SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 4, 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 OCTOBER 4, 2024

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_____	561	CAF 23 01022	Mtr of JACOB A., JR.
_____	567	CA 23 01669	DONNA RENZI V THOMAS RENZI
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

558

KA 23-00756

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHANCE N. STEWART, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Armen J. Nazarian, J.), rendered January 9, 2023. The judgment convicted defendant upon a jury verdict of assault in the first degree (two counts), kidnapping in the second degree, criminal possession of a weapon in the third degree, and menacing in the second 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 two counts of assault in the first degree (Penal Law § 120.10 [1], [2]), one count of kidnapping in the second degree (§ 135.20), one count of criminal possession of a weapon in the third degree (§ 265.02 [1]), and one count of menacing in the second degree (§ 120.14 [1]). Defendant's conviction stems from his conduct in assaulting the victim with a cleaver and knife and holding him in a basement for two hours.

Defendant's contention that County Court violated CPL 270.15 (2) with respect to the sequence for exercising peremptory challenges is not preserved for our review (*see People v Mancuso*, 22 NY2d 679, 680 [1968], *cert denied* 393 US 946 [1968], *rearg denied* 27 NY2d 670 [1970]; *People v Watkins*, 229 AD2d 957, 958 [4th Dept 1996], *lv denied* 89 NY2d 931 [1996]; *see also People v Newton*, 147 AD3d 1463, 1464 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]; *People v Davis*, 106 AD3d 1510, 1511 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013]). 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]). Contrary to defendant's contention, the failure to follow the mandates of CPL 270.15 (2) does not fall within the " 'very narrow exception' " of a mode of proceedings error to the preservation rule (*People v Mack*, 27 NY3d 534, 540 [2016], *rearg denied* 28 NY3d 944 [2016]).

Defendant further contends that he was denied the right to be present for the court's response to a substantive jury note. Shortly after deliberations began, the jury sent a note requesting a "paper copy of the different elements required to accurately find a guilty verdict on each charge." The court read the contents of the note verbatim in the presence of the prosecutor and defense counsel, and the parties agreed to the court giving the jury a written copy of the jury charge with respect to the elements of the charged crimes. The court said that it would provide the document to the jury and would let the jury resume deliberations. Defendant failed to preserve his present contention for our review (*see* CPL 470.05 [2]), 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 alleged error with respect to the jury note constitutes a mode of proceedings error for which the preservation rule does not apply. We agree with defendant "that a criminal defendant has the right to be present during instructions to the jury where the court is required to state the fundamental legal principles applicable to criminal cases generally, as well as the material legal principles applicable to a particular case and the application of the law to the facts . . . as well as the court's instructions in response to the jury's questions about the evidence . . . These rights are implemented in CPL 310.30 when a deliberating jury requests further information or instruction" (*People v Collins*, 99 NY2d 14, 17 [2002] [internal quotation marks omitted]; *see People v Rivera*, 23 NY3d 827, 831 [2014]). The failure to comply with the mandates of CPL 310.30 regarding nonministerial instructions affects the mode of proceedings prescribed by law (*see Rivera*, 23 NY3d at 831; *Collins*, 99 NY2d at 17). However, "[n]ot every communication . . . requires that the jury be recalled or that defendant be present," such as ministerial communications (*Collins*, 99 NY2d at 17; *see Rivera*, 23 NY3d at 832). We conclude that, under the circumstances of this case, the court's act of providing the written instructions to the jury constituted a ministerial act for which defendant's presence was not required (*see generally People v Muhammad*, 171 AD3d 442, 449 [1st Dept 2019], *affd* 34 NY3d 1152 [2020]; *People v Williams*, 21 NY3d 932, 935 [2013]; *Collins*, 99 NY2d at 18).

Defendant's contention that the court failed to respond meaningfully to a jury note requesting clarification on the kidnapping charge is not preserved for our review (*see People v Santiago*, 101 AD3d 1715, 1717 [4th Dept 2012], *lv denied* 21 NY3d 946 [2013]), 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 agree with defendant, however, that he was deprived of his right to effective assistance of counsel. We conclude that defense counsel made several significant errors at trial and that the cumulative effect of those errors was prejudicial enough to deprive defendant of meaningful representation and a fair trial (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Young*, 167 AD3d 1448, 1449 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019]).

The first error occurred during voir dire when defense counsel failed to object to patently improper comments from the prosecutor regarding his ability to sleep at night now that he is a prosecutor and no longer a defense attorney. Perhaps it was a legitimate strategy for defense counsel not to object to the first improper comment of that nature given that defense counsel may not have wanted to draw more attention to the prejudicial comment. For the same reason, defense counsel might be excused for not objecting when the prosecutor repeated the comment to the same group of prospective jurors. We can discern no legitimate strategy, however, for defense counsel to remain quiet when the prosecutor made the same comment for the third, fourth and fifth times during voir dire. At some point, defense counsel was obligated to protect defendant from the prejudice arising from the repeated acts of prosecutorial misconduct and, at the very least, request a curative instruction from the court.

Defense counsel also erred in not objecting—and, indeed, consenting—to the court's unlawful procedure of having the parties alternate which side went first in declaring whether they wished to exercise a peremptory challenge to a particular prospective juror. CPL 270.15 (2) provides that the People "must exercise their peremptory challenges first and may not, after the defendant has exercised [the defendant's] peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box." After the court stated that its practice was to have parties alternate their exercise of peremptory challenges, defense counsel, evidently unaware of the statute's mandate, said, "I'll go first. He can go first. I don't care." As a result, on numerous occasions during voir dire defense counsel stated whether or not she was peremptorily challenging a prospective juror before the prosecutor was required to state his position.

Although the court's violation of CPL 270.15 (2) does not constitute a mode of proceedings error, it was certainly prejudicial to defendant and we can conceive of no legitimate strategy for defense counsel's acquiescence to the unlawful procedure. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, "[o]ur review of this record indicates that defendant was not afforded meaningful representation and was therefore deprived of a fair trial" (*People v Gugino*, 132 AD2d 989, 989 [4th Dept 1987]).

Finally, we have reviewed defendant's remaining contentions and conclude that they are either unpreserved, lacking in merit, or academic in light of our determination.

All concur except GREENWOOD, and KEANE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the judgment. We agree with the majority that defendant's contentions that County Court violated CPL 270.15 (2), that he was denied the right to be present for the court's response to a substantive jury note, and that the court failed to respond meaningfully to a jury note are not preserved for our review (*see* CPL 470.05 [2]), and we would decline to exercise our power to review them

as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The majority agrees with defendant that he was denied effective assistance of counsel, but we cannot agree. Meaningful representation, of course, does not mean " 'perfect representation' " (*People v Ford*, 86 NY2d 397, 404 [1995]). Defendant contends that defense counsel failed to object when the prosecutor remarked several times to prospective jurors during voir dire that he "sleep[s] better" after becoming a prosecutor instead of a defense counsel. Although we in no way condone the conduct of the prosecutor (*see generally People v Thompson*, 126 AD3d 1486, 1486-1487 [4th Dept 2015], *lv denied* 26 NY3d 1092 [2015]; *People v Herman*, 187 AD2d 1027, 1028 [4th Dept 1992]), we conclude that defendant failed to show "the absence of strategic or other legitimate explanations" (*People v Hogan*, 26 NY3d 779, 785 [2016] [internal quotation marks omitted]; *see People v Benevento*, 91 NY2d 708, 712 [1998]) for defense counsel's failure to object (*see generally People v Masi*, 151 AD3d 1389, 1391 [3d Dept 2017], *lv denied* 30 NY3d 1062 [2017]). Defense counsel may have used the prosecutor's remarks to determine whether any prospective jurors harbored the same sentiment as the prosecutor.

Defense counsel's failure to object to testimony referencing defendant's past incarceration did not constitute ineffective assistance. The victim and another prosecution witness were former and current, respectively, incarcerated individuals who testified that they knew defendant from their time in prison. Any objection to that testimony would have had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see generally People v Young*, 190 AD3d 1087, 1092-1093 [3d Dept 2021], *lv denied* 36 NY3d 1102 [2021]; *People v Samo*, 124 AD3d 412, 413 [1st Dept 2015], *lv denied* 26 NY3d 934 [2015]). With respect to defense counsel's failure to object to certain testimony regarding a prior bad act committed by defendant, i.e., the victim's testimony that defendant had tried to rape him, the victim made that statement during cross-examination, and defense counsel used it to her advantage in attempting to portray the victim as not credible in his recollection of the incident. There was thus a "reasonable and legitimate strategy" for defense counsel's failure to object (*Benevento*, 91 NY2d at 713).

Regarding defense counsel's failure to object to the court's procedure of having the parties alternate which side went first in exercising peremptory challenges in violation of CPL 270.15 (2), upon our review of the record we conclude that defendant was not prejudiced by defense counsel's failure to object (*see generally People v Lostumbo*, 182 AD3d 1007, 1010 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Viewing the evidence, the law, and the circumstances of the 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]).

Inasmuch as we conclude that the remaining contentions raised by

defendant do not require reversal or modification of the judgment, we would affirm.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

561

CAF 23-01022

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

IN THE MATTER OF JACOB A., JR., LILLY N.,
AND MILES N.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ROBERT G.N., RESPONDENT-APPELLANT.
(PROCEEDING NO. 1.)

IN THE MATTER OF JACOB A., JR., LILLY N.,
AND MILES N.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

SIDERIA D.J.N., RESPONDENT-APPELLANT.
(PROCEEDING NO. 2.)

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT-APPELLANT SIDERIA D.J.N.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT ROBERT G.N.

JACQUELINE A. MCCORMICK, LYONS, FOR PETITIONER-RESPONDENT.

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Wayne County (Arthur B. Williams, J.), entered May 18, 2023, in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order that, among other things, terminated their parental rights with respect to the subject children on the ground of permanent neglect, committed the custody and guardianship of the children to petitioner, and freed the children for adoption. Contrary to respondents' contentions, petitioner met its burden with respect to permanent neglect by establishing that, despite its diligent efforts to

encourage and strengthen respondents' relationship with the children, respondents failed to plan for the future of the children (*see Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1182 [4th Dept 2024], *lv denied* — NY3d — [2024]; *see generally* Social Services Law § 384-b [7] [a]).

Permanent neglect requires a determination that, although a parent is "physically and financially able" to plan for the child, the parent has not "successfully address[ed] or gain[ed] insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see Matter of Alexander S. [David S.]*, 130 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015], *appeal dismissed & lv denied* 26 NY3d 1030 [2015], *rearg denied* 26 NY3d 1132 [2016]; *see generally* Social Services Law § 384-b [7] [a]). Here, although respondents engaged in regular visitation and participated to some extent in parenting classes, they failed to address the problems that caused the removal of the children (*see Matter of Leon RR*, 48 NY2d 117, 125 [1979]).

The children were removed due to the deplorable conditions of the home, and those conditions remained even four years after petitioner became involved with respondents. Despite the efforts of petitioner's personnel, police, and relatives to ameliorate those conditions, respondents' situation did not significantly improve over time. Respondents were capable of cleaning the residence, as was evident from the condition of the residence during announced visits, but on unannounced visits that took place within days of an announced visit, caseworkers repeatedly found that the residence had been allowed to revert to its prior state.

