DEFENDANTS,
AND ROSE CHARLEUS, DEFENDANT-RESPONDENT.

HURWITZ & FINE P.C., BUFFALO (BRIAN D. BARNAS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 25, 2023, in a declaratory judgment action. The order and judgment, inter alia, granted the motion of defendant Rose Charleus for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of defendant Rose Charleus and reinstating the complaint, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking a judgment declaring that it has no duty to defend or indemnify defendants Junior M. Campbell, doing business as JMC Quality Air (JMC), and Gerald Bremmer in a personal injury action commenced against them in Florida by defendant Rose Charleus. The underlying action arises from a motor vehicle accident that occurred in Florida in August 2017 when Bremmer, an employee of JMC, was operating a vehicle owned by JMC and insured by plaintiff pursuant to a commercial automobile liability policy. According to Charleus, the van struck her vehicle from behind at an intersection.

Charleus provided notice of the accident to plaintiff nine days after the accident and then commenced the underlying action against JMC and Bremmer in February 2019. Neither JMC nor Bremmer notified plaintiff of the accident or the lawsuit, and both refused to discuss the accident with plaintiff's representatives. In May 2020, plaintiff disclaimed coverage to JMC based on the insured's failure to cooperate with the investigation of the claim and defense of the personal injury

action. Plaintiff disclaimed coverage to Bremmer the following month on the same ground. The disclaimers were made after the personal injury action in Florida had been placed on the trial calender. Plaintiff had been defending both JMC and Bremmer up to that point of the litigation.

In this declaratory judgment action, plaintiff named JMC, Bremmer and Charleus as defendants, but only Charleus appeared. Following joinder of issue, Charleus moved for summary judgment dismissing the complaint, contending, among other things, that plaintiff's disclaimers of coverage to JMC and Bremmer were untimely under Insurance Law § 3420 (d) (2) because they were not provided as soon as reasonably possible. Plaintiff moved for summary judgment declaring that it has no duty to defend JMC or Bremmer based on their failure to cooperate with plaintiff's investigation of the claim and defense of the underlying action. Plaintiff also moved for a default judgment against JMC and Bremmer. Supreme Court denied plaintiff's motion, granted Charleus's motion, and dismissed the complaint. We now modify the order and judgment by denying Charleus's motion and reinstating the complaint.

As a preliminary matter, we agree with plaintiff that New York law rather than Florida law applies to this action. "The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved" (*Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]). Here, as the parties recognize, there is a conflict between the laws of the two states. Under Florida law, the insurer must establish, among other things, that it was "substantially prejudiced" by the insured's failure to cooperate (*Bankers Ins. Co. v Macias*, 475 So 2d 1216, 1218 [Fla Sup Ct 1985]; *see American Fire & Cas. Co. v Vliet*, 148 Fla 568, 571 [1941]), while in New York a showing of prejudice is not required (*see Nationwide Mut. Ins. Co. v Graham*, 275 AD2d 1012, 1013 [4th Dept 2000]).

The next step in the choice-of-law analysis is to apply the "center of gravity" or "grouping of contacts" analysis, focusing on which state "has 'the most significant relationship to the transaction and the parties' " (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994]; *see Matter of Midland Ins. Co.*, 16 NY3d 536, 543-544 [2011]; *Allstate Ins. Co.*, 81 NY2d at 226). "In the context of liability insurance contracts," the state with the most significant relationship to the transaction and the parties will generally be the one " 'which the parties understood was to be the principal location of the insured risk' " (*Midland Ins. Co.*, 16 NY3d at 544; *see Zurich Ins. Co.*, 84 NY2d at 318).

Here, the policy was issued in New York and the issuing insurance company, insured, and agent were all based in New York. Additionally, the policy was issued with New York-specific forms, and the insured vehicle was principally garaged in New York. Under the circumstances, we conclude that New York has the most significant contacts with the parties and the contract and that Florida was merely the state in

which the accident occurred, which is not dispositive (*see Matter of Unitrin Direct/Warner Ins. Co. v Brand*, 120 AD3d 698, 700 [2d Dept 2014]; *Jimenez v Monadnock Constr., Inc.*, 109 AD3d 514, 517 [2d Dept 2013]; *FC Bruckner Assoc., L.P. v Fireman's Fund Ins. Co.*, 95 AD3d 556, 556-557 [1st Dept 2012]).

Contrary to Charleus's assertion, the choice-of-law analysis is not changed by the policy provision stating that plaintiff would "provide at least the minimum amount and kind of coverage which is required . . . under the laws" of any other state in which the insured vehicle was operated. The plain language of the provision cannot reasonably be interpreted as providing that the policy will be interpreted and enforced pursuant to the laws of another state in which the insured vehicle is operated (*see generally Progressive Northeastern Ins. Co. v State Farm Ins. Cos.*, 81 AD3d 1376, 1378 [4th Dept 2011], *appeal dismissed* 16 NY3d 891 [2011], *lv dismissed* 17 NY3d 849 [2011]). Indeed, the Florida legal standard for disclaiming coverage does not constitute an "amount" or "kind" of insurance coverage within the meaning of the provision.

Applying New York law, we agree with plaintiff that the court erred in determining that plaintiff's disclaimers of coverage were untimely pursuant to Insurance Law § 3420 (d) (2), which reads: "If under a liability policy issued or delivered *in this state*, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring *within this state*, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant" (emphasis added). Section 3420 (d) (2) limits its application to accidents occurring in New York (*see United States Fid. & Guar. Co. v New York, Susquehanna & W. Ry. Corp.*, 275 AD2d 977, 978 [4th Dept 2000]; *Brennan v Liberty Mut. Fire Ins. Co.*, 204 AD2d 675, 676 [2d Dept 1994]; *see also Matter of Sentry Ins. Co. [Amsel]*, 36 NY2d 291, 295 [1975]). Although Charleus contends as an alternative ground for affirmance that the disclaimers were untimely under common-law principles even if section 3420 (d) (2) does not apply (*see Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]), she failed to preserve that contention for our review (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Henry v Buffalo Mgt. Group, Inc.*, 218 AD3d 1233, 1234 [4th Dept 2023]). We therefore conclude that the court erred in granting Charleus's motion based on plaintiff's alleged untimely notice of disclaimer.

Contrary to plaintiff's contention, however, we further conclude that the court properly denied that part of plaintiff's motion for summary judgment declaring that it has no duty to defend JMC or Bremmer based on their failure to cooperate with plaintiff's investigation of the claim and defense of the underlying action. It is well settled that the burden of establishing lack of cooperation of the insured is on the insurer, who is asserting noncooperation as an excuse for its own nonperformance under the insurance contract (*see*

Thrasher v United States Liab. Ins. Co., 19 NY2d 159, 168 [1967]). The burden has been described as "a heavy one indeed" (*id.*; *see Country-Wide Ins. Co. v Preferred Trucking Servs. Corp.*, 22 NY3d 571, 576 [2014]), requiring the carrier to establish "(1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that its efforts were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured was one of 'willful and avowed obstruction' " (*Matter of New York Cent. Mut. Fire Ins. Co. [Salomon]*, 11 AD3d 315, 316 [1st Dept 2004], quoting *Thrasher*, 19 NY2d at 168; *see Van Opdorp v Merchants Mut. Ins. Co.*, 55 AD2d 810, 810-811 [4th Dept 1976]; *Alexander v Stone*, 45 AD2d 216, 220 [4th Dept 1974]).

"The rationale for imposing this heavy burden is to protect an innocent injured party, who may well have relied upon the fact that the insured had adequate coverage, from being penalized for the imprudence of the insured, over whom he or she has no control" (*Mount Vernon Fire Ins. Co. v 170 E. 106th St. Realty Corp.*, 212 AD2d 419, 420-421 [1st Dept 1995], *lv denied* 86 NY2d 707 [1995]; *see Continental Cas. Co.*, 11 NY3d at 450; *Thrasher*, 19 NY2d at 168). Thus, to allow an insurer to disclaim coverage, "[t]he inference of noncooperation must be 'practically compelling' " (*West St. Props., LLC v American States Ins. Co.*, 150 AD3d 792, 794 [2d Dept 2017], *lv denied* 29 NY3d 917 [2017], quoting *Matter of Empire Mut. Ins. Co. [Stroud—Boston Old Colony Ins. Co.]*, 36 NY2d 719, 722 [1975]).

Here, applying strict scrutiny to the evidence submitted by plaintiff (*see Continental Cas. Co.*, 11 NY3d at 450; *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 410 [1st Dept 2010]), we conclude that plaintiff failed to meet its initial burden on the motion insofar as it sought summary judgment declaring that it has no duty to defend JMC or Bremmer based on their failure to cooperate. Although plaintiff established that JMC and Bremmer did not meaningfully respond to inquiries regarding the subject accident, their inaction is not enough on its own to allow plaintiff to avoid its coverage obligations. The evidence fails to establish, as a matter of law, that *plaintiff* acted diligently in seeking the cooperation of JMC and Bremmer, that its efforts were reasonably calculated to obtain their cooperation, and that the attitude of JMC and Bremmer was one of willful and avowed obstruction. We conclude that "the nonaction of the insured, which is the only factual basis in this case, cannot in this instance be escalated into a finding of willful and avowed obstruction" (*Flans v Martini*, 136 AD2d 498, 499 [1st Dept 1988] [internal quotation marks omitted]), "especially in cases where[, as here,] an innocent accident victim would be deprived of [their] source of payment because a liability carrier claims that its assured has failed to cooperate" (*Ausch v St. Paul Fire & Mar. Ins. Co.*, 125 AD2d 43, 46 [2d Dept 1987], *lv denied* 70 NY2d 610 [1987], citing, inter alia, *Thrasher*, 19 NY2d at 168).

We therefore conclude that the court properly denied that part of plaintiff's motion for summary judgment declaring that it has no duty to defend JMC or Bremmer " 'regardless of the sufficiency of the

opposing papers' " (*Paul v Cooper*, 45 AD3d 1485, 1486 [4th Dept 2007]; *see generally Steven Mueller Motors, Inc. v Hickey*, 134 AD3d 1467, 1468 [4th Dept 2015]). We have reviewed plaintiff's remaining contention and conclude that it does not warrant reversal or further modification of the order and judgment.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

458

CA 23-00623

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

KATHLEEN KIRSCHLER AND WALTER KIRSCHLER,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF NORTH COLLINS AND VILLAGE OF
NORTH COLLINS DEPARTMENT OF PUBLIC WORKS,
DEFENDANTS-APPELLANTS-RESPONDENTS.

HURWITZ FINE P.C., BUFFALO (TODD C. BUSHWAY OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 21, 2023. The order denied defendants' motion for summary judgment dismissing the complaint and denied in part plaintiffs' cross-motion for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries Kathleen Kirschler (plaintiff) allegedly sustained when she slipped and fell on ice in the staff parking lot of her employer, a school district (District). The District had entered into an intermunicipal agreement (Agreement), pursuant to section 119-o of the General Municipal Law, with defendant Village of North Collins pursuant to which the village, through defendant Village of North Collins Department of Public Works, agreed to provide salting services for certain of the District's parking lots, including the staff parking lot. Defendants moved for summary judgment dismissing the complaint on the grounds that they did not owe plaintiff a duty of care and that plaintiff was unable to identify the cause of her fall. Plaintiffs cross-moved for summary judgment on the issues of duty, negligence, and causation. Supreme Court denied the motion and granted that part of the cross-motion with respect to the issue of duty. Defendants appeal, and plaintiffs cross-appeal.

We reject defendants' contention on their appeal that the court erred in denying their motion with respect to the issue of duty.

" '[T]he threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?' " (*Nicholas T. v Town of Tonawanda*, 213 AD3d 1333, 1334 [4th Dept 2023]). Here, any duty that defendants owed with respect to salting the parking lot arose exclusively out of the intermunicipal agreement with the District (*see generally Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1523 [4th Dept 2017]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), and that principle applies with equal force where the contractual obligation arises from the sort of intermunicipal contract at issue here (*see Honer v McComb*, 126 AD3d 1555, 1556 [4th Dept 2015]; *see also Suzanne P. v Joint Bd. of Directors of Erie-Wyoming County Soil Conservation Dist.*, 175 AD3d 1093, 1094 [4th Dept 2019], *affd* 41 NY3d 391 [2024], *rearg denied* 41 NY3d 1000 [2024]). Nevertheless, a party who enters into a contract to render services may be said to have assumed a duty of care to third persons where "the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launches a force or instrument of harm' " (*Espinal*, 98 NY2d at 140).

We agree with defendants that they met their initial burden on the motion of establishing that, in performing their salting obligations, they did not launch a force or instrument of harm by creating or exacerbating a dangerous condition (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]; *Espinal*, 98 NY2d at 142; *Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1435 [4th Dept 2021]; *Lingenfelter*, 149 AD3d at 1523). In opposition, plaintiffs submitted the affidavit of an expert, who opined that defendants' use of sodium chloride (rock salt) created a dangerous condition and launched a force of harm because the rock salt would have caused water to flow and pool near the area where plaintiff fell. The expert further opined that, due to the temperatures on the date of the incident, the pooled water near the area of plaintiff's fall would have refrozen quickly, thereby creating the alleged dangerous condition (*see Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1585 [4th Dept 2022]). Plaintiffs also submitted the deposition testimony of defendants' employee, who confirmed that during wintertime, when the temperature can fluctuate above and below freezing, water could accumulate in the parking lot where plaintiff fell, and that the accumulated water could then freeze when the temperature went below freezing (*see Britt*, 199 AD3d at 1436). We conclude that plaintiffs' submissions raised a triable issue of fact whether defendants assumed a duty of care to plaintiff by launching the force or instrument of harm. The court thus properly denied that part of the motion with respect to the issue of duty. Because there is a question of fact whether defendants owed a duty of care to plaintiff, however, we further conclude that the court erred in granting that part of the cross-motion with respect to the issue of duty, and we therefore modify the order accordingly.

Defendants also contend on their appeal that the court erred in denying that part of their motion seeking summary judgment dismissing the complaint on the ground that plaintiff could not identify the

cause of her fall without engaging in speculation. We reject that contention. Defendants failed to meet their initial burden on the motion inasmuch as their own submissions raised a triable issue of fact regarding the cause of the fall. In particular, defendants submitted the deposition testimony of plaintiff, who testified that she noticed ice on the ground when she opened her car door because when she put her feet out, she felt that the pavement was slippery. In addition, the fact that defendants had been called to salt the parking lot supports the reasonable inference that icy patches remained among the melting snow (*see Williams v Jones*, 139 AD3d 1346, 1348 [4th Dept 2016]). We note that circumstantial evidence is sufficient to preclude summary judgment "if the plaintiffs show[ ] facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365 [4th Dept 2012]; *see Jewett v M.D. Fritz, Inc.*, 83 AD3d 1572, 1574 [4th Dept 2011]).

We have considered plaintiffs' contentions on their cross-appeal and conclude that none warrants further modification or reversal of the order.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

459

CA 23-01213

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

MELVIN L. WILLIAMS, JR., AND
EVELYN L. WILLIAMS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 10, 2023. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiffs commenced this action to recover damages for injuries Melvin L. Williams, Jr. (plaintiff) sustained when the motorcycle he was operating struck a police vehicle owned by defendant City of Buffalo and operated by a City of Buffalo police officer. At the time of the accident, the officer was making a left turn at an intersection and failed to yield the right of way to plaintiff, who was approaching in the oncoming lane of travel. Defendant moved for summary judgment dismissing the complaint on the ground that the officer was engaged in the emergency operation of an authorized emergency vehicle at the time of the accident and that his operation of the vehicle was not reckless. Supreme Court denied the motion, and defendant now appeals. We affirm.

Pursuant to Vehicle and Traffic Law § 1104, the driver of an emergency vehicle who is engaged in an emergency operation may operate that vehicle in violation of the provisions of the Vehicle and Traffic Law so long as the driver's conduct falls within one of the four statutorily enumerated categories of privileged conduct (*see Kabir v County of Monroe*, 68 AD3d 1628, 1630 [4th Dept 2009], *affd* 16 NY3d 217 [2011]). Under those circumstances, the driver is exempt from the consequences of their ordinary negligence and liable only for conduct constituting "the higher standard of reckless disregard for the safety of others" (*id.*).

Defendant met its initial burden on the motion of establishing that the reckless disregard standard of care applies here by submitting evidence, including surveillance video, demonstrating that at the time of the accident the officer "was responding to a police call and was therefore operating an authorized emergency vehicle while involved in an emergency operation" (*Williams v Fassinger*, 119 AD3d 1368, 1369 [4th Dept 2014], *lv denied* 24 NY3d 912 [2014]*; see Gernatt v Gregoire*, 217 AD3d 1340, 1341 [4th Dept 2023]) and that he was engaged in privileged conduct inasmuch as his "fail[ure] to yield the right of way while attempting to execute a left turn at a green light . . . [is among] the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Williams*, 119 AD3d at 1369 [internal quotation marks omitted]).

In opposition to the motion, plaintiffs submitted evidence, including a second surveillance video and an unsworn statement from an eyewitness (*see Shaw v Rosha Enters., Inc.*, 129 AD3d 1574, 1577 [4th Dept 2015]), demonstrating that at the time of the accident the officer was not responding to a police call and, therefore, that the heightened reckless disregard standard of care did not apply to his conduct (*see generally Rusho v State of New York*, 76 AD3d 783, 784 [4th Dept 2010]). The conflicting evidence on the motion raises a triable issue of fact as to the applicable standard of care, which cannot be resolved on summary judgment (*see Smith v NGM Ins. Co.*, 221 AD3d 1450, 1454 [4th Dept 2023], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

460

CA 23-02044

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

AB 511 DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LYNDONVILLE CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT,
AND LYNDONVILLE ELEMENTARY SCHOOL, DEFENDANT.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEVE BOYD, P.C., BUFFALO (LEAH COSTANZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (Deborah A. Chimes, J.), entered December 1, 2023. The order, among other things, denied in part defendants' motion for summary judgment.

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

Memorandum: Plaintiff commenced this action under the Child Victims Act (*see* CPLR 214-g) alleging that he was sexually abused by his fifth grade teacher while he was a student in defendant Lyndonville Central School District (District) in the mid-1980s. Some of the incidents allegedly occurred on repeated occasions in the teacher's classroom and at school during the day. Defendants moved for summary judgment dismissing the amended complaint and, as relevant here, Supreme Court denied the motion with respect to the District insofar as it sought summary judgment dismissing the cause of action for negligent failure to supervise plaintiff, the claim for negligent supervision of the teacher, and the cause of action for negligent retention of the teacher. The District appeals, and we affirm.

With respect to the first cause of action, for negligent supervision of plaintiff, it is well established that "[a] school district has the duty to exercise the same degree of care and supervision over [students] under its control as a reasonably prudent parent would exercise under the same circumstances" (*Lisa P. v Attica Cent. School Dist.*, 27 AD3d 1080, 1081 [4th Dept 2006]). "The standard for determining whether this duty was breached is whether a parent of ordinary prudence placed in an identical situation and armed with the same information would invariably have provided greater supervision" (*id.* [internal quotation marks omitted]). Prior

knowledge of an individual's propensity to engage in criminal conduct is not required to establish a cause of action for the negligent supervision of a student inasmuch as there are situations in which such conduct " 'may . . . be a "reasonably foreseeable" consequence of circumstances created by the defendant' " (*Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001], quoting *Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946 [1997]). In other words, even without actual or constructive notice of an individual's criminal propensity, a school district may "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006]).

Thus, even assuming arguendo, that defendants met their initial burden on the motion by submitting evidence that their employees had no notice of the subject teacher's propensity for sexual abuse of children (*see Lisa P.*, 27 AD3d at 1081), we conclude that plaintiff raised a triable issue of fact whether the teacher's sexual abuse of plaintiff was a reasonably foreseeable consequence of the failure of the District and its employees to prevent an employee from routinely inappropriately touching other male students in the hallway and from creating situations where the teacher was alone with plaintiff by having plaintiff arrive early to school, keeping him after school, holding him back from going to other classes, or taking him out of other classes for no articulated reason (*see generally Doe v Whitney*, 8 AD3d 610, 611-612 [2d Dept 2004]; *Murray*, 283 AD2d at 997).

With respect to the claim in the third cause of action, for negligent supervision of the teacher, and the fourth cause of action, for negligent retention of the teacher, we note that to establish such causes of action a plaintiff must show "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]; *see McMindes v Jones*, 41 AD3d 1196, 1196 [4th Dept 2007]). Even assuming, arguendo, that defendants met their initial burden on the motion by submitting, inter alia, evidence that they did not have knowledge of the teacher's propensity to sexually abuse children, plaintiff raised a triable issue of fact in opposition whether the District should have known about the teacher's propensity to improperly meet alone with a student. Specifically, plaintiff submitted evidence that the subject teacher was alone with plaintiff in his classroom when another teacher walked in and observed the subject teacher sexually abusing plaintiff but failed to report it and that the subject teacher for no articulated reason repeatedly had plaintiff arrive early to school, kept him after school, held him back from going to other classes, and took him out of other classes with the awareness of school employees. Plaintiff's submissions raised a triable issue of fact whether the District "had notice of the potential for harm to . . . plaintiff such that its alleged negligence in supervising and retaining [the subject teacher] 'placed [him] in a position to cause foreseeable harm' " (*Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 636 [2d

Dept 2018]; *see generally Miller v Miller*, 189 AD3d 2089, 2090-2091 [4th Dept 2020]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

461

KA 23-00085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE M. LACEY, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered July 27, 2022. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree, assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: In this prosecution arising from allegations that defendant caused the death of her boyfriend (victim)—who was the father of one of her children—by running him over with her car, defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). We affirm.

Contrary to defendant's contention, County Court properly denied that part of her omnibus motion seeking to dismiss the indictment on the ground that the integrity of the grand jury proceeding was impaired by the submission of certain inadmissible evidence. "Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*People v Huston*, 88 NY2d 400, 409 [1996]) and, here, we conclude that the remaining evidence was legally sufficient to support the indictment (*see People v Bullock*, 213 AD3d 1351, 1352 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]; *People v Peck*, 96 AD3d 1468, 1469 [4th Dept 2012], *lv denied* 21 NY3d 1008 [2013]; *People v Tuszynski*, 71 AD3d 1407, 1408 [4th Dept 2010], *lv denied* 15 NY3d 810 [2010]).

Defendant also contends that the court erred in discharging a

juror for cause without conducting an adequate inquiry of the juror, who the record establishes had been selected but not yet sworn as a trial juror (*cf.* CPL 270.15 [2]), and that the court employed an incorrect standard in discharging the juror. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Browne*, 144 AD3d 834, 835 [2d Dept 2016]; *People v Sanchez*, 123 AD3d 624, 624 [1st Dept 2014], *lv denied* 25 NY3d 1207 [2015]; *see generally People v Hopkins*, 76 NY2d 872, 873 [1990]). After the selected but unsworn juror disclosed that he and his wife had some personal connection with defendant and the victim, defense counsel initially expressed a desire to speak further with the juror, but defense counsel thereafter elicited confirmation from the prosecutor that she had a problem with the juror serving as a trial juror and, accepting the court's characterization that both the defense and the prosecution had expressed discomfort with the juror serving as a trial juror, defense counsel thanked the court after it discharged the juror for cause and never objected to the discharge of the juror on any ground (*see Browne*, 144 AD3d at 835; *Sanchez*, 123 AD3d at 624; *People v Norrell*, 105 AD3d 546, 546 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Sanchez*, 123 AD3d at 624; *Norrell*, 105 AD3d at 546).

Defendant further contends that she was denied a fair trial because a forensic pathologist was permitted to testify that, in her opinion, the victim's death was a "homicide." Although, as the People correctly concede, the court erred in allowing the forensic pathologist to opine that the death was a homicide inasmuch as such characterization improperly invaded the province of the jury (*see People v Campanella*, 100 AD3d 1420, 1421 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]), we conclude that the error is harmless (*see People v Szatanek*, 169 AD3d 1448, 1450 [4th Dept 2019], *lv denied* 33 NY3d 981 [2019]; *Campanella*, 100 AD3d at 1421; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Defendant's remaining challenges to the forensic pathologist's testimony are not preserved for our review because she failed to object to the testimony on the specific grounds she now raises on appeal (*see* CPL 470.05 [2]; *People v Bridges*, 185 AD3d 1426, 1428 [4th Dept 2020], *lv denied* 35 NY3d 1111 [2020]). In any event, contrary to defendant's contention, "[i]t is not error for a court to admit in evidence expert testimony on cause of death that is based, in part, on nonmedical evidence" where, as here, "the opinion is also based, in part, 'on professional or medical knowledge' " (*People v Neulander*, 221 AD3d 1412, 1414 [4th Dept 2023], *lv denied* 41 NY3d 984 [2024]; *see People v Ramsaran*, 154 AD3d 1051, 1055 [3d Dept 2017], *lv denied* 30 NY3d 1063 [2017]). We further conclude that, to the extent that the forensic pathologist's spontaneous comment on the thoroughness of the police investigation constituted improper bolstering testimony, any error in admitting that testimony is harmless (*see People v Jones*, 142 AD3d 1383, 1384-1385 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016]; *People v Gibson*, 137 AD3d 1657, 1658 [4th Dept 2016], *lv denied* 27 NY3d 1151 [2016]; *see generally Crimmins*, 36 NY2d at 241-242).

Next, even assuming, arguendo, that defendant fully preserved for our review her challenges to the testimony of a police investigator, we conclude that any error in admitting that testimony is likewise harmless (*see People v Box*, 181 AD3d 1238, 1242 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *see generally People v Inoa*, 25 NY3d 466, 472, 475-477 [2015]; *Crimmins*, 36 NY2d at 241-242). Here, "the [circumstantial] proof of defendant's commission of the charged crimes was overwhelming and we perceive no significant probability that, but for the error, the verdict, as it bore upon defendant, would have been less adverse" (*Inoa*, 25 NY3d at 472; *see generally People v Johnson*, 133 AD3d 1309, 1311 [4th Dept 2015], *lv denied* 27 NY3d 1000 [2016]).

As defendant correctly concedes, her further contention that she was deprived of a fair trial due to alleged instances of prosecutorial misconduct "is unpreserved for our review inasmuch as defendant did not object to any of [those] alleged instances of misconduct" (*People v Pendergraph*, 150 AD3d 1703, 1703 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]; *see* CPL 470.05 [2]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Watts*, 218 AD3d at 1174).

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, contrary to defendant's contention, the verdict is not against the weight of the evidence, particularly in light of the overwhelming circumstantial evidence presented by the People (*see People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *People v Wise*, 46 AD3d 1397, 1399-1400 [4th Dept 2007], *lv denied* 10 NY3d 872 [2008]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

462

KA 18-00926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS O. PEREZ, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 23, 2016. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of kidnapping in the second degree (Penal Law § 135.20), defendant contends that the waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

463

KA 21-00375

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered February 19, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]) and criminal possession of stolen property in the fifth degree (§ 165.40). In appeal No. 2, defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of stolen property in the fourth degree (§ 165.45 [1]). Even assuming, arguendo, in each appeal that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Crosby*, 222 AD3d 1411, 1411 [4th Dept 2023], *lv denied* 41 NY3d 1001 [2024]; *People v Mowery*, 213 AD3d 1300, 1300 [4th Dept 2023]), we reject defendant's challenge to the severity of the sentence in each appeal. We note, however, with respect to appeal No. 1, the certificate of conviction in that appeal incorrectly reflects that only the sentence imposed on count 2 is to run consecutively to a prior sentence imposed in Wyoming County. The certificate of conviction in appeal No. 1 must therefore be amended to reflect that the sentences of incarceration imposed on counts 1 and 2,

while running concurrently with each other, are to both run consecutively to the Wyoming County sentence.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

464

KA 21-00376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered February 19, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Same memorandum as in *People v Putnam* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

465

KA 21-00534

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE SANGER, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 31, 2021. The judgment convicted defendant upon his plea of guilty of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Cole*, 201 AD3d 1360, 1360-1361 [4th Dept 2022]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

467

KA 20-00388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINTON J. EDMONDS, ALSO KNOWN AS
QUINTON EDMONDS, ALSO KNOWN AS QUINTEN J. EDMONDS,
DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered February 19, 2020. The judgment convicted defendant, upon his plea of guilty, of murder 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 murder in the second degree (Penal Law § 125.25 [1]). We affirm.

As a preliminary matter, to the extent that the pro se notice of appeal states that defendant is appealing from the sentence only, rather than the entire judgment, we exercise our discretion in the interest of justice to treat the appeal as validly taken from the judgment (*see* CPL 460.10 [6]; *People v Burney*, 204 AD3d 1473, 1474 [4th Dept 2022]).