In addition to failing to maintain the residence in a safe and sanitary condition, the father failed to engage meaningfully in mental health treatment. The mother, however, engaged in treatment and was generally compliant with that treatment. Both parents engaged to some extent in parenting classes. Nevertheless, "[a]ttendance at the myriad programs and visits arranged for respondents clearly does not signal the necessary change, nor does their desire for return of the children. Of singular importance in reaching a determination as to whether respondents have actually *learned to accept responsibility and modify their behavior* must be an evaluation of respondents' own testimony, particularly their credibility, as well as the evidence of witnesses (professional and nonprofessional) who have dealt with them in the various programs and observed them and the children" (*Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986] [emphasis added]). We thus conclude that petitioner established that, despite any minimal progress, respondents did not actually learn to accept responsibility and modify their behavior (*see id.*; *cf. Matter of Nicole H.*, 24 AD3d 1054, 1056 [3d Dept 2005]).

Respondents further contend that Family Court erred in refusing to address a custody petition filed by the paternal grandmother before entering the dispositional order. We note that respondents lack standing to challenge any actual determination of the grandmother's

petition (*see Matter of Ty'Shawn B. [Cassandra B.]*, 209 AD3d 1280, 1281 [4th Dept 2022]; *see e.g. Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022]; *Matter of Terrance M. [Terrance M., Sr.]*, 75 AD3d 1147, 1147 [4th Dept 2010]). Nevertheless, to the extent that respondents each contend that the court's failure to address that petition affected the underlying order terminating their parental rights, we conclude that those contentions lack merit. Where, as here, a nonparent relative has filed a petition for custody of the children, "the proper procedural course would have been for the [court] to consider her custody petition in the context of a dispositional hearing in the underlying termination proceedings, wherein the court would determine the best interests of the child" (*Matter of Weiss v Weiss*, 142 AD3d 507, 508 [2d Dept 2016]; *see Matter of Carl G. v Oneida County Dept. of Social Servs.*, 24 AD3d 1274, 1275 [4th Dept 2005]). We nevertheless conclude that "the record supports the [court's] conclusion that the child[ren]'s best interests required continuing custody with [petitioner], so that [they] could be made available for adoption by [their] foster parents" (*Matter of Violetta K. v Mary K.*, 306 AD2d 480, 481 [2d Dept 2003]). The only issue at a dispositional hearing is the best interests of the children, and "a nonparent relative takes no precedence for custody over the adoptive parents selected by an authorized agency" (*id.*). In this case, the record from the hearing, at which the paternal grandmother testified, establishes that it was in the children's best interests to remain with the pre-adoptive parents.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

567

CA 23-01669

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

DONNA RENZI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS RENZI, DEFENDANT-APPELLANT.

JENNIFER M. LORENZ, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

FERON POLEON, LLP, AMHERST (KELLY A. FERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 2, 2023. The order directed defendant to pay maintenance to plaintiff of $5,700 per month until defendant reaches the age of 67.

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

Memorandum: In this matrimonial action, defendant husband appeals from an order, issued after a remittal from this Court (*Renzi v Renzi*, 217 AD3d 1336 [4th Dept 2023]), that, among other things, awarded plaintiff wife maintenance, above the presumptive amount under Domestic Relations Law § 236 (B) (6), until the husband reaches the age of 67. We affirm.

Contrary to the husband's contention, Supreme Court did not err in awarding the wife maintenance above the presumptive amount until the husband reaches the age of 67. "[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Anastasi v Anastasi*, 207 AD3d 1131, 1131 [4th Dept 2022] [internal quotation marks omitted]; *see Mehlenbacher v Mehlenbacher*, 199 AD3d 1304, 1307 [4th Dept 2021]). Although this Court's authority in determining issues of maintenance is "as broad as that of the trial court" (*Anastasi*, 207 AD3d at 1131 [internal quotation marks omitted]; *see Reed v Reed*, 55 AD3d 1249, 1251 [4th Dept 2008]), generally, this Court "will not disturb the determination of maintenance absent an abuse of discretion" (*Anastasi*, 207 AD3d at 1131 [internal quotation marks omitted]; *see Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015]).

Here, the court properly considered, among other things, the length of the parties' marriage, the age and current health of the parties, the parties' present and future earning potential, and the

parties' standard of living during the marriage. We conclude that "[t]he court properly considered [the wife's] reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors" (*Peck v Peck*, 167 AD3d 1518, 1519 [4th Dept 2018] [internal quotation marks omitted]; *see* Domestic Relations Law § 236 [B] [6]). Although the husband contends that the court erred in finding him in good health inasmuch as he has a diagnosis of multiple sclerosis, the record establishes that, at the time of the court's decision, he was able to continue working with no restrictions. We perceive no abuse of discretion here, and we decline to substitute our discretion for that of the court.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

570

KA 17-00900

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. MCCRACKEN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 March 13, 2017. The appeal was held by this Court by order entered June 30, 2023, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (217 AD3d 1543 [4th Dept 2023]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). We previously held this case, reserved decision, and remitted the matter to Supreme Court to conduct a hearing to determine whether defendant was unlawfully arrested in his home in violation of *Payton v New York*, 445 US 573 (1980) (*People v McCracken*, 217 AD3d 1543 [4th Dept 2023]). Upon remittal, the court determined following the *Payton* hearing that the police lawfully arrested defendant pursuant to a parole warrant. More specifically, the court determined that the warrant had been issued upon probable cause to believe that defendant had absconded from parole supervision and that the warrant was still active at the time of defendant's arrest. Although defendant has not submitted a new brief on resubmission, he has notified this Court that he is relying on the arguments he made in writing to the court following the hearing. We conclude that the evidence at the hearing amply supports the court's determination that defendant was lawfully arrested in his home pursuant to a valid parole warrant (*see People v Johnson*, 140 AD3d 1630, 1631 [4th Dept 2016], *lv denied* 28 NY3d 1028 [2016]).

Defendant's remaining contention, raised in his initial brief, is that his plea was involuntarily entered. Because defendant did not

move to withdraw his plea or to vacate the judgment of conviction, however, he failed to preserve his contention for our review (*see People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]), and "this case does not fall within the rare exception to the preservation rule" (*People v Taylor*, 196 AD3d 1050, 1051 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021] [internal quotation marks omitted]; *see People v Bellamy*, 170 AD3d 1653, 1654 [4th Dept 2019]; *see generally People v Lopez*, 71 NY2d 662, 666 [1988]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

578

CAF 23-00269

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

EVAN F., RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNELL, 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.), entered November 10, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, adjudicated the subject child to be permanently neglected.

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

Memorandum: Respondent father appeals from an order of fact-finding and disposition adjudicating the subject child to be permanently neglected and ordering that the child 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.

The father contends that petitioner was required to change the permanency goal to adoption prior to petitioning to terminate his 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, Family 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]).

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

The father further contends 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[ ], providing services to the parents to overcome problems that prevent the discharge of the child[ ] into their care, and informing the parents of their child[ ]'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 father], its efforts were fruitless because [the father] 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 father and to work with him toward his service plan goals, the father failed to cooperate in any meaningful manner.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

590

CA 23-01595

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

IN THE MATTER OF ARBITRATION BETWEEN BUFFALO TEACHERS' FEDERATION, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF THE BUFFALO CITY SCHOOL DISTRICT, RESPONDENT-RESPONDENT.

ROBERT T. REILLY, GENERAL COUNSEL, NEW YORK STATE UNITED TEACHERS, LATHAM (JOSE L. MANJARREZ OF COUNSEL), FOR PETITIONER-APPELLANT.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered August 10, 2023, in a proceeding pursuant to CPLR article 75. The order and judgment denied the petition seeking to vacate an arbitration award and confirmed the award.

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

Memorandum: In this CPLR article 75 proceeding, petitioner appeals from an order and judgment that denied petitioner's petition seeking to vacate an arbitration award and confirmed the award. We affirm.

"It is well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Matter of Syracuse Firefighters Assn., Local 280, IAFF, AFL-CIO, CLC [City of Syracuse]*, 213 AD3d 1249, 1249 [4th Dept 2023]). As relevant here, "CPLR 7511 (b) (1) (iii) permits vacatur of an award where . . . the arbitrator exceeds [their] power" (*Matter of Gerber v Goldberg Segalla LLP*, 199 AD3d 1354, 1355 [4th Dept 2021]). "An arbitrator exceeds [their] power . . . where [their] award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Barone v Haskins*, 193 AD3d 1388, 1390 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022], *appeal dismissed* 37 NY3d 1032 [2021]; *see Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]), such as "a limitation on [the arbitrator's] power as set forth in [a collective bargaining agreement]" (*Matter of Lackawanna*

Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO [City of Lackawanna], 156 AD3d 1406, 1407 [4th Dept 2017]). "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an arbitrator has made an error of law or fact' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 91 [2010], quoting *Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003]). As the Court of Appeals has explained, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). "The party seeking to vacate an arbitration award thus bears a heavy burden to establish that the arbitrator exceeded their power" (*Matter of Buffalo Teachers' Fedn. [Board of Educ. of Buffalo City Sch. Dist.]*, 227 AD3d 1435, 1436 [4th Dept 2024]; *see Matter of Asset Protection & Sec. Servs., LP v Service Empls. Intl. Union, Local 200 United*, 19 NY3d 1009, 1011 [2012]).

Here, contrary to petitioner's assertion, the arbitrator merely interpreted and applied the limitation contained within the relevant collective bargaining agreement (CBA) prohibiting arbitration of the grievance filed by petitioner, as he had the authority to do (*see Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO*, 156 AD3d at 1408). We are powerless to set aside that interpretation even if we disagree with it (*see id.*). In any event, we conclude that the plain language of the CBA supports the arbitrator's interpretation.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

593

KA 20-01629

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL HOWARD, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), entered November 12, 2020. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant was previously convicted following a nonjury trial by County Court (D'Amico, J.) of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirmed the judgment of conviction on direct appeal (*People v Howard*, 101 AD3d 1749 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013]) and denied defendant's subsequent motion for a writ of error coram nobis and "other relief" (*People v Howard*, 112 AD3d 1385 [4th Dept 2013]). Defendant thereafter moved to vacate the judgment of conviction. County Court (D'Amico, J.) denied the motion without a hearing. This Court reversed that order and remitted the matter for a hearing on the motion insofar as it sought to vacate the judgment of conviction on the ground of ineffective assistance of counsel (*People v Howard*, 175 AD3d 1023 [4th Dept 2019]). Defendant now appeals by permission of this Court from an order of County Court (Maxwell Barnes, J.) denying his motion after a hearing. We affirm.

According to defendant, the court erred in denying his motion because defense counsel readily admitted at the hearing that he did not conduct any investigation into an alibi defense, relying instead on defendant and his mother to identify witnesses who could support that defense. Defendant further contends that the court erred in concluding that any error by defense counsel in failing to conduct a

proper investigation did not warrant a new trial.

As the Court of Appeals has explained, "[e]ssential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case" (*People v Oliveras*, 21 NY3d 339, 346 [2013]; *see People v Sposito*, 37 NY3d 1149, 1150 [2022]; *see generally Strickland v Washington*, 466 US 668, 690-691 [1984]). "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case" (*Rompilla v Beard*, 545 US 374, 387 [2005] [internal quotation marks omitted]; *see generally People v Ramos*, 194 AD3d 964, 965-966 [2d Dept 2021]). " 'To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Cleveland*, 217 AD3d 1346, 1349 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]).

Here, even assuming, arguendo, that defense counsel did not properly investigate defendant's alibi defense (*see People v Borcyk*, 184 AD3d 1183, 1184-1186 [4th Dept 2020]; *see also People v Lanier*, 191 AD3d 1094, 1096 [3d Dept 2021]; *see generally Oliveras*, 21 NY3d at 348), we must determine whether counsel's acts or omissions " 'prejudice[d] the defense or defendant's right to a fair trial' " (*People v Benevento*, 91 NY2d 708, 714 [1998], quoting *People v Hobot*, 84 NY2d 1021, 1024 [1995]). Although defendant called numerous witnesses at the CPL 440.10 hearing, only one such witness provided testimony that could conceivably support an alibi defense. The witness testified that, on the night in question, she was with defendant at a party at his mother's house, which was on the same street as the shooting.

Given that the party was only a short distance from the crime scene and the witness did not testify that she kept her eyes on defendant the entire time she was at the party, we cannot conclude that the witness's testimony, if offered at trial, would likely have changed the result, especially considering that the factfinder heard and apparently rejected similar alibi testimony of defendant and his mother. Thus, we conclude that defendant "failed to demonstrate that trial counsel's omission actually had a probable effect on the outcome of the trial" (*People v Hobot*, 200 AD2d 586, 596 [2d Dept 1994], *affd* 84 NY2d 1021 [1995] [internal quotation marks omitted]; *see People v Daley*, 172 AD2d 619, 620-621 [2d Dept 1991]), "so as to support the conclusion that he was denied 'meaningful representation' " (*Hobot*, 200 AD2d at 596, quoting *People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

598

KA 21-01386

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WESLEY SAVAGE, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered September 1, 2021. The judgment convicted defendant upon a plea of guilty of attempted burglary in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of two counts of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]), 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 the waiver of the right to appeal is unenforceable and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Resto*, 222 AD3d 1425, 1425 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). We note that defendant's plea satisfied multiple charges that could have resulted in consecutive sentences if he were convicted at trial, he was allowed to plead guilty to reduced charges, and his sentence on the crimes to which he pleaded guilty was far closer to the legal minimum than the legal maximum.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

611

CA 23-01982

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, GREENWOOD, AND HANNAH, JJ.

LIBERTY MAINTENANCE, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLIANT INSURANCE SERVICES, INC.,
DEFENDANT-APPELLANT.

GORDON & REES, LLP, WALNUT CREEK, CALIFORNIA (DON WILLENBURG, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (DEBORAH A. SUMMERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 27, 2023. The order denied the motion of defendant to dismiss plaintiff's second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the fifth cause of action and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for, inter alia, defendant's alleged breach of its brokerage services agreement (agreement) with plaintiff, defendant appeals from an order denying its motion to dismiss plaintiff's second amended complaint pursuant to CPLR 3211 (a) (1) and (7).

We agree with defendant that Supreme Court erred in denying the motion insofar as it sought dismissal of the fifth cause of action, for promissory estoppel, pursuant to CPLR 3211 (a) (1), and we therefore modify the order accordingly. "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *see Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991-992 [2d Dept 2011], *lv dismissed* 19 NY3d 991 [2012], *rearg denied* 20 NY3d 965 [2012]). Here, defendant established not only that the parties had a contract, i.e., the brokerage services agreement, but also that the agreement included an integration clause prohibiting modification of the agreement except by written amendment. We conclude that plaintiff has "no tenable claim that [it] reasonably relied upon [defendant's alleged oral or implied promise] in support

of [its promissory] estoppel cause of action" (*Gebbia v Toronto-Dominion Bank*, 306 AD2d 37, 38 [1st Dept 2003]; *see IBT Media Inc. v Pragad*, 220 AD3d 530, 532 [1st Dept 2023]). We otherwise affirm for reasons stated in the decision at Supreme Court.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

621

KA 23-00804

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY J. LAWRENCE, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered April 20, 2023. The judgment convicted defendant upon a jury verdict of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), stemming from his conduct in forcibly stealing property at knifepoint from an attendant (victim) at a gas station convenience store. We affirm.

Defendant contends that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). In particular, he contends that the People's failure to disclose the criminal histories of two prosecution witnesses (*see* CPL 245.20 [1] [k] [iv], [p]) and body-worn camera (BWC) footage from two New York State troopers investigating the robbery (*see* § 245.20 [1] [g]) rendered two certificates of compliance filed pursuant to CPL 245.50 improper, thereby rendering the corresponding declarations of trial readiness illusory and insufficient to stop the running of the speedy trial clock. We reject defendant's contention.

The criminal action against defendant in this case was commenced on April 27, 2022 (*see* CPL 1.20 [17]). The People filed their initial certificate of compliance (COC) and statement of readiness (SOR) on May 25, 2022. On October 20, 2022, defense counsel contacted the People and indicated that criminal histories for two prosecution witnesses had not yet been disclosed, including with respect to events that occurred *after* the filing of the initial COC. That same day, the

People immediately disclosed the complete criminal histories of both witnesses, and, on October 24, 2022, they filed a supplemental COC and SOR. At that time, defendant did not seek any relief related to that belated production. On December 30, 2022, defense counsel contacted the People again to indicate that she had recently become aware that the BWC footage from the New York State Police (NYSP) had not been disclosed. The People that same day disclosed the missing footage and filed a second supplemental COC and SOR.

On the same day, defendant moved to dismiss the indictment on speedy trial grounds, arguing that the People's failure to provide all initial discovery required by CPL 245.20 invalidated the initial COC and first supplemental COC, thereby rendering the corresponding SORs illusory. Consequently, defendant contended that the court should charge the People with all the time that had elapsed since the commencement of the criminal action, requiring dismissal of the indictment (*see* CPL 30.30 [1]). The court denied the motion.

We conclude that the court did not err in denying defendant's motion. 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]). "A statement of readiness [made] at a time when the People are not actually ready is illusory and insufficient to stop the running of the speedy trial clock" (*England*, 84 NY2d at 4) and will be deemed invalid (*see* CPL 30.30 [5]).

As relevant here, "[a]ny [SOR] must be accompanied or preceded by a certification of good faith compliance with the disclosure requirements of [CPL] 245.20" (CPL 30.30 [5]; *see* § 245.50 [1]; *People v Cooperman*, 225 AD3d 1216, 1217 [4th Dept 2024]). A COC must 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 must also "identify the items provided" (CPL 245.50 [1]; *see People v Gaskin*, 214 AD3d 1353, 1354 [4th Dept 2023]). Notwithstanding the provisions of any other law, and absent an individualized finding of special circumstances by the court before which the charge is pending, the prosecution will not be deemed ready for trial for purposes of CPL 30.30 until it has filed a "proper" COC pursuant to CPL 245.50 (1) (CPL 245.50 [3]; *see People v Bay*, 41 NY3d 200, 210 [2023]).

Consequently, in evaluating the propriety of a COC—i.e., whether the People have complied with their mandatory initial disclosure obligations under CPL 245.20—"the key question . . . 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]). Despite not being defined by the statute, due diligence "is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives" (*Bay*, 41 NY3d at 211 [internal quotation marks omitted]). That analysis "is fundamentally

case-specific . . . and will turn on the circumstances presented" (*id.* at 212). Although the statute does not require a "perfect prosecutor"—i.e., there is no rule of strict liability—the Court of Appeals has emphasized that the prosecutor's good faith, while required, "is not sufficient standing alone and cannot cure a lack of diligence" (*id.*). In determining whether the People exercised due diligence, the Court in *Bay* identified the following non-exhaustive list of factors for courts to consider: "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.*; *see People v Mitchell*, 228 AD3d 1250, 1255 [4th Dept 2024]; *Cooperman*, 225 AD3d at 1219).

In short, on 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 made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*Bay*, 41 NY3d at 213; *see Cooperman*, 225 AD3d at 1218). Where the People fail to meet their burden, "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" (*Bay*, 41 NY3d at 213; *Mitchell*, 228 AD3d at 1256).

Here, with respect to the NYSP BWC footage, we conclude, under the circumstances of this case and upon considering the relevant *Bay* factors, that the People exercised due diligence and made reasonable efforts to satisfy their obligations under CPL article 245 at the time of the initial COC (*see Bay*, 41 NY3d at 212). Even though the underlying case was not particularly complex, which cuts against a finding of due diligence, most of the other remaining factors, when considered as part of a "holistic assessment," support the conclusion that the People exercised due diligence with respect to the missing BWC footage (*Cooperman*, 225 AD3d at 1220). The initial discovery supplied by the People pursuant to their mandatory obligations under CPL article 245 was voluminous, as shown by the lengthy list of disclosed material submitted with the initial COC. Among other things, the People disclosed numerous audio and video files, photographs, booking information, numerous files containing law enforcement paperwork, and police reports. There also is no dispute that the People did, in fact, disclose some BWC footage, albeit not the footage from NYSP. Indeed, that fact supports the People's assertion that, in complying with their mandatory discovery obligations, they had requested such footage from all agencies—including NYSP—and that, due to mere "error and oversight," the NYSP BWC footage was not initially disclosed. Given the voluminous discovery actually produced, it would not have been particularly obvious to the People at the time of the initial COC that some of the requested BWC footage was missing. Ultimately, the People established that their initial failure to disclose the missing BWC footage "was inadvertent and without bad faith or a lack of due

diligence" (*People v Deas*, 226 AD3d 823, 826 [2d Dept 2024]), which is substantiated by the fact that the People immediately disclosed the remaining BWC footage once they learned that it had not been turned over in the initial release. This is not a case where the People affirmatively denied the existence of clearly discoverable material (*cf. Bay*, 41 NY3d at 215) or failed to take any steps to ascertain the existence of discoverable material contained in their own records (*cf. Mitchell*, 228 AD3d at 1256). To conclude otherwise—i.e., that the People did not exercise due diligence with respect to the NYSP BWC footage—would, in our view, hew too closely to the "perfect prosecutor" approach expressly rejected by the Court of Appeals (*Bay*, 41 NY3d at 212 [internal quotation marks omitted]; *see Cooperman*, 225 AD3d at 1218).

Further, with respect to the criminal histories of the two witnesses—which are undisputedly subject to disclosure under CPL 245.20 (1) (k) (iv) and (p)—we conclude, under the circumstances of this case and upon considering the relevant factors, as discussed in greater detail above, that the court did not err in denying defendant's motion inasmuch as the People exercised due diligence and "made reasonable efforts sufficient to satisfy CPL article 245" (*Bay*, 41 NY3d at 212; *see* CPL 245.50 [1]) at the time of the filing of the initial COC.