Defendant contends that his plea was involuntary because his statements at sentencing negated an essential element of the crime and raised the possibility of an intoxication defense, and County Court failed to conduct a further inquiry to ensure that the plea was voluntary. Although defendant retains the right to appellate review of his challenge to the voluntariness of the plea regardless of the validity of his waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), that challenge is not preserved for our review because defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Tapia*, 158 AD3d 1079,

1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *People v Wilson*, 59 AD3d 975, 975 [4th Dept 2009], *lv denied* 12 NY3d 861 [2009]). The narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case. Defendant said "[n]othing . . . during the plea colloquy itself" that negated an element of the pleaded-to crime or otherwise called into doubt the voluntariness of his plea (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see Cunningham*, 213 AD3d at 1271), and the court therefore had no duty to conduct further inquiry with respect to the plea (*see Lopez*, 71 NY2d at 666). Contrary to defendant's assertion, we reiterate that "a trial court has no duty, in the absence of a motion to withdraw a guilty plea, to conduct a further inquiry concerning the plea's voluntariness 'based upon comments made by [the] defendant during . . . sentencing' " (*People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *see Mobayed*, 158 AD3d at 1223). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's further contention and the People's incorrect concession (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Morrison*, 179 AD3d 1454, 1455 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]), the record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Giles*, 219 AD3d 1706, 1706-1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *Morrison*, 179 AD3d at 1455; *see generally Thomas*, 34 NY3d at 559-564; *People v Lopez*, 6 NY3d 248, 256 [2006]).

We note at the outset that the court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally Thomas*, 34 NY3d at 567; *Giles*, 219 AD3d at 1706; *People v Osgood*, 210 AD3d 1426, 1427 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]). 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 Giles*, 219 AD3d at 1706). Contrary to defendant's additional assertion, the court did not mischaracterize the appeal waiver as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; *see e.g. People v Wilson*, 217 AD3d 1561, 1562 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *People v Cromie*, 187 AD3d 1659, 1659 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]). Instead, the court appropriately followed the model colloquy by explaining that defendant retained the right to take an appeal, but that his conviction and sentence "would normally be final" because he was giving up the right to appellate review of "most . . . claims of error," including the severity of the sentence, except for "a number of limited claims" that would survive the appeal waiver, such as the voluntariness of the plea, the validity of the appeal waiver, the legality of the sentence, the jurisdiction of the

court, defendant's competency to stand trial, and the constitutional right to a speedy trial (*see Thomas*, 34 NY3d at 567; *People v Jackson*, 198 AD3d 1317, 1318 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). Contrary to defendant's related assertion, his "waiver [of the right to appeal] is not invalid on the ground that the court did not specifically inform [him during the oral colloquy] that his general waiver of the right to appeal encompassed the court's suppression ruling[ ]" (*People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019] [internal quotation marks omitted]; *see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Johnson*, 183 AD3d 1256, 1256 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]).

Additionally, the court's oral colloquy was supplemented by a detailed written waiver that, among other things, accurately explained the rights waived and retained as a result of the waiver and, in doing so, used the phrase "waiver of the right to raise issues on appeal," thereby employing language that "more precisely" reflected that the waiver merely represented "a narrowing of the issues for appellate review" (*Thomas*, 34 NY3d at 559). The written waiver specifically informed defendant that he was waiving appellate review of the court's suppression ruling about witness identifications of him (*see People v Williams*, 36 NY2d 829, 830 [1975], *cert denied* 423 US 873 [1975]; *People v Correa*, 149 AD2d 909, 909 [4th Dept 1989]). Contrary to defendant's assertion, the record establishes that the court "ascertained that defendant had reviewed the written waiver with his attorney, that he understood it, and that he had no questions for his attorney or the court" with respect to it (*People v Johnson*, 125 AD3d 1419, 1420 [4th Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *see People v Gebreyesus*, 133 AD3d 1365, 1366 [4th Dept 2015], *lv denied* 27 NY3d 997 [2016]; *cf. People v Bradshaw*, 18 NY3d 257, 262 [2011]; *see generally People v Ramos*, 7 NY3d 737, 738 [2006]).

In light of the foregoing, we conclude that "all the relevant circumstances reveal a knowing and voluntary waiver" (*Thomas*, 34 NY3d at 563; *see Wilson*, 217 AD3d at 1562). Defendant's valid waiver of the right to appeal encompasses his challenges to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *Kemp*, 94 NY2d at 833) and to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

468

KA 23-01116

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 (HEATHER M. DESTEFANO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered April 17, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) after a conviction upon his guilty plea of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [1]).

Defendant contends that he should not have been assessed 10 points under risk factor 1, for the use of forcible compulsion. We reject that contention. The People established by clear and convincing evidence, through their submission of, inter alia, the plea minutes, the presentence report and the grand jury testimony of the victim, that defendant used forcible compulsion during the incident underlying his conviction (*see People v Dabney*, 221 AD3d 624, 625 [2d Dept 2023], *lv denied* 41 NY3d 904 [2024]).

Contrary to defendant's further contention, we conclude that his counsel was not ineffective in purportedly failing to articulate adequate reasons in support of his request for a downward departure because such a request had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Clement*, 209 AD3d 1300, 1301 [4th Dept 2022]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

469

KA 23-00918

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Ross P. Andrews, A.J.), rendered October 21, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree (three counts), criminal possession of a controlled substance in the fifth 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 plea of guilty, of one count of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), one count of criminal possession of a controlled substance in the fifth degree (§ 220.06 [1]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1], [3]). The conviction arises from a search of defendant's residence conducted by parole officers based on recent parole violations committed by him.

We reject defendant's contention that he received ineffective assistance of counsel. "In the context of a guilty plea, a defendant has been afforded meaningful representation when [the defendant] receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003] [internal quotation marks omitted]). The defendant "must show that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial" (*People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572

US 1070 [2014] [internal quotation marks omitted]). Here, the record establishes that defendant received a favorable plea bargain, and that defendant received meaningful representation (*see Brown*, 305 AD2d at 1069). To the extent that defendant's contention is premised upon defense counsel's failure to move to strike the People's certificate of compliance and failure to move to dismiss the indictment on speedy trial grounds, we note that there is nothing "clear cut about [defendant's] CPL 30.30 claim" (*People v Brunner*, 16 NY3d 820, 821 [2011]; *see People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]) and that "its success would have depended on the resolution of several novel issues" in light of the new discovery laws (*Brunner*, 16 NY3d at 821).

We further reject defendant's contention that his plea was made involuntarily. Any advice from defense counsel concerning his sentencing exposure or the strength of the People's case "does not constitute coercion" (*People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]).

Defendant also contends that County Court erred in denying his motion to suppress the contraband found at his residence. We reject that contention. "It is well settled that a parole officer may conduct a warrantless search where . . . the conduct of the parole officer was rationally and reasonably related to the performance of the parole officer's duty" (*People v June*, 128 AD3d 1353, 1354 [4th Dept 2015], *lv denied* 26 NY3d 931 [2015] [internal quotation marks omitted]). The search must be "motivated . . . by legitimate reasons related to defendant's status as a parolee" (*People v Johnson*, 94 AD3d 1529, 1532 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]). A parole officer may search a parolee's home for evidence of a parole violation if the officer has reason to believe that a parolee violated the terms of parole (*see People v Snell*, 219 AD3d 1705, 1705 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023]). When searching a home, the officer may look "for evidence of *other* parole violations" (*People v Barnett*, 221 AD3d 1421, 1422 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024] [emphasis added]). Here, defendant was on parole. Testimony at a suppression hearing established that, on two occasions shortly before the search of his residence took place, defendant was not at the premises during curfew hours and had thus violated the terms of his parole (*see generally Snell*, 219 AD3d at 1705). Moreover, defendant, as part of his parole conditions, consented to searches of his residence (*see Johnson*, 94 AD3d at 1530).

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

Finally, we note that the certificate of disposition and the uniform sentence and commitment form must be amended to correct a clerical error (*see People v Lewis*, 185 AD3d 1542, 1543 [4th Dept 2020], *lv denied* 35 NY3d 1114 [2020]). Both the certificate of disposition and the uniform sentence and commitment form erroneously state that defendant was convicted of one of the counts of criminal possession of a controlled substance in the third degree under Penal

Law § 220.16 (2), and those documents should therefore be amended to correctly reflect that defendant was convicted of all three counts of that offense under Penal Law § 220.16 (1).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

470

KA 23-00709

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. WERNLE, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, SPECIAL PROSECUTOR, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered June 14, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and tampering with physical evidence (§ 215.40 [2]) arising from his conduct in bludgeoning the victim to death. The victim was reported missing, and the victim's cell phone "pinged" to an area near defendant's home. The police found the victim's abandoned car nearby and conducted a grid search of the area the following morning. Defendant allowed the police to search his property, where they discovered the victim's body underneath the porch of defendant's home.

We reject defendant's contention that the search by the police underneath his porch exceeded the scope of the consent given by him. The police captain who testified at the suppression hearing described defendant as "overly helpful" when the captain asked if the police could come onto his property and search. Throughout the encounter, the captain asked defendant if the police could search the garage, around the property, inside the garbage totes, around the garbage area, and underneath the porch, all of which defendant agreed to either explicitly or implicitly. The police officer who found the victim's body testified that he heard defendant consent to "anything [they] needed." We therefore agree with Supreme Court that the police did not exceed the scope of the consent defendant had given to search when they looked underneath the porch (*see People v Reed*, 34 AD3d 1364, 1365 [4th Dept 2006], *lv denied* 8 NY3d 884 [2007]; *cf. People v Hall*, 35 AD3d 1171, 1171 [4th Dept 2006], *lv denied* 8 NY3d 923 [2007];

see generally People v Gomez, 5 NY3d 416, 420 [2005]). Based on defendant's verbal responses, his nonverbal conduct, and his overall willingness to help the police, a " 'typical reasonable person [would] have understood by the exchange between the officer and [defendant]' " that he was giving the police general consent to search his property (*Gomez*, 5 NY3d at 419).

Defendant further contends that he was denied his constitutional right to present a defense inasmuch as he was precluded from introducing evidence as to possible sources, other than defendant, from which the jailhouse informant could have learned the details about the crime. We reject that contention. The court did not abuse its discretion in excluding certain testimony that was not relevant to the issue (*see People v Nwajei*, 151 AD3d 1963, 1963 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *People v Herring*, 101 AD3d 1151, 1152 [2d Dept 2012], *lv denied* 21 NY3d 943 [2013]) and certain other testimony, even if relevant, was not "so critical that [its] exclusion deprived defendant of due process" (*People v Hayes*, 17 NY3d 46, 54 [2011], *cert denied* 565 US 1095 [2011]). In any event, any error is harmless inasmuch as the evidence against defendant is overwhelming and there is no reasonable possibility that any error in precluding certain evidence might have contributed to the conviction (*see People v Coggins*, 198 AD3d 1297, 1300 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

472

CA 23-01763

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

JOSEPH A. ROSS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTHEAST DIVERSIFICATION, INC., AND
HAMBURG CENTRAL SCHOOL DISTRICT,
DEFENDANTS-APPELLANTS.

BURDEN & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANT-APPELLANT NORTHEAST DIVERSIFICATION, INC.

WALSH ROBERTS & GRACE LLP, BUFFALO (ROBERT P. GOODWIN OF COUNSEL), FOR DEFENDANT-APPELLANT HAMBURG CENTRAL SCHOOL DISTRICT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered May 1, 2023. The order, insofar as appealed from, denied the motions of defendants to, inter alia, set aside a verdict.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while he was working as a concrete finisher on a project for which defendant Northeast Diversification, Inc. (Northeast) was hired as the general contractor to install concrete sidewalks and pavement at an elementary school owned by defendant Hamburg Central School District (Hamburg). While performing that work, plaintiff allegedly slipped and tripped on stone and fell into an 8-to-12-inch-deep trench that had been cut into the blacktop to allow the installation of a curb.

With respect to the relevant portions of the parties' previous motions, plaintiff moved for partial summary judgment on the issue of liability on his Labor Law § 240 (1) causes of action. Hamburg moved for summary judgment dismissing plaintiff's Labor Law §§ 200 and 240 (1) and common-law negligence causes of action against it and dismissing plaintiff's Labor Law § 241 (6) cause of action against it in part. Northeast moved for summary judgment dismissing plaintiff's complaint against it. Supreme Court issued an order that, as relevant here, granted that part of plaintiff's motion seeking summary judgment

with respect to liability under Labor Law § 240 (1), granted those parts of Hamburg's motion seeking summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action against it, and otherwise denied defendants' motions insofar as they sought summary judgment dismissing the complaint.

While appeals from the summary judgment order were pending, the court conducted a damages-only trial, following which the jury returned a verdict awarding plaintiff certain damages. Defendants each filed a posttrial motion seeking, inter alia, an order pursuant to CPLR 4404 (a) setting aside the verdict on various grounds and granting a new trial. The court issued a posttrial order that, among other things, denied defendants' posttrial motions.

We resolved the pending appeals shortly thereafter (*Ross v Northeast Diversification, Inc.*, 218 AD3d 1244 [4th Dept 2023]). We concluded, in relevant part, that the court erred in granting plaintiff's motion with respect to liability under Labor Law § 240 (1) and erred in denying those parts of defendants' motions seeking summary judgment dismissing the section 240 (1) causes of action (*id.* at 1245-1246). We reasoned that plaintiff's work involved only the demolition and restoration of a sidewalk and thus section 240 (1) was inapplicable (*id.* at 1246). We therefore modified the summary judgment order by denying plaintiff's motion in its entirety and granting those parts of defendants' motions for summary judgment dismissing the section 240 (1) causes of action (*id.*). We further modified the summary judgment order by granting those parts of defendants' motions for summary judgment dismissing the section 241 (6) causes of action insofar as they were based on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), but we otherwise held that the court had properly denied defendants' motions with respect to plaintiff's section 241 (6) causes of action insofar as they were based on alleged violations of 12 NYCRR 23-1.7 (d) and (e) (2) and 12 NYCRR 23-2.1 (b) (*id.* at 1246-1247). Defendants now each appeal from the posttrial order, and we conclude that, although defendants are entitled to a trial on liability with respect to the remaining claims in light of our order in the prior appeals (*see id.* at 1244-1245), defendants are not entitled to a new trial on damages.

Defendants contend that, in light of our determination in the prior appeals that defendants are not liable under Labor Law § 240 (1), a new trial should be granted on damages to ensure that the damages award is not improperly clouded by the absolute liability imposed pursuant to section 240 (1). Although defendants' contentions in that respect do not require preservation, we conclude that, contrary to those contentions, defendants are not entitled to a new trial on damages based on our prior liability determination alone. "[I]t is well settled that an issue once correctly determined need not be tried again 'even though justice demands that another distinct issue, because erroneously determined, must . . . be passed on by a jury' " (*Hogue v Wilson*, 51 AD2d 424, 426 [4th Dept 1976]). Consequently, "where the circumstances of a particular case indicate that justice can only be done by a complete new trial, then such should be ordered; where, however, the error affects only the

determination of some of the issues, then the court may [ ]try only those issues" (*id.* at 426-427; *see generally* CPLR 4404 [a]). Generally, issues of liability and damages in a negligence action "are distinct and severable and should be tried separately" (*Iglesias v Brown*, 59 AD3d 992, 993 [4th Dept 2009]; *see* 22 NYCRR 202.42 [a]).

Defendants further contend that a new trial on damages is warranted based on comments made by plaintiff's counsel that inextricably linked the issues of damages with liability. While the limited record on appeal reveals that plaintiff's counsel stated to the jury at the damages-only trial that defendants were absolutely liable for plaintiff's injuries, defendants conceded at oral argument on their appeals that the issue of the propriety and number of such remarks was not preserved for our review by an appropriate objection at any time during the trial (*see generally Reed v Fraser*, 52 AD3d 1323, 1323-1324 [4th Dept 2008], *lv denied* 11 NY3d 719 [2009]). It is well settled that "[a]n issue may not be raised for the first time on appeal where 'it could have been obviated or cured by factual showings or legal countersteps in the trial court' " (*Harriger v State of New York*, 207 AD3d 1045, 1046 [4th Dept 2022]). Further, even assuming, arguendo, that defendants' contentions regarding the comments made by plaintiff's counsel are preserved, we are unable to determine whether those contentions have merit based on the limited record before us. Where, as here, defendants, as appellants, "submitted this appeal on an incomplete record[, they] must suffer the consequences" (*Capozzolo v Capozzolo*, 208 AD3d 1624, 1625 [4th Dept 2022] [internal quotation marks omitted]; *see Polyfusion Electronics, Inc. v AirSep Corp.*, 30 AD3d 984, 985 [4th Dept 2006]).

Defendants also contend that the damages award, inter alia, was excessively large and deviated materially from what would be reasonable compensation. Upon review of the limited record on appeal, however, we conclude that the record is incomplete for us to evaluate fully the propriety of the jury's damages awards (*see generally Luppino v Flannery*, 186 AD3d 1082, 1083 [4th Dept 2020]).

Finally, we reject defendants' contentions that the verdict should have been set aside because plaintiff belatedly disclosed various diagnoses and treatments. The new information disclosed just prior to trial related to the allegations in the bill of particulars, and defendants were not prejudiced by the late disclosure inasmuch as defendants' medical experts reviewed and testified as to that information at trial (*see generally Connors v Sowa*, 251 AD2d 989, 989 [4th Dept 1998]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

476

CA 23-00299

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF GARY LEKKI, AS TRUSTEE OF THE EDMUND LEKKI IRREVOCABLE TRUST OF APRIL 20, 2012,
PETITIONER-APPELLANT,

VALERIE HANKE, ANDREW MIKUS, AND ERIC MIKUS,
OBJECTANTS-RESPONDENTS.
(PROCEEDING NO. 1.)

ORDER

IN THE MATTER OF THE COMPULSORY ACCOUNTING OF THE EDMUND AND HELEN LEKKI IRREVOCABLE TRUST OF JUNE 9, 2004,

SUSAN MIKUS, PETITIONER-RESPONDENT,

GARY LEKKI, RESPONDENT-APPELLANT.
(PROCEEDING NO. 2.)
(APPEAL NO. 1.)

BARCLAY DAMON LLP, SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R. CANNON OF COUNSEL), FOR OBJECTANTS-RESPONDENTS AND PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered December 31, 2022. The order, among other things, granted in part the motion of objectants in proceeding No. 1 for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

477

CA 23-00300

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

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF GARY LEKKI, AS TRUSTEE OF THE EDMUND LEKKI IRREVOCABLE TRUST OF APRIL 20, 2012,
PETITIONER-APPELLANT,

VALERIE HANKE, ANDREW MIKUS, ERIC MIKUS, AND RYAN MIKUS, OBJECTANTS-RESPONDENTS.
(PROCEEDING NO. 1.)

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

IN THE MATTER OF THE COMPULSORY ACCOUNTING OF THE EDMUND AND HELEN LEKKI IRREVOCABLE TRUST OF JUNE 9, 2004,

SUSAN MIKUS, PETITIONER-RESPONDENT,

GARY LEKKI, RESPONDENT-APPELLANT.
(PROCEEDING NO. 2.)
(APPEAL NO. 2.)

BARCLAY DAMON LLP, SYRACUSE (TERESA M. BENNETT OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA R. CANNON OF COUNSEL), FOR OBJECTANTS-RESPONDENTS AND PETITIONER-RESPONDENT.

Appeal from an amended order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered February 1, 2023. The amended order, among other things, granted in part the motion of objectants in proceeding No. 1 for summary judgment.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying that part of objectants' motion in proceeding No. 1 with respect to objections 6 and 12 of the amended objections and granting the motion of petitioner in that proceeding with respect to those objections and dismissing those objections, and as modified the amended order is affirmed without costs.

Memorandum: These proceedings concern two family trusts, one that was created in 2004 (2004 trust), and another that was created in 2012 (2012 trust). The 2004 trust was created by Edmund Lekki (father) and Helen Lekki (mother), with their children, Gary Lekki (son) and Susan Mikus (daughter), named as trustees and as beneficiaries. The 2012 trust was created by the father, with the

father and the son named as trustees and the son and daughter named as beneficiaries.

A few months after the father created the 2012 trust, he and the daughter had a falling-out. In August 2012, the father removed the daughter from the 2012 trust and left her share to each of her children in equal shares. In October 2013, the father unilaterally took action to remove the daughter as a beneficiary of the 2004 trust, leaving the son as the sole beneficiary, and, in August 2014, the father removed the daughter as a trustee of the 2004 trust.

The mother died in 2015, and the father died in 2018. During the father's life, the son invaded the corpus of the 2012 trust as part of a gift-back strategy to satisfy a Medicaid penalty incurred when the father required placement in a nursing home. Upon the father's death, the son notified the daughter's children that the value of the 2012 trust had been reduced substantially as a result of the payments to Medicaid.

In March 2019, the son commenced proceeding No. 1 seeking the judicial settlement of his account as trustee under the 2012 trust and, thereafter, the daughter's children (objectants) filed amended objections to the accounting. In October 2019, the daughter commenced proceeding No. 2 seeking to compel an accounting of the 2004 trust by the son and, thereafter, the son answered the petition in that proceeding. The son now appeals from an amended order that, inter alia, granted in part and denied in part his motion in proceeding No. 1 for summary judgment dismissing the amended objections, granted in part and denied in part objectants' motion in proceeding No. 1 for summary judgment on the issue of liability with respect to certain of the amended objections, and denied the son's motion in proceeding No. 2 for summary judgment dismissing the petition in that proceeding.

We agree with the son that Surrogate's Court erred in granting that part of objectants' motion in proceeding No. 1 with respect to objections 6 and 12 of the amended objections and in denying that part of the son's motion seeking summary judgment dismissing those objections, and we therefore modify the amended order accordingly. Objectants alleged with respect to objections 6 and 12 of the amended objections, respectively, that the son failed to prudently invest the 2012 trust assets and failed to generate a reasonable return on investment and reasonable income. At the time of the creation of the 2012 trust, the father was 90 years old and the mother was 87 years old. The Prudent Investor Act (EPTL 11-2.3) requires a trustee to "exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument" (EPTL 11-2.3 [b] [2]). Here, the son continued the investment strategy of the father of making a partial investment in a wealth management account and investing the remainder of the trust corpus in an interest-bearing savings account. It is well settled that " 'retention of securities received from the creator of the trust may be found to be prudent even when purchase of the same securities might not' " (*Matter of HSBC Bank USA, Inc., N.A.*

[Knox], 98 AD3d 300, 309 [4th Dept 2012], *lv dismissed* 20 NY3d 1056 [2013]).

"Generally, whether a fiduciary has acted prudently is a factual determination to be made by the . . . court" (*Matter of Janes*, 90 NY2d 41, 50 [1997], *rearg denied* 90 NY2d 885 [1997]). Under the Prudent Investor Act, it is the "standard of conduct, not outcome or performance" that must be reviewed (EPTL 11-2.3 [b] [1]; *see Margesson v Bank of N.Y.*, 291 AD2d 694, 696 [3d Dept 2002]). We conclude that the evidence submitted by the son on his motion in proceeding No. 1 establishes that he acted in substantial compliance with the prudent investor standard (*see* EPTL 11-2.3 [b] [1]) inasmuch as he appropriately considered, inter alia, "the nature and estimated duration of the fiduciary relationship," the "general economic conditions" at the time, and "the expected tax consequences of investment decisions or strategies and of distributions of income and principal" (EPTL 11-2.3 [b] [3] [B]). Under the circumstances of this case, the son established on his motion that he acted with the " 'reasonable care, skill and caution' " required by the Prudent Investor Act (*Matter of Wellington Trusts [JPMorgan Chase Bank, N.A.—Sarah P.]*, 165 AD3d 809, 814 [2d Dept 2018], quoting EPTL 11-2.3 [b] [2]). We conclude that the son met his initial burden on his motion in proceeding No. 1 with respect to objections 6 and 12 of the amended objections, and we further conclude that, in opposition, objectants failed to raise a triable issue of fact with respect to those objections (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

With respect to proceeding No. 2, we conclude that, contrary to the son's contention, by failing to assert the statute of limitations in his amended answer or in a motion to dismiss, the son waived that affirmative defense (*see Gross, Shuman, Brizdle & Gilfillan, P.C. v Bayger*, 256 AD2d 1187, 1187-1188 [4th Dept 1998]; *see generally* CPLR 3018 [b]; 3211 [e]). We similarly conclude that, under the circumstances of this case, the son waived the affirmative defense of laches (*see Morgan v Morgan*, 21 AD3d 1068, 1068-1069 [2d Dept 2005]; *Fade v Pugliani/Fade*, 8 AD3d 612, 614-615 [2d Dept 2004]; *Kromer v Kromer*, 177 AD2d 472, 473 [2d Dept 1991]; *see generally* CPLR 3018 [b]).

We reject the son's contention that the Surrogate improperly shifted the burden to him with respect to the issue of the mother's capacity and conclude that the Surrogate properly determined that there are triable issues of fact regarding the mother's capacity that preclude granting him summary judgment on his motion in proceeding No. 2. Even assuming, arguendo, that "the level of capacity required to execute a revocable trust is the same as that required to execute a contract" (*Matter of Burrows*, 203 AD3d 1699, 1703 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022]), we conclude that the son failed to meet his initial burden on his motion of establishing the mother's incompetence as of October 16, 2013, when the father unilaterally removed the daughter from the 2004 trust.

Initially, we note that the mother is presumed competent under

the law (*see Matter of DelGatto*, 98 AD3d 975, 977 [2d Dept 2012]) and that, insofar as the son asserts that the daughter was validly removed by the father alone because the mother was incompetent, it would be his burden at a trial to prove the mother's lack of capacity (*see Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). In any event, as the movant on his motion for summary judgment, the son bore the burden of establishing that the power of appointment was validly executed to remove the daughter, which in turn required him to establish, prima facie, the mother's incompetence (*see Matter of Cuttitto Family Trust*, 10 AD3d 656, 657 [2d Dept 2004]; *see generally Matter of Giaquinto*, 164 AD3d 1527, 1528 [3d Dept 2018], *affd* 32 NY3d 1180 [2019]).

While the son submitted medical records and affidavits of family members establishing that the mother had memory issues and was diagnosed with Alzheimer's disease, "[p]ersons suffering from a disease such as Alzheimer's are not presumed incompetent" (*Feiden*, 151 AD2d at 890; *see Matter of Alibrandi*, 104 AD3d 1175, 1177 [4th Dept 2013]; *Matter of Makitra*, 101 AD3d 1579, 1580 [4th Dept 2012]). Moreover, while the son also submitted an affirmation of a physician who treated the mother from 2011 to 2015 in which the physician opined that the mother "was incapacitated as of February 16, 2012," that physician did not explain what he meant by "incapacitated," nor did he opine that the mother lacked the capacity to enter into a contract, or that she lacked testamentary capacity. We thus conclude that the son failed to meet his initial burden on his motion in proceeding No. 2.

We have considered the son's remaining contentions and conclude that they do not require further modification or reversal of the amended order.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01690

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES GAMBLE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

STEVEN A. FELDMAN, MANHASSET, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 8, 2021. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of tampering with a witness in the third degree (§ 215.11 [1]). Appeal Nos. 1 and 2 arise from separate indictments that were consolidated and tried together.

In both appeals, defendant contends that Supreme Court erred in permitting the People to elicit testimony from the victim regarding a prior uncharged bad act in which defendant allegedly pulled out a knife during a confrontation with the victim that occurred approximately one month prior to the incident underlying appeal No. 1. To the extent that defendant contends that the court erred in failing to issue limiting instructions with respect to that *Molineux* evidence, defendant's contention is not preserved for our review (*see* CPL 470.05 [2]; *People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We agree with defendant, however, that the testimony was improperly admitted as evidence of his motive to commit the instant offense. "[A]llegations of prior bad acts may not be

admitted against [a defendant] for the sole purpose of establishing their propensity for criminality" (*People v Weinstein*, — NY3d —, —, 2024 NY Slip Op 02222, *1 [2024], citing *People v Molineux*, 168 NY 264 [1901]). "*Molineux* recognized exceptions by which evidence of other crimes could be used to prove the charged crime when such evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan . . . ; [or] (5) the identity of the person charged with the commission of the crime on trial" (*Weinstein*, — NY3d at —, 2024 NY Slip Op 02222, *5 [internal quotation marks omitted]). "In order to be admissible, *Molineux* evidence must be logically connected to some specific material issue in the case and be directly relevant to it" (*id.* [internal quotation marks omitted]; *see People v Denson*, 26 NY3d 179, 185 [2015]). "The prosecution has the burden of showing this direct relevance" (*Weinstein*, — NY3d at —, 2024 NY Slip Op 02222, *5). "In reviewing a *Molineux* ruling, [an appellate court] [f]irst . . . evaluates whether the prosecution has identif[ied] some issue, *other than mere criminal propensity*, to which the evidence is relevant" (*id.* [internal quotation marks omitted]). "This is a question of law, not discretion and [appellate courts] review it de novo" (*id.* [internal quotation marks omitted]). "Second, if the evidence is relevant to an issue aside from propensity, the [appellate court] determines whether its probative value exceeds the potential for prejudice resulting to the defendant" (*id.* [internal quotation marks omitted]). "[T]he trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather, it must constitute an abuse of discretion as a matter of law" (*id.*).