Even assuming, arguendo, that the challenged COCs were invalid and that, consequently, defendant met his "initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]), we nevertheless conclude based on our review of the record and the circumstances of this case that the motion was properly denied because the People met their burden of demonstrating "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]; *see People v Abergut*, 202 AD3d 1497, 1498 [4th Dept 2022], *lv denied* 38 NY3d 1068 [2022]; *People v Hewitt*, 144 AD3d 1607, 1607-1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although we conclude that "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings" (*People v Watts*, 218 AD3d 1171, 1173 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023] [internal quotation marks omitted]), the jury here "was entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of defendant's witnesses" as well as over defendant's competing account of the incident asserting that the robbery was actually staged by him and the victim, and we perceive no reason to disturb the jury's credibility determinations in that regard (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]; *see Watts*, 218 AD3d at 1173-1174; *People v Mercado-Gomez*, 206 AD3d 1643, 1644 [4th Dept 2022]). To the extent that there were any inconsistencies in the victim's testimony, we

conclude that it "was not 'so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Lewis*, 129 AD3d 1546, 1548 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]; *see People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]), and that "any such inconsistencies merely presented issues of credibility for the jury to resolve" (*Mercado-Gomez*, 206 AD3d at 1644; *see People v Anderson*, 220 AD3d 1223, 1224 [4th Dept 2023]).

Finally, defendant contends that the court erred in denying his CPL 330.30 motion to set aside the verdict based on his allegation that the indictment was not properly filed in accordance with CPL 190.65 (3), thereby depriving the court of jurisdiction to conduct the trial. We reject that contention. CPL 190.65 (3) provides, in relevant part, that "[u]pon voting to indict a person, a grand jury must . . . file an indictment *with the court by which it was impaneled*" (emphasis added). Here, that requirement was satisfied when the People filed the indictment with Wayne County Court, the superior court that had impaneled the grand jury (*see generally* CPL 10.10 [2] [b]; 210.10). In addition to the foregoing, a new trial is not warranted here because "case law establishes that the language of CPL 190.65 (3) that requires the filing of the indictment is directory, not mandatory" (*People v Fulton*, 13 AD3d 1217, 1217 [4th Dept 2004], *lv denied* 4 NY3d 830 [2005]; *see generally Dawson v People*, 25 NY 399, 405-406 [1862]), and therefore the purported defect is not jurisdictional inasmuch as the failure to file is not subject to any "time limits" (*People v Cade*, 74 NY2d 410, 416 [1989]; *see People v Brancoccio*, 189 AD2d 525, 530 [2d Dept 1993], *affd* 83 NY2d 638 [1994]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

632

TP 24-00456

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

IN THE MATTER OF WILLIE STRONG, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY 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, Wyoming County [Melissa Lightcap Cianfrini, A.J.], entered March 13, 2024) to review a determination of respondent. The determination denied petitioner's grievance challenging a jail time credit calculation.

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

Memorandum: Petitioner filed a grievance with the Incarcerated Grievance Resolution Committee (IGRC) challenging the calculation of his jail time credit (*see* 7 NYCRR 701.4, 701.5 [b]). IGRC denied the grievance, and petitioner's appeal to the facility superintendent was denied. Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying his grievance.

As a preliminary matter, we note that Supreme Court erred in transferring this proceeding to us pursuant to CPLR 7804 (g) on the ground that the petition raises an issue of substantial evidence. The determination was not "made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law" (CPLR 7803 [4]), and thus no issue of substantial evidence has been raised (*see Matter of Bennefield v Annucci*, 122 AD3d 1329, 1330 [4th Dept 2014]; *Matter of Shomo v Zon*, 35 AD3d 1227, 1227 [4th Dept 2006]). We nevertheless retain jurisdiction in the interest of judicial economy (*see Bennefield*, 122 AD3d at 1330; *Shomo*, 35 AD3d at 1227).

We conclude that petitioner failed to exhaust his administrative remedies with respect to the denial of his grievance, and we therefore

dismiss the petition. "A petitioner must exhaust all administrative remedies before seeking judicial review unless an agency's action is challenged as either unconstitutional or wholly beyond its grant of power . . . or when resort to an administrative remedy would be futile . . . or when its pursuit would cause irreparable injury" (*Bennefield*, 122 AD3d at 1331 [internal quotation marks omitted]; *see Matter of Walker v Uhler*, 185 AD3d 1363, 1363-1364 [3d Dept 2020]). After the superintendent denied petitioner's grievance appeal, petitioner was required to appeal that denial to the Central Office Review Committee (CORC) (*see* 7 NYCRR 701.5 [d]; *Matter of Jackson v Administration of Bare Hill Corr. Facility*, 139 AD3d 1191, 1192 [3d Dept 2016]).

In his answer, respondent submitted evidence that petitioner failed to appeal to CORC, which petitioner does not dispute (*see generally Matter of Beaubrun v Annucci*, 144 AD3d 1309, 1310-1311 [3d Dept 2016]; *Matter of Alvarez v Fischer*, 94 AD3d 1404, 1407 [4th Dept 2012]). Petitioner thus failed to exhaust his administrative remedies (*see Jackson*, 139 AD3d at 1192; *Alvarez*, 94 AD3d at 1407; *see also Matter of Reyes v Annucci*, 142 AD3d 1395, 1396 [4th Dept 2016]), and he did not establish that any exceptions to the exhaustion requirement applied (*see Bennefield*, 122 AD3d at 1331). Petitioner's "mere assertion that a constitutional right is involved will not excuse [his] failure to pursue established administrative procedures that can provide adequate relief" (*Beaubrun*, 144 AD3d at 1311 [internal quotation marks omitted]; *see also Walker*, 185 AD3d at 1364).

Entered: October 4, 2024 Ann Dillon Flynn
Clerk of the Court

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

639

KA 21-01721

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS MALCOLM, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN HUTCHISON 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 (Kenneth F. Case, J.), rendered October 28, 2021. The judgment convicted defendant upon his plea of guilty of assault on a police officer and unlawful fleeing a police officer in a motor vehicle in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault on a police officer (Penal Law § 120.08) and unlawful fleeing a police officer in a motor vehicle in the second degree (§ 270.30). Contrary to defendant's contention, the record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Rowell*, 224 AD3d 1335, 1335 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]). The valid waiver forecloses defendant's challenge to County Court's "discretionary decision to deny youthful offender status" (*People v Stackhouse*, 214 AD3d 1303, 1304 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]), any request that we exercise our interest of justice jurisdiction "to adjudicate him a youthful offender" (*People v Middlebrooks*, 167 AD3d 1483, 1484 [4th Dept 2018], *lv denied* 32 NY3d 1207 [2019], *reconsideration denied* 33 NY3d 1033 [2019]), and defendant's "challenge to the severity of the sentence" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see Rowell*, 224 AD3d at 1335-1336).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

643

CAF 23-01979

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

IN THE MATTER OF BENJAMIN C. KAYE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KAREN C. HALL, RESPONDENT-RESPONDENT.

BENJAMIN C. KAYE, PETITIONER-APPELLANT PRO SE.

KAREN C. HALL, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Oswego County (Karen M. Brandt Brown, A.J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, dismissed the objections of petitioner 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, petitioner father appeals from an order that, inter alia, denied his written objections to the order of the Support Magistrate, which effectively granted in part the father's petition seeking modification of the parties' judgment of divorce by reducing the father's weekly child support payment but imputed income to the father in determining those payments. We affirm.

As relevant, the father objected to the Support Magistrate's determination to impute income to him because the Veterans Administration determined that he is "totally and permanently disabled" and because there was no evidence that any of his businesses had been successful prior to their sale. We reject the father's contention that Family Court erred in denying that objection.

It is well settled that " '[c]ourts have considerable discretion to . . . impute an annual income to a parent' " (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]; *see Matter of Drake v Drake*, 185 AD3d 1382, 1383 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]). Furthermore, "[c]hild 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]), and "a court's imputation of

income will not be disturbed so long as there is record support for its determination" (*Drake*, 185 AD3d at 1383 [internal quotation marks omitted]).

In determining a party's child support obligation, "[a] court need not rely upon a party's own account of [their] finances, but may impute income based upon the party's past income or demonstrated future potential earnings . . . The court may impute income to a party based on [their] employment history, future earning capacity, educational background, or money received from friends and relatives . . . [In addition, a court] may properly impute income in calculating a support obligation where [it] finds that a party's account of [their] finances is not credible or is suspect" (*Matter of Deshotel v Mandile*, 151 AD3d 1811, 1811-1812 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Rohme v Burns*, 92 AD3d 946, 947 [2d Dept 2012]).

Here, the Support Magistrate did not abuse her discretion by imputing income to the father, who had been unemployed since 2017 despite having a bachelor's degree in mechanical engineering. Although the father had been deemed disabled by the Veterans Administration, that determination was based solely upon the father's self-reporting. Indeed, the Veterans Administration records note that "there is no official record of such incurrence or aggravation" of post-traumatic stress disorder in the father's service treatment records. In addition, the evidence before the Support Magistrate revealed that the father had twice applied for social security benefits based upon his disability and had been denied, most recently in 2021. Thus, despite the father's contention that he is unable to work due to a disability, his testimony was not substantiated or corroborated by any medical evidence, and "[t]he Support Magistrate was not obliged to accept the father's unsupported testimony that a medical condition prevented him from working" (*Matter of Niagara County Dept. of Social Servs. v Hueber*, 89 AD3d 1433, 1434 [4th Dept 2011], *lv denied* 18 NY3d 805 [2012] [internal quotation marks omitted]; *see Drake*, 185 AD3d at 1384).

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

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

644

CA 23-00874

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

TIMOTHY ELLS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, DEFENDANT-APPELLANT.

HURWITZ FINE P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (EDWARD L. SMITH, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered April 26, 2023. The order, insofar as appealed from, granted in part the motion of plaintiff for partial summary judgment pursuant to Labor Law §§ 240 (1) and 241 (6) and denied in part the motion of defendant for summary judgment dismissing the complaint.

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 sustained when a tree that was being cut down by a coworker fell and struck him. Plaintiff's employer was the general contractor on defendant's roadway rehabilitation project. The project included the erection of a pedestrian bridge. At the time of the accident, plaintiff and his coworkers were removing trees to ready the site for construction of the pedestrian bridge, with plaintiff assisting in the operation of a wood chipper. Plaintiff moved for summary judgment on the issue of liability with respect to his Labor Law §§ 240 (1) and 241 (6) causes of action and sought specific findings with respect to the Labor Law § 241 (6) cause of action. Supreme Court, inter alia, granted plaintiff's motion insofar as it sought summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action and determined with respect to the Labor Law § 241 (6) cause of action that defendant violated certain applicable provisions of the Industrial Code, that those violations constituted a failure by defendant to use reasonable care, and that issues of fact existed whether those violations were a proximate cause of plaintiff's injury and whether plaintiff was free from comparative fault. Defendant appeals, and we affirm.

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

that part of plaintiff's motion with respect to the Labor Law § 240 (1) cause of action. "Although trees are not structures and tree removal in and of itself is not an enumerated activity within the meaning of Labor Law § 240 (1), tree removal performed to facilitate an enumerated activity does come within the ambit of this statute" (*Krencik v Oakgrove Constr., Inc.*, 186 AD3d 1006, 1007 [4th Dept 2020], citing *Lombardi v Stout*, 80 NY2d 290, 296 [1992]; *see also Allyn v First Class Siding, Inc.*, 174 AD3d 1340, 1341 [4th Dept 2019]). Here, plaintiff met his initial burden on the motion of establishing that he was engaged in an activity within the protection of Labor Law § 240 (1) at the time of his accident by submitting uncontradicted evidence that the "tree removal work [he was engaged in] at the time of the accident was ancillary to the larger construction project . . . that was ongoing at the time of the accident" (*Krencik*, 186 AD3d at 1007; *see also Reisch v Amadori Constr. Co.*, 273 AD2d 855, 856 [4th Dept 2000]). Plaintiff also submitted an uncontroverted expert affidavit opining that the use of a safety device to control the descent of felled trees was necessary and consistent with the objective of the work being performed at the time of the accident (*see generally Lombardi*, 80 NY2d at 296; *Krencik*, 186 AD3d at 1006). In opposition, defendant failed to raise a triable issue of fact, including with respect to whether the tree removal work "[fell] into a separate phase easily distinguishable from other parts of the larger construction project" (*Krencik*, 186 AD3d at 1007 [internal quotation marks omitted]). To the contrary, defendant conceded that the work was necessary to prepare the site so that construction on the overall project could go forward (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]).