Here, the *Molineux* ruling fails at step one. The People sought to admit the evidence, and the trial court did admit the evidence, pursuant to the motive exception to *Molineux*. We conclude, however, that evidence that defendant allegedly threatened the victim with a knife one month prior to the shooting does not tend to establish defendant's motive for the shooting. Rather, it was the content of the argument between defendant and the victim during the confrontation in which a knife was allegedly brandished that provided an explanation for defendant's motive—i.e., that defendant and the victim had argued about the victim's relationship with defendant's ex-girlfriend—and testimony describing the content of the argument could have been elicited without reference to defendant's display of the knife (*see People v Leonard*, 29 NY3d 1, 7-8 [2017]; *see generally Weinstein*, — NY3d at —, 2024 NY Slip Op 02222, *5-6).

Further, even if the testimony regarding defendant's display of the knife is relevant to defendant's motive for the shooting, the court abused its discretion in determining that the probative value of the evidence outweighed its potential for prejudice. Evidence that defendant had previously pulled a knife on the victim during an argument one month earlier "was highly prejudicial, as it showed that defendant had allegedly engaged in [similar] behavior on a prior occasion with the same victim—classic propensity evidence" (*Leonard*, 29 NY3d at 8). As noted above, evidence of the content of their argument on the date of the shooting could have established the same

motive without eliciting evidence of a propensity towards violence. Thus, the proffered *Molineux* evidence was "of slight value when compared to the possible prejudice to [defendant]" (*People v Arafet*, 13 NY3d 460, 465 [2009] [internal quotation marks omitted]).

Nevertheless, the error is harmless inasmuch as there is overwhelming evidence of defendant's guilt and there is no "significant probability" that the jury would have acquitted defendant but for the error (*People v Crimmins*, 36 NY2d 230, 242 [1975]; *see People v Jones*, 208 AD3d 1632, 1632-1633 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]; *see generally People v Telfair*, 41 NY3d 107, 110 [2023]).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contentions with respect to the testimony of a law enforcement witness's prior dealings with defendant (*see People v Jones*, 224 AD3d 1348, 1351 [4th Dept 2024]; *People v Dragani*, 204 AD3d 690, 690 [2d Dept 2022], *lv denied* 38 NY3d 1070 [2022]), the testimony of the victim regarding having been wrongfully convicted (*see generally People v Miller*, 96 AD3d 1451, 1452 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]), and the court's failure to issue a limiting instruction pursuant to CPL 310.20 (2) (*see People v Allen*, 122 AD3d 1423, 1424 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015], *reconsideration denied* 25 NY3d 1197 [2015]; *People v McCloud*, 121 AD3d 1286, 1290 [3d Dept 2014], *lv denied* 25 NY3d 1167 [2015]). Defendant also failed to preserve for our review his contention that the court penalized him for exercising his right to trial (*see People v Cotton*, 184 AD3d 1145, 1149 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]), and his challenges to the order of protection (*see People v Rodriguez-Ricardo*, 200 AD3d 1734, 1735 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022]; *People v Castillo*, 151 AD3d 1802, 1804 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]). 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]).

Finally, defendant's sentence is not unduly harsh or severe.

All concur except KEANE, J., who concurs in the result in the following memorandum: I concur with the majority's determination to affirm in both appeals but write separately because I respectfully disagree with the majority's conclusion that, under the *Molineux* rule (*People v Molineux*, 168 NY 264 [1901]), Supreme Court erred in allowing the People to introduce evidence of a prior uncharged bad act.

The majority concludes that the court's *Molineux* ruling fails at step one of the analysis because evidence that defendant had allegedly

threatened the victim with a knife one month prior to the shooting does not tend to establish defendant's motive for the shooting, but rather, the motive could be established by the content of the argument between defendant and the victim during that prior confrontation. In my view, however, the evidence of the prior confrontation with the knife is relevant to defendant's motive, as well as to complete the narrative of the incident.

Under the well-settled *Molineux* rule, "[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]), including when evidence is relevant to establish a defendant's motive or intent (*see id.*). Where there is a proper nonpropensity purpose for the evidence at issue, "it is not to be excluded merely because it shows that the defendant had committed other crimes" (*People v Cass*, 18 NY3d 553, 560 [2012]). Rather, its admissibility "rests upon the trial court's discretionary balancing of probative value and unfair prejudice" (*Dorm*, 12 NY3d at 19). "[U]nder [the Court of Appeals'] *Molineux* jurisprudence, [courts] begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions" (*People v Resek*, 3 NY3d 385, 390 [2004]). The rule of exclusion, however, "is not an absolute . . . [and] gives way when evidence of prior crime is probative of the crime now charged" (*People v Ventimiglia*, 52 NY2d 350, 359 [1981]; *see People v Allweiss*, 48 NY2d 40, 46-47 [1979]).

Unlike the majority of *Molineux* evidence admitted in *People v Weinstein* (— NY3d —, 2024 NY Slip Op 02222 [2024]), in the instant case, the charged crimes and the prior uncharged bad act in which defendant pulled a knife involved the same victim. Further, the prior incident occurred close in time to defendant's shooting of the victim, and the prior incident constitutes evidence demonstrating motive, intent, and even the absence of mistake or accident. I therefore conclude that the prosecution identified some issue other than mere criminal propensity to which this evidence is relevant. The evidence of defendant's willingness to resort to the use of deadly force during the prior argument between defendant and the victim helps to complete the narrative about their relationship and serves to undermine any claim of mistake or lack of intent. Further, this was not an unrelated prior bad act, such as defendant shooting another person or fighting with another person. Thus, I conclude that these facts meet the threshold set forth in step one of the *Molineux* rule - that prior incident serves to complete the narrative.

If the evidence is relevant to an issue other than propensity, the court must weigh the testimony to determine whether the probative value exceeds the potential for prejudice. "At this step, the trial court's decision to admit the evidence may not be disturbed simply because a contrary determination could have been made or would have been reasonable. Rather it must constitute an abuse of discretion as a matter of law" (*Weinstein*, — NY3d at —, 2024 NY Slip Op 02222, *5 [internal quotation marks omitted]). I further find that the court

did not abuse its discretion in allowing the prosecution to introduce that evidence of a prior uncharged bad act.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES GAMBLE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

STEVEN A. FELDMAN, MANHASSET, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 8, 2021. The judgment convicted defendant upon a jury verdict of tampering with a witness in the third degree.

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

Same memorandum as in *People v Gamble* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

All concur except KEANE, J., who concurs in the result in the same concurring memorandum as in *People v Gamble* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00728

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON W. BARBER, DEFENDANT-APPELLANT.

JONATHAN ROSENBERG, BROOKLYN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Armen J. Nazarian, J.), rendered April 21, 2022. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (two counts), rape in the third degree, criminal sexual act in the first degree, criminal sexual act in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment that convicted him, upon a jury verdict, of two counts of rape in the second degree (Penal Law § 130.30 [1]) and one count each of rape in the third degree (§ 130.25 [2]), criminal sexual act in the first degree (§ 130.50 [2]), criminal sexual act in the third degree (§ 130.40 [2]), and endangering the welfare of a child (§ 260.10 [1]). Defendant's contention that he was deprived of a fair trial because of improper comments made during the People's summation is unpreserved for our review inasmuch as defendant failed to object to any of the purportedly improper comments (*see People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Love*, 134 AD3d 1569, 1570 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]).

To the extent that it is preserved for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we reject defendant's contention that the evidence is legally insufficient to support his conviction of two counts of rape in the second degree and one count of criminal sexual act in the first degree. Viewing the facts in the light most favorable to the People, we conclude that " 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of [those] crimes prove[n] beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We

nevertheless note that " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]).

Viewing the evidence in light of the elements of the crimes of rape in the second degree and criminal sexual act in the first degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The victim's testimony established that defendant committed two counts of rape in the second degree and one count of criminal sexual act in the first degree within the time frames alleged in the indictment, and we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see People v McDermott*, 200 AD3d 1732, 1733 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022], *reconsideration denied* 38 NY3d 1009 [2022]).

Finally, the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

484

KA 20-00467

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARYN CAMPBELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered May 13, 2019. The judgment convicted defendant upon a nonjury verdict of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts 3 through 5 of the indictment.

Memorandum: On appeal from a judgment convicting him after a nonjury trial of one count of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), defendant contends that the evidence is legally insufficient to establish that he constructively possessed the drugs and drug paraphernalia, and that the evidence is insufficient to establish his liability as an accomplice. Because defendant's motion for a trial order of dismissal was not " 'specifically directed' at th[at] alleged error," he failed to preserve for our review his contention that there is insufficient evidence of his liability as an accomplice (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Bell*, 198 AD3d 1305, 1306 [4th Dept 2021], *lv denied* 37 NY3d 1144 [2021]). With respect to the preserved contention, viewing the evidence in the light most favorable to the People (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that there is insufficient evidence of his constructive possession of the drugs and drug paraphernalia (*see People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]). Among other things, defendant told a police officer that he rented a room inside the home where the drugs and drug paraphernalia were found, and identification cards with defendant's name were found in one of the bedrooms therein

(*see generally People v Slade*, 133 AD3d 1203, 1205 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]; *People v Holley*, 67 AD3d 1438, 1439 [4th Dept 2009], *lv denied* 14 NY3d 801 [2010]). The drugs and drug paraphernalia were found in common areas of the apartment, i.e., the living room and kitchen, and mail addressed to defendant at the home was found on a table in the kitchen (*see generally People v Tucker*, 173 AD3d 1817, 1818 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019]; *People v Davis*, 101 AD3d 1778, 1779-1780 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]). The testimony at trial that the other bedroom in the home contained no furniture supports the inference that defendant's room was the only occupied bedroom (*see generally People v Banks*, 14 AD3d 726, 727-728 [3d Dept 2005], *lv denied* 4 NY3d 851 [2005]).

"[V]iewing the evidence in light of the elements of the crime[s] in this nonjury trial" (*People v Ghent*, 132 AD3d 1275, 1275 [4th Dept 2015], *lv denied* 26 NY3d 1145 [2016]; *see Danielson*, 9 NY3d at 349), we likewise reject defendant's contention that the weight of the evidence did not support the verdict with respect to his constructive possession of the drugs and drug paraphernalia (*see Mattison*, 41 AD3d at 1225), and his liability as an accessory (*see generally People v Brewer*, 196 AD3d 1172, 1174 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021], *cert denied* — US —, 142 S Ct 1684 [2022]).

We agree with defendant, however, that Supreme Court erred in applying the "room" or "drug factory" presumption pursuant to Penal Law § 220.25 (2) (*see People v Kims*, 24 NY3d 422, 425 [2014]). As relevant here, section 220.25 (2) provides that "[t]he presence of a narcotic drug . . . in open view in a room . . . under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found." "Penal statutes 'must be construed according to the fair import of their terms to promote justice and effect the objects of the law' " (*People v Fraser*, 264 AD2d 105, 110 [4th Dept 2000], *affd* 96 NY2d 318 [2001], *cert denied* 533 US 951 [2001], quoting § 5.00; *see People v Miller*, 70 NY2d 903, 906 [1987]). The drug factory presumption is "intended to allow police in the field to identify potentially culpable individuals involved in a drug business, under circumstances that demonstrate those individuals' participation in a drug operation" (*Kims*, 24 NY3d at 432-433). According to its drafters, the presumption is "designed to remedy that situation wherein police execute a search warrant on a premises suspected of being a 'drug factory,' only to find dangerous drugs and/or drug paraphernalia scattered about the room. The occupants of such 'factories,' who moments before were diluting or packaging the drugs, usually proclaim their innocence and disclaim ownership of, or any connection with, the materials spread before them. Police, under such circumstances, are often uncertain as to whom to arrest. In addition, with the present burden of proof of knowing possession of dangerous drugs on the [P]eople, successful prosecution of persons other than the owner or lessee of such premises is extremely rare" (Mem of St

Commn of Investigation, Bill Jacket, L 1971, ch 1044 at 4).

The legislative history includes the further explanation that the phrase "close proximity" within the statute is "intended to include persons who might, upon the sudden appearance of the police, hide in closets, bathrooms or other convenient recesses" (Letter from St Commn of Investigation, Dec. 1, 1971, Bill Jacket, L 1971, ch 1044 at 7; *see Kims*, 24 NY3d at 433).

In light of the statute's legislative purpose, the phrase "close proximity" in Penal Law § 220.25 (2) means "when the defendant is sufficiently near the drugs so as to evince defendant's participation in an apparent drug sales operation, thus supporting a presumption of defendant's knowing possession" (*Kims*, 24 NY3d at 433). "[T]he proximity determination requires careful consideration of the underlying facts related to defendant's location on the premises" (*id.* at 434). Thus, a defendant need not be apprehended within the same room as the drugs in order to satisfy the element of "close proximity" (*see People v Hogan*, 118 AD3d 1263, 1264 [4th Dept 2014], *affd* 26 NY3d 779 [2016]), and the presumption applies to a defendant caught while trying to flee the premises upon the sudden entry by police (*see Kims*, 24 NY3d at 435).

Here, the drugs were found in a room on the ground floor, and the police did not find defendant in the room with the drugs or in flight therefrom. Officers first observed defendant upstairs on the second floor, "walking from [the observing officer's] left to [his] right." The officers' observation is consistent with defendant walking out of his bedroom, which was, as explained at trial, "up the stairs and kind of off to the left" from where the officers were standing. Officers also testified at trial that defendant was wearing only underwear when he was first encountered, and that defendant's clothing was discovered inside his bedroom.

The "underlying facts related to . . . defendant's location on the premises" (*id.* at 434) reflect that defendant was not apprehended in close proximity to the drugs as contemplated by the drug factory presumption, i.e., he was not "sufficiently near the drugs so as to evince defendant's participation in an apparent drug sales operation, thus supporting a presumption of defendant's knowing possession" (*id.*). Defendant was not apprehended in the room with the drugs, he was not apprehended fleeing from that room, and he was not apprehended within or outside of the home while attempting to hide from police. Thus, he was not apprehended under circumstances suggesting that he had, just "moments before," been engaged in drug distillation or packaging (Mem of Commn of Investigation, Bill Jacket, L 1971, ch 1044 at 4).

We therefore conclude that the court erred in ruling that the drug factory presumption applied to the facts of this case. Although the drug factory presumption was applied directly to only count 3, which arose from the alleged possession of cocaine, we further conclude that the erroneous application of the presumption requires reversal of the judgment and a new trial on each of the three counts

upon which defendant was convicted. Indeed, in their respondent's brief in this appeal, the People rely, in part, on the drug factory presumption when addressing defendant's contentions regarding the sufficiency and weight of the evidence with respect to all three counts, and correctly contend that the presumption, if properly applied to the cocaine, would have allowed the court to "infer that if the drugs to which the statutory presumption applied were part of the drug factory's supply, all the contraband found must have been controlled by the factory's operatives" (*People v Bundy*, 90 NY2d 918, 920 [1997]). In light of our determination, we do not address defendant's alternative contention that the court erred in denying defendant's request for a circumstantial evidence charge.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

485

KA 23-01005

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WYATT S. PENFOLD, DEFENDANT-APPELLANT.

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

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered April 21, 2022. The judgment convicted defendant upon a guilty plea of assault 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 guilty plea of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that he was deprived of effective assistance of counsel because his attorney failed to file any motions, failed to request a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]), and failed to move to withdraw his plea when it became apparent that County Court would impose an enhanced sentence. We reject defendant's contention. An attorney is not ineffective for failing to file motions that have " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Zona*, 225 AD3d 1296, 1297-1298 [4th Dept 2024]), and defendant has not identified any motions that he believes would have been meritorious if filed on his behalf. With respect to defendant's remaining complaints about defense counsel's performance, we note that defendant stated on the record at sentencing that he did not wish to have an *Outley* hearing, which the court offered to conduct, and defense counsel stated, without contradiction by defendant, that defendant did not wish to withdraw his plea. Considering that defense counsel negotiated a seemingly favorable plea agreement, which involved the dismissal of two unrelated felony charges, we conclude, after viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant's challenge to the severity of his enhanced

sentence is precluded by his valid waiver of the right to appeal (*see People v May*, 169 AD3d 1365, 1365 [4th Dept 2019]; *see generally People v Garcia*, 155 AD3d 1570, 1571 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

486

KA 23-00290

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERNEST JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered November 28, 2022. The judgment convicted defendant upon his plea of guilty of murder 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 murder in the second degree (Penal Law § 125.25 [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 Stackhouse*, 214 AD3d 1303, 1303 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant's contention that his plea was "not voluntarily entered because [he] provided only monosyllabic responses to County 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 appeal (*see People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *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]; *Giles*, 219 AD3d at 1707) and to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Further, although defendant frames his contention regarding the

court's *Molineux* ruling as an attack on the voluntariness of his plea, his argument is, in fact, a challenge to the propriety of the *Molineux* ruling and is forfeited by defendant's guilty plea (*see People v Johnson*, 195 AD3d 1420, 1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]).

Defendant contends that he did not receive effective assistance of counsel. Defendant's contention does not survive his guilty plea to the extent that defendant argues counsel was ineffective for failing to move to dismiss the indictment on speedy trial grounds (*see People v Bovee*, 221 AD3d 1549, 1549-1550 [4th Dept 2023], *lv denied* 41 NY3d 982 [2024]). To the extent that defendant's contention survives his guilty plea, we conclude that it is without merit. A claim of ineffective assistance of counsel survives a plea of guilty only if "the plea bargaining process was infected by [the] allegedly ineffective assistance or [if] defendant entered the plea because of his attorney[']s allegedly poor performance" (*People v Judd*, 111 AD3d 1421, 1423 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014] [internal quotation marks omitted]). " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]). Here, defense counsel secured a favorable plea bargain for defendant, and nothing in the record casts doubt on the apparent effectiveness of defense counsel (*see People v Ford*, 86 NY2d 397, 404 [1995]; *People v Smith*, 198 AD3d 1347, 1348 [4th Dept 2021]).

We reject defendant's contention that the court abused its discretion in denying his motion to withdraw his guilty plea. Defendant contends that his guilty plea was not knowing, voluntary, and intelligent because he asserted a claim of actual innocence during the plea allocution that was not sufficiently explored by the court prior to its acceptance of his guilty plea. We reject that contention. Although the court has a duty to inquire further " 'where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise call into question the voluntariness of the plea' " (*People v Mox*, 20 NY3d 936, 938 [2012], quoting *People v Lopez*, 71 NY2d 662, 666 [1988]), here, we conclude that defendant's recitation of the facts failed to cast significant doubt upon his guilt (*see People v Lee*, 185 AD3d 439, 440 [1st Dept 2020]; *People v Roberson*, 161 AD3d 544, 545 [1st Dept 2018], *lv denied* 32 NY3d 940 [2018]; *People v Hill*, 128 AD3d 1479, 1480 [4th Dept 2015], *lv denied* 26 NY3d 930 [2015]; *cf. Mox*, 20 NY3d at 938-939). Even assuming, arguendo, that defendant's statements cast doubt upon his guilt, the court engaged in the requisite inquiry to ensure that defendant's plea was knowing, voluntary, and intelligent (*see People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017]; *People v Bonacci*, 119 AD3d 1348, 1349 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]; *cf. People v Hernandez*, 185 AD3d 1428, 1429 [4th Dept 2020]).

Contrary to defendant's contention, inasmuch as there was no

record support for defendant's claim of actual innocence, the court did not abuse its discretion in denying defendant's motion insofar as it sought to withdraw his plea on that ground (*see People v Worthy*, 46 AD3d 1382, 1382 [4th Dept 2007], *lv denied* 10 NY3d 773 [2008]; *People v Chisholm*, 8 AD3d 1025, 1025-1026 [4th Dept 2004], *lv denied* 3 NY3d 672 [2004]). Defendant's contention that his motion to withdraw the plea should have been granted because he was erroneously informed with respect to the maximum possible sentence is also not supported by the record. Furthermore, "the court did not coerce [defendant] into pleading guilty by advising him of the potential terms of incarceration in the event he was convicted following a trial" (*People v Bradford*, 126 AD3d 1374, 1375 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]). To the extent that defendant contends that his motion should have been granted because defense counsel did not discuss the specifics of the plea bargain with him, and because he told defense counsel he did not want to plead guilty to a crime that he did not commit, his contention concerns matters outside the record on appeal and must therefore be raised by way of a motion pursuant to CPL article 440 (*see People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]).

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01348

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

AJAY KOLLI, AS EXECUTOR OF THE ESTATE OF
DR. VENKATESWARA KOLLI, DECEASED, AND MLMIC
INSURANCE COMPANY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS
DEGRAFF MEMORIAL HOSPITAL, DEFENDANT-APPELLANT.

KALEIDA HEALTH, DOING BUSINESS AS DEGRAFF MEMORIAL
HOSPITAL, THIRD-PARTY PLAINTIFF-APPELLANT,

V

HEALTHCARE PROFESSIONALS INSURANCE COMPANY,
THIRD-PARTY DEFENDANT-RESPONDENT.

FAEGRE DRINKER BIDDLE & REATH LLP, NEW YORK CITY (MARK D. TATICCHI OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

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

E. STEWARD JONES HACKER MURPHY LLP, SCHENECTADY (BENJAMIN F. NEIDL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Edward Pace, A.J.), entered June 22, 2023, in a declaratory judgment action. The judgment, inter alia, granted the motions of third-party defendant and plaintiffs for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion of third-party defendant, denying in part the motion of plaintiffs, vacating the declaration with respect to the allocation of the settlement amount, vacating the sixth decretal paragraph, reinstating the first counterclaim of defendant-third-party plaintiff, reinstating the third-party action, and granting in part the motion of defendant-third-party plaintiff, and judgment is granted in favor of defendant-third-party plaintiff as follows:

> It is ADJUDGED and DECLARED that defendant-third-party plaintiff and third-party defendant are excess insurers and plaintiff MLMIC Insurance Company is the primary insurer

> with regard to the underlying action, and that defendant-third-party plaintiff and third-party defendant are obligated to pay, on a pro rata basis, the costs of the remaining portion of the settlement following exhaustion of MLMIC Insurance Company's primary coverage,

and as modified the judgment is affirmed without costs.

Memorandum: The appeal in this declaratory judgment action arises from a dispute between plaintiff MLMIC Insurance Company (MLMIC), defendant-third-party plaintiff, Kaleida Health, doing business as DeGraff Memorial Hospital (Kaleida), and third-party defendant, Healthcare Professionals Insurance Company (HPIC), over insurance coverage provided to Dr. Venkateswara Kolli (decedent) in an underlying medical malpractice action. In the underlying action, Kaleida, MLMIC, and HPIC entered into a settlement funding agreement, with each of them agreeing to pay one-third of the settlement of the underlying action and to reimburse each other according to the court's determination of their respective responsibilities under their respective contracts and policies.

Plaintiffs MLMIC and Ajay Kolli, as executor of the estate of decedent, then commenced an action against Kaleida, seeking, inter alia, a declaration that Kaleida provided decedent with insurance coverage under Kaleida's self-insurance plan and that MLMIC is entitled to be reimbursed by Kaleida for expenses it incurred defending decedent. Kaleida answered and commenced a third-party action against HPIC, seeking a declaration that HPIC is obligated to provide first layer excess coverage pursuant to the policy HPIC issued to decedent. HPIC moved for summary judgment dismissing all claims against it and seeking reimbursement of its contribution towards the settlement in the underlying action, and plaintiffs moved for summary judgment seeking, inter alia, a declaration that decedent is a covered person under the self-insurance plan issued by Kaleida. Kaleida moved for summary judgment dismissing the claims against it and granting summary judgment on its claims against plaintiffs and HPIC. Supreme Court granted the motions of HPIC and plaintiffs, denied the motion of Kaleida, determined, inter alia, that HPIC's coverage constituted excess coverage and declared that the full amount of the settlement must be paid by Kaleida and MLMIC in proportion to their respective policy limits. Kaleida now appeals.

Contrary to Kaleida's contention, we conclude the court properly determined that decedent was entitled to coverage under Kaleida's self-insurance plan. It is well settled that a contract must be read as a whole to give effect and meaning to every term (*see Town of Eden v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89 [4th Dept 2001], *lv denied* 97 NY2d 603 [2001]). Indeed, "[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible" (*Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc.*, 14 AD3d 963, 965 [3d Dept 2005]; *see American Ref-Fuel Co. of Niagara*, 284 AD2d at 89). In the insurance context, "all ambiguities must be resolved in favor of the insured" (*Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 19 [4th Dept 1995], *lv dismissed in*

part & denied in part 87 NY2d 953 [1996]), and that "rule is enforced even more strictly when the language at issue purports to limit the [insurer's] liability" (*Woods v General Acc. Ins.*, 292 AD2d 802, 803 [4th Dept 2002] [internal quotation marks omitted]). "[T]he insurer bears the burden of establishing that the construction it advances is not only reasonable, but also that it is the only fair construction" (*id.* [internal quotation marks omitted]).

Here, Kaleida failed to meet its burden of establishing that its construction is the only fair construction. Kaleida contends that the self-insurance contract with decedent did not cover services provided to patients at Kaleida's facilities for which decedent retained the right to bill. The language in Kaleida's self-insurance plan could reasonably be interpreted to limit coverage when decedent treated his private practice patients at Kaleida, but not to limit coverage where, as in the underlying action, he treated a patient at Kaleida as part of his on-call duties pursuant to his employment agreement (*see generally Woods*, 292 AD2d at 803; *Oot v Home Ins. Co. of Ind.*, 244 AD2d 62, 66 [4th Dept 1998]).

The court properly denied Kaleida's motion insofar as Kaleida contended that decedent is not entitled to coverage in the underlying action because he failed to give Kaleida notice of the claim. Kaleida received timely notice of decedent's claim when it was served with the complaint in the underlying action (*see* 11 NYCRR 73.3 [a]). To the extent Kaleida contends that it is not obligated to provide coverage with respect to the underlying action because decedent failed to make a timely claim for coverage under the terms of the self-insurance plan, we conclude that Kaleida's self-insurance plan does not define a "claim" as a demand for coverage by the insured, and Kaleida has not identified on this appeal any provision of that plan requiring decedent to make a formal demand for coverage.

We reject Kaleida's contention that the claims of MLMIC and HPIC for reimbursement are barred by laches (*see generally Skrodelis v Norbergs*, 272 AD2d 316, 316-317 [2d Dept 2000]).

Kaleida further contends that the court erred in denying its motion because, even if decedent was entitled to coverage from Kaleida in the underlying action, Kaleida has no obligation to reimburse MLMIC or HPIC because the self-insurance plan does not constitute other insurance under MLMIC's policy. We reject that contention. The self-insurance plan protected against physicians' medical malpractice liability, and it required physicians to report any potential claims. We conclude that Kaleida's self-insurance plan constituted "other insurance policy or equivalent coverage" under MLMIC's policy (*see generally Woods*, 292 AD2d at 802-803).

We agree with Kaleida, however, that its coverage is excess to MLMIC's policy, and that the court therefore erred in granting the motion of HPIC, in granting the motion of plaintiffs and in denying the motion of Kaleida with respect to the allocation of the settlement amount. "[W]here there are multiple policies covering the same risk,

and each generally purports to be excess to the other, the excess coverage clauses are held to cancel out each other and each insurer contributes in proportion to its [policy] limit," unless to do so would distort the plain meaning of the policies (*Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 655 [1980]; *see Federal Ins. Co. v Atlantic Natl. Ins. Co.*, 25 NY2d 71, 75-76 [1969]; *Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265, 1267-1268 [4th Dept 2006]). By contrast, "if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective" (*Osorio v Kenart Realty, Inc.*, 48 AD3d 650, 653 [2d Dept 2008]; *see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 686-687 [1999]; *Stout v 1 E. 66th St. Corp.*, 90 AD3d 898, 904 [2d Dept 2011]). Here, HPIC's policy *specifically* states that its coverage is excess to MLMIC's coverage, and thus the court properly determined that HPIC is an excess carrier.

We further conclude that Kaleida's coverage is also excess to MLMIC's coverage. Kaleida's self-insurance plan provides that physicians "shall be assumed to be maintaining primary medical practice insurance" with coverage limits of at least $1 million per claim and $3 million aggregate (*see generally Osorio*, 48 AD3d at 653). MLMIC, as the primary insurer, had policies of $1.3 million "Each Person Limit" and a $3.9 million "Total Limit." Under the circumstances of this case, MLMIC's "Each Person Limit" applies, and Kaleida and HPIC are responsible as excess insurers for the remaining portion of the settlement, with Kaleida responsible for 91.67% and HPIC responsible for 8.33% (*see Utica Mut. Ins. Co. v Erie Ins. Co.*, 107 AD3d 1522, 1525-1526 [4th Dept 2013]). We therefore modify the judgment accordingly.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00542

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

RICHARD L. BATES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GANNETT CO., INC., DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

FRANCIS L. GOODSELL, RANDALL PENBERG,
PAUL TRACY AND JIM YORK, PLAINTIFFS-APPELLANTS,

V

GANNETT CO., INC., DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

BALLARD TACKETT, BRIAN COPENHAGEN AND KELBY ASH,
PLAINTIFFS-APPELLANTS,

V

GANNETT CO., INC., DEFENDANT-RESPONDENT.
(ACTION NO. 3.)

SWEENEY, REICH & BOLZ, LLP, LAKE SUCCESS (GERARD J. SWEENEY OF COUNSEL), FOR PLAINTIFF-APPELLANT RICHARD L. BATES.

MARSH LAW FIRM PLLC, NEW YORK CITY (CORI IACOPELLI OF COUNSEL), AND PFAU COCHRAN VERTETIS AMALA PLLC, FOR PLAINTIFFS-APPELLANTS FRANCIS L. GOODSELL, RANDALL PENBERG, PAUL TRACY, JIM YORK, BALLARD TACKETT, BRIAN COPENHAGEN AND KELBY ASH.

HARTER, SECREST & EMERY LLP, ROCHESTER (TRACIE M. HIATT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (Deborah A. Chimes, J.), entered January 20, 2023. The order granted the motion of defendant to stay the actions and for referral to the Workers' Compensation Board and held in abeyance the cross-motions of plaintiffs to amend their complaints.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's motion is denied, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum:

Each of the plaintiffs in these three actions seeks damages pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g) arising from their employment delivering newspapers in the 1980s for the Rochester Democrat & Chronicle, which is now owned by defendant. In their respective complaints, plaintiffs allege that they were sexually abused by a supervisor and that defendant is liable in negligence for their injuries. In a single motion, defendant moved in all three actions for a stay of the actions and a referral to the Workers' Compensation Board (Board) for a determination "whether [p]laintiffs' [alleged] injuries occurred in the course of employment and are compensable by [w]orkers' [c]ompensation." Plaintiffs cross-moved for leave to amend their respective complaints, and plaintiffs now appeal from an order that granted defendant's motion and held plaintiffs' cross-motions in abeyance pending the Board's determination. We reverse.

" 'As a general rule, when an employee is injured in the course of . . . employment, [the employee's] sole remedy against [their] employer lies in [their] entitlement to a recovery under the Workers' Compensation Law' " (*Ciapa v Misso*, 103 AD3d 1157, 1158 [4th Dept 2013]; *see generally McKnight v Mariner Rest.*, 2 AD3d 1296, 1297 [4th Dept 2003]). "[T]he issue whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Board" (*Alfonso v Lopez*, 149 AD3d 1535, 1536 [4th Dept 2017]).

"[C]ourts defer to [an] administrative agency where the issue involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Matter of Jun Wang v James*, 40 NY3d 497, 502 [2023] [internal quotation marks omitted]). However, "[w]here . . . the question is one of pure statutory interpretation, [courts] need not accord any deference to [an administrative body's] determination and can undertake its function of statutory construction" (*Matter of DeVera v Elia*, 32 NY3d 423, 434 [2018] [internal quotation marks omitted]; *see Jun Wang*, 40 NY3d at 502; *O'Rourke v Long*, 41 NY2d 219, 224 [1976]). As relevant here, although a factual determination with respect to the applicability of the Workers' Compensation Law should be referred to the Board, which has primary jurisdiction over that issue, questions of law remain within the domain of the court (*cf. Alfonso*, 149 AD3d at 1536; *Rivera v Lopez*, 167 AD2d 953, 953 [4th Dept 1990]). Here, whether the CVA revives otherwise time-barred claims for workers' compensation benefits, based on allegations of sexual abuse by a coworker, and whether plaintiffs are limited to benefits under the Workers' Compensation Law even if their claims are revived, are questions of law to be decided by the court, not the Board. Thus, we agree with the plaintiffs that Supreme Court erred in granting defendant's motion, staying the actions pending review by the Board, and holding plaintiffs' cross-motions to amend their complaints in abeyance pending the Board's decision.

We therefore reverse and we remit the matter to Supreme Court for further proceedings to determine whether the CVA revives otherwise

time-barred claims for workers' compensation benefits and whether plaintiffs are limited to such benefits if their claims are revived, and to rule on plaintiffs' cross-motions seeking leave to amend their respective complaints.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-00956

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

BL DOE 4, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (RYAN L. MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), AND O'BRIEN & FORD, BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, among other things, denied in part the motion of defendant Rochester City School District for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that she was sexually abused during a period from 1980 to 1981 by defendant Edwin D. Fleming while attending East High School in defendant Rochester City School District (defendant). After discovery, plaintiff moved for partial summary judgment on defendant's liability and dismissal of certain affirmative defenses asserted by defendant, and defendant moved for summary judgment dismissing the complaint against it. Supreme Court, inter alia, granted plaintiff's motion insofar as plaintiff sought dismissal of defendant's 1st through 4th, 13th, 14th and 16th affirmative defenses, and denied defendant's motion to the extent that it sought dismissal of the negligence and negligent failure to report causes of action. Defendant now appeals, as limited by its brief, from those parts of the order and judgment that denied its motion to the extent that it sought dismissal of the negligence and negligent failure to report causes of action. We affirm.

Plaintiff's negligence cause of action is premised on two theories, specifically defendant's alleged negligent supervision of plaintiff and defendant's alleged negligent retention of Fleming, a

music teacher employed by defendant. Both theories require consideration of whether Fleming's misconduct was reasonably foreseeable. "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *BL Doe 2 v Fleming*, — AD3d —, —, 2024 NY Slip Op 03610, *1 [4th Dept 2024]). That duty "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1422 [4th Dept 2021] [internal quotation marks omitted]; *see David v County of Suffolk*, 1 NY3d 525, 526 [2003]; *BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *1). A plaintiff may succeed on a claim of negligent supervision by establishing "that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (*Mirand*, 84 NY2d at 49). Further, although unanticipated third-party acts generally will not give rise to liability (*see Brandy B.*, 15 NY3d at 302), a school district may nonetheless "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006]; *see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946-947 [1997]; *Mirand*, 84 NY2d at 49-51; *BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *1-2). Similarly, to establish a claim of negligent retention, "it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]; *see BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *2; *Pater v City of Buffalo*, 141 AD3d 1130, 1131 [4th Dept 2016], *lv denied* 29 NY3d 911 [2017]).

Contrary to defendant's contention, the court properly denied that part of its motion seeking summary judgment dismissing the negligence cause of action inasmuch as defendant failed to meet its prima facie burden of establishing that the sexual abuse that led to plaintiff's injuries was unforeseeable as a matter of law (*see Bell*, 90 NY2d at 946-947; *BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *2). In support of its motion, defendant submitted, among other things, plaintiff's deposition wherein she testified that various teachers "recalled that Fleming had a questionable reputation" and "that there were rumors, that there was definitely a touchy-feely vibe in the music room." Defendant also submitted the deposition of another music teacher employed by defendant, who testified that she learned of Fleming's nickname, "Flem the feeler," prior to the abuse of plaintiff. With that testimony, along with other testimony regarding Fleming's reputation, defendant's own submissions raise an issue of fact whether defendant exercised the same degree of care and supervision over plaintiff that a parent of ordinary prudence would have exercised (*see BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *2; *see generally Doe v Whitney*, 8 AD3d 610, 611-612 [2d Dept 2004]).

The court also properly denied defendant's motion with respect to the cause of action for violation of the common-law duty to report.

Contrary to defendant's contention, a school's duty to report falls within the scope of its "common-law duty to adequately supervise its students," which, as noted above, "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3*, 199 AD3d at 1422 [internal quotation marks omitted]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87-88 [4th Dept 1996]; *see generally Mirand*, 84 NY2d at 49; *BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *2-3). Thus, regardless of whether a common-law cause of action exists in New York for failure to report child abuse by a defendant who lacks a school's in loco parentis relationship with a child (*see BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *3; *Heidt v Rome Mem. Hosp.*, 278 AD2d 786, 787 [4th Dept 2000] [Lawton, J., dissenting], citing, inter alia, *Eiseman v State of New York*, 70 NY2d 175, 187-189 [1987]), here defendant's alleged failure to do so is a recognized form of negligence (*see BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *3; *BL Doe 3*, 199 AD3d at 1422-1423). We further conclude that defendant failed to meet its burden of establishing, with respect to its failure to report the abuse of plaintiff, that it exercised such care and supervision over plaintiff as a parent of ordinary prudence would have exercised (*see BL Doe 2*, — AD3d at —, 2024 NY Slip Op 03610, *3; *see generally BL Doe 3*, 199 AD3d at 1422-1423).

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00020

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

MARY E. GALANTE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. KARLIS, DEFENDANT,
COUNTY OF ERIE, ELMA MEADOWS GOLF COURSE
AND COUNTY OF ERIE PARKS, RECREATION AND FORESTRY,
DEFENDANTS-APPELLANTS.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (ERIN E. MOLISANI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered September 15, 2023. The order, insofar as appealed from, denied in part the cross-motion of defendants-appellants for summary judgment and granted the motion of plaintiff to dismiss two of defendants-appellants' affirmative defenses.

It is hereby ORDERED that said appeal insofar as taken by defendants Elma Meadows Golf Course and County of Erie Parks, Recreation and Forestry is dismissed and the order insofar as appealed from is reversed on the law without costs, the motion is denied in part, the 11th affirmative defense is reinstated, the cross-motion is granted in its entirety and the complaint against defendant County of Erie is dismissed.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she sustained when the golf cart that she was driving was struck by a vehicle driven by defendant Robert G. Karlis in the parking lot of defendant Elma Meadows Golf Course (golf course). The golf course is owned by defendant County of Erie (County). The golf course, the County, and defendant County of Erie Parks, Recreation and Forestry (CPRF) (collectively, County defendants) answered and asserted several affirmative defenses, including their 11th affirmative defense, i.e., assumption of the risk, and the 15th affirmative defense, i.e., release. Plaintiff moved to dismiss the County defendants' 11th and 15th affirmative defenses, and the County defendants cross-moved for summary judgment dismissing the complaint against them. Supreme Court granted plaintiff's motion and dismissed the 11th and 15th affirmative defenses, granted the cross-motion in part and dismissed the complaint

against the golf course and CPRF, and otherwise denied the cross-motion. The County defendants now appeal from the order insofar as it granted plaintiff's motion and denied in part their cross-motion.

At the outset, inasmuch as the court granted in part the County defendants' cross-motion and dismissed the complaint against the golf course and CPRF, the golf course and CPRF are not aggrieved by the order and the appeal insofar as taken by those defendants must be dismissed (*see* CPLR 5511; *Tomaszewski v Seewaldt*, 11 AD3d 995, 995 [4th Dept 2004]).

The County contends that the court erred in granting plaintiff's motion with respect to the affirmative defense of assumption of the risk and in denying that part of the cross-motion seeking summary judgment dismissing the complaint against the County on the ground that plaintiff assumed the risks associated with the use of a golf cart on the golf course. We agree. "The doctrine of assumption of the risk acts as a complete bar to recovery where a plaintiff is injured in the course of a sporting or recreational activity through a risk inherent in that activity" (*Conrad v Holiday Val., Inc.*, 187 AD3d 1520, 1521 [4th Dept 2020]; *see Turcotte v Fell*, 68 NY2d 432, 438-439 [1986]). Initially, we reject plaintiff's assertion that assumption of the risk does not apply inasmuch as she was not actively engaged in the activity of golf at the time of the accident. Rather, we conclude that the accident "occurred in a designated . . . recreational venue" (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012]) inasmuch as the parking lot is a part of the golf course facilities (*see e.g. Valverde v Great Expectations, LLC*, 131 AD3d 425, 426 [1st Dept 2015]; *Bockelman v New Paltz Golf Course*, 284 AD2d 783, 783-784 [3d Dept 2001], *lv denied* 97 NY2d 602 [2001]; *Egeth v County of Westchester*, 206 AD2d 502, 502 [2d Dept 1994]). Similarly, we conclude that plaintiff "was still involved . . . , or participating . . . , in the sport of [golf] at the time of [her] injury" (*Litz v Clinton Cent. Sch. Dist.*, 126 AD3d 1306, 1308 [4th Dept 2015] [internal quotation marks omitted]). " '[T]he assumption [of the risk] doctrine applies to any facet of the activity inherent in it' " (*id.*, quoting *Maddox v City of New York*, 66 NY2d 270, 277 [1985]), and "it would be inconsistent with the purpose of the assumption of the risk doctrine to isolate the moment of injury and ignore the context of the accident" (*id.*). Here, plaintiff was using the golf cart to transport her clubs from her vehicle in the parking lot to the golf course playing area. Plaintiff testified that, before every round of golf she played, she drove a golf cart down the same cart path from the clubhouse to the parking lot to retrieve her clubs from her car, which was a common practice at the golf course, and the accident occurred when she left the cart path and entered into the parking lot.

Inasmuch as the County defendants established that plaintiff was engaged in the activity of golf at the time of the accident, the question thus becomes whether plaintiff assumed the risk of the injury-causing acts at issue (*see Litz*, 126 AD3d at 1308). "As a general rule, participants properly may be held to have consented, by

their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte*, 68 NY2d at 439, citing *Maddox*, 66 NY2d at 277-278). "It is not necessary to the application of the assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which [their] injury occurred, so long as [they are] aware of the potential for injury of the mechanism from which the injury results" (*Conrad*, 187 AD3d at 1521 [internal quotation marks omitted]). Rather, "a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Litz*, 126 AD3d at 1307 [internal quotation marks omitted]). "The question of whether the consent was an informed one includes consideration of the participant's knowledge and experience in the activity generally" (*Turcotte*, 68 NY2d at 440).

Here, we agree with the County that the County defendants met their burden of establishing that the risk of being injured while driving a golf cart is "inherent in the sport" of golf and that plaintiff was aware of the risk and assumed it (*Turcotte*, 68 NY2d at 441; *see Conrad*, 187 AD3d at 1521; *Kirby v Drumlins, Inc.*, 145 AD3d 1561, 1562-1563 [4th Dept 2016]), and that plaintiff failed to raise an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). At the time of the accident, plaintiff was an experienced golfer who played the golf course regularly throughout the season (*see Kirby*, 145 AD3d at 1562). Moreover, the County defendants demonstrated that plaintiff had routinely driven a golf cart into the parking lot to retrieve her clubs from her vehicle, and that she was aware of the fact that other people would be operating motor vehicles in the parking lot. The County defendants therefore established as a matter of law that being injured while driving a golf cart in the parking lot of the golf course before a round of golf is "within the known, apparent and foreseeable dangers of the sport" of golf (*Turcotte*, 68 NY2d at 441).

In light of our determination, we do not address the County's alternative contention.

All concur except LINDLEY, J.P., and OGDEN, J., who dissent and vote to affirm in the following memorandum: Although being struck by a ball while playing golf is "a commonly appreciated risk" of the sport (*Katleski v Cazenovia Golf Club, Inc.*, 225 AD3d 1030, 1035 [3d Dept 2024]; *see Anand v Kapoor*, 15 NY3d 946, 948 [2010]; *Delaney v MGI Land Dev., LLC*, 72 AD3d 1254, 1255 [3d Dept 2010]), being struck by a motor vehicle is not. We therefore respectfully dissent.

"[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997], *rearg denied* 90 NY2d 936 [1997]; *see Puccio v Boy Scouts of Am.*, 202 AD3d 1488, 1489 [4th Dept 2022]). Here, even assuming, arguendo, that plaintiff was engaged in the sport of golf when she was driving a cart in the parking lot to get her clubs before even setting foot on the

course (*see Hawkes v Catatonk Golf Club, Inc.*, 288 AD2d 528, 529 [3d Dept 2001]), we agree with Supreme Court's determination that being struck by a motor vehicle is not an inherent risk of playing golf. Of course, anyone in a parking lot open to the general public is at risk of being struck by a vehicle, but that risk does not arise from playing golf or riding in a golf cart. For instance, if plaintiff was walking to her car to get her clubs when struck by defendant Robert G. Karlis' vehicle, we would not say that the doctrine of primary assumption of risk bars her from suing Karlis or any of the other defendants in negligence. The fact that plaintiff was in a golf cart when the accident occurred does not in our view change the result.

We therefore conclude that the court properly denied that part of the cross-motion of defendants County of Erie (County), Elma Meadows Golf Course (golf course) and County of Erie Parks, Recreation and Forestry (CPRF) for summary judgment dismissing the complaint against the County, and properly granted plaintiff's motion to dismiss the County's affirmative defense based on the doctrine of primary assumption of risk. Finally, we agree with the majority that the appeal insofar as taken by the golf course and CPRF must be dismissed (*see* CPLR 5511), and we conclude that, contrary to the County's further contention, the court properly granted plaintiff's motion insofar as it sought dismissal of its affirmative defense based on waiver and release. We would affirm the order in its entirety.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00081

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

CHARLES L. DURKEE, SR., PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN SANCHEZ-RODRIGUEZ, ERIC O. ZUBER, ZUBER FARMS AND ZUBER FARMS, LLC, DEFENDANTS-RESPONDENTS-APPELLANTS.

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

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (TARA E. WATERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered January 8, 2024. The order denied the motion of plaintiff and the cross-motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of plaintiff's motion seeking summary judgment with respect to the issues of defendants' negligence and the vicarious liability of defendants Eric O. Zuber, Zuber Farms and Zuber Farms, LLC, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that he sustained when the vehicle he was driving collided with the rear end of a manure spreader being towed by a tractor operated by defendant Martin Sanchez-Rodriguez. The manure spreader and tractor were owned by defendants Zuber Farms and Zuber Farms, LLC, which were owned, in part, by defendant Eric O. Zuber (collectively, Zuber defendants). The accident occurred at night, when plaintiff crested a hill and came upon the tractor and manure spreader, which had no operational tail lights or reflectors. Plaintiff moved for summary judgment on the issues of negligence and liability, and defendants cross-moved for summary judgment dismissing the complaint. Supreme Court denied the motion and cross-motion, and now plaintiff appeals and defendants cross-appeal.

We agree with plaintiff on his appeal that the court erred in denying that part of his motion seeking summary judgment on the issue of defendants' negligence, and we therefore modify the order accordingly. "[A] defendant's unexcused violation of the Vehicle and

Traffic Law constitutes negligence *per se*" (*Koziol v Wright*, 26 AD3d 793, 794 [4th Dept 2006] [internal quotation marks omitted]) and here, plaintiff met his initial burden on the motion by submitting evidence that the manure spreader was being operated on a public roadway, more than one-half hour after sunset, without "at least two lighted lamps on the rear, one on each side" in violation of Vehicle and Traffic Law § 375 (2) (a) (3), and without "signaling devices and reflectors" in violation of section 376 (a), which constitutes negligence per se (*see generally Lowes v Anas*, 195 AD3d 1579, 1581 [4th Dept 2021]).

In opposition to plaintiff's motion, defendants failed to raise a question of fact on the issue of their negligence (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although defendants submitted the affidavit of an expert, who opined that the accident was caused by plaintiff's inattention, "[t]he fact that [plaintiff] may have also been negligent does not absolve [defendants] of liability inasmuch as an accident may have more than one proximate cause" (*Zbock v Gietz*, 145 AD3d 1521, 1522-1523 [4th Dept 2016]).

We also agree with plaintiff on his appeal that the court erred in denying that part of his motion seeking summary judgment on the issue of the vicarious liability of the Zuber defendants on the ground that Sanchez-Rodriguez was working within the scope of his employment at the time of the accident. We therefore further modify the order accordingly. "The general rule is that an employee acts within the scope of his [or her] employment when [the employee] is acting in furtherance of the duties owed to the employer and where the employer is or could be exercising some degree of control, directly or indirectly, over the employee's activities" (*Swartzlander v Forms-Rite Bus. Forms & Print. Serv.*, 174 AD2d 971, 972 [4th Dept 1991], *affd* 78 NY2d 1060 [1991]; *see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131 [4th Dept 2008]). Here, plaintiff established that Sanchez-Rodriguez was "acting within the scope of his employment" at the time of the accident (*McMindes v Jones*, 41 AD3d 1196, 1197 [4th Dept 2007]), and defendants failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

Finally, contrary to the contentions of plaintiff on his appeal and defendants on their cross-appeal, the court properly denied both the motion and cross-motion on the issue whether plaintiff is required to establish a serious injury as defined in Insurance Law § 5102 (d) in order to recover for non-economic losses. "[I]n any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury" (§ 5104 [a]). The definition of a "motor vehicle" in the statute does not encompass a "tractor and . . . attached [equipment] . . . being used exclusively for agricultural purposes, [and therefore] the serious injury threshold requirement is not applicable" when a tractor and attached equipment are used exclusively for those purposes (*Graham v Gerow*, 126 AD3d 1549, 1549 [4th Dept 2015]; *see* §§ 5102 [d], [j]; 5104 [a]; *see also* Vehicle and Traffic Law § 311 [2]). Here, there is a question of fact whether the manure spreader and tractor were being

used exclusively for agricultural purposes (*see generally Graham*, 126 AD3d at 1549).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-00422

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENDY B.-S., DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated September 17, 2020. The order denied the application of defendant for resentencing pursuant to CPL 440.47.

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

Memorandum: Defendant was convicted in November 1989, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and two counts of intimidating a victim or witness in the first degree (§ 215.17 [1], [2]). The conviction arose from defendant's conduct in aiding her then-husband in the bludgeoning death of a friend, who had been cooperating with authorities by implicating defendant and her husband in other crimes, by calling the friend and luring him to the house where he was killed. Defendant was sentenced to concurrent terms of incarceration aggregating to 25 years to life. We affirmed defendant's judgment of conviction on direct appeal (*People v Wendy S.*, 172 AD2d 1028 [4th Dept 1991], *lv denied* 78 NY2d 927 [1991]), and we later also affirmed the husband's judgment of conviction arising from the murder (*People v Smythe*, 210 AD2d 887 [4th Dept 1994], *lv denied* 85 NY2d 943 [1995]). Defendant remained incarcerated in April 2020 when she applied for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47; Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1), but she was subsequently released to parole supervision in September 2020. Supreme Court thereafter denied her application for resentencing pursuant to the DVSJA, and defendant now appeals as of right (*see* CPL 440.47 [3] [a]). We affirm.

"The DVSJA, without diminishing the gravity of an offense, permits courts to impose alternative, less severe sentences in certain

cases involving defendants who are victims of domestic violence" (*People v Fisher*, 221 AD3d 1195, 1196 [3d Dept 2023], *lv denied* 41 NY3d 1001 [2024]; *see* CPL 440.47; Penal Law § 60.12; *People v Vilella*, 213 AD3d 1282, 1283 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]). A defendant who is confined while serving a sentence of a certain length for an offense committed prior to the effective date of the DVSJA and is eligible for an alternative sentence may request to apply for resentencing in accordance with Penal Law § 60.12 (*see* CPL 440.47 [1] [a]; *People v Shawn G.G.*, 225 AD3d 1246, 1247 [4th Dept 2024]). If the court finds that the defendant has met the requirements to apply for resentencing, the court must notify the defendant that they may submit an application for resentencing (*see* CPL 440.47 [1] [c]). An application for resentencing must include certain pieces of evidence pursuant to the provisions of CPL 440.47 (2) (c) and, if the court finds that the defendant has complied with those provisions, it must "conduct a hearing to aid in making its determination of whether the applicant should be resentenced in accordance with [Penal Law § 60.12]" (CPL 440.47 [2] [e]; *see Fisher*, 221 AD3d at 1196). The court may impose an alternative sentence where it determines, upon a preponderance of the evidence following the hearing, that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" (Penal Law § 60.12 [1]; *see Fisher*, 221 AD3d at 1196-1197; *People v T.P.*, 216 AD3d 1469, 1471-1472 [4th Dept 2023]; *People v Addimando*, 197 AD3d 106, 112 [2d Dept 2021]).

There is no dispute in this case that, at the time of the underlying offenses, defendant was "a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by" the husband (Penal Law § 60.12 [1] [a]; *see T.P.*, 216 AD3d at 1471-1472). As the court properly determined and defendant correctly contends, there is ample evidence in the record that the husband, who was manipulative and controlling, subjected defendant to numerous acts of physical brutality, as well as emotional and psychological abuse, including threatening to harm defendant's young son from another relationship. Defendant thus indisputably fulfilled the first prong of the statutory analysis (*see* § 60.12 [1] [a]).

The court nonetheless further determined under the second prong of Penal Law § 60.12 (1) that the abuse suffered by defendant was not a significant contributing factor to her criminal behavior related to the victim's death. We agree with defendant that the court erred in that regard. In evaluating whether the abuse was "a significant contributing factor to the defendant's criminal behavior" (§ 60.12 [1] [b]), a court should "consider the cumulative effect of the abuse together with the events immediately surrounding the crime, paying particular attention to the circumstances under which [the] defendant

was living and adopting a 'full picture' approach in its review" (*People v Smith*, 69 Misc 3d 1030, 1038 [Erie County Ct 2020]; *see People v Brenda WW.*, 222 AD3d 1188, 1192-1193 [3d Dept 2023], citing *Smith*, 69 Misc 3d at 1038; *People v Burns*, 207 AD3d 646, 648-649 [2d Dept 2022]).

Here, we agree with defendant that the cumulative effect of the husband's abuse, along with the events immediately surrounding the crimes, demonstrates that the abuse was a significant contributing factor to defendant's conduct in calling the victim and luring him to the house. The husband had repeatedly and violently abused defendant throughout their relationship, and defendant feared for the safety of herself and her son. The record establishes that defendant—whether out of fear of harm at the hands of the husband or as the result of actual threats and physical harm inflicted on the day of the murder—complied with the husband's demand that she call the victim, with whom she was a close friend, and invite him to the house. In sum, upon "[c]onsidering the cumulative effect of . . . defendant's abuse at the hands of [the husband], together with the events immediately surrounding the crimes, and paying particular attention to the circumstances under which . . . defendant was living," we conclude that "the preponderance of the evidence demonstrates that the [husband's] abuse was a [significant] contributing factor to [defendant's criminal behavior related to] the murder of [the victim]" (*Burns*, 207 AD3d at 648-649).

None of the court's reasons for reaching a contrary conclusion survive scrutiny. First, contrary to the court's conclusion that defendant's alcohol and drug abuse at the time of the crimes established that her conduct could not be attributed to the abuse, we conclude that "such factors do not negate the aforementioned history of abuse suffered by defendant and whether it played a significant role in her behavior" (*Brenda WW.*, 222 AD3d at 1192). Second, the court's determination that defendant could not credibly claim that the domestic abuse she endured was a significant contributing factor to her criminal behavior because she had, over the years, given minimally inconsistent accounts of her role in the victim's death, cannot be reconciled with the modern understanding of the effects of domestic violence as both embodied in the DVSJA and emphasized by defendant's trauma counselor at the hearing (*see People v Liz L.*, 221 AD3d 1288, 1291 [3d Dept 2023]; *see generally* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U Pa L Rev 399, 405-406 [2019]). Third, the court's reliance on the trial court's pontification during the original sentencing proceeding that defendant had manipulated and controlled the husband, not the other way around, is misplaced because, as defendant contends, that interpretation of the relationship lacks support in the record before us and appears grounded in "outdated notions regarding domestic violence issues" (*Addimando*, 197 AD3d at 117).