Contrary to defendant's contention, we conclude that the court did not err in its determinations with respect to the Labor Law § 241 (6) cause of action. Plaintiff met his initial burden of establishing that he was engaged in an activity within the protection of Labor Law § 241 (6) at the time of his accident by submitting uncontradicted evidence that the tree removal work he was engaged in "was related to construction, demolition or excavation work" (*Krencik*, 186 AD3d at 1008; *see Moreira v Ponzo*, 131 AD3d 1025, 1027 [2d Dept 2015]). Plaintiff also met his burden of establishing that provisions of the Industrial Code were applicable, that they were violated, and that those violations constituted a failure to use reasonable care. Specifically, plaintiff submitted an uncontroverted expert opinion that he was not required to be present in the area where the trees were being felled, as well as uncontradicted evidence that the area was not sectioned off. That evidence was sufficient to establish, as a matter of law, a violation of 12 NYCRR 23-1.7 (a) (2), which "requires barricades to cordon off areas for the safety of those[, like plaintiff,] *not* required to work within the sectioned-off area" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 50 [1st Dept 2012]). Plaintiff also submitted uncontradicted evidence that the use of the wood chipper to dispose of debris by mulching felled trees was not done safely because the wood chipper had been placed within the area where trees were falling, in violation of 12 NYCRR 23-2.1 (b) (*see DiPalma v State of New York*, 90 AD3d 1659, 1661 [4th Dept 2011]).

Defendant failed to raise a triable issue of fact in opposition.

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

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

646

CA 23-01353

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

KEVIN KONARSKI AND JENNIFER KONARSKI,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

THOMAS F. VANDYKE AND BWE, LLC,
DEFENDANTS-RESPONDENTS.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered July 21, 2023. The order denied the motion of plaintiffs for partial summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Kevin Konarski (plaintiff) when his motor vehicle was struck by a tanker truck operated by Thomas F. VanDyke (defendant) and owned by defendant BWE, LLC. The collision occurred in the early morning during an attempted lane change by defendant on a section of Interstate 90 (I-90) eastbound consisting of four lanes located between the on-ramp from an expressway and a junction allowing motorists to continue on I-90 eastbound or exit to another interstate highway. Following discovery, plaintiffs moved for partial summary judgment, contending that defendant was negligent and that his negligence was the sole proximate cause of the collision. Plaintiffs appeal from an order denying that motion, and we now affirm.

Viewing the evidence in the light most favorable to defendants and affording them the benefit of every reasonable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that plaintiffs failed to meet their initial burden on the motion (*see Spence v Kitchens*, 210 AD3d 1416, 1418-1419 [4th Dept 2022]; *Murray v Sminkey*, 200 AD3d 1705, 1706-1707 [4th Dept 2021]; *Fayson v Rent-A-Center E., Inc.*, 166 AD3d 1569, 1569-1570 [4th Dept 2018]). Plaintiffs submitted plaintiff's deposition testimony and a police accident report supporting the conclusion that plaintiff's vehicle

merged onto I-90 eastbound from the on-ramp and continued traveling in the rightmost lane at the speed limit of 55 miles per hour in a nonnegligent manner, at which point defendant's truck was initially behind plaintiff's vehicle, in the next lane over, moving at a slightly faster pace (i.e., in excess of the speed limit), before it arrived at a position such that, when defendant attempted to change lanes, the front of defendant's truck struck the front bumper and driver's door of plaintiff's vehicle (*see Brown v Askew*, 202 AD3d 1501, 1502-1503 [4th Dept 2022]). Plaintiffs' own submissions, however, also contained a differing version of the accident that raises a triable issue of fact regarding defendant's negligence (*see Spence*, 210 AD3d at 1419; *Brown*, 202 AD3d at 1503; *Murray*, 200 AD3d at 1706-1707; *Fayson*, 166 AD3d at 1570). Defendant insisted during his deposition testimony that he too was traveling at the speed limit of 55 miles per hour (i.e., not in excess thereof as testified to by plaintiff). If both vehicles were moving at that speed, defendant's truck would not have been able—as plaintiff suggested—to begin some distance behind plaintiff's vehicle and yet end up in a position beside plaintiff's vehicle such that the front of defendant's truck could strike the front of plaintiff's vehicle when defendant attempted to change lanes. Notably, plaintiff did not specifically recall defendant's truck pulling alongside him prior to the accident, explaining that he "did not see" the truck in that position, and it may be reasonably inferred from defendant's deposition testimony that, although defendant did not see it occur, plaintiff's vehicle had "come up beside" his truck on the right. Relatedly, each driver's respective failure to see the other vehicle just prior to the collision may have resulted, at least in part, from the weather and lighting conditions at the time of the accident, which defendant described as "very overcast and dark," so much so that he could not even tell that the sun had risen. When viewed in the light most favorable to defendants (*see Esposito*, 28 AD3d at 1143), the evidence raises the possibility that plaintiff merged onto I-90 eastbound and then traveled in the rightmost lane in relatively dark conditions at a speed in excess of the speed limit, thereby arriving at a position beside defendant's truck just as defendant attempted to change lanes to the right (*see generally Brown*, 202 AD3d at 1503).

Based on the foregoing, we conclude that plaintiff's own submissions raise triable issues of fact whether defendant was negligent in approaching plaintiff's vehicle on the left in excess of the speed limit and making an unsafe lane change to the right, thereby striking plaintiff's vehicle (*see* Vehicle and Traffic Law § 1128 [a]; *Gabriel v Great Lakes Concrete Prods. LLC*, 151 AD3d 1855, 1855-1856 [4th Dept 2017]), and also whether plaintiff was negligent in unsafely beginning to pass defendant on the right (*see* § 1123 [b]) at a speed in excess of the limit and imprudent for the conditions in the area between the merger from the on-ramp and the subsequent junction containing the exit (*see* § 1180 [a], [b]; *Brown*, 202 AD3d at 1503). Supreme Court thus properly determined that there were conflicting accounts regarding the speed and positioning of the vehicles (*see Murray*, 200 AD3d at 1706-1707) and, contrary to plaintiffs' contention, their submissions "failed to eliminate all triable issues

of fact with respect to whether defendant was negligent on th[e] basis" that he failed to see what was there to be seen (*Sztorc v Heaney*, 214 AD3d 1472, 1474 [4th Dept 2023]). Consequently, "although plaintiff[s] proffered compelling evidence that defendant acted negligently in the manner he operated his [truck], [the conflicting accounts in] plaintiff[s'] own submissions raised triable issues of fact whether defendant was negligent[and, if so, whether such negligence was a proximate cause of the collision], and the burden never shifted to defendants" (*Spence*, 210 AD3d at 1419; *see Sztorc*, 214 AD3d at 1474; *Murray*, 200 AD3d at 1707). We have considered plaintiffs' remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

647

CA 23-01601

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

IN THE MATTER OF ARBITRATION BETWEEN
LOCAL 32, INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS, A.F.L.-C.I.O.-C.L.C.,
UTICA PROFESSSIONAL FIRE FIGHTERS'
ASSOCIATION, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CITY OF UTICA, RESPONDENT-RESPONDENT.

GLEASON, DUNN, WALSH & O'SHEA, ALBANY (KELSEY ANNE SHAFFER OF COUNSEL), FOR PETITIONER-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (JOSEPH V. MCBRIDE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Mark R. Rose, J.), entered August 23, 2023, in a proceeding pursuant to CPLR article 75. The order, insofar as appealed from, denied in part the petition seeking to confirm an arbitration award.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is granted in its entirety and the arbitration award is confirmed in its entirety.

Memorandum: In this proceeding pursuant to CPLR article 75, petitioner appeals from an order insofar as it denied in part petitioner's petition seeking to confirm an arbitration award sustaining a grievance petitioner filed with respect to respondent's handling of certain requests for emergency leave under the parties' collective bargaining agreement (CBA).

The emergency leave provision of the CBA provides that "[e]mergency leave shall be granted during a member's tour of duty in the event of an unexpected serious illness of his wife, child, father, mother, brother, sister, mother-in-law, or father-in-law. The member shall make every effort to return to duty as soon as possible." A separate provision of the CBA provides that, where a grievance is settled by arbitration, the decision of the arbitrator "shall be final, conclusive and binding upon all parties" and "the arbitrator shall be strictly limited to the application and interpretation of the specific provision of the [CBA] and may not add to, modify or otherwise deviate from those provisions."

As relevant to this appeal, two firefighters requested emergency leave to attend to family emergencies. At the time each firefighter learned of the emergency, he was off duty but was scheduled to report for duty the following day. Thus, each firefighter's request for emergency leave was made prior to his tour of duty. Although each firefighter was excused from the next day's tour of duty, respondent ultimately charged the missed time against the firefighter's compensatory time, rather than treating it as paid emergency leave, inasmuch as the requests were not made during the firefighter's tour of duty. The arbitrator concluded that nothing in the language of the emergency leave provision required that the emergency leave request be made during the member's tour of duty. Rather, the use of the phrase "during a member's tour of duty" in the CBA's emergency leave section was meant to allow the member to leave or miss work to attend to a family emergency, and the phrase thus addressed the period of time when the leave must be taken, not when the request must be made. The arbitrator determined, inter alia, that the firefighters were entitled to paid emergency leave for the time in question and directed respondent to restore the charged compensatory time.

Supreme Court denied the petition to the extent that it sought to confirm the arbitrator's determination that the two firefighters were entitled to paid emergency leave, concluding that the arbitrator's grant of an emergency leave request that was made prior to a firefighter's tour of duty added a new clause or term to the CBA in violation of the limits placed on the arbitrator's authority in the CBA. We reverse.

"[J]udicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Matter of Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO [City of Lackawanna]*, 156 AD3d 1406, 1407 [4th Dept 2017]). "The court must vacate an arbitration award where the arbitrator exceeds a limitation on his or her power as set forth in the CBA" (*Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO*, 156 AD3d at 1407; *see* CPLR 7511 [b] [1] [iii]). The court, however, lacks the authority to "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003] [internal quotation marks omitted]).