Nevertheless, we conclude that defendant is not entitled to resentencing pursuant to the DVSJA because, under the third prong of the statutory analysis, the original sentence is not "unduly harsh" in

light of the "nature and circumstances of the crime and the history, character and condition of the defendant" (Penal Law § 60.12 [1] [c]; *see Fisher*, 221 AD3d at 1197-1198). The crimes for which defendant was convicted—i.e., aiding her husband in the fatal bludgeoning of the victim as reprisal for and prevention of the victim's cooperation with authorities in implicating defendant and the husband in other crimes—were as brutal as they were reprehensible (*see Fisher*, 221 AD3d at 1197-1198). Although defendant has been somewhat inconsistent over the years about her precise knowledge of the husband's intentions for the victim at the time she placed the call to lure him to the location, the record before us establishes by a preponderance of the evidence that defendant knew, even if indirectly, that the victim was going to be killed. Additionally, despite some admirable accomplishments and engagement in services while incarcerated, defendant committed a remarkably extensive number of disciplinary violations while in prison, including for drug use. Inasmuch as defendant is no longer incarcerated and has been released to lifetime parole supervision, she seeks resentencing solely for the purpose of shortening the period—and ultimately relieving her—of postrelease supervision. However, defendant's criminal history, both before and during the relationship with the husband, and her continued difficulty in conducting herself appropriately as evinced by her extensive disciplinary history throughout her incarceration, coupled with her apparent success thus far while on supervision in the community, suggest that supervision continues to serve important purposes in defendant's case (*cf. People v S.M.*, 72 Misc 3d 809, 816 [Erie County Ct 2021]). Thus, although defendant has been released to parole supervision, given her criminal and disciplinary history as well as her need for services, we conclude that, contrary to defendant's contention, lifetime parole supervision does not render her sentence unduly harsh and she should not be resentenced pursuant to the DVSJA (*see People v Rangel*, 195 AD3d 541, 542 [1st Dept 2021], *lv denied* 37 NY3d 1098 [2021]).

Finally, we note that our affirmance of the order on the aforementioned ground does not violate CPL 470.15 (1). The Court of Appeals has construed that statute as "a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see People v Butler*, 41 NY3d 186, 199 [2023]; *People v Nicholson*, 26 NY3d 813, 825 [2016]). The statute thus "bars [the Appellate Division] from affirming a judgment, sentence or order on a ground not decided *adversely* to the appellant by the trial court" (*People v Concepcion*, 17 NY3d 192, 195 [2011]; *see Nicholson*, 26 NY3d at 825). Consequently, "*LaFontaine* and its progeny preclude our review of an entirely distinct alternative ground for affirmance which the court of first instance did not decide adversely to the appellant" (*People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]). Critically, however, in cases involving consideration of "a single multipronged legal ruling" rather than a "separate and analytically distinct" alternative ground for affirmance that the trial court did not decide adversely to the appellant, *LaFontaine* and

its progeny do not preclude our review of all aspects of the ruling even when the trial court did not address a particular prong thereof (*id.*; *see People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Case*, 197 AD3d 985, 986 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]).

Here, the court's determination whether defendant should be resentenced pursuant to the DVSJA (*see* CPL 440.47; Penal Law § 60.12) involves "a single multipronged legal ruling" (*Garrett*, 23 NY3d at 885 n 2; *see* Penal Law § 60.12 [1]; *Brenda WW.*, 222 AD3d at 1193; *Liz L.*, 221 AD3d at 1290-1291; *Addimando*, 197 AD3d at 111). Thus, our determination affirming the order on the ground that defendant did not fulfill the third prong of the statutory analysis, which the court did not address given its determination on the second prong, does not constitute "the type of appellate overreaching prohibited by CPL 470.15 (1)" because such affirmance is not "on grounds explicitly different from those of the trial court, or on grounds that were clearly resolved in a defendant's favor" (*Nicholson*, 26 NY3d at 826; *see Garrett*, 23 NY3d at 885 n 2; *Reynolds*, 211 AD3d at 1494; *Case*, 197 AD3d at 986).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

495

KA 23-00631

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIRK ASHTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 23, 2022. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree (7 counts), course of sexual conduct against a child in the second degree (7 counts) and endangering the welfare of a child (10 counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of 7 counts of sexual abuse in the first degree (Penal Law § 130.65 [4]), 7 counts of course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]) and 10 counts of endangering the welfare of a child (EWOC) (§ 260.10 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict following the same jury trial of 4 counts of sexual abuse in the first degree (§ 130.65 [4]), 10 counts of course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]) and 8 counts of EWOC (§ 260.10 [1]). The convictions arise from allegations that defendant, during the years from 2012 to 2021 and while employed as a principal of an elementary school, sexually abused 26 boys who attended the school.

Defendant contends that Supreme Court erred in failing to discharge a juror as "grossly unqualified," or at least conduct an inquiry of the juror, after the juror was observed allegedly sleeping during a readback of testimony during jury deliberations (*see* CPL 270.35 [1]). We reject that contention. " 'A determination whether a juror is unavailable or grossly unqualified, and subsequently to discharge such a juror, is left to the broad discretion of the court' " (*People v Jean-Philippe*, 101 AD3d 1582, 1582 [4th Dept

2012]). Here, defense counsel brought to the court's attention that, during the readback of testimony, he observed a juror who had to be woken by the court. The court stated that it was watching "pretty carefully" and observed the juror's head nodding a few times. The court stopped the court reporter during the readback and, after that point, the juror never nodded again. The court also noted for the record that the juror heard the same testimony during the trial. "Inasmuch as 'the court had the benefit of its own observations, further inquiry was not required' " and the court did not abuse its discretion in not disqualifying the juror (*People v Hurst*, 113 AD3d 1119, 1121 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014], *reconsideration denied* 23 NY3d 1021 [2014]; *see People v Moore*, 242 AD2d 882, 882 [4th Dept 1997], *lv denied* 91 NY2d 835 [1997]).

Defendant failed to preserve for our review his further contention that he was denied a fair trial based on the testimony of an expert with respect to child sexual abuse accommodation syndrome (CSAAS) (*see People v Goupil*, 104 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 21 NY3d 943 [2013]). In any event, that contention is without merit. "[E]xpert testimony concerning CSAAS 'is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred' " (*People v Lathrop*, 171 AD3d 1473, 1473 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]). Here, the expert's generalized testimony regarding grooming and the principal-student relationship, which provided further context and support for his explanation of CSAAS that child victims exhibit secrecy and helplessness, did not exceed permissible bounds (*see People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; *Lathrop*, 171 AD3d at 1473-1474).

We reject defendant's contention that three of the EWOC counts were dismissed by operation of law. CPL 300.40 (7) provides that any count of an indictment not submitted to the jury is deemed to have been dismissed by the court. While the court failed to charge the jury with respect to those three specific counts, the jury was charged on the material principles for the counts, the counts were submitted to the jury on the verdict sheet and the jury reached a verdict on them (*cf. People v Williams*, 133 AD2d 717, 718-719 [2d Dept 1987]; *see generally People v Faux*, 124 AD2d 20, 22 [4th Dept 1987], *lv denied* 69 NY2d 827 [1987]).

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

496

KA 23-01744

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIRK ASHTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered November 23, 2022. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree (4 counts), course of sexual conduct against a child in the second degree (10 counts) and endangering the welfare of a child (8 counts).

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

Same memorandum as in *People v Ashton* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

497

KA 23-00978

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE D. BAKER, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE CALLANAN, ACTING DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered April 5, 2023. The judgment convicted defendant upon a guilty plea of sexual abuse in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant contends that, contrary to County Court's determination in denying his motion to dismiss the indictment pursuant to CPL 30.30, the People failed to show that they had exercised due diligence and made reasonable efforts to identify mandatory discovery prior to filing their initial certificate of compliance (COC), filed in April 2022, and supplemental COC, filed in July 2022, and therefore the COCs were not proper and the People's declaration of readiness at each of those times was illusory. We agree.

Defendant was arrested on February 1, 2022, and charged, by felony complaint, with course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), for allegedly engaging in various acts of sexual contact with the victim from 2016 until the summer of 2021. On April 26, 2022, the People filed a COC certifying that they had complied with their discovery obligations under CPL article 245 and declaring that they were ready for trial. In July 2022, defendant was charged, by indictment, with multiple felonies. On July 22, 2022, the People filed a supplemental COC, again certifying that they had complied with their discovery obligations and declaring readiness for trial.

In September 2022, a new prosecutor was assigned to the case and

provided defendant, for the first time, with the body-worn camera footage from the date of defendant's arrest. Thereafter, on September 20, defendant moved for an order striking the People's COCs as invalid pursuant to CPL 30.30 (5), an order finding that the People had not complied with their discovery obligations under CPL article 245, and an order dismissing the indictment pursuant to CPL 30.30.

On September 27, 2022, the People turned over additional discovery materials consisting of a forensic report, detailing the results of a search of electronics taken from defendant's home during the execution of a search warrant, and the disciplinary records of nine of the law enforcement "officers listed in discovery." The People also filed a response to defendant's motion to dismiss, conceding that they had failed to turn over several items that CPL article 245 mandated be turned over in discovery, but contending that they had acted in good faith and reasonably under the circumstances and that the "minor oversights" should not invalidate their April and July 2022 COCs. After oral argument, the court denied the motion, ruling that the July 2022 COC was valid.

Initially, we reject the People's contention that defendant forfeited his right to contest the denial of his statutory speedy trial motion by pleading guilty (*see* CPL 30.30 [6]; *People v Gaskin*, 214 AD3d 1353, 1353-1355 [4th Dept 2023]).

"In felony cases such as this one, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (CPL 30.30 [1] [a]). Whether the People have satisfied [that] obligation is generally determined by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]).

"Any statement of trial readiness must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL] 245.20" (CPL 30.30 [5]) and, "[n]otwithstanding the provisions of any other law" and "absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of [CPL] 30.30 . . . until it has filed a proper certificate pursuant to [CPL 245.50 (1)]" (CPL 245.50 [3]; *see People v Bay*, 41 NY3d 200, 209-210 [2023]). In sum, "CPL 245.50 (3) and CPL 30.30 (5), taken together, . . . require that the People file a proper COC reflecting that they have complied with their disclosure obligations before they may be deemed ready for trial" (*Bay*, 41 NY3d at 213-214). The People are thus required, in the COC, to "state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" and to "identify the

items provided" (CPL 245.50 [1]). "CPL 245.60 imposes a continuing duty to disclose, and when the People provide discovery after a COC has been filed, they must file a supplemental COC" (*Bay*, 41 NY3d at 209; *see* CPL 245.50 [1]).

Consequently, "[u]nder the terms of the statute, the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211, quoting CPL 245.50 [1]; *see also* CPL 245.20 [2]; 245.50 [3]). "Although the statute nowhere defines 'due diligence,' it is a familiar and flexible standard that requires the People 'to make reasonable efforts' to comply with statutory directives" (*Bay*, 41 NY3d at 211). "Reasonableness, then, is the touchstone" (*id.* at 211-212). "An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*id.* at 212). Although "[t]here is no rule of 'strict liability' " and thus "the statute does not require or anticipate a 'perfect prosecutor[,]' . . . the plain terms of the statute make clear that while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.*). In assessing due diligence, "courts should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*). "Although belated disclosure will not necessarily establish a lack of due diligence or render an initial COC improper, post-filing disclosure and a supplemental COC cannot compensate for a failure to exercise diligence before the initial COC is filed" (*id.*).

Where, as here, "a defendant bring[s] a CPL 30.30 motion to dismiss on the ground that the People failed to exercise due diligence and therefore improperly filed a COC, the People bear the burden of establishing that they did, in fact, exercise due diligence and ma[k]e reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*id.* at 213). "If the prosecution fails to make such a showing, the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed" (*id.*).

Here, upon our review of the circumstances presented, including the illustrative list of relevant factors set out by the Court of Appeals in *Bay*, we conclude that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the July 2022 COC (*see id.* at 215-216). The People failed to put forward any evidence of their efforts "to ascertain the existence" of either the forensic report or

the disciplinary records prior to filing the July 2022 COC (*id.* at 211, quoting CPL 245.50 [1]). Rather, the People's submissions established that, *after* they became aware of the materials' existence, they promptly provided them to defense counsel—an assertion that is undisputed. As the Court of Appeals stated in *Bay*, "post-filing disclosure and a supplemental COC cannot compensate for a failure to exercise diligence *before* the initial COC is filed" (*id.* at 212 [emphasis added]). We note in particular that the forensic report was completed more than six months before, upon the case being assigned to a new prosecutor, it was discovered and provided (*see id.*).

The People failed to preserve for our review their contention that defendant failed to comply with his responsibility to notify the People of any deficiency in their discovery response inasmuch as the People did not raise it in the trial court (*see People v Minwalkulet*, 198 AD3d 1290, 1291 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]; *People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]) and, thus, this Court has no power to review that contention (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]).

Inasmuch as the court determined that the July 2022 COC was proper and thus that the People's statement of readiness at that time was not illusory, the court did not rule on whether the time chargeable to the People exceeded the applicable CPL 30.30 period. Where, as here, " 'the record does not reflect that the court ruled on a part of a motion, the failure to rule on that part cannot be deemed a denial thereof' " (*People v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]; *see generally Concepcion*, 17 NY3d at 197-198). We therefore hold the case, reserve decision, and remit the matter to County Court to determine whether the People were ready within the requisite time period (*see* CPL 30.30 [1] [a]; *Session*, 206 AD3d at 1682).

All concur except SMITH, J.P., and GREENWOOD, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. The sole issue raised on appeal is whether the People " 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*People v Bay*, 41 NY3d 200, 211 [2023], quoting CPL 245.50 [1]). The belated items of discovery turned over by the People consisted of a five-page document of the forensic analysis of items seized from defendant pursuant to a search warrant, including his computer, and disciplinary records of nine police officers involved in the case. The majority concludes that, solely because these missing items would have been obvious to a prosecutor reviewing the case, the People failed to meet their burden of establishing that they exercised due diligence prior to filing the July 2022 Certificate of Compliance (COC). In our view, the majority has failed to make "a holistic assessment of the People's efforts to comply with the automatic discovery provisions" (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024]), and instead has imposed the very same "rule of 'strict liability' " that the Court of Appeals explicitly instructed courts not to apply (*Bay*, 41 NY3d at 212).

As the Court of Appeals explained in *People v Bay*, "[r]easonableness . . . is the touchstone" (*id.* at 211-212) in determining whether the People have complied with their discovery obligations. The Court clarified that an analysis of whether the People made reasonable efforts is fundamentally case-specific and the statute does not require or anticipate a " 'perfect prosecutor' " (*id.* at 212). As the majority notes, the Court of Appeals set forth a non-exhaustive list of factors to consider when determining whether the People exercised due diligence, including "the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*). In our view, the majority fails to apply those factors properly.

Here, the prosecutor candidly admitted that the failure to turn over the forensic report and police disciplinary records was an oversight. Contrary to the majority's reasoning, however, that does not end the analysis. Considering the other *Bay* factors, as well as other relevant factors in this case-specific analysis, we conclude that the People met their burden of showing that they exercised due diligence. The People turned over to the defense many items of discovery, which County Court described as "voluminous." It included certain body-worn camera footage, the criminal history of a prosecution witness, grand jury minutes, photographs, search warrants, case paperwork, audio recordings of defendant's interview with the police, 911 documents and recordings, defendant's criminal history, and a forensic interview of the victim. In addition, unlike in *Bay*, the prosecutor here never erroneously advised defendant or the court that the forensic report and disciplinary records of the police officers in the People's possession did not exist (*cf. id.* at 215). The record shows that the People simply failed to recognize that those items had not been turned over. The record further shows that the defense never alerted the People to the missing items of discovery (*see generally* CPL 245.50 [4]).

We therefore conclude, after considering the *Bay* factors and the circumstances of this case, that the court did not err in concluding that the People met their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the July 2022 COC (*see generally Bay*, 41 NY3d at 211). The record establishes that "the People's failure to disclose [the missing items of discovery] in a timely fashion was inadvertent and without bad faith or a lack of due diligence" (*People v Deas*, 226 AD3d 823, 826 [2d Dept 2024]; *see People v Williams*, 224 AD3d 998, 1007 [3d Dept 2024], *lv denied* — NY3d — [2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

498

KA 23-02068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN J. MOTELL, IV, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Spencer J. Ludington, A.J.), rendered January 11, 2018. The judgment convicted defendant upon his plea of guilty of rape in the third degree (two counts) and sexual abuse 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 two counts of rape in the third degree (Penal Law § 130.25 [3]) and one count of sexual abuse in the first degree (§ 130.65 [1]). We agree with defendant that he did not validly waive his right to appeal. County 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 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 Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Phillips*, 221 AD3d 1501, 1501-1502 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]).

By failing to move to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that the guilty plea was not knowingly, intelligently, and voluntarily entered because he was not advised of the sex offender registration fee (*see People v Cornish*, 214 AD3d 1456, 1456 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]; *People v Gerald*, 103 AD3d 1249, 1250 [4th Dept 2013]) or the possibility of civil confinement pursuant to the Sex Offender Management and Treatment Act (Mental Hygiene Law

§ 10.01 *et seq.* [SOMTA]) (*see People v Rios*, 224 AD3d 1284, 1285 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]). In any event, his contention is without merit. Contrary to defendant's contention, the sex offender registration fee was not a core component of the sentence (*see People v Hoti*, 12 NY3d 742, 743 [2009]; *People v Martinezdiaz*, 162 AD3d 904, 904 [2d Dept 2018], *lv denied* 32 NY3d 1005 [2018]; *see generally People v Harnett*, 16 NY3d 200, 205 [2011]) and, moreover, he was advised of the fee during the plea proceeding through statements made by the court and through the written sentence agreement (sentence agreement). Similarly, defendant was aware through the sentence agreement of the possibility of civil confinement pursuant to SOMTA.

Defendant also contends that the plea was not knowingly, intelligently, and voluntarily entered because the court ordered him to pay restitution that was not part of the plea agreement without affording him the opportunity to withdraw his plea. The People requested restitution stemming from the victim's visit to a hospital after one incident of rape. Defendant objected to restitution only on the ground that the hospital records did not support the claim that defendant's conduct was the cause of the victim's visit to the hospital. By failing to object to the sentence on the ground that restitution was not part of the plea agreement or to move to withdraw the plea, defendant failed to preserve his contention for our review (*see People v Predmore*, 68 AD3d 1755, 1756 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010]; *People v Lovett*, 8 AD3d 1007, 1008 [4th Dept 2004], *lv denied* 3 NY3d 677 [2004]). We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's further contention, the People met their burden of establishing the victim's out-of-pocket loss by a preponderance of the evidence (*see* CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221 [2007]).

Defendant contends that he was denied effective assistance of counsel because defense counsel failed to make any arguments during the *Huntley* hearing. Even assuming, arguendo, that defendant's contention survives his guilty plea (*see People v Clark*, 191 AD3d 1485, 1486 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Glowacki*, 159 AD3d 1585, 1586 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]), we reject that contention inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]). Defendant's further contention that he was denied effective assistance of counsel because counsel failed to advise him of the possibility of civil confinement under SOMTA is without merit inasmuch as the sentence agreement included that possibility. Defendant signed the sentence agreement and acknowledged during the plea colloquy that he reviewed it with his attorney.

Contrary to defendant's contention, the court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Hall*, 221 AD3d 1600, 1600-1601 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]; *People v Cepeda*, 219 AD3d 1672, 1672 [4th Dept 2023]). Additionally, 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 that status (*see Cepeda*, 219 AD3d at 1672; *People v Shrubsall*, 167 AD2d 929, 930 [4th Dept 1990]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

505

CA 23-01518

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

CAMPUS SQUARE, LLC, AND MCGUIRE CAMPUS SQUARE, LLC,
PLAINTIFFS-PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NORTH-ELLICOTT MANAGEMENT, INC.,
DEFENDANT-RESPONDENT-APPELLANT,
AND NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, DEFENDANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFFS-PETITIONERS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered February 27, 2023. The order and judgment denied the motion of defendant-respondent North-Ellicott Management, Inc. for summary judgment, granted the motion of plaintiffs-petitioners for summary judgment and declared that North-Ellicott Management, Inc. is no longer a party to a certain brownfield cleanup agreement and directed defendant-respondent New York State Department of Environmental Conservation to remove North-Ellicott Management, Inc., as an applicant on or party to that agreement.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, plaintiffs-petitioners' motion is denied, the declaration and the directive are vacated, the motion of defendant-respondent North-Ellicott Management, Inc. is granted, and judgment is granted in favor of that defendant-respondent as follows:

> It is ADJUDGED and DECLARED that plaintiffs-petitioners are not entitled in this action and proceeding to judicial modification of the subject agreement to remove North-Ellicott Management, Inc. as a party thereto.

Memorandum: Plaintiff-petitioner Campus Square, LLC, whose majority membership interest owner and managing member is plaintiff-petitioner McGuire Campus Square, LLC (collectively, Campus Square), and defendant-respondent North-Ellicott Management, Inc. (NEM), as applicants, entered into a brownfield cleanup agreement (BCA) with

defendant-respondent New York State Department of Environmental Conservation (DEC) as part of an environmental remediation and development project at a site in Buffalo (*see* ECL 27-1405 [1], [4]). Campus Square is a developer on the project and, at the time of the application, NEM was an active part of the development team that was intended to take the lead in developing and ultimately operating the affordable housing component of the project. The real property underlying the project site was, at that time, owned by an entity controlled by an individual who also owns and controls NEM.

Under the BCA, Campus Square and NEM agreed to abide by the Standard Clauses for All New York State Brownfield Site Cleanup Agreements (Standard Clauses), which were made part of the agreement. In pertinent part, the Standard Clauses provided, with an exception not relevant here, that the BCA would be enforceable as a contractual agreement under the laws of the State of New York. The terms of the BCA constituted the complete and entire agreement between the applicants and the DEC concerning the implementation of the activities required by the agreement, and no term, condition, understanding or agreement purporting to modify or vary any term of the BCA would be binding unless made in writing and subscribed by the party to be bound. If an applicant desired that any provision of the BCA be changed, the applicant was required to make a timely written application to the DEC. Any change to the parties to the BCA would be subject to approval by the DEC after the submission of an application acceptable to the DEC.

Campus Square and NEM agreed to provide access to the site, as well as proof of access, upon the DEC's request, if the applicant was not the owner of the site. The DEC reserved the right to periodically inspect the site to ensure that use of the property complied with the terms and conditions of the BCA. The Standard Clauses provided that failure to provide access "may result in termination" of the BCA pursuant to the provisions of a particular paragraph. That paragraph, in turn, provided that an applicant or the DEC could terminate the BCA consistent with regulations that set forth the notice requirements for termination of the agreement (*see* 6 NYCRR 375-3.5 [b]-[d]). The Standard Clauses further provided for a dispute resolution procedure under certain circumstances.

It is uncontested that, a few years after entering into the BCA, Campus Square and NEM experienced a complete breakdown of the relationship. Campus Square thereafter took the position that NEM had lost any legal interest in the site after its mortgages on the real property were foreclosed upon, and thus NEM could no longer be part of the project. NEM countered that Campus Square forced it off the project and denied it access to the site, thereby preventing it from fulfilling its obligations.

Campus Square subsequently commenced, in effect, a hybrid declaratory judgment action and CPLR article 78 proceeding seeking a judgment declaring that NEM is no longer an applicant on the BCA and directing the DEC to remove NEM as an applicant thereon. Campus Square alleged that, following the breakdown in the relationship, NEM

was no longer part of the development team for the project. According to Campus Square, NEM had no ownership interest in the site, no lawful authority to make legal decisions with regard to the project or the site, no lawful right to enter upon the site, and no actual or apparent authority to control or ensure compliance with the BCA. Campus Square asserted that the BCA required that every applicant demonstrate the ability to access the site and be able to effectuate its obligations to develop and implement the needed environmental remedies, and that an inability to comply with either of those requirements could result in termination of the BCA. Inasmuch as NEM had no right to access the site and no ability to develop or implement any environmental remedies, Campus Square reasoned that NEM had no ability to participate in the BCA. Campus Square alleged that NEM had nonetheless been using its status as an applicant on the BCA to stymie the project and prevent Campus Square from completing the cleanup. Campus Square also alleged upon information and belief that the DEC, having been advised of NEM's inability to control or participate in the project, had no objection to the removal of NEM from the BCA.

NEM answered by, in relevant part, denying Campus Square's substantive allegations and asserting various affirmative defenses. The DEC also filed an answer, of which we take judicial notice via NYSCEF (*see Matter of Estate of Clifford*, 204 AD3d 1397, 1397 [4th Dept 2022]), wherein, in response to Campus Square's allegation that the DEC had no objection to removal of NEM from the BCA, the DEC affirmatively stated that it took no position with respect to NEM's participation in the BCA, averred that it had an interest in achieving the objectives of the BCA, and otherwise denied the allegation.

NEM moved for summary judgment dismissing the complaint-petition against it on the ground that, as a result of a release in a stipulation of settlement agreement in prior litigation arising from the project, Campus Square's action against NEM was barred. Campus Square moved for summary judgment on its complaint-petition. Campus Square contended, in pertinent part, that NEM currently had no ownership interest in the site, no lawful right to enter upon the site, and no actual or apparent authority to control or ensure compliance with the BCA, and that NEM was therefore in violation of the paragraph of the Standard Clauses requiring that an applicant provide access to the site and proof of access thereto if the applicant was not an owner. Consequently, Campus Square contended that NEM was not eligible to participate in the program and must be removed from the BCA. Supreme Court denied NEM's motion, granted Campus Square's motion, declared that NEM is no longer an applicant on or party to the BCA, and directed the DEC to remove NEM as an applicant on or party to the BCA. NEM now appeals.

NEM first contends that, contrary to the court's determination, it is entitled to summary judgment dismissing the action against it because, as a result of the release in the stipulation of settlement agreement in the prior litigation arising from the project, Campus Square's action against NEM is barred. We reject that contention.

" 'Stipulations of settlement are essentially contracts and will

be construed in accordance with contract principles and the parties' intent' " (*Drew v Prudential Ins. Co. of Am.*, 224 AD2d 1036, 1036 [4th Dept 1996]; *see Matter of Ecogen Wind LLC v Town of Prattsburgh Town Bd.*, 112 AD3d 1282, 1284 [4th Dept 2013]). "When [such] an agreement between parties is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence" (*Drew*, 224 AD2d at 1036; *see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). A settlement agreement may contain a condition precedent that must be satisfied before a provision of the settlement agreement becomes effective (*see Robinson v Day*, 182 AD3d 528, 529 [1st Dept 2020]; *see generally Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). "Express conditions [precedent] are those agreed to and imposed by the parties themselves" and "must be literally performed" (*Oppenheimer & Co.*, 86 NY2d at 690).

Here, even assuming, arguendo, that Campus Square is included among those that would be bound by the release clause in favor of NEM, we agree with Campus Square that the present litigation is not barred by that clause of the settlement agreement inasmuch as NEM failed to satisfy the conditions precedent to render the release effective. Indeed, upon "[r]eading the [settlement] agreement as a whole and avoiding an interpretation that renders any portion of it meaningless," we conclude that, "contrary to [NEM's] contention that the [release] became effective upon the signing of the settlement agreement, the [release] does not become effective until the conditions precedent are satisfied" and, here, NEM failed to satisfy those conditions precedent (*Robinson*, 182 AD3d at 529).

NEM next contends that, even if the release does not apply to bar the action, Campus Square is still not entitled to the relief it seeks—i.e., summary judgment declaring that NEM is no longer an applicant on or party to the BCA and directing that the DEC remove NEM as an applicant on or party to the BCA—because the BCA is a separate contract that controls the rights and duties among the parties thereto and survives the dissolution of the working relationship between the applicants. Campus Square responds that the DEC's removal of NEM as an applicant to the BCA is the proper result because NEM lacks the legal ability to participate in any remediation and has used its continued status as an applicant to stymie the project.

"In 2003, the Legislature enacted a new title 14 of article 27 of the New York State Environmental Conservation Law to promote the voluntary cleanup, reuse and redevelopment of brownfields through the [brownfield cleanup program], to be administered by [the] DEC" (*Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dept. of Envtl. Conservation*, 14 NY3d 161, 164 [2010]; *see* ECL 27-1403). An applicant—i.e., "a person whose request to participate in the brownfield cleanup program . . . has been accepted by the [DEC]" (ECL 27-1405 [1])—"must enter into an agreement with DEC to conduct an investigation to assess the nature and extent of contamination at the brownfield site . . . , and must devise and carry out a remedial program that [the] DEC judges to be protective of public health and the environment" (*Lighthouse Pointe Prop. Assoc. LLC*, 14 NY3d at 166,

citing ECL 27-1409, 27-1411, 27-1415 [1], [2] [internal quotation marks omitted]).

Such a "[b]rownfield site cleanup agreement" is defined as "an agreement executed in accordance with [ECL] 27-1409 . . . by an applicant and the [DEC] for the purpose of completing a brownfield site remedial program" (ECL 27-1405 [4]; *see* ECL 27-1409). The statute requires that a BCA include, among other things, a provision "authorizing the [DEC] to terminate [the BCA] at any time during the implementation of such agreement if the applicant implementing such agreement fails to substantially comply with such agreement's terms and conditions" (ECL 27-1409 [5]; *see* ECL 27-1409 [12]; *Matter of Hamil Stratten Props., LLC v New York State Dept. of Envtl. Conservation*, 79 AD3d 747, 748 [2d Dept 2010]). Such an agreement may also include "other conditions considered necessary by the [DEC] concerning the effective and efficient implementation" of the brownfield cleanup program (ECL 27-1409 [11]). We reiterate that the Standard Clauses in the BCA currently before us provide, as particularly relevant here, that the BCA shall be enforceable as a contractual agreement under the laws of the State of New York.