Here, the arbitrator merely interpreted and applied the provisions of the relevant CBA, as he had the authority to do (*see Matter of Syracuse Firefighters Assn., Local 280, IAFF, AFL-CIO, CLC [City of Syracuse]*, 213 AD3d 1249, 1250 [4th Dept 2023]; *Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO*, 156 AD3d at 1408). We are powerless to set aside that interpretation even if we disagree with it (*see Syracuse Firefighters Assn., Local 280, IAFF, AFL-CIO, CLC*, 213 AD3d at 1250). Contrary to respondent's urging, the arbitrator's determination was not irrational; nothing in the CBA suggests that a request for emergency leave may not be made prior to

the start of a tour of duty, and the arbitrator provided a justification for his determination (*see Matter of Buffalo Teachers' Fedn. [Board of Educ. of Buffalo City Sch. Dist.]*, 227 AD3d 1435, 1437-1438 [4th Dept 2024]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

649

CA 23-02042

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

BRYNN N. SNYDER, FORMERLY KNOWN AS
BRYNN N. HOLEVA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRANDON M. HOLEVA, DEFENDANT-RESPONDENT.

BAKSHI & LETA, WILLIAMSVILLE (JOSEPH A. LETA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RJ FRIEDMAN ATTORNEYS, HAMBURG (R.J. FRIEDMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered November 1, 2023. The order, insofar as appealed from, granted defendant a refund of the overpayment of maintenance.

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

Memorandum: Plaintiff wife and defendant husband divorced in 2019 after a six-year, childless marriage. Pursuant to the terms of their separation agreement, which was incorporated but not merged into the judgment of divorce, defendant was obligated to make monthly maintenance payments to plaintiff for 20 months. The maintenance obligation was reduced to an income withholding for support order (wage withholding order) that was served on defendant's employer. Despite the fact that defendant's obligations under the order expressly terminated after 20 months, his employer thereafter continued to withhold the same portion of his income and make monthly payments to plaintiff. Defendant filed a motion in this post-divorce action seeking, inter alia, an order terminating the wage withholding order and directing plaintiff to reimburse him for the overpayment of maintenance. Plaintiff consented to the termination of the wage withholding order, but opposed defendant's request for reimbursement of the maintenance overpayment. Supreme Court granted defendant's motion in part and, inter alia, directed plaintiff to refund him the maintenance overpayment. Plaintiff now appeals, and we affirm.

Contrary to plaintiff's contention, we conclude that the court did not err in granting that part of the motion seeking a refund of the overpayment of maintenance. "Generally, as a matter of public policy, a payor spouse is not entitled to restitution or recoupment of

maintenance payments" (*Kaplan v Kaplan*, 130 AD3d 576, 578 [2d Dept 2015]; *see Redgrave v Redgrave*, 25 AD3d 973, 974 [3d Dept 2006]; *see also Jensen v Jensen*, 299 AD2d 959, 960 [4th Dept 2002]). Such policy is grounded on the presumed fact that the money is "deemed to have been devoted to that purpose, and no funds exist from which one may recoup moneys so expended if the award is thereafter reversed or modified" (*Radar v Radar*, 54 AD3d 919, 920 [2d Dept 2008] [internal quotation marks omitted]; *see O'Donnell v O'Donnell*, 153 AD3d 1357, 1359 [2d Dept 2017]; *Kelly v Kelly*, 262 AD2d 944, 944 [4th Dept 1999]). However, courts have carved out exceptions to this general rule in certain circumstances (*see generally Arcabascio v Arcabascio*, 48 AD3d 606, 606 [2d Dept 2008]; *Vigliotti v Vigliotti*, 260 AD2d 470, 471 [2d Dept 1999]; *cf. generally Weidner v Weidner*, 136 AD3d 1425, 1426-1427 [4th Dept 2016], *lv dismissed* 28 NY3d 1101 [2016], *rearg denied & lv dismissed* 29 NY3d 990 [2017]).

Here, both parties knowingly entered into the settlement agreement, which, along with the wage withholding order, stated that the maintenance payments to plaintiff ended after 20 months. Thus, plaintiff knew that she was not entitled to the payments made beyond that point. Moreover, the extra payments were not voluntarily made by defendant; nor were they made pursuant to any court order. Therefore, defendant reasonably believed that the terms of the wage withholding order would be honored by his employer. Plaintiff also makes no claims of undue hardship, and instead simply relies on the general public policy in support of her contention that she is entitled to retain the money overpaid. Under these circumstances, allowing plaintiff to retain the maintenance overpayments made in violation of the wage withholding order would result in a windfall to plaintiff, and the court's award to defendant of the reimbursement of the overpayments does not implicate public policy.

We reject plaintiff's further contention that reimbursement of the overpayments is barred by laches. " 'The defense of laches requires both delay in bringing an action and a showing of prejudice to the adverse party' " (*Santillo v Santillo*, 155 AD3d 1688, 1689 [4th Dept 2017]; *see Taberski v Taberski*, 197 AD3d 871, 872-873 [4th Dept 2021]). Even assuming, arguendo, that there was a delay by defendant in seeking to terminate the overpayments, we conclude that plaintiff has not demonstrated that she was prejudiced by that delay (*see generally Santillo*, 155 AD3d at 1689).

Entered: October 4, 2024 Ann Dillon Flynn
Clerk of the Court

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

650

CA 23-01566

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

ANTHONY TRUSSO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BREV519, LLC, DEFENDANT-APPELLANT.

NESPER, FERBER, DIGIACOMO, JOHNSON & GRIMM, LLP, AMHERST (JEFFREY J. TYRPAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (MATTHEW J. BECK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered September 12, 2023. The order, inter alia, granted the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, in his first cause of action, a judgment declaring an easement by necessity burdening defendant's adjoining property. Defendant appeals from an order of Supreme Court granting plaintiff's motion for summary judgment on his first cause of action and permanently enjoining defendant from "obstructing . . . [plaintiff's] and his permissive guests' ability to enter or leave [plaintiff's] property." We reverse.

"[T]he party asserting an easement by necessity bears the burden of establishing by clear and convincing evidence . . . that there was a unity and subsequent separation of title, and . . . that at the time of severance an easement over [the servient estate's] property was *absolutely necessary*" (*Simone v Heidelberg*, 9 NY3d 177, 182 [2007] [internal quotation marks omitted]; *see Mau v Schusler*, 124 AD3d 1292, 1295 [4th Dept 2015]).

Contrary to defendant's contention, we conclude that plaintiff, on his motion, established "unity and subsequent separation of title" as a matter of law (*Simone*, 9 NY3d at 182 [internal quotation marks omitted]). Indeed, as defendant correctly concedes, plaintiff established that he had common ownership of the subject parcels at the time of severance. We agree with defendant, however, that, "inasmuch as the existence and extent of an easement by necessity is determined

based on the circumstances as they existed at the time of severance" (*Foti v Noftsier*, 72 AD3d 1605, 1608 [4th Dept 2010]; *see also Bolognese v Bantis*, 215 AD3d 616, 621 [2d Dept 2023]), plaintiff failed to establish by clear and convincing evidence that the use and extent of a right-of-way he now seeks was "*absolutely necessary*" upon separation of title (*Simone*, 9 NY3d at 182 [internal quotation marks omitted]; *see Mau*, 124 AD3d at 1295). While plaintiff generally averred in his affidavit in support of his motion that he retained his landlocked parcel "for purposes of utilizing [the] space for personal parking needs," any such statement of future intentions failed to establish the nature and extent of the access over the conveyed property that was "indispensable to the reasonable use for the [retained] property" upon severance of title (*Mau*, 124 AD3d at 1295 [internal quotation marks omitted]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

653

KA 22-00351

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DETROIT KELLY, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (Thomas E. Moran, J.), rendered November 22, 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm.

Contrary to defendant's contention, we conclude that the plea colloquy establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Witherow*, 203 AD3d 1595, 1595 [4th Dept 2022]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Supreme Court's misstatement at sentencing that defendant could still appeal the denial of his statutory speedy trial motion does not vitiate his otherwise valid waiver of the right to appeal (*see People v Snyder*, 153 AD3d 1662, 1663 [4th Dept 2017]; *People v West*, 239 AD2d 921, 921 [4th Dept 1997], *lv denied* 90 NY2d 944 [1997]; *see generally People v Moissett*, 76 NY2d 909, 910, 912 [1990]). Consequently, defendant's valid waiver of the right to appeal precludes our review of his contention that he was denied his statutory right to a speedy trial (*see People v Wint*, 222 AD3d 1050, 1051 [3d Dept 2023], *lv denied* 41 NY3d 945 [2024]; *People v Person*, 184 AD3d 447, 447 [1st Dept 2020], *lv denied* 35 NY3d 1069 [2020]; *People v Paduano*, 84 AD3d 1730, 1730 [4th Dept 2011]).

Although it survives his valid waiver of the right to appeal (*see*

People v Gessner, 155 AD3d 1668, 1669 [4th Dept 2017]; *see generally People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Seaberg*, 74 NY2d 1, 9 [1989]), we conclude that defendant's contention that his constitutional right to a speedy trial was violated is unpreserved for our review because defendant failed to move to dismiss the accusatory instrument on that ground (*see People v Works*, 211 AD3d 1574, 1575 [4th Dept 2022], *lv denied* 39 NY3d 1114 [2023]; *People v Williams*, 120 AD3d 1526, 1526-1527 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]; *People v Chinn*, 104 AD3d 1167, 1169 [4th Dept 2013], *lv denied* 21 NY3d 1014 [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 [3] [c]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

655

KA 24-00085

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM FOLTIN, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Matthew J. Doran, J.), rendered February 28, 2023. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count each of predatory sexual assault against a child (Penal Law former § 130.96) and endangering the welfare of a child (§ 260.10 [1]), and two counts of rape in the second degree (former § 130.30 [1]). We affirm.

Defendant contends that the verdict is against the weight of the evidence because the People failed to prove that he engaged in the acts constituting one of the counts of rape in the second degree on a certain date. Defendant's contention is, in actuality, a challenge to the legal sufficiency of his conviction on that count and is unpreserved because defendant failed to move for a trial order of dismissal on that basis (*see People v Cooley*, 220 AD3d 1189, 1189 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]).

In any event, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's [additional] challenge regarding the weight of the evidence" with respect to all of the counts of which he was convicted (*People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014] [internal quotation marks omitted]). Here, 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]).

We also reject defendant's contention that County Court erred in allowing an officer to improperly bolster the victim's testimony. The court properly permitted the officer to describe the phases of the forensic interview (*see People v Kozlowski*, 11 NY3d 223, 238 [2008], *rearg denied* 11 NY3d 904 [2009], *cert denied* 556 US 1282 [2009]), and when doing so, the officer spoke only in general terms and did not mention the victim. "[I]nasmuch as the officer's testimony did not contain any statement of the victim, it could not be considered bolstering" (*People v Englert*, 130 AD3d 1532, 1533 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015], *lv denied* 26 NY3d 1144 [2016]). The court also properly permitted testimony regarding the victim's demeanor during her initial interview with police. Evidence of a victim's demeanor when reporting sexual abuse is admissible "to explain how the victim eventually disclosed the abuse and how the investigation started" (*People v Ludwig*, 104 AD3d 1162, 1163 [4th Dept 2013], *affd* 24 NY3d 221 [2014]). Defendant's further contention that the court erred in permitting the officer to testify that a safety plan was implemented following the victim's forensic interview "is not preserved for our review because defendant objected to the testimony of that officer at trial on a ground different from that now asserted on appeal" (*People v Smith*, 24 AD3d 1253, 1253 [4th Dept 2005], *lv denied* 6 NY3d 818 [2006]).