With respect to those applicable principles of contract law, it is fundamental that courts "will enforce the bargain that contracting parties have freely made, [a]bsent some violation of law or transgression of a strong public policy" (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 354 [2020] [internal quotation marks omitted]). Thus, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The parties may even agree to contract terms that "provide for modification [of the agreement], and contracts which provide for subsequent changes therein are not unusual" (22A NY Jur 2d, Contracts § 475). However, "[m]odification *by the court* is, of course, not legally available in a contract action" (*Didley v Didley*, 194 AD2d 7, 11 [4th Dept 1993] [emphasis added]). "[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 38 NY3d 169, 178 [2022] [internal quotation marks omitted]). Additionally, where, as here, "a contract to which the State is a party comes before the courts[,] the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law and [t]he rules of construction which apply between persons apply to the State" (*Village Nursing Home v Axelrod*, 146 AD2d 382, 392 [1st Dept 1989] [internal quotation marks omitted]; *see Hollerbach v United States*, 233 US 165, 171-172 [1914]; *People ex rel. Graves v Sohmer*, 207 NY 450, 458 [1913], *rearg denied* 208 NY 581 [1913]).

Here, NEM is indisputably correct that the BCA is a standalone contract under which the parties thereto have enforceable rights and obligations. The BCA itself provides that it shall be enforceable as a contractual agreement under the laws of New York, and both the

statute and common law confirm that understanding of the BCA as an enforceable contract between Campus Square, NEM, and the DEC (*see* ECL 27-1405 [4]; 27-1409; *Lighthouse Pointe Prop. Assoc. LLC*, 14 NY3d at 166).

Campus Square's complaint-petition, summary judgment motion, and argument on appeal are premised on the fact that the BCA requires that an applicant provide access to the site, as well as proof of access, upon the DEC's request, if the applicant is not the owner of the site. In Campus Square's view, inasmuch as NEM no longer has the ability to provide such access, it should no longer be a party to the BCA. As even Campus Square acknowledges, though, the remedy provided by the BCA for failure to provide the requisite access is potential termination of the BCA by the DEC pursuant to the applicable paragraph of the Standard Clauses (*see generally* 6 NYCRR 375-3.5 [b]-[d]). *Termination* of the BCA is, however, *not* the remedy that Campus Square has pursued. Campus Square has presumably not pursued termination of the BCA because, according to the DEC's representations in this litigation, such termination would result in forfeiture of tax credits associated with any monies already spent by the parties on the project.

Campus Square has instead sought—as the court aptly described it in its bench decision—"to judicially amend the agreement to remove NEM as an applicant from the [BCA]." However, contrary to Campus Square's position and the court's determination, "[m]odification [of an agreement] *by the court* is . . . not legally available in a contract action" (*Didley*, 194 AD2d at 11 [emphasis added]). Campus Square has not pointed to any provision of the BCA that would authorize, in the event of a party's breach or inability to perform, the removal of that party from the agreement or termination of the BCA with respect to that party only (*see generally Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014]). If the parties had included such a provision in the BCA, litigation seeking the remedy of judicial enforcement of that provision would be appropriate, but the relief sought by Campus Square and granted by the court here—i.e., removal of an applicant—does not purport to enforce the terms of any provision of the BCA.

The BCA nonetheless does contemplate that the parties to the agreement may be changed. Specifically, the BCA provides in relevant part that "[a]ny change to parties pursuant to this [a]greement . . . is subject to approval by the [DEC], after submittal of an application acceptable to the [DEC]." The DEC has promulgated explanatory and advisory guidance that, among several other things, sets forth the DEC's policy with respect to amendments to a BCA (*see generally Matter of Destiny USA Dev., LLC v New York State Dept. of Envtl. Conservation*, 63 AD3d 1568, 1571 [4th Dept 2009], *lv denied* 14 NY3d 703 [2010]). The guidance provides in particular that "[m]odifications to BCAs may be necessary during a . . . project for various reasons, includ[ing] . . . to add or change applicants" (DEC Program Policy DER-32 / Brownfield Cleanup Program Applications and Agreements, available at https://extapps.dec.ny.gov/docs/remediation_hudson_pdf/der32.pdf

[last accessed June 20, 2024]). In the DEC's view, "[t]ypically, modifications to BCAs to add, substitute, or remove an applicant on the BCA will be considered minor modifications" (*id.*). The DEC determines whether an application to amend a BCA is major or minor on a case-by-case basis, and an application for an amendment considered minor does not require submission of a new BCA application and will be decided by the DEC within 45 days of receipt (*see id.*). With certain exceptions for corrections to a BCA that are inapplicable here, in order "[t]o amend a BCA, an [a]pplicant must submit an amendment request using the form developed by [the] DEC" available on the DEC's website (*id.*; *see* NY State Dept. of Envtl. Conservation, Brownfield Cleanup Program [BCP] Application to Amend Brownfield Cleanup Agreement and Amendment, available at https://extapps.dec.ny.gov/docs/remediation_hudson_pdf/bcaamendapp.pdf [last accessed June 20, 2024]).

Inasmuch as neither the BCA nor the guidance seems to preclude one applicant from applying to modify the agreement by removing another applicant, it is uncertain whether the DEC, despite some of its representations to the contrary in this litigation, would entertain such an application. In any event, it is unclear whether Campus Square has applied to the DEC for such relief, nor does it appear that Campus Square has sought injunctive relief to prevent NEM's alleged interference with the project. With respect to the relief sought in the present action and proceeding, however, we conclude that Campus Square is not entitled to court-ordered removal of an applicant from the duly executed BCA.

In light of the foregoing, we reverse the order and judgment, deny Campus Square's motion, vacate the declaration and the directive, grant NEM's motion, and grant judgment in favor of NEM by adjudging and declaring that Campus Square is not entitled in this action and proceeding to judicial modification of the subject agreement to remove NEM as a party thereto.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

507

CA 23-00640

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

PB-33 DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY J. RUDOLPH, IN HIS OFFICIAL CAPACITY AS WYOMING COUNTY SHERIFF, ET AL., DEFENDANTS, VILLAGE OF WARSAW AND WARSAW VILLAGE POLICE DEPARTMENT, DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (HEATHER DECHERT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS & PAOLICELLI LLP, NEW YORK CITY (ARI L. TAUB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Deborah A. Chimes, J.), entered March 14, 2023. The order, among other things, granted plaintiff's motion insofar as it sought leave to reargue, and upon reargument, denied in part the motion of defendants Village of Warsaw and Warsaw Village Police Department seeking summary judgment dismissing plaintiff's amended complaint against them.

It is hereby ORDERED that said appeal insofar as taken by defendant Warsaw Village Police Department is unanimously dismissed and the order is modified on the law by granting that part of the motion of defendants Village of Warsaw and Warsaw Village Police Department seeking summary judgment dismissing the second cause of action against the Village of Warsaw and dismissing that cause of action against that defendant, and as modified the order is affirmed without costs.

Memorandum: In July 2020, plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that he was sexually abused by an employee (hereinafter employee) of defendant Wyoming County Sheriff's Department (WCSD) and defendant Genesee Valley BOCES (GVB), from 1990 to 1992. Initially, plaintiff named WCSD, GVB, Gregory J. Rudolph, in his official capacity as Wyoming County Sheriff, and Kevin MacDonald, in his official capacity as District Superintendent for the GVB, as defendants. During plaintiff's July 2021 deposition testimony, however, it became clear that the employee was also employed by defendant Warsaw Village Police Department (WVPD) during the relevant time period. On October 21, 2021, plaintiff filed an amended complaint naming defendant Village of Warsaw (Village) and WVPD (collectively, Warsaw defendants) as

additional defendants. The Warsaw defendants moved for, inter alia, summary judgment dismissing the amended complaint against them, contending that the complaint was untimely. Supreme Court granted the motion and dismissed the complaint against the Warsaw defendants as untimely. Plaintiff moved for leave to reargue and renew his opposition to the Warsaw defendants' motion. The court, inter alia, granted plaintiff's motion insofar as it sought leave to reargue and, upon reargument, denied the Warsaw defendants' motion to the extent that it sought summary judgment dismissing the amended complaint on timeliness grounds and to the extent that it sought summary judgment dismissing certain causes of action against the Village. The Warsaw defendants appeal from the order.

Initially, the appeal must be dismissed insofar as taken by the WVPD. The court dismissed plaintiff's claims against the WVPD, and therefore the WVPD is not aggrieved by the order (*see* CPLR 5511; *Tomaszewski v Seewaldt*, 11 AD3d 995, 995 [4th Dept 2004]).

The Village contends that the court erred in denying the motion insofar as it sought summary judgment dismissing the amended complaint as time-barred, because the Executive Orders issued by then-Governor Andrew Cuomo during the COVID-19 pandemic did not toll the statute of limitations contained within CPLR 214-g. We reject that contention. "In 2019, the CVA became effective and originally permitted actions to be commenced between August 14, 2019, and August 14, 2020" (*Bethea v Children's Vil.*, 225 AD3d 580, 581 [2d Dept 2024]; *see* CPLR 214-g). "On August 3, 2020, the CVA was amended so as to extend the revival window for one additional year, until August 14, 2021" (*Bethea*, 225 AD3d at 581; *see* Bill Jacket, L 2020, ch 130 at 1). "After the date of this amendment, however, former Governor Andrew Cuomo, following prior executive orders issued amidst the COVID-19 pandemic, continued to issue executive orders that ultimately tolled the statute of limitations through November 3, 2020" (*Bethea*, 225 AD3d at 581; *see* Executive Order [A. Cuomo] Nos. 202.55.1 [9 NYCRR 8.202.55.1], 202.60 [9 NYCRR 8.202.60], 202.67 [9 NYCRR 8.202.67], 202.72 [9 NYCRR 8.202.72]).

Contrary to the Village's contention, "the executive orders issued subsequent to the CVA's amendment tolled the close of the CVA's revival window for 90 days, from August 14, 2021, until at least November 12, 2021" (*Bethea*, 225 AD3d at 581; *see Doe v Archdiocese of N.Y.*, 221 AD3d 451, 452 [1st Dept 2023]). Inasmuch as the instant action was commenced against the Warsaw defendants on October 21, 2021, it was timely commenced (*see Bethea*, 225 AD3d at 581; *Doe*, 221 AD3d at 452).

We agree with the Village and plaintiff correctly concedes, however, that the court erred in denying the Warsaw defendants' motion insofar as it sought summary judgment dismissing plaintiff's second cause of action against the Village, for breach of statutory duties to report certain abuse pursuant to Social Services Law former § 413 and Social Services Law § 420, because plaintiff was not an "abused child" under the Social Services Law. Although the Warsaw defendants did not raise that specific argument before the motion court, we may

"nevertheless address the contention . . . because the issue [raised therein] is one of law appearing on the face of the record that [plaintiff] could not have countered had it been raised in the court of first instance" (*Hoke v Hoke*, 27 AD3d 1055, 1055 [4th Dept 2006] [internal quotation marks omitted]; *see Tuttle v State Farm Mut. Auto. Ins. Co.*, 149 AD3d 1477, 1478 [4th Dept 2017]; *Henner v Everdry Mktg. & Mgt., Inc.*, 74 AD3d 1776, 1778 [4th Dept 2010]).

In his amended complaint, plaintiff alleges that the Warsaw defendants violated their statutory reporting duties under Social Services Law former § 413 by failing to report the abuse of plaintiff by the employee. In a decision released while this appeal was pending, we concluded, as other Departments of the Appellate Division had previously, that there is no statutory duty to report child abuse where the alleged abuser is neither a parent nor another person legally responsible for the abused child's care (*Solly v Pioneer Cent. Sch. Dist.*, 221 AD3d 1447, 1449 [4th Dept 2023]; *see Dolgas v Wales*, 215 AD3d 51, 59 [3d Dept 2023], *lv denied* 41 NY3d 904 [2024]; *Hanson v Hicksville Union Free Sch. Dist.*, 209 AD3d 629, 631 [2d Dept 2022]; *see generally Matter of Catherine G. v County of Essex*, 3 NY3d 175, 180 [2004]). In reaching that conclusion, we explained that the Social Services Law incorporated the definition of "abused child" in the Family Court Act (*see* Social Services Law former § 412 [1]), which in turn defined that term, as relevant there, as a child harmed by a "parent or other person legally responsible for [the child's] care" (Family Ct Act former § 1012 [e]; *see Solly*, 221 AD3d at 1449). The Family Court Act definition of an "abused child" does not encompass abuse by "persons who assume fleeting or temporary care of a child" (*Solly*, 221 AD3d at 1449 [internal quotation marks omitted]). Inasmuch as the employee, based on the allegations in the amended complaint, could not be the subject of a report for purposes of Social Services Law former § 413, the Warsaw defendants were not required to report any suspected abuse by him (*see Solly*, 221 AD3d at 1449; *Hanson*, 209 AD3d at 631).

We therefore modify the order by granting that part of the Warsaw defendants' motion seeking summary judgment dismissing the second cause of action against the Village and dismissing that cause of action against that defendant.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

509.1

TP 23-02069

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

IN THE MATTER OF JESSE PARSON, PETITIONER,

V MEMORANDUM AND ORDER

UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK, RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PETITIONER.

DAVID NOCENTI, OFFICE OF COURT ADMINISTRATION, NEW YORK CITY (NIAA C. DANIELS 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, Monroe County [Sam L. Valleriani, J.], entered October 4, 2023) to review a determination of respondent. The determination placed petitioner on probation for six months and suspended petitioner without pay for five days.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination finding him guilty of a disciplinary charge and imposing a penalty of a six-month probationary term and suspension without pay for five days. We conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-232 [1974]). Hearsay is admissible in administrative proceedings, "and if sufficiently relevant and probative may constitute substantial evidence" (*People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]; *see Matter of Gray v Adduci*, 73 NY2d 741, 742-743 [1988]). The hearsay testimony at the hearing was relevant and probative on the charge that petitioner engaged in misconduct against a female staff member that constituted

sexual harassment. We have considered petitioner's remaining contention and conclude that it is without merit.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

509

CA 23-01853

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

IN THE MATTER OF JAMES L. AND MICHELLE L.,
AS PARENTS AND NATURAL GUARDIANS OF THEIR SON,
J.L., A PERSON UNDER THE AGE OF 18,
AND LANDON GRAINY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

STARPOINT CENTRAL SCHOOL DISTRICT, BOARD OF
EDUCATION OF STARPOINT CENTRAL SCHOOL DISTRICT
AND DR. SEAN M. CROFT, SUPERINTENDENT OF SCHOOLS,
STARPOINT CENTRAL SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

GROSS SHUMAN P.C., BUFFALO (B. KEVIN BURKE, JR., OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 4, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul respondents' determination to remove two students from school on an emergency basis following allegations that they repeatedly engaged in the sexual assault of a wresting teammate during practices. Petitioners appeal from a judgment that dismissed their petition. We affirm.

Upon receiving credible allegations of sexual assault by two students, respondents provided a detailed factual recitation of the allegations against each student and determined that each student posed an immediate threat to the physical health and safety of other students (*see* 34 CFR 106.44 [c]). Contrary to petitioners' contention, upon our review of the record, we conclude that respondents' emergency removal determination is supported by a rational basis and is not arbitrary and capricious (*see generally Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Doe 1*

v Syracuse Univ., 188 AD3d 1570, 1575-1576 [4th Dept 2020], *lv denied* 37 NY3d 906 [2021]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

512

KA 21-01143

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN COLELLA, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU 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 (Deborah A. Haendiges, J.), rendered August 9, 2021. The judgment convicted defendant upon a jury verdict of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]) arising out of the theft of a vehicle. Viewing the evidence, including DNA evidence, in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that he received ineffective assistance of counsel. "What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation" (*People v Baldi*, 54 NY2d 137, 146 [1981]; *see People v Borcyk*, 184 AD3d 1183, 1183 [4th Dept 2020]). In order to establish that defense counsel's failure to make a particular pretrial motion constituted ineffective assistance of counsel, "defendant must show that the particular motion, if made, would have been successful and that defense counsel's failure to make that motion deprived him of meaningful representation" (*People v Marcial*, 41 AD3d 1308, 1308 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]; *see People v Riley*, 182 AD3d 1017, 1018 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020]; *see generally Baldi*, 54 NY2d at 147). It is well established that "a simple disagreement with strategies . . . weighed long after the trial, does not suffice" (*People v Benevento*, 91 NY2d 708, 713 [1998]) [internal quotation marks omitted]).

Here, the People's theory of the case was that defendant fled from a home in Holland, New York, after learning about the imminent execution of a parole violation warrant against him, and stole a vehicle that was parked in a driveway some two miles away. The stolen vehicle was recovered by the police the next morning in the City of Buffalo. A detective viewed surveillance video footage from a home that is across the street from where the vehicle was found and made a copy of it on a cell phone. A police report in the record indicates that the video footage showed a person parking and exiting the vehicle. The police report further notes that the person in the footage was "wearing a hooded shirt and dark pants." However, one of the prosecution witnesses had informed law enforcement, in text messages sent to 911 to report defendant's whereabouts, that defendant was wearing a gray T-shirt and gray jogging pants on the night in question. Both the footage and the police copy were lost or destroyed and therefore were never produced to defense counsel.

The attorney originally assigned to defendant's case filed an omnibus motion in which he moved for, inter alia, dismissal of the indictment under *Brady v Maryland* (373 US 83 [1963]) on the basis of the People's failure to turn over the footage or a copy. That attorney was subsequently relieved as counsel and replaced by a new assigned counsel (defense counsel). Defense counsel withdrew the former counsel's pretrial motion and subsequently entered into a stipulation with the prosecution whereby there would be no mention at trial of the surveillance footage. The stipulation was made by defense counsel over defendant's vehement objection. In a letter to defendant, defense counsel stated that his reason for drafting the stipulation was that "no description [had been given] of the individual who left the [vehicle]" and the jury might speculate as to whether defendant had appeared in the video.

We conclude that defendant established that defense counsel did not have a legitimate strategy for withdrawing the prior counsel's pretrial motion raising the *Brady* violation and entering into the stipulation and that a motion relating to the footage would have been successful. Pursuant to CPL 245.20 (1) (g) the People were required to provide "[a]ll tapes or other electronic recordings" relevant to the subject matter of the case that were "in the possession, custody or control of the prosecution or persons under the prosecution's direction or control." CPL 245.20 (2) and CPL 245.55 (1) further provide that all items and information in police possession are deemed to be in the People's possession. Thus, once the police made the copy of the video, the People had an obligation to preserve it (*see generally People v Kelly*, 62 NY2d 516, 520 [1984]).

Additionally, defense counsel's proffered strategic reasoning for the stipulation was faulty and therefore did not amount to "a reasonable and legitimate strategy under the circumstances" (*Benevento*, 91 NY2d at 713). Defense counsel had in his possession the police report indicating that the surveillance video showed a man with certain clothing park and leave the stolen vehicle. He also had information related to the witness's statement to law enforcement supporting the conclusion that defendant was wearing different

clothing on the night of the incident. Thus, defense counsel's proffered reasons—that "no description" had been given of the person leaving the vehicle and that the footage "completely contradict[ed]" defendant's claim of innocence—were incorrect and could not constitute a legitimate strategic reason for the stipulation.

Additionally, because of the stipulation, defense counsel failed to introduce the exculpatory information, including the inconsistency between the police report description and the description of defendant in the 911 text message, at trial. Moreover, defense counsel expressly told Supreme Court that the evidence "completely contradict[ed] [defendant's] theory of his defense," thereby taking an adverse position to defendant, who consistently maintained that the footage showed that he was innocent, told defense counsel that the omnibus motion had been filed pursuant to his request, and repeatedly objected to defense counsel's withdrawal of the motion (*see generally People v Richardson*, 143 AD3d 1252, 1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Betsch*, 286 AD2d 887, 887 [4th Dept 2001]).

We cannot conclude that "the evidence, the law and the circumstances of [this] case, viewed together and as of the time of representation, reveal that meaningful representation was provided" (*People v Satterfield*, 66 NY2d 796, 798-799 [1985]; *see Baldi*, 54 NY2d at 147).

In light of our decision to grant a new trial, we do not address the issue whether the sentence is unduly harsh and severe. We have reviewed defendant's remaining contention and conclude that it is without merit.

All concur except WHALEN, P.J., and CURRAN, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we disagree with the conclusion of the majority that defendant was denied effective assistance of counsel. Defendant contends that defense counsel failed to provide effective assistance when counsel, inter alia, withdrew a previously filed omnibus motion alleging a *Brady* violation based on the People's alleged failure to preserve video surveillance footage that had been viewed by the police upon discovery of the vehicle allegedly stolen by defendant. Even assuming, arguendo, that the majority is correct in asserting that defense counsel likely would have been successful in obtaining some relief on the motion, such as an adverse inference instruction (*see generally People v Handy*, 20 NY3d 663, 670 [2013]), as a result of the People's failure had counsel chosen to pursue that strategy (*see generally People v Viruet*, 29 NY3d 527, 532-533 [2017]), we do not agree that the withdrawal of the motion rendered counsel ineffective. In considering defendant's claim of ineffective assistance, we must "avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (*People v Baldi*, 54 NY2d 137, 146 [1981]).

Here, the record establishes that defense counsel's decision to seek preclusion of all references to the video surveillance footage, rather than a sanction for its loss, was a legitimate trial strategy.

The available adverse inference instruction is merely permissive—it "neither establishes a legal presumption nor furnishes substantive proof" in favor of a defendant (*Handy*, 20 NY3d at 670 [internal quotation marks omitted]; *see* CJI2d[NY] Adverse Inference: Missing, Lost, Destroyed Evidence). To obtain that instruction, however, defense counsel would have had to permit the jury to learn that police officers had viewed video surveillance footage that showed the sole occupant exit the stolen vehicle within hours of its theft and subsequently arrested defendant. Thus, although the jury might have taken the permitted adverse inference against the People, jurors might instead have inferred that the police officers arrested defendant in part because of what they viewed on the video surveillance. Further, although there is some evidence in the record that the video surveillance footage might have shown that the person exiting the stolen vehicle shortly after midnight was wearing clothing that appeared different from that which defendant had been described as wearing earlier in the evening, we cannot conclude that the evidence of that potential discrepancy was so clearly exculpatory that no reasonable defense counsel would have failed to seek an adverse inference instruction highlighting its absence (*see generally People v McGee*, 20 NY3d 513, 518 [2013]). Indeed, a reasonable juror could have concluded that what appeared to be "gray jogging pants" earlier in the evening would have looked like "dark pants" on a surveillance video taken after midnight and that a hoodie is easily thrown over a T-shirt. Thus, as defense counsel explained to defendant in a letter included in the record, defense counsel made the strategic decision to avoid any reference to the video surveillance footage: "Rather than allow a trial jury to speculate that the person who exited the vehicle was [defendant], [defense counsel] consider[ed] less evidence to be more." By entering into a stipulation with the prosecution to preclude any reference to the video surveillance footage, defense counsel was able to focus on raising a reasonable doubt regarding the only remaining inculpatory evidence against defendant, specifically the DNA evidence found in the stolen vehicle. Thus, defense counsel's decision, although ultimately unsuccessful, nonetheless had a " 'strategic or other legitimate explanation[ ]' " (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see People v Rodriguez*, 31 NY3d 1067, 1068 [2018]; *People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant's contention therefore amounts to a "mere disagreement with trial strategy," which "is insufficient to establish that defense counsel was ineffective" (*People v Barksdale*, 191 AD3d 1370, 1371 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021] [internal quotation marks omitted]).

Inasmuch as we have reviewed defendant's remaining contentions and conclude that they are without merit, we would affirm.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

513

KA 23-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES EVERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 15, 2021. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and four counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]) arising out of a drive-by shooting of the victim. We affirm.

Defendant's contention that County Court failed to conduct a sufficient inquiry into the People's readiness as directed by CPL 30.30 (5) is not preserved for our review inasmuch as defendant did not object to the sufficiency of the inquiry (*see People v Hardy*, 47 NY2d 500, 505 [1979]; *see generally People v Wills*, 224 AD3d 1329, 1330 [4th Dept 2024], *lv denied* 41 NY3d 1005 [2024]).

We reject defendant's contention that the court erred in admitting evidence of prior violence between feuding groups of individuals who reside in the vicinity of the park where the shooting occurred, as well as evidence that defendant and his codefendant were affiliated with one of those groups. It is well settled that "[e]vidence regarding gang activity can be admitted to provide necessary background, or when it is 'inextricably interwoven' with the charged crime[ ], or to explain the relationships of the individuals involved" (*People v Kims*, 24 NY3d 422, 438 [2014]; *see People v Tatum*, 204 AD3d 1400, 1402 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]). Here, the testimony regarding defendant's affiliation with certain

individuals provided necessary background information to explain the relationship of defendant to his codefendant and defendant's motive for shooting from a moving car into a crowd of people in the park (*see People v Savery*, 209 AD3d 1268, 1269 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]), and we further conclude that the prejudicial effect of that testimony did not outweigh its probative value (*see People v Haygood*, 201 AD3d 1363, 1364 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022]).

We also reject defendant's contention that the court erred in refusing to sever his trial from that of his codefendant. "The decision to grant or deny a separate trial is vested primarily in the sound judgment of the [t]rial [j]udge, and defendant[']s] burden to demonstrate abuse of that discretion is a substantial one" (*People v Mahboubian*, 74 NY2d 174, 183 [1989]). Moreover, "[j]oint trials are preferred where, as here, the same evidence will be used and the defendant and codefendant[ ] are charged with acting in concert . . . , and severance is not required solely because of hostility between the [defendants], differences in their trial strategies or inconsistencies in their defenses" (*People v Rideout*, 177 AD3d 1377, 1378-1379 [4th Dept 2019], *lv denied* 35 NY3d 973 [2020] [internal quotation marks omitted]). Contrary to defendant's contention, the codefendant's counsel did not act as a second prosecutor because, although he emphasized the People's evidence against defendant on summation, "[he] did not elicit any new evidence against the defendant that his jury would not otherwise have heard had he been granted a separate trial" (*People v Bostic*, 217 AD3d 678, 680 [2d Dept 2023], *lv denied* 41 NY3d 964 [2024]; *see People v Osborne*, 88 AD3d 1284, 1285 [4th Dept 2011], *lv denied* 19 NY3d 999 [2012], *reconsideration denied* 19 NY3d 1104 [2012]; *cf. People v Cardwell*, 78 NY2d 996, 998 [1991]).

We also reject defendant's contention that he was denied a fair trial by prosecutorial misconduct, including the prosecutor's references to the musical West Side Story in her opening statement and the quality of the police investigation in her summation. The challenged comments were not so egregious as to deprive defendant of a fair trial (*see People v Melendez*, 11 AD3d 983, 984 [4th Dept 2004], *lv denied* 4 NY3d 888 [2005]; *People v White*, 291 AD2d 842, 843 [4th Dept 2002], *lv denied* 98 NY2d 656 [2002]) and, further, "the court alleviated any prejudice arising from the prosecutor's comments and summation by instructing the jury that the comments and summations of the prosecutor and defense counsel do not constitute evidence" (*People v Williams*, 28 AD3d 1059, 1061 [4th Dept 2006], *affd* 8 NY3d 854 [2007]).

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

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

All concur except HANNAH, J., who dissents and votes to reverse in the following memorandum: I respectfully dissent because I believe

that severance was compelled in this case and thus that defendant is entitled to a new trial. Severance of criminal trials that could otherwise be joined is rooted in the fundamental concern that a defendant may be unduly prejudiced by a joint trial (*see* CPL 200.40 [1]). The determination whether to sever permissively joined trials requires, essentially, a balancing of judicial economy on the one hand and a defendant's right to a fair trial on the other (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]). Although typically left to the discretion of the trial court, the Court of Appeals has "set forth a two-part test for determining whether severance is required," holding that " 'severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt' " (*People v Cardwell*, 78 NY2d 996, 997-998 [1991], quoting *Mahboubian*, 74 NY2d at 184).