Finally, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: October 4, 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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KAH 23-01069

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DETROIT KELLY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMY TITUS, SUPERINTENDENT, ORLEANS CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Orleans County (Sanford A. Church, A.J.), dated April 18, 2023, in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus pursuant to CPLR article 70, contending, inter alia, that he was improperly permitted to plead guilty while his CPL 30.30 speedy trial motion was pending. We conclude that Supreme Court properly dismissed the petition inasmuch as petitioner's contentions were or could have been raised on direct appeal or by a motion pursuant to CPL article 440 (*see People ex rel. Frederick v Superintendent, Auburn Corr. Facility*, 156 AD3d 1468, 1468 [4th Dept 2017], *lv denied* 31 NY3d 908 [2018], *lv dismissed* 32 NY3d 1218 [2019]; *People ex rel. Haddock v Dolce*, 149 AD3d 1593, 1593 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *People ex rel. Mills v Poole*, 55 AD3d 1289, 1290 [4th Dept 2008], *lv denied* 11 NY3d 712 [2008]). Further, the allegations in the petition do not warrant departure from traditional orderly procedure (*see People ex rel. Cole v Graham*, 147 AD3d 1350, 1351 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]; *People ex rel. Lifrieri v Lee*, 116 AD3d 720, 720 [2d Dept 2014], *lv dismissed* 24 NY3d 952 [2014], *rearg denied* 24 NY3d 1039 [2014]; *People ex rel. Hammock v Meloni*, 233 AD2d 929, 929 [4th Dept 1996], *lv denied* 89 NY2d 807 [1997]).

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

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

663

CAF 22-00384

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

IN THE MATTER OF LEONEL CASAS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL DAY, RESPONDENT-APPELLANT.

IN THE MATTER OF CRYSTAL DAY,
PETITIONER-APPELLANT,

V

LEONEL CASAS, RESPONDENT-RESPONDENT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Karen Stanislaus, R.), entered January 24, 2022, in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted Leonel Casas primary physical residence and sole decision-making authority with respect to choice of school for the subject child.

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

Memorandum: In these proceedings commenced pursuant to article 6 of the Family Court Act, respondent-petitioner mother appeals from an order that, among other things, granted the parties joint legal custody and shared physical custody of their infant child. The order further provided that "the child's primary residence shall be the residence of the [petitioner-respondent] father," who "shall have sole decision-making authority as to where the child attends school." Contrary to the mother's contention, we conclude that a sound and substantial basis in the record supports Family Court's determination that it is in the child's best interests to award primary residence and sole-decision making authority regarding where the child attends school to the father (*see Matter of Robinson v Santiago*, 227 AD3d 1415, 1415-1416 [4th Dept 2024], *lv denied* — NY3d — [2024]; *see*

generally Eschbach v Eschbach, 56 NY2d 167, 171-174 [1982]). Although the evidence demonstrated that both parties are caring and competent parents, one or the other must have primary residence for school purposes given that they live in different school districts. Considering that, prior to commencement of these proceedings, the mother moved across the state with the child without notifying the father, thereby depriving him of visitation with the child for an extended period of time, we cannot conclude that the court erred in designating the father's residence as the primary residence of the child for school purposes.

We have reviewed the mother's remaining contentions and conclude that they lack merit.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

670

CA 24-00054

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

PORSCHIA C., AN INFANT, BY HER MOTHER AND NATURAL GUARDIAN MELISSA A.C., MELISSA A.C., INDIVIDUALLY, PLAINTIFFS,
BAILEE P., AN INFANT, BY HER MOTHER AND NATURAL GUARDIAN CASSIE L.F., AND CASSIE L.F., INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SODUS CENTRAL SCHOOL DISTRICT, SODUS ELEMENTARY SCHOOL, SODUS CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION AND SODUS CENTRAL SCHOOL DISTRICT DEPARTMENT OF TRANSPORTATION,
DEFENDANTS-RESPONDENTS.

BELLUCK & FOX, LLP, NEW YORK CITY (MICHAEL A. MACRIDES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (GIANCARLO FACCIPONTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered July 5, 2023. The order, insofar as appealed from, granted the motion of defendants for summary judgment and dismissed the complaint of plaintiffs-appellants.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the complaint of plaintiffs Bailee P., an infant, by her mother and natural guardian Cassie L.F., and Cassie L.F., individually, is reinstated.

Memorandum: The infant plaintiffs and their mothers commenced these negligence actions, seeking damages based on allegations that the infant plaintiffs were subjected to sexual misconduct while being transported to and from defendant Sodus Elementary School (school) on a bus operated by defendants. The underlying sexual misconduct allegedly occurred on multiple occasions from the time the infant plaintiffs were in kindergarten through the second grade. The alleged sexual misconduct was perpetrated by a male student who rode the bus with the infant plaintiffs, and included, inter alia, exposing himself to them, touching the genitals of one of the infant plaintiffs, asking one of the infant plaintiffs to touch his genitals, and "attempt[ing] to have sex with [one of the infant plaintiffs] or rub[bing] his body

against [hers]." The perpetrator threatened to hurt the infant plaintiffs if they refused to participate in the aforementioned sexual acts.

In their complaints, plaintiffs asserted causes of action for, inter alia, negligent supervision, alleging that defendants, despite having actual or constructive notice of the perpetrator's misconduct, failed to protect the infant plaintiffs from sexual misconduct on the school bus. Following discovery, defendants moved for summary judgment dismissing the complaints, contending, inter alia, that they lacked notice of the perpetrator's propensity for sexual misconduct and, thus, they could not have foreseen the sexual misconduct against the infant plaintiffs. Supreme Court granted the motion, the infant plaintiff Bailee P. and her mother, plaintiff Cassie L.F., appeal, and we now reverse the order insofar as appealed from.

We note as an initial matter that the record does not contain a notice of appeal from the order with respect to the infant plaintiff Porschia C. and her mother, plaintiff Melissa A.C., and, therefore, the appeal of those plaintiffs was deemed dismissed for failure to perfect within six months of the date of the notice of appeal (*see* 22 NYCRR 1250.7 [b] [4]; 1250.10 [a]). Consequently, the contentions of those plaintiffs pertaining to the order are not properly before us (*see Perri v Case*, 208 AD3d 1046, 1047 [4th Dept 2022]; *GRJH, Inc. v 3680 Props., Inc.*, 179 AD3d 1177, 1178 [3d Dept 2020]; *Hageman v Santasiero*, 277 AD2d 1049, 1049-1050 [4th Dept 2000]). Dismissals pursuant to 22 NYCRR 1250.10 (a) may be vacated on motion, if the motion is "made within one year of the date of the dismissal" (22 NYCRR 1250.10 [c]).

It is well settled that "[s]chools 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]). "Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable 'for every thoughtless or careless act by which one pupil may injure another' " (*Mirand*, 84 NY2d at 49). "A school bus operator owes the 'very same duty to the students entrusted to its care and custody' " (*Champagne v Lonero Tr. Inc.*, 162 AD3d 632, 633 [2d Dept 2018]; *see Harker v Rochester City School Dist.*, 241 AD2d 937, 938 [4th Dept 1997], *lv denied* 90 NY2d 811 [1997], *rearg denied* 91 NY2d 957 [1998]).

"In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49; *see Hale v Holley Cent. Sch. Dist.*, 159 AD3d 1509, 1510 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]). "Actual or constructive notice to the

school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*Mirand*, 84 NY2d at 49). Thus, "an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" (*id.*).

Defendants, as parties moving for summary judgment, had the initial burden of establishing as a matter of law that they lacked actual or constructive notice of "the dangerous conduct which caused injury" (*Mirand*, 84 NY2d at 49; *see Charles D.J. v City of Buffalo*, 185 AD3d 1488, 1489 [4th Dept 2020]; *Hale*, 159 AD3d at 1510; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, we conclude that defendants did not meet that burden. In support of their motion, defendants submitted, inter alia, the deposition testimony of the principal of the school at the time of the alleged misconduct. The principal, when asked at his deposition whether he had been aware of any prior "incidents of student *sexual assaults*" on the bus and whether he had ever had to deal with any student at the school who had been characterized as "*sexually violent*," answered both questions in the negative (emphases added). That testimony was insufficient to meet defendants' burden because it failed to address whether the principal knew of incidents within the broader category of sexual misconduct alleged by plaintiffs in their complaints. Plaintiffs alleged that the perpetrator engaged in a wide range of sexual misconduct—some of which was not equivalent to "sexual assault [ ]" and was not "sexually violent." In short, the principal's testimony failed to establish that defendants had no actual or constructive notice of any sexual misconduct of the types alleged by plaintiffs (*see Charles D.J.*, 185 AD3d at 1489; *cf. Knaszak v Hamburg Cent. Sch. Dist.*, 196 AD3d 1141, 1143 [4th Dept 2021]; *Kozakiewicz v Frontier Middle School*, 37 AD3d 1138, 1139 [4th Dept 2007]).

Additionally, to the extent that defendants submitted deposition testimony of various other witnesses—including the infant plaintiffs and the bus driver—we conclude that it was insufficient to satisfy defendants' initial burden with respect to actual or constructive notice. In particular, although the infant plaintiffs and the bus driver testified that they did not report instances of the alleged misconduct to defendants, they were not in a position to know whether there had been prior incidents of sexual misconduct involving the perpetrator and, if so, whether defendants had actual or constructive notice of any of those incidents prior to the sexual misconduct alleged in the complaint (*see Charles D.J.*, 185 AD3d at 1489-1490). Their testimony could not establish whether defendants obtained notice by other means (*see generally Nizen-Jacobellis v Lindenhurst Union Free Sch. Dist.*, 191 AD3d 1007, 1008-1009 [2d Dept 2021]).

Inasmuch as defendants failed to meet their initial burden on the motion, the burden never shifted to plaintiffs Bailee P. and Cassie

L.F., and denial of the motion with respect to those plaintiffs "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad*, 64 NY2d at 853).

The remaining contentions are academic in light of our determination.

Entered: October 4, 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 23-01125

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

BOLAND'S EXCAVATING AND TOPSOIL, INC., PLAINTIFF,

V MEMORANDUM AND ORDER

BRADFORD CENTRAL SCHOOL DISTRICT, DEFENDANT.

BRADFORD CENTRAL SCHOOL DISTRICT, THIRD-PARTY PLAINTIFF-APPELLANT,

V

SCHULER-HAAS ELECTRIC CORP., THIRD-PARTY DEFENDANT-RESPONDENT.

FERRARA FIORENZA PC, EAST SYRACUSE (RYAN L. MCCARTHY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (BRIAN M. STREICHER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered May 30, 2023. The order granted the motion of third-party defendant to dismiss the third-party complaint.

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

Memorandum: In this action sounding in, among other things, breach of contract, defendant-third-party plaintiff, Bradford Central School District (District), appeals from an order that granted the pre-answer motion of third-party defendant, Schuler-Haas Electric Corp. (Schuler), to dismiss the third-party complaint.

In 2019, the District began a large capital improvement project, which included, among other things, improvements to the school grounds and athletic fields. To that end, the District entered into a contract with Schuler whereby Schuler agreed to provide electrical work for, as relevant here, an outdoor concession stand and scoreboard near the District's athletic fields. The District also entered into a contract with plaintiff, Boland's Excavating and Topsoil, Inc. (Boland), whereby Boland agreed to improve the athletic fields by

installing new sod. Boland then executed a subcontract with Schuler whereby Schuler agreed to perform part of the work on Boland's project at the school.