The first part of that test is satisfied here. At trial, it was alleged by the prosecution that three individuals were riding in a vehicle, that two of those persons fired gunshots from the vehicle, and that the gunshots killed the victim. The third person in the vehicle (eyewitness) was called as a prosecution witness and accused defendant and his codefendant of being the two shooters. The core of defendant's presentation to the jury was that he was not one of those two shooters because the prosecution had, his counsel argued on summation, failed to establish either that he was present in the vehicle or, even if present, that he was one of the two persons alleged to have fired from it. In stark contrast, the core of the codefendant's presentation was, as explicitly synthesized during closing argument, that defendant was one of the two shooters, along with the eyewitness. One cannot both be and not be one of the shooters, and thus the core of each defense stood, axiomatically, in irreconcilable conflict. In one case defendant was not a shooter and may not have even been present, whereas in the other he was not only present but one of the two persons who shot at the victim. "This was more than complete disagreement on some factual detail, or even some peripheral aspect of the case . . . The defenses presented here were antagonistic at their crux" (*Mahboubian*, 74 NY2d at 185-186). The second part of the test, however, requires a deeper look into the circumstances of the case.

Here, the People most directly established defendant's guilt through the testimony of the eyewitness who, if credited, established defendant's identity as one of the shooters. Understandably then, discrediting the eyewitness became a central focus of defendant's defense at every stage—through pretrial motions, cross-examination, trial motions, and closing argument. At each step, defendant attempted to establish that the eyewitness was not to be believed based on his history of bad acts; his evasiveness and untruthfulness when speaking to the police; and discrepancies in his various statements to the police, his testimony before the grand jury, and his testimony at trial.

Interjected into this otherwise classic battle over witness

credibility, however, was the codefendant's defense. Despite defendant's pretrial motions, cross-examination of prosecution witnesses, and preparations for closing argument all aimed at discrediting the eyewitness, at the end of trial, the codefendant's counsel stood before the jury and exclaimed during his own closing argument that the jury knew—or ostensibly should have known—"two things for sure about the car, shots came from it and there were two guns." With an equal lack of equivocation, the codefendant's counsel then stated that "we know who one of those persons was that had [a] gun," thereby identifying defendant as one of the shooters. Not only did those explicit, zero-hour statements by the codefendant's counsel sharply undercut defendant's claim of innocence, but they also more specifically undercut his defense against the eyewitness's damning testimony. Rather than posing a simple choice of whether to credit the eyewitness, defendant now had to overcome the accusations of two persons, i.e., the eyewitness and the codefendant, who were now both telling a consistent story insofar as it identified defendant as a shooter. Unlike what would have occurred absent the codefendant's involvement, discrediting the eyewitness's identification of defendant as a shooter now required that the jury discredit both the eyewitness and the codefendant—a person defendant lacked the ability to cross-examine—and overlook the fact that defendant apparently could not get his own story to match those of either of the other two people in the car. In short, the unambiguous accusations from the codefendant on summation not only provided, in effect, a third-party endorsement of the People's case against defendant, but it also served to undermine a lynchpin of defendant's defense—that the eyewitness was incredible—by presenting a second voice, independent of the People's case, that specifically endorsed the eyewitness's identification of defendant.

Under the circumstances of this case, I believe that the irreconcilable conflict between defendant and the codefendant, in light of the role that the eyewitness's credibility played and the way in which that conflict impacted how the jury would view the credibility of his testimony, created a significant danger that this conflict alone permitted the jury to infer that defendant was one of the shooters, thus inferring his guilt (*see Cardwell*, 78 NY2d at 997-998). Indeed, because County Court refused to sever defendant's trial from that of the codefendant, the jury was presented with two defendants who were not telling consistent stories, while also being presented with a prosecution witness—the only person other than the two defendants who was inside the car—whose testimony both defendants attempted to claim was incredible. This situation, as perhaps reflected in the verdict, created a "significant possibility that the jury unjustifiably concluded by virtue of the conflict itself that both defenses were incredible and gave undue weight to the government's evidence," discrediting both defendant and the codefendant due to the finger-pointing between them and instead lending greater weight to the eyewitness presented by the People (*Mahboubian*, 74 NY2d at 186).

Although the majority notes that the codefendant did not elicit new evidence against defendant that the jury would not have otherwise heard in a severed trial, I disagree with that characterization.

Initially, the above two-part analysis articulated by the Court of Appeals speaks to the conflict between "each defense" (*id.* at 184), not the way in which a codefendant has elicited new evidence not otherwise brought forth by the People (*see Cardwell*, 78 NY2d at 997-998; *Mahboubian*, 74 NY2d at 184). Although certainly a reason for which severance may be compelled, I do not view the *Mahboubian* standard as requiring a codefendant's defense to conflict in any particular way or to present such conflict by any particular means, so long as the conflict creates the sort of "significant danger" the analysis contemplates (74 NY2d at 184). In any event, I believe that the closing argument of the codefendant's counsel in fact did reveal new information when viewed in light of the credibility battle between defendant and the eyewitness. Prior to the codefendant's closing argument, testimony reflected that the eyewitness's accusation against defendant was his and his alone. Until closing argument, the jury did not know that the codefendant would adopt that allegation. Although the codefendant's endorsement of the identification of defendant was not a new piece of physical evidence or new testimony, it was certainly a new development that altered the landscape of how the jury would likely consider the credibility dispute before it, and one that would not have arisen in a severed trial.

Consequently, I believe that severance was "compelled" (*id.*). Inasmuch as I conclude that none of defendant's contentions requires dismissal of the indictment, I would therefore reverse the judgment of conviction and grant defendant a new trial.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEJOURN HUDSON, 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 Erie County Court (James F. Bargnesi, J.), rendered July 27, 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, in appeal No. 1, from a judgment convicting him, upon a plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and, in appeal No. 2, from a judgment convicting him, upon a plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Contrary to defendant's contention, the plea colloquy establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see People v Giles*, 219 AD3d 1706, 1706 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentences (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Szymanski*, 217 AD3d 1415, 1415 [4th Dept 2023], *lv denied* 40 NY3d 952 [2023]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

515

KA 21-01186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEJOURN HUDSON, 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 Erie County Court (James F. Bargnesi, J.), rendered July 27, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Hudson* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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CA 23-01615

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

VICTORIA VISIKO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (AMANDA L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), AND O'BRIEN & FORD P.C., BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, inter alia, denied in part the motion of defendant Rochester City School District for summary judgment.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that, in the 1970s, she was sexually abused by defendant Edwin D. Fleming during and subsequent to her attendance at East High School in the Rochester City School District (defendant). After discovery, defendant moved for summary judgment dismissing plaintiff's complaint against it and plaintiff cross-moved for, inter alia, partial summary judgment on defendant's liability. Supreme Court, inter alia, denied defendant's motion to the extent that it sought dismissal of plaintiff's negligence and common-law failure to report causes of action and denied plaintiff's cross-motion to the extent that it sought partial summary judgment on defendant's liability. Defendant now appeals, as limited by its brief, from those parts of the order and judgment that denied its motion to the extent that it sought dismissal of plaintiff's negligence and common-law failure to report causes of action. We affirm.

Plaintiff's negligence cause of action is premised on two theories, specifically defendant's alleged negligent supervision of plaintiff and defendant's alleged negligent retention of Fleming, a music teacher employed by defendant. Both theories require consideration of whether Fleming's misconduct was reasonably

foreseeable. "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). That duty "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1422 [4th Dept 2021] [hereinafter *Female Academy*] [internal quotation marks omitted]; *see David v County of Suffolk*, 1 NY3d 525, 526 [2003]). A plaintiff may succeed on a claim of negligent supervision by establishing "that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (*Mirand*, 84 NY2d at 49). Further, although unanticipated third-party acts generally will not give rise to liability (*see Brandy B.*, 15 NY3d at 302), a school district may nonetheless "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006] [hereinafter *Fulton School Dist.*]; *see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946-947 [1997]; *Mirand*, 84 NY2d at 49-51; *Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001]). Similarly, to establish a claim of negligent retention, "it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]).

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal of plaintiff's negligence cause of action inasmuch as defendant failed to meet its prima facie burden of establishing that the sexual abuse that led to plaintiff's injuries was unforeseeable as a matter of law (*see Bell*, 90 NY2d at 946-947). In support of its motion, defendant submitted, among other things, plaintiff's deposition testimony, wherein she testified that she never discussed Fleming's conduct with anyone during the time that it was occurring. Plaintiff, however, further testified that, during her time at East High School, Fleming was less than circumspect regarding his conduct with female students. Plaintiff observed Fleming during her time at East High School giving "piggyback rides [to female students] in the hallways, [with] his hands . . . holding them up [by] their bottom[s]." Plaintiff stated that "many students" would have seen Fleming hugging her in the hallways, hugs that plaintiff described as becoming "longer and longer" over her years at East High School, "always with hands groping and to the point that it became very embarrassing and very disgusting." Plaintiff also described an additional incident where Fleming groped her from behind in front of, at a minimum, several other students. Thus, defendant's own submissions raise a triable issue of fact whether Fleming's misconduct was so open and prevalent that a reasonable person would have been on notice to protect against the injury-causing conduct (*see Mirand*, 84 NY2d at 49-50; *Shapiro*, 208 AD3d at 960).

Further, defendant offered no affirmative evidence establishing as a matter of law the existence of any sexual harassment prevention

policies or the absence of any relevant complaints regarding Fleming prior to or during the relevant time period (*cf. Ernest L. v Charlton School*, 30 AD3d 649, 651 [3d Dept 2006]). Defendant did submit, among other things, the deposition testimony of a former special education coordinator who continued his career with defendant as an administrator. That administrator testified that, in reference to complaints regarding sexual misconduct, "there was a time where we didn't cross our T's and dot our I's." The administrator explained that, before "the '80s" when the state "got a lot more forceful," there was "always an effort to resolve the problem by removing the teacher." He said, "In this case the teacher resigned. So 75 percent of the problem had resolved itself." The administrator agreed, however, that defendant "didn't necessarily take the action that would prevent [the sexual abuse] from happening again." A factfinder could reasonably infer from that statement that defendant was aware of other instances of sexual misconduct by teachers with students occurring prior to the 1980s inasmuch as there was a practice of removing the offending teacher as a result. Thus, defendant's own submissions raise a triable issue of fact whether plaintiff's injuries were the "reasonably foreseeable consequence of circumstances it created by its inaction" (*Fulton School Dist.*, 35 AD3d at 1195).

Even assuming, arguendo, that defendant did meet its initial burden with respect to plaintiff's negligence cause of action, we conclude that plaintiff raised a triable issue of fact in opposition. In opposition to defendant's motion and in support of her cross-motion, plaintiff submitted, among other things, the deposition testimony of another student, identified as BL Doe 3, who attended East High School before plaintiff did and who alleges that she was also sexually abused by Fleming. BL Doe 3 testified that, beginning in the fall of 1972, she told several school staff members that Fleming "was too touchy-feely or [that] he was touching or [that] he gave [her] the creeps." She said to one staff member in particular, " 'Mr. Fleming makes me uncomfortable. He's very touchy. I don't like to be touched.' " She said to another staff member, " 'He touches too much.' " Contrary to defendant's contention, a factfinder could reasonably infer that, despite the absence of more explicit terminology, a student reporting that a teacher was touching her in a way that made her uncomfortable should have triggered defendant, in exercising such care as a parent of ordinary prudence would observe in comparable circumstances, to take a closer look at the teacher in question (*see generally David*, 1 NY3d at 526; *Shapiro*, 208 AD3d at 960).

The court also properly declined to dismiss plaintiff's cause of action alleging defendant's violation of the common-law duty to report. Contrary to defendant's contention, a *school's* duty to report falls within the scope of its "common-law duty to adequately supervise its students," which, as noted above, "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*Female Academy*, 199 AD3d at 1422 [internal quotation marks omitted]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87-88 [4th Dept 1996]; *see*

generally Mirand, 84 NY2d at 49). Thus, regardless of whether a common-law cause of action exists in New York for failure to report child abuse by a defendant who lacks a school's in loco parentis relationship with a child (*see Heidt v Rome Mem. Hosp.*, 278 AD2d 786, 787 [4th Dept 2000, Lawton, J., dissenting], citing, inter alia, *Eiseman v State of New York*, 70 NY2d 175, 187-189 [1987]), here defendant's alleged failure to do so is a recognized form of negligence (*see Female Academy*, 199 AD3d at 1422-1423).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

518

CA 23-01358

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

FRANCISCO ALVARADO, PLAINTIFF-APPELLANT,

V ORDER

RAANA JILANI, DEFENDANT-RESPONDENT.

PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (NICOLE U. MARMANILLO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered June 29, 2023. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment on the issues of negligence and serious injury.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 15, 2024,

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

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

520

CA 23-00765

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

STEVEN G. NOVAK AND ALISA NOVAK,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

WESTERN NEW YORK SNOWMOBILE CLUB OF
BOSTON, INC., DEFENDANT-APPELLANT,
PETER H. WILKINS, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (DALE J. BAUMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (DOMINIC M. CHIMERA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 14, 2023. The order, among other things, denied the motion of defendant Western New York Snowmobile Club of Boston, Inc. for summary judgment and granted the motion of defendant Peter H. Wilkins for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Western New York Snowmobile Club of Boston, Inc. and dismissing the complaint against that defendant, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Steven G. Novak (plaintiff) when the snowmobile he was operating was struck by a motor vehicle driven by defendant Peter H. Wilkins. At the time of the accident, plaintiff was on a portion of a snowmobile trail maintained by defendant Western New York Snowmobile Club of Boston, Inc. (Club) that crossed a public road. Plaintiff, who concedes that he did not stop before crossing the road and yield the right-of-way to Wilkins, claimed that the snowmobile trail was not properly marked with signs advising riders to "stop" or "stop ahead." The Club moved for summary judgment dismissing the complaint against it contending that it was immune from liability pursuant to the recreational use statute, i.e., General Obligations Law § 9-103. Wilkins moved for summary judgment dismissing the

complaint and any cross-claims against him contending that there was no evidence of negligence on his part. Supreme Court denied the Club's motion, and granted Wilkins' motion. Plaintiffs and the Club now appeal, and we modify.

With respect to the Club's appeal, General Obligations Law § 9-103 "grants landowners (and lessees and occupants) immunity from liability based on ordinary negligence if a person engaged in a listed recreational activity is injured while using their land" (*Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 548 [1994]; *see Davis v Hinds*, 215 AD3d 1242, 1242-1243 [4th Dept 2023]). It provides, in relevant part, that "an owner, lessee or occupant of premises . . . owes no duty to keep the premises safe for entry or use by others for . . . recreational purposes [including] snowmobile operation . . . or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes" (§ 9-103 [1] [a]), unless, inter alia, the owner, lessee or occupant of the premises engages in a "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity" (§ 9-103 [2] [a]).

"Whether a parcel of land is suitable and the immunity available is a question of statutory interpretation, and is, therefore, a question of law for the Court" (*Bragg*, 84 NY2d at 552). To determine suitability, a court must ascertain "whether the premises are the type of property that is both physically conducive to the particular activity or sport and appropriate for public use in pursuing the activity as recreation" (*Wheeler v Gibbons*, 196 AD3d 1083, 1084 [4th Dept 2021], citing *Albright v Metz*, 88 NY2d 656, 662 [1996] and *Iannotti v Consolidated Rail Corp.*, 74 NY2d 39, 45 [1989]). "A substantial indicator that property is 'physically conducive to the particular activity' is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it" (*Albright*, 88 NY2d at 662).

Here, it is undisputed that the portion of the snowmobile trail running alongside the power lines and across the public road in the area where plaintiff's accident occurred was maintained as a snowmobile trail and used by thousands of snowmobilers, including plaintiff, for many years. Contrary to plaintiffs' contention, the fact that "stop" or "stop ahead" signs may not have been visible along the trail before the subject road crossing does not affect that area's overall suitability inasmuch as "suitability must be judged by viewing the property as it generally exists" (*Bragg*, 84 NY2d at 552), and such an omission constituted, at most, a failure to warn for which the recreational use statute explicitly provides immunity (General Obligations Law § 9-103 [1] [a]). Thus, we conclude that the Club met its initial burden on its motion of establishing that the portion of the trail where the accident occurred is "the type of property which is not only physically conducive to [snowmobiling] but is also a type which would be appropriate for public use in pursuing [snowmobiling] as recreation" (*Thomann v Niagara Mohawk Power Corp.*, 90 AD3d 1583, 1584 [4th Dept 2011] [internal quotation marks omitted]; *see Wheeler*,

196 AD3d at 1084-1085), and plaintiffs failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We further conclude that the Club also met its initial burden of establishing "that the willful conduct exception [set forth in General Obligations Law § 9-103 (2)] that would void the protection of section 9-103 (1) (a) is inapplicable here" (*Thomann*, 90 AD3d at 1584 [internal quotation marks omitted]) and that plaintiffs failed to raise a triable issue of fact on that issue (*see generally Zuckerman*, 49 NY2d at 562). Although there was evidence that trail signage may not have been visible, that evidence, alone, is "insufficient to establish the 'high-threshold demonstration by the injured party to show willful intent by the alleged wrongdoer' " (*Thomann*, 90 AD3d at 1584, quoting *Farnham v Kittinger*, 83 NY2d 520, 529 [1994]). Thus, we modify the order by granting the Club's motion and dismissing the complaint against it (*see generally Wheeler*, 196 AD3d at 1085-1086).

With respect to plaintiffs' appeal, we reject plaintiffs' contention that the court erred in granting Wilkins' motion. " 'It is well settled that [a] driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way . . . Although a driver with the right-of-way has a duty to use reasonable care to avoid a collision . . . , a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision' " (*Gomez v Buczynski*, 213 AD3d 1312, 1313 [4th Dept 2023]). Here, Wilkins met his initial burden of establishing that "he was not negligent because he had the right-of-way while traveling . . . , was operating his vehicle in a lawful and prudent manner, . . . was traveling at a lawful rate of speed, and . . . there was nothing he could have done to avoid the accident" (*id.*). In opposition, plaintiffs failed to raise a triable issue of fact whether Wilkins " 'was at fault in the happening of the accident or whether he could have done anything to avoid the collision' " (*Wallace v Kuhn*, 23 AD3d 1042, 1043 [4th Dept 2005]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

521

CA 23-00748

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

RESETARITS CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORFOLK SOUTHERN RAILWAY COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
INTERVENOR-RESPONDENT.
(APPEAL NO. 1.)

COHEN & FREY P.C., ARDMORE, PENNSYLVANIA (TIMOTHY L. FREY, ADMITTED PRO HAC VICE, OF COUNSEL), AND ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

ADAMS LECLAIR LLP, ROCHESTER (THEODORE M. BAUM OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 13, 2023. The order granted plaintiff's motion seeking leave to file and serve a first amended complaint and granted Philadelphia Indemnity Insurance Company's motion to intervene.

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

Memorandum: These consolidated appeals arise from a construction contract dispute between defendant Norfolk Southern Railway Company (Norfolk) and plaintiff, Resetarits Construction Corporation (RCC). In appeal No. 1, Norfolk appeals from an order that granted RCC's motion for leave to file and serve a first amended complaint and further granted the motion of the surety on RCC's performance bond, Philadelphia Indemnity Insurance Company (PIIC), to intervene in the action. In appeal No. 2, Norfolk appeals from an order that denied its motion to dismiss the third cause of action in the first amended complaint and, further, denied its motion to dismiss PIIC's intervenor complaint. We affirm in both appeals.

With respect to appeal No. 1, " '[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' " (*DiGiacco v Grenell Is. Chapel*, 210 AD3d 1466, 1467 [4th Dept 2022]; *see* CPLR 3025 [b]), and "the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Brooks v City of Buffalo*, 209 AD3d 1270, 1271 [4th Dept 2022] [internal quotation marks omitted]), the exercise of which "will not be lightly disturbed" (*Yonkers Lodging Partners, LLC v Selective Ins. Co. of Am.*, 158 AD3d 732, 735 [2d Dept 2018]). The first amended complaint sought to add a third cause of action, for a judgment declaring that Norfolk terminated the underlying contract improperly or for convenience, either of which would, inter alia, vitiate Norfolk's counterclaim for breach of contract seeking cure damages (*see Paragon Restoration Group, Inc. v Cambridge Sq. Condominiums*, 42 AD3d 905, 906 [4th Dept 2007]; *Fruin-Colnon Corp. v Niagara Frontier Transp. Auth.*, 180 AD2d 222, 233 [4th Dept 1992]). Inasmuch as the proposed amendment is not patently lacking in merit, we reject Norfolk's contention that Supreme Court abused its discretion in granting RCC's motion for leave to amend its complaint.

Norfolk also contends that the court abused its discretion in granting PIIC's motion to intervene because that motion was untimely. We reject that contention. "[A] timely motion for leave to intervene should be granted . . . where the intervenor has a real and substantial interest in the outcome of the proceedings" (*Jones v Town of Carroll*, 158 AD3d 1325, 1327 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018] [internal quotation marks omitted]). " 'In examining the timeliness of [a] motion [to intervene], courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party' " (*id.* at 1328). We conclude that the court properly granted PIIC's motion inasmuch as PIIC's intervention "will not delay resolution of the action and [Norfolk] will not suffer prejudice" (*id.*; *see Poblocki v Todoro*, 55 AD3d 1346, 1347 [4th Dept 2008]; *Matter of Norstar Apts. v Town of Clay*, 112 AD2d 750, 751 [4th Dept 1985]).

With respect to appeal No. 2, Norfolk failed to preserve for our review its contention that RCC's third cause of action seeking a declaratory judgment should be dismissed pursuant to CPLR 3211 (a) (4) because of a prior pending federal action between Norfolk and PIIC in which Norfolk seeks to enforce the surety bond (*see generally Henry v Buffalo Mgt. Group, Inc.*, 218 AD3d 1233, 1234 [4th Dept 2023]).

We reject Norfolk's contention that the court erred in denying its motion to dismiss the declaratory judgment cause of action pursuant to CPLR 3211 (a) (3) for lack of standing. "Where a CPLR 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*Wilmington Sav. Fund. Socy., FSB v Matamoro*, 200 AD3d 79, 89-90 [2d Dept 2021]). "To defeat a defendant's motion to dismiss, the plaintiff has no burden of

establishing its standing as a matter of law, but must merely raise a question of fact as to the issue" (*id.* at 90; *see Borrelli v Thomas*, 195 AD3d 1491, 1494 [4th Dept 2021]). "Standing is an element of the larger question of justiciability . . . The various tests that have been devised to determine standing are designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast[ ] the dispute in a form traditionally capable of judicial resolution" (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154-155 [1994] [internal quotation marks omitted]; *see Smith v Hurley*, 221 AD2d 981, 982 [4th Dept 1995]). "The most critical requirement of standing . . . is the presence of injury in fact—an actual legal stake in the matter being adjudicated" (*Alloway v Bowlmor AMF Corp.*, 188 AD3d 1716, 1718 [4th Dept 2020], *lv denied* 36 NY3d 911 [2021] [internal quotation marks omitted]). Allegations in the first amended complaint that Norfolk's termination of the underlying contract improperly or for convenience, inter alia, precludes Norfolk's counterclaim and caused RCC to make payments to subcontractors for which it was not reimbursed raise an issue of fact whether RCC suffered an injury-in-fact.

Finally, Norfolk contends that the court abused its discretion by denying its motion to dismiss PIIC's intervenor complaint because of the prior pending federal action between Norfolk and PIIC. We reject that contention. CPLR 3211 (a) (4) " 'vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action' " (*Cellino & Barnes, P.C. v Law Off. of Christopher J. Cassar, P.C.*, 140 AD3d 1732, 1734 [4th Dept 2016], quoting *Whitney v Whitney*, 57 NY2d 731, 732 [1982]). " 'While complete identity of the parties is not a necessity for dismissal under [the statute] . . . , there must at least be a substantial identity of the parties which generally is present when at least one plaintiff and one defendant is common in each action' " (*Matter of Witkowski v HS 570, Inc.*, 218 AD3d 1230, 1232 [4th Dept 2023]). RCC is not a party in the federal action, and thus substantial identity of the parties is lacking. We therefore conclude that the court did not abuse its discretion in denying Norfolk's motion to dismiss the intervenor complaint (*see Ashwood v Uber USA, LLC*, 219 AD3d 1289, 1290 [2d Dept 2023]; *cf. WYNIT, Inc. v Smartparts, Inc.*, 74 AD3d 1720, 1720-1721 [4th Dept 2010]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

522

CA 23-01300

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

RESETARITS CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORFOLK SOUTHERN RAILWAY COMPANY,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V

NORFOLK SOUTHERN RAILWAY COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

COHEN & FREY P.C., ARDMORE, PENNSYLVANIA (TIMOTHY L. FREY, ADMITTED PRO HAC VICE, OF COUNSEL), AND ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL), FOR PLAINTIFF-RESPONDENT RESETARITS CONSTRUCTION CORPORATION.

ADAMS LECLAIR LLP, ROCHESTER (THEODORE M. BAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT PHILADELPHIA INDEMNITY INSURANCE COMPANY.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 23, 2023. The order denied the motion of defendant Norfolk Southern Railway Company to dismiss the third cause of action in plaintiff Resetarits Construction Corporation's first amended complaint and denied the motion of defendant Norfolk Southern Railway Company to dismiss the intervenor complaint of Philadelphia Indemnity Insurance Company.

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

Same memorandum as in *Resetarits Constr. Corp. v Norfolk S. Ry. Co.* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

523

CA 23-00714

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

STEPHANIE DUHART-NEAL, AS ADMINISTRATOR
OF THE ESTATE OF SAMUEL NEAL, JR., DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MONROE COUNTY, MONROE COMMUNITY HOSPITAL AND
JOHN/JANE DOES #1-5, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

THE RUSSELL FRIEDMAN LAW GROUP, LLP, GARDEN CITY (NEIL FLYNN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered March 23, 2023. The order denied the motion of plaintiff for an order, inter alia, deeming service of the amended and supplemental notice of claim valid or for leave to serve the amended and supplemental notice of claim.

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

Same memorandum as in *Duhart-Neal v Monroe County* ([appeal No. 2] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

524

CA 23-00964

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

STEPHANIE DUHART-NEAL, AS ADMINISTRATOR
OF THE ESTATE OF SAMUEL NEAL, JR., DECEASED,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

MONROE COUNTY, MONROE COMMUNITY HOSPITAL,
AND JOHN/JANE DOES #1-5,
DEFENDANTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

THE RUSSELL FRIEDMAN LAW GROUP, LLP, GARDEN CITY (NEIL FLYNN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ALISSA M. BRENNAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered May 9, 2023. The order granted in part and denied in part the motion of defendants to dismiss the complaint, granted the cross-motion of plaintiff insofar as it sought leave to reargue and, upon reargument, adhered to a prior determination denying plaintiff's motion for an order, inter alia, deeming service of the amended and supplemental notice of claim valid or for leave to serve the amended and supplemental notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the order to the extent that it determined that the amended and supplemental notice of claim was untimely with respect to a potential wrongful death cause of action and by granting that part of defendants' motion seeking to dismiss plaintiff's fifth cause of action and dismissing that cause of action, and as modified the order is affirmed without costs.

Memorandum: While a patient at defendant Monroe Community Hospital, plaintiff's decedent developed a stage IV bedsore. Prior to his death, decedent timely served a notice of claim asserting that he sustained personal injuries arising from defendants' "negligence, recklessness, gross negligence and carelessness" related to the development of the bedsore.

Decedent died on February 19, 2022, and plaintiff obtained letters of administration of decedent's estate on November 7, 2022. On November 22, 2022, plaintiff served an amended and supplemental

notice of claim (amended notice of claim), which "supplemented [the original notice of claim] to include claims for conscious pain and suffering, fear of impending death, deprivation of statutory rights, wrongful death and medical malpractice."

Plaintiff commenced this action on November 28, 2022, asserting seven causes of action. The next day, plaintiff moved for an order, inter alia, deeming service of the amended notice of claim valid, granting her leave to serve the amended notice of claim, or deeming it a late notice of claim and granting leave to serve it. Supreme Court denied plaintiff's motion, concluding that the amended notice of claim was untimely as to the new claims asserted therein and that, of the new claims, all but the wrongful death claim was barred by the applicable statute of limitations. The court thus determined that it could not grant leave for plaintiff to serve a late amended notice of claim with respect to the time-barred claims and declined to grant leave to serve the late amended notice of claim insofar as it alleged wrongful death.

While plaintiff's motion was pending, defendants moved to dismiss the complaint on the grounds that, inter alia, certain causes of action were barred by the applicable statute of limitations and other claims had not been properly noticed in a timely notice of claim. In addition, following the court's denial of her motion, plaintiff cross-moved for leave to reargue that motion, contending, among other things, that CPLR 210 (a) rendered timely the claims that the court determined were time-barred. The court granted the cross-motion insofar as it sought leave to reargue and, upon reargument, concluded that the claims stated for the first time in the amended notice of claim were not barred by the statute of limitations, but it otherwise adhered to its prior determination that the amended notice of claim was untimely and that plaintiff would not be granted leave to serve a late amended notice of claim. The court granted defendants' motion in part, dismissing the second cause of action, alleging violations of the Public Health Law, the sixth cause of action, for negligent hiring and retention, and the seventh cause of action, for medical malpractice, on the ground that those claims had not been alleged in a timely notice of claim and dismissing the third cause of action insofar as it sought punitive damages. The court concluded that the remaining causes of action were premised on allegations contained in the original notice of claim.

In appeal No. 1, plaintiff appeals from the order denying her motion. In appeal No. 2, plaintiff appeals and defendants cross-appeal from the order granting in part defendant's motion to dismiss and granting plaintiff's cross-motion for leave to reargue and, upon reargument, adhering to the prior determination. Preliminarily, 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 Utility Servs. Contr., Inc. v Monroe County Water Auth.*, 90 AD3d 1661, 1662 [4th Dept 2011], *lv denied* 19 NY3d 803 [2012]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]). We have considered plaintiff's contentions on appeal insofar as they pertain to the order in appeal No. 2 (*see generally Lagares v Carrier*

Term. Servs., Inc. [appeal No. 2], 204 AD3d 1456, 1458 [4th Dept 2022]).

Plaintiff contends on her appeal that the original notice of claim provided sufficient notice of defendants' violation of certain provisions of the Public Health Law and that the court thus erred in granting defendants' motion with respect to the second cause of action. We reject that contention. "It is a condition precedent to, and indeed an essential element of, any cause of action for personal injury against a [county] that the plaintiff have served upon the [county] a notice of claim setting forth, inter alia, the nature of the claim and the items of damage or injuries claimed to have been sustained" (*Gonzalez v Povoski*, 149 AD3d 1472, 1474 [4th Dept 2017]). Here, we conclude that the original notice of claim alleging personal injuries arising from defendants' negligence did not provide notice of the distinct statutory violations alleged in the second cause of action (*see generally Cornell v County of Monroe*, 158 AD3d 1151, 1152 [4th Dept 2018]; *Betette v County of Monroe*, 82 AD3d 1708, 1710 [4th Dept 2011]; *Zeides v Hebrew Home for Aged at Riverdale*, 300 AD2d 178, 179 [1st Dept 2002]).

We reject plaintiff's further contention that the court abused its discretion in denying her motion for leave to serve a late notice of claim or to otherwise deem the amended notice of claim to have been timely served. We note that, although the General Municipal Law affords the representative of an estate 90 days, measured from the date of appointment, in which to file a notice of claim, that provision applies only to wrongful death actions (*see* General Municipal Law § 50-e [1] [a]). With respect to plaintiff's second cause of action, alleging violations of the Public Health Law, the 90-day period in which to serve a notice of claim ran from the date on which the claim arose (*see id.*). Inasmuch as the original notice of claim alleged that the bedsore developed in December 2020 and became permanent on August 25, 2021, the amended notice of claim, served in November 2022, was untimely. In determining whether to grant leave to serve a late notice of claim, the court should consider "several factors, including whether the [plaintiff] has shown a reasonable excuse for the delay, whether [the defendants] had actual knowledge of the facts surrounding the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would cause substantial prejudice to the [defendants]" (*Matter of Diaz v Rochester-Genesee Regional Transp. Auth. [RGRTA]*, 175 AD3d 1821, 1821 [4th Dept 2019] [internal quotation marks omitted]). On her motion, plaintiff bore the burden of establishing the existence of the relevant factors (*see Tate v State Univ. Constr. Fund*, 151 AD3d 1865, 1865-1866 [4th Dept 2017]; *see also Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 980 [4th Dept 2020]; *Powell v Central N.Y. Regional Transp. Auth.*, 169 AD3d 1412, 1413 [4th Dept 2019], *lv denied* 34 NY3d 904 [2019]). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Mariani v Wilson Cent. Sch. Dist.*, 192 AD3d 1579, 1580 [4th Dept 2021] [internal quotation marks omitted]; *see Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1790 [4th Dept 2017]). Here, we conclude that

plaintiff offered only conclusory statements in support of her application (*see Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1172 [4th Dept 2020]), and thus the court did not abuse its broad discretion in denying the request (*see Mariani*, 192 AD3d at 1580).

We agree with plaintiff, however, that the court erred to the extent that it concluded that the amended notice of claim was untimely with respect to a potential wrongful death cause of action. Unlike the other claims "supplemented" by the amended notice of claim, the 90-day period in which to serve the amended notice of claim alleging a wrongful death action ran "from [her] appointment [as] . . . representative of the decedent's estate" (General Municipal Law § 50-e [1] [a]). Plaintiff was named the estate representative on November 7, 2022, and thus service of the amended notice of claim on November 22, 2022, was timely with respect to a possible action for wrongful death. We therefore modify the order accordingly.

We reject defendants' contention on their cross-appeal that the court erred in denying their motion with respect to plaintiff's first and fourth causes of action and part of the third cause of action. Those causes of action were premised on theories of common-law negligence and gross negligence, which were sufficiently stated in the original notice of claim (*see generally Root v Salamanca Cent. Sch. Dist.*, 192 AD3d 1526, 1527 [4th Dept 2021]). We agree with defendants, however, that the court erred in denying that part of their motion with respect to plaintiff's fifth cause of action. That cause of action was premised on defendants' violation of various statutes and regulations that involved a legal theory not asserted in a timely notice of claim (*see Gonzalez*, 149 AD3d at 1474). We therefore further modify the order accordingly.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

526

KA 22-01393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAHKIM ROBINSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH 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 (Matthew J. Doran, J.), rendered March 10, 2022. The judgment convicted defendant as a juvenile offender upon a plea of guilty of murder in the second degree (two counts), robbery in the first degree and burglary 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 as a juvenile offender upon his plea of guilty of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [3]). Defendant's sole contention is that the sentence is unduly harsh and severe. Under the circumstances of this case, we reject that contention.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

528

KA 23-00946

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXIS HERRERA-CRUZ, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 13, 2021. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

529

KA 23-00647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE JUNOT, III, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Caroline E. Morrison, J.), entered January 12, 2023. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously 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: Defendant appeals from an order determining that he is a level two risk under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We agree with defendant that County Court erred in granting the People's request for an upward departure from the presumptive level one risk. It is well settled that a court must follow a three-step procedure to determine whether an upward departure from the presumptive risk level is warranted (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). In the first step, the court "must decide whether the aggravating . . . circumstances alleged by [the People] are, as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines" (*id.*; *see People v Foley*, 35 AD3d 1240, 1240-1241 [4th Dept 2006]). Here, the People identified as aggravating factors to warrant an upward departure that there were multiple acts of sexual intercourse and oral sexual conduct between defendant and the victim, but we conclude that the sexual conduct with the victim and the continuing course of sexual misconduct are factors that are adequately taken into account by the risk assessment guidelines under risk factors two and four (*see People v Torres-Acevedo*, 213 AD3d 1266, 1266 [4th Dept 2023]; *cf. People v Cortez-Moreno*, 215 AD3d 698, 699 [2d Dept 2023], *lv denied* 40 NY3d 902 [2023]; *People v Stewart*, 77 AD3d 1029, 1030 [3d Dept 2010]). We therefore modify the order by determining that

defendant is a level one risk (*see Foley*, 35 AD3d at 1241).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

532

KA 20-00051

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AREYONA FAVORS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BHAGYASHREE GUPTE 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 (John L. Michalski, A.J.), rendered May 13, 2019. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her, upon her plea of guilty, of assault in the second degree (Penal Law § 120.05 [7]) and, in appeal No. 2, she appeals from a judgment convicting her, upon her plea of guilty, of manslaughter in the first degree (§ 125.20 [1]). Defendant contends in each appeal that her waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waivers of the right to appeal are invalid and therefore do not preclude our review of her challenges to the severity of her sentences (*see People v Manso*, 202 AD3d 1509, 1509-1510 [4th Dept 2022]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

533

KA 23-00054

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AREYONA FAVORS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BHAGYASHREE GUPTE 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 (John L. Michalski, A.J.), rendered May 13, 2019. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Same memorandum as in *People v Favors* ([appeal No. 1] — AD3d — [July 26, 2024] [4th Dept 2024]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

534

KA 22-01784

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON CAMPBELL, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 8, 2021. The judgment convicted defendant, upon a plea of guilty, of attempted robbery 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 plea of guilty, of two counts of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

535

KA 23-00824

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRELL ROSS, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, 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 (Susan M. Eagan, J.), rendered March 8, 2023. The judgment convicted defendant upon his plea of guilty of arson 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 arson in the third degree (Penal Law § 150.10 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the negotiated sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

537

KAH 23-01753

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

IN THE MATTER OF DAKOTA SMITH, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered January 23, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various incarcerated individual rules. Petitioner then moved for summary judgment on the petition based on respondent's failure to submit an answer. Respondent filed an answer in response. Supreme Court effectively denied the motion and dismissed the petition, and we affirm.

We reject petitioner's contention that the court erred in denying his motion. CPLR 7804 (e) provides that "[s]hould the [respondent] body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted." Inasmuch as "it is the established policy of this State that disputes be resolved on their merits . . . a proceeding to annul a determination by an administrative agency should not be concluded in the petitioner's favor merely upon the basis of a failure to answer the petition on the return date thereof, unless it appears that such failure to plead was intentional and that the administrative body has no intention to have the controversy determined on the merits" (*Matter of Murray v Matusiak*, 247 AD2d 303, 304 [1st Dept 1998] [internal quotation marks omitted]; *see Matter of Adoui v Commissioner of Permit & Inspection Servs.*, 147 AD3d 1404, 1405 [4th Dept 2017]). Respondent demonstrated an intention to have the subject controversy determined on the merits through the submission of an answer in response to petitioner's motion and, thus, the petition should be resolved on the merits (*see Adoui*,

147 AD3d at 1405).

We note, however, that the court erred in failing to then transfer the proceeding to this Court pursuant to CPLR 7804 (g). "[W]here a substantial evidence issue is raised, 'the court shall first dispose of such other objections as could terminate the proceeding[,] . . . [and i]f the determination of the other objections does not terminate the proceeding,' the court shall transfer the proceeding to this Court" (*Matter of Murphy v Graham*, 98 AD3d 833, 834 [4th Dept 2012], quoting CPLR 7804 [g]). We conclude that, "[b]ecause the petition raises—albeit inartfully—a question of substantial evidence, [the court] should have transferred the matter to this Court after it disposed of [the] other objection[ ] that 'could terminate the proceeding' " (*Matter of McMillian v Lempke*, 149 AD3d 1492, 1492-1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017] [internal quotation marks omitted]). Nonetheless, inasmuch as "the record is now before us, we will 'treat the proceeding as if it had been properly transferred here in its entirety' . . . and review petitioner's contentions de novo" (*Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]; *see McMillian*, 149 AD3d at 1493).

We reject petitioner's contention that the Hearing Officer's determination that the search of his cell complied with Department of Corrections and Community Supervision (DOCCS) directive No. 4910 (VI) (D) (1), which allows incarcerated individuals to observe searches of their cells unless a supervisory security staff member determines that they pose a danger to the safety and security of the facility, was not supported by substantial evidence. "A prison disciplinary determination must be supported by substantial evidence, meaning that in order to sustain a determination of guilt, a court must find that the disciplinary authorities have offered such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Bryant v Coughlin*, 77 NY2d 642, 647 [1991]). Here, the supervising officer's testimony constituted substantial evidence that petitioner presented a danger to the safety and security of the facility and, thus, petitioner's removal during the search of his cell complied with DOCCS directive No. 4910 (VI) (D) (1) (*cf. Matter of Holloway v Lacy*, 263 AD2d 740, 741 [3d Dept 1999]; *see generally Matter of Mills v Annucci*, 149 AD3d 1593, 1594 [4th Dept 2017]). To the extent other witness testimony or exhibits conflicted with the supervising officer's testimony, that "present[ed] an issue of credibility for the Hearing Officer to resolve" (*Matter of Dalrymple v Fischer*, 65 AD3d 725, 725 [3d Dept 2009]; *see Matter of Gray v Annucci*, 144 AD3d 1613, 1614 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]).

In addition, contrary to petitioner's remaining contentions, the record does not establish that the Hearing Officer "was biased or that the determination flowed from the alleged bias" (*Matter of Amaker v Fischer*, 112 AD3d 1371, 1372 [4th Dept 2013]) or that petitioner was denied the opportunity to present his defense (*see generally Matter of Abdur-Raheem v Mann*, 85 NY2d 113, 124 [1995]; *Matter of Thomas v*

Annucci, 193 AD3d 1356, 1357 [4th Dept 2021]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

538

KA 23-01439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYE K. CERONE, DEFENDANT-APPELLANT.

CAITLIN M. CONNELLY, BUFFALO, 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 August 8, 2023. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75), defendant contends that his negotiated sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence, we perceive no basis in the record on which to modify the sentence as a matter of discretion in the interest of justice (*see People v Stanley*, 162 AD3d 1581, 1581-1582 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]; *People v Storms*, 147 AD3d 1341, 1341 [4th Dept 2017]; *see generally* CPL 470.15 [6] [b]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

539

KA 23-00304

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG ALLIS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered May 10, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that Supreme Court erred in refusing to grant him a downward departure from risk level three to risk level two. Initially, we conclude that, although the court failed to set forth its findings of fact and conclusions of law in denying defendant's request for a downward departure, "the record is sufficient for us to make our own findings of fact and conclusions of law," thereby obviating the need for remittal (*People v Snyder*, 218 AD3d 1356, 1356 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]). With respect to the merits, even assuming, arguendo, that defendant adequately identified mitigating circumstances that are, as a matter of law, of a kind or to a degree not adequately taken into account by the Guidelines and proved their existence by a preponderance of the evidence (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we conclude, based upon the totality of the circumstances, that a downward departure is not warranted (*see People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see generally Gillotti*, 23 NY3d at 861).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

541

KA 22-00166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL CONVERSO, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JESSICA STICKL ASBACH OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY M. BRUCE, SPECIAL PROSECUTOR, BATAVIA, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered July 28, 2021. The judgment convicted defendant upon a guilty plea of attempted course of sexual conduct against a child 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 course of sexual conduct against a child in the second degree (Penal Law §§ 110.00, 130.80 [1] [b]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Hawkins*, 224 AD3d 1219, 1219 [4th Dept 2024]; *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]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *People v Lollie*, 204 AD3d 1430, 1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

544

CA 23-01621

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

IN THE MATTER OF JONATHAN SPAETH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered September 14, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to annul the determination of the Board of Parole (Board) denying his request for release to parole supervision following a hearing in April 2022. The Attorney General has advised this Court that, subsequent to that denial and during the pendency of this appeal, petitioner reappeared before the Board in April 2024 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Romano v Annucci*, 196 AD3d 1176, 1176 [4th Dept 2021]; *Matter of Colon v Annucci*, 177 AD3d 1393, 1394 [4th Dept 2019]; *see generally Matter of Moissett v Travis*, 97 NY2d 673, 674 [2001]). Contrary to petitioner's contention, we conclude that this case does not fall within the exception to the mootness doctrine (*see Romano*, 196 AD3d at 1176; *Colon*, 177 AD3d at 1394; *Matter of Brunner v Speckard*, 214 AD2d 1040, 1040-1041 [4th Dept 1995], *lv denied* 86 NY2d 707 [1995]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

546

KA 23-00787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE A. PEARSALL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Thomas D. Williams, A.J.), dated April 20, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) after a conviction of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and sexual abuse in the first degree (§ 130.65 [3]) arising from his separate acts of sexual conduct against, respectively, a 13-year-old girl (first victim) and a 3-year-old girl (second victim). Even assuming, arguendo, that defendant is correct that he should have been assessed only 5 points rather than 30 points under risk factor 9 on the risk assessment instrument for his prior conviction of *attempted* endangering the welfare of a child (*see People v Lewis*, 178 AD3d 971, 972 [2d Dept 2019]; *People v Freeman*, 85 AD3d 1335, 1335-1336 [3d Dept 2011]; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 13-14 [2006]), thereby rendering him a presumptive level two risk, we reject defendant's further contention that County Court erred in determining in the alternative that an upward departure to a level three risk was warranted, and thus we affirm.

"[W]hen the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines,' a court 'must exercise its discretion by weighing the aggravating and [any]

mitigating factors to determine whether the totality of the circumstances warrants a departure' from a sex offender's presumptive risk level" (*People v Havlen*, 167 AD3d 1579, 1579 [4th Dept 2018], quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]). Here, contrary to defendant's contention, the written statement of the police detective who investigated the offenses, which was prepared for the presentence investigation report and included therein, constitutes "reliable hearsay" upon which the court properly relied in making the upward departure (§ 168-n [3]; *see People v Diaz*, 34 NY3d 1179, 1181 [2020]; *People v Mingo*, 12 NY3d 563, 573-574 [2009]). Moreover, the court properly credited the detective's statement that, during the course of the investigation, he spoke on numerous occasions with a third victim, who had been traumatized by the sexual abuse she endured as a five-year-old child and thus declined to pursue criminal charges against defendant out of fear of going public (*see People v Tidd*, 128 AD3d 1537, 1537-1538 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]; *see generally Diaz*, 34 NY3d at 1181). The court also properly credited the uncontested information in the case summary that the conduct underlying defendant's prior conviction of attempted endangering the welfare of a child involved defendant's physical abuse of the second victim's mother, upon whom he admittedly "left marks," in the presence of their infant child (*see People v Auger*, 162 AD3d 1082, 1083 [2d Dept 2018], *lv denied* 32 NY3d 907 [2018]; *People v James*, 45 AD3d 555, 556 [2d Dept 2007], *lv denied* 10 NY3d 710 [2008]). We therefore conclude that the People established by clear and convincing evidence the existence of aggravating factors not taken into account by the risk assessment guidelines—i.e., defendant had, in addition to the first victim and second victim, similarly abused yet another underage victim and had also engaged in domestic violence against the mother of the second victim in the presence of their infant child (*see Auger*, 162 AD3d at 1083; *People v D'Adamo*, 67 AD3d 1132, 1133 [3d Dept 2009], *lv denied* 15 NY3d 714 [2010]; *James*, 45 AD3d at 556). The aggravating factors outweighed any mitigating factors, and the totality of the circumstances thus warranted an upward departure to avoid an under-assessment of defendant's dangerousness and risk of sexual recidivism (*see People v Cottom*, 207 AD3d 1243, 1245 [4th Dept 2022]; *People v Thomas*, 186 AD3d 1067, 1068 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]; *see generally Gillotti*, 23 NY3d at 861).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

547

KA 23-01109

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CONNOR E. POPE, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Melissa Lightcap Cianfrini, J.), dated May 30, 2023. The order determined that respondent is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in denying his request for a downward departure from his presumptive risk level. We reject that contention.

Defendant is correct that "a defendant's response to treatment, 'if exceptional' . . . , may constitute a mitigating factor to serve as the basis for a downward departure" (*People v Bernecky*, 161 AD3d 1540, 1541 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]; *see People v Wester*, 199 AD3d 1404, 1404 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]; *People v Davis*, 170 AD3d 1519, 1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]). Here, however, we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response to treatment was exceptional (*see Wester*, 199 AD3d at 1404-1405; *People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]). Moreover, even assuming, arguendo, that defendant demonstrated that his response to treatment was exceptional, we nevertheless conclude, based upon the totality of the circumstances, that a downward

departure is not warranted (*see Wester*, 199 AD3d at 1405; *Rivera*, 144 AD3d at 1596; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

548

KA 23-00086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON EVANS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 11, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sexual act in the first degree (Penal Law § 130.50 [4]). We agree with defendant that he did not validly waive his right to appeal (*see People v Franklin*, 217 AD3d 1427, 1427 [4th Dept 2023]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-01748

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SIENNA FOUMAKOYE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered September 6, 2023. The judgment convicted defendant, upon a plea of guilty, of grand larceny in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of grand larceny in the second degree (Penal Law § 155.40 [1]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Hawkins*, 224 AD3d 1219, 1219 [4th Dept 2024]; *see also People v Roberto*, 224 AD3d 1367, 1367 [4th Dept 2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal precludes our review of her challenge to the severity of her sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

551

KA 20-00233

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIN O'CONNOR, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 20, 2019. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment that convicted her, upon her guilty plea, of grand larceny in the fourth degree (Penal Law § 155.30 [8]). We agree with defendant, and the People correctly concede, that her waiver of the right to appeal is invalid, inasmuch as Supreme Court's oral colloquy mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Cole*, 181 AD3d 1329, 1330 [4th Dept 2020]; *People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020]).

On the merits, defendant contends that her plea was not knowing, intelligent, and voluntary. Defendant correctly concedes that she failed to preserve that contention for our review, because she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Boyde*, 224 AD3d 1306, 1306-1307 [4th Dept 2024]; *People v Derrell A.E.*, 128 AD3d 1536, 1536-1537 [4th Dept 2015], *lv denied* 26 NY3d 928 [2015]; *see generally People v Lopez*, 71 NY2d 662, 665 [1988]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d at 666), and we decline to exercise our

power to review defendant's contention as a matter of discretion in the interests of justice (*see* CPL 470.15 [3] [c]).

Entered: July 26, 2024

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 23-00518

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

IN THE MATTER OF ONONDAGA COUNTY, COMMISSIONER OF SOCIAL SERVICES, ON BEHALF OF DESLA L. SULLIVAN, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARSHEEN B. TAYLOR, RESPONDENT-APPELLANT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

LAL, GINGOLD & FRANKLIN, PLLC, SYRACUSE (SUJATA LAL OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 6, 2023, in a proceeding pursuant to Family Court Act article 4. The order, among other things, sentenced respondent to incarceration at the Onondaga County Correctional Facility for a period of six months.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, respondent appeals from an order that confirmed the Support Magistrate's finding of a willful violation of a prior order of child support and sentenced him to six months of incarceration. We reverse.

We agree with respondent that Family Court erred when it determined that his alleged violation of the child support order was willful and sentenced him to incarceration because the court did not afford respondent the right to a fair hearing (*see Matter of Green v Lafler*, 177 AD3d 1380, 1381 [4th Dept 2019]; *Matter of Davis v Bond*, 104 AD3d 1227, 1228 [4th Dept 2013]; *see generally* Family Ct Act §§ 433, 454 [1]). Although "[n]o specific form of a hearing is required, . . . at a minimum the hearing must consist of an adducement of proof coupled with an opportunity to rebut it" (*Matter of Thompson v Thompson*, 59 AD3d 1104, 1105 [4th Dept 2009] [internal quotation marks omitted]), and the court must provide "counsel reasonable opportunity to appear and present respondent's evidence and arguments" (*Matter of Lewis v Crosson*, 53 AD2d 1029, 1029 [4th Dept 1976]; *see Matter of Smith v Smith*, 122 AD2d 546, 547-548 [4th Dept 1986]). Here, the court denied respondent's assigned counsel an adjournment to

allow her time to prepare for the hearing, for which she had no prior notice, and further prohibited her from conferring with respondent before the court attempted to swear in respondent to testify, and the court in so doing denied respondent his right to counsel and, thus, denied him a fair hearing, prior to sentencing him to a period of incarceration (*see Matter of Worsdale v Holowchak*, 170 AD3d 1027, 1029 [2d Dept 2019]; *Matter of Keenan v Keenan*, 51 AD3d 1075, 1077-1078 [3d Dept 2008]; *see generally People v Spears*, 64 NY2d 698, 699-700 [1984]).

Further, the record demonstrates that the court "had a predetermined outcome of the case in mind during the hearing" (*Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1320 [4th Dept 2024] [internal quotation marks omitted]) and "took on the function and appearance of an advocate" (*Matter of Zyion B. [Fredisha B.]*, 224 AD3d 1285, 1286 [4th Dept 2024] [internal quotation marks omitted]). Specifically, the court, inter alia, sua sponte transformed what was scheduled as an appearance for a "[r]eport" into a hearing, over the objection of respondent's assigned counsel; exhorted that, "[i]f [respondent] wants to be cheeky with me, we'll be cheeky"; advised the parties in advance that the hearing was only "going to take ten minutes"; sought to call respondent as a witness for the court's own line of questioning regarding his employment and inquired of respondent's counsel whether respondent would "like to answer my questions now or would he like to go to jail today"; and asked respondent if he had "clean underwear on," thereby implying that he would be going directly to jail after the hearing. We are compelled under these circumstances, once again, to remind the Family Court Judge in this case "that judges must perform their duties 'without bias or prejudice' " (*id.* at 1288, quoting 22 NYCRR 100.3 [B] [4]), and to "express our deep concern with the Family Court Judge's abandonment of her neutral judicial role" (*id.* at 1286). Given the "preconceived opinion expressed and the lack of impartiality exhibited" by the Family Court Judge before ordering that respondent be incarcerated for six months, the matter must be remitted to Family Court for a new hearing and determination by a different judge (*Anthony J.*, 224 AD3d at 1320).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00940

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DAVID SANTIAGO, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (Debra L. Givens, A.J.), dated May 24, 2022. The appeal was held by this Court by order entered November 17, 2023, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (221 AD3d 1539 [4th Dept 2023]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court to determine whether defendant had standing to contest the legality of the search of an apartment containing narcotics and a gun (*People v Santiago*, 221 AD3d 1539 [4th Dept 2023]). Upon remittal, the court determined that defendant had standing.

The People contend that the court erred. We reject that contention. "A defendant seeking suppression of evidence has the burden of establishing standing by demonstrating a legitimate expectation of privacy in the premises or object searched" (*People v Ramirez-Portoreal*, 88 NY2d 99, 108 [1996]; *see People v Hunter*, 17 NY3d 725, 726 [2011]; *People v Smith*, 170 AD3d 1564, 1564-1565 [4th Dept 2019], *lv denied* 33 NY3d 1035 [2019]). "A legitimate expectation of privacy exists where defendant has manifested an expectation of privacy that society recognizes as reasonable" (*Ramirez-Portoreal*, 88 NY2d at 108). That "test has two components. The first is a subjective component—did *defendant* exhibit an expectation of privacy in the place or items searched, that is, did [defendant] seek to preserve something as private" (*id.*). "The second component is objective—does society generally recognize defendant's expectation of privacy as *reasonable*, that is, is [defendant's] expectation of privacy justifiable under the circumstances" (*id.*). The defendant may meet their burden "by defendant's own evidence or by relying on the People's evidence" (*id.* at 109; *see People v Gonzalez*, 68 NY2d 950,

951 [1986]).

Here, the People contend, both below and on appeal, only that defendant failed to meet the first prong of the test—i.e., that defendant did not exhibit an expectation of privacy in the place searched. We reject that contention. Contrary to the People's characterization, the evidence established that the upper apartment was not simply "a vacant apartment where illegal narcotics and firearms were being stored." Rather, the parole officer who searched the apartment testified at the suppression hearing that he observed mail and other unidentified documents with defendant's name on them, a credit card bearing defendant's name, and family photos hung on the wall that included defendant (*see People v Carey*, 162 AD3d 1476, 1476-1477 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018]; *cf. People v Jose*, 252 AD2d 401, 402 [1st Dept 1998], *affd* 94 NY2d 844 [1999]; *People v Sanchez-Reyes*, 172 AD2d 1034, 1035 [4th Dept 1991], *lv denied* 78 NY2d 926 [1991]). Thus, we conclude that the court properly determined that defendant met the first prong of the test by exhibiting a subjective expectation of privacy in the area searched.

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court

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

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KA 19-00542

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY ANDERSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, BANASIAK LAW OFFICE, PLLC (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 25, 2019. The appeal was held by this Court by order entered June 30, 2023, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (217 AD3d 1560 [4th Dept 2023]). The proceedings were held and completed (Douglas A. Randall, J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [a]). We previously held this case, reserved decision, and remitted the matter to County Court for a reconstruction hearing on whether defendant was present during the *Sandoval* conference (*People v Anderson*, 217 AD3d 1560 [4th Dept 2023]). Upon remittal, the court held a reconstruction hearing and determined that the *Sandoval* proceedings had been held outside of defendant's presence.

Where a defendant is denied the right to be present during a *Sandoval* hearing, reversal of defendant's conviction is required (*see People v Dokes*, 79 NY2d 656, 658 [1992]; *see also* CPL 260.20), unless "defendant's presence at the hearing would have been superfluous" (*People v Cooper*, 159 AD3d 1446, 1447 [4th Dept 2018] [internal quotation marks omitted]; *see generally People v Odiat*, 82 NY2d 872, 874 [1993]). Here, it cannot be said that defendant's presence at the hearing would have been superfluous because the court's ruling was a compromise and thus, it was not "wholly favorable to defendant" (*Cooper*, 159 AD3d at 1447).

Defendant additionally contends that the conviction of course of sexual conduct against a child in the first degree is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction of course of sexual conduct against a child in the first degree is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court