In early July 2019, Boland installed sod on the athletic fields, using an automatic watering system that received power from an electric system installed by Schuler. It is not disputed that the automatic watering system failed and that the field was not watered for a lengthy period of time. The sod could not be salvaged, and Boland replaced it with new sod. Boland requested payment for the additional labor and materials required to replace the sod, the District refused, and Boland commenced this action against the District. The District answered and thereafter commenced a third-party action against Schuler, asserting causes of action for breach of contract and indemnification.

Schuler made a pre-answer motion to dismiss the third-party complaint pursuant to CPLR 3211 (a) (1) and (7), arguing that its work on the athletic field and irrigation system was wholly pursuant to its subcontract with Boland and that it lacked privity of contract with the District with respect to that work. Supreme Court granted the motion, and the District now appeals.

At the outset, we note that, as limited by its brief, the District does not appeal from that portion of the order dismissing its cause of action sounding in indemnification. We agree with the District, however, that the court erred in dismissing the cause of action for breach of contract.

When reviewing a CPLR 3211 motion to dismiss, we must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] 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]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted "only if the documentary evidence submitted *conclusively establishes* a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88 [emphasis added]; *see Town of Mexico v County of Oswego*, 175 AD3d 876, 877 [4th Dept 2019]). Here, "our role is not to interpret the contract, but to determine whether [Schuler] met its burden of proffering documentary evidence conclusively refuting [the District's] allegations" (*Shephard v Friedlander*, 195 AD3d 1191, 1194 [3d Dept 2021]).

The District alleges that the watering system derived "electrical power from electrical equipment . . . provided and installed by [Schuler] *pursuant to its contract on the Project with the District*" (emphasis added), that Schuler "performed the actual connection of the pumps and sprinklers to the electric system installed by [Schuler]," and that "the electric system providing power to the sprinklers failed," resulting in damages. The documentary evidence submitted by Schuler—including its contract with the District, its subcontract with

Boland, and email correspondences between Schuler, Boland, and the District's construction manager—failed to conclusively establish a defense to the claims of breach of contract asserted in the third-party complaint as a matter of law (*see Leon*, 84 NY2d at 88). We therefore modify the order by denying the motion in part and reinstating the cause of action for breach of contract in the third-party complaint.

The District's remaining contentions are unpreserved or, in light of the foregoing, are academic.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

674

KA 22-02018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACK K. SIMPSON, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

JEFFERY G. TOMPKINS, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (David A. Renzi, A.J.), rendered August 4, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and driving while ability impaired by drugs.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count 1 of the indictment and as modified the judgment is affirmed, and the matter is remitted to Lewis County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]) and driving while ability impaired by drugs as a misdemeanor (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [b] [i]). Defendant contends that County Court erred in denying that part of his omnibus motion seeking to dismiss the indictment on the ground that the grand jury proceeding was defective pursuant to CPL 210.35 (5). Defendant contends in particular that the integrity of the grand jury proceeding was impaired and he was potentially prejudiced because a grand juror worked at the jail where defendant was being held and was employed by the same county sheriff's office as the deputy who had arrested defendant, and the prosecutor failed to conduct a sufficient inquiry to ensure that the grand juror could be fair and impartial. Although defendant's contention survives his guilty plea (*see People v Washington*, 82 AD3d 1675, 1676 [4th Dept 2011]; *see generally People v Hansen*, 95 NY2d 227, 231 [2000]), we conclude that it lacks merit.

A court may dismiss an indictment upon motion by a defendant if the grand jury proceeding was defective (*see* CPL 210.20 [1] [c]).

A grand jury proceeding is defective when, inter alia, the proceeding "fails to conform to the requirements of [CPL article 190] to such degree that the integrity thereof is impaired and prejudice to the defendant may result" (CPL 210.35 [5]; *see People v Huston*, 88 NY2d 400, 409 [1996]). Although a "defendant need not demonstrate actual prejudice under this statutory scheme to prevail" (*People v Sayavong*, 83 NY2d 702, 709 [1994]), dismissal of an indictment under CPL 210.35 (5) is an "exceptional remedy" that "should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the [g]rand [j]ury" (*Huston*, 88 NY2d at 409). " '[T]he statutory test, which does not turn on mere flaw, error or skewing[,] . . . is very precise and very high' " (*People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* 23 NY3d 948 [2014], quoting *People v Darby*, 75 NY2d 449, 455 [1990]).

Here, the record establishes that a grand juror disclosed to the prosecutor at the outset of the grand jury proceeding, outside the presence of the grand jury, that they worked for the county sheriff's office at the jail where defendant was being held. Contrary to defendant's contention, we conclude that the prosecutor thereafter "engaged the grand juror in the requisite 'further inquiry' outside the presence of the other grand jurors" (*People v Richardson*, 132 AD3d 1239, 1241 [4th Dept 2015]). That inquiry revealed that the grand juror and defendant had not discussed the case and that the grand juror had not heard defendant discussing the case with anyone else. The prosecutor also inquired whether the grand juror could fairly and impartially consider the evidence against defendant and, after the grand juror initially responded that they "believe[d]" they could do so, the prosecutor sought and received from the grand juror confirmation that they could be fair and impartial. Thus, any doubt as to the grand juror's impartiality based on their familiarity with defendant "was dispelled by the unequivocal response to the prosecutor's immediate follow-up question, as well as the statements that the [grand juror] had never discussed [with defendant nor heard him discuss] this case" (*People v Wilkinson*, 166 AD3d 1396, 1398 [3d Dept 2018], *lv denied* 32 NY3d 1179 [2019]; *see Richardson*, 132 AD3d at 1241; *People v Farley*, 107 AD3d 1295, 1295-1296 [3d Dept 2013], *lv denied* 21 NY3d 1073 [2013]).

Contrary to defendant's related contention, even if the precise nature of any relationship between the grand juror and the deputy should have been further explored by the prosecutor, we conclude that the exceptional remedy of dismissal is not warranted under the particular facts of this case (*see People v Malloy*, 166 AD3d 1302, 1304 [3d Dept 2018], *affd* 33 NY3d 1078 [2019]; *see generally Huston*, 88 NY2d at 409). Inasmuch as the grand juror specifically disclosed that they worked on the correctional staff in the jail where defendant was an inmate, which the record established was different than the deputy's patrol position, the grand juror's representation did not suggest any "close relationship [with the deputy] that would raise[ ] the real risk of potential prejudice" (*Richardson*, 132 AD3d at 1241 [internal quotation marks omitted]; *see People v Henriquez*, 173 AD3d 1268, 1268-1269 [3d Dept 2019]; *cf. People v Connolly*, 63 AD3d 1703,

1704-1705 [4th Dept 2009]; *People v Revette*, 48 AD3d 886, 886-888 [3d Dept 2008]). Moreover, even if the grand juror was familiar with the deputy as a member of the same law enforcement agency, the record here establishes that the grand juror unequivocally responded to the prosecutor's repeated inquiries by specifically affirming that they could fairly and impartially consider the evidence against defendant (*see Henriquez*, 173 AD3d at 1269; *Richardson*, 132 AD3d at 1241; *Farley*, 107 AD3d at 1296). Consequently, " 'the prosecutor's voir dire of the grand juror was appropriate and sufficient to ensure such juror's impartiality' " (*Richardson*, 132 AD3d at 1241).

Based on the foregoing, we conclude that the court did not err in denying that part of defendant's omnibus motion seeking to dismiss the indictment on the ground that the grand jury proceeding was defective pursuant to CPL 210.35 (5) inasmuch as the record establishes that there is "no articulable likelihood of or . . . potential for prejudice stemming from the grand juror[']s] prior knowledge of [defendant]" or possible familiarity with the deputy employed by the same law enforcement agency (*Malloy*, 166 AD3d at 1304 [internal quotation marks omitted]).

Next, we note that defendant's cursory challenge to the severity of the sentence is raised for the first time in his reply brief and is thus not properly before us (*see People v Ford*, 69 NY2d 775, 777 [1987], *rearg denied* 69 NY2d 985 [1987]; *People v Bailey*, 195 AD3d 1486, 1488 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]). We further conclude, however, that the sentence imposed on the count of criminal possession of a controlled substance in the third degree is illegal and cannot stand despite the failure of either defendant or the People to raise the issue before the sentencing court or on appeal (*see People v Meden*, 96 AD3d 1494, 1495 [4th Dept 2012]). Inasmuch as defendant admitted to the allegation in the CPL 400.21 statement that he was previously convicted of the class B violent felony offense of assault in the first degree (Penal Law § 120.10 [1]; *see* § 70.02 [1] [a]) and he stood convicted of the class B felony of criminal possession of a controlled substance in the third degree (§ 220.16 [7]), the court should have sentenced defendant as a second felony drug offender previously convicted of a violent felony (*see* Penal Law § 70.70 [1] [a], [b], [c]; *People v Cruz-Ocasio*, 208 AD3d 1059, 1060 [4th Dept 2022]; *see generally People v Yusuf*, 19 NY3d 314, 318-319 [2012]). The court was thus required to include as part of the sentence a period of postrelease supervision of not less than 1½ or more than 3 years (*see* §§ 70.45 [2] [d]; 70.70 [4] [b]), and therefore the period of 1 year of postrelease supervision imposed by the court is illegal (*see People v Donaldson*, 117 AD3d 1467, 1468 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014]; *People v Allen*, 57 AD3d 1383, 1384 [4th Dept 2008]). We therefore modify the judgment by vacating the sentence on count 1 of the indictment charging defendant with criminal possession of a controlled substance in the third degree, and

we remit the matter to County Court for resentencing on that count

(*see Allen*, 57 AD3d at 1384).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

675

KA 22-01156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN S. CECCHINI, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JESSICA STICKL ASBACH OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sanford A. Church, J.), rendered June 30, 2022. The judgment convicted defendant upon a plea of guilty of burglary in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, we conclude that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

676

KA 22-01806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM KRATZ, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 October 7, 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 modified on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that his "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Williams*, 136 AD3d 1280, 1281 [4th Dept 2016], *lv denied* 27 NY3d 1141 [2016], *lv denied* 29 NY3d 954 [2017]). "Although ambiguities in a court's explanation may be cured by adequate clarifying language, which may be provided either in a written waiver or in the oral colloquy," we conclude that "such language is absent from the record in the appeal[ ] before us" (*People v Parker*, 189 AD3d 2065, 2066 [4th Dept 2020], *lv denied* 36 NY3d 1122 [2021]).

Nevertheless, we reject defendant's contention that the bargained-for sentence of incarceration is unduly harsh and severe. We note, however, that a discrepancy between the sentencing minutes and the certificate of conviction requires vacatur of the sentence imposed. At sentencing, County Court sentenced defendant to a

determinate sentence of nine years of incarceration, plus four years of postrelease supervision. The certificate of conviction, however, recites that the sentence for the conviction is nine years of incarceration, plus five years of postrelease supervision. Given the discrepancy between the sentencing minutes and the certificate of conviction, we modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (*see People v Delp*, 156 AD3d 1450, 1453 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]; *see generally People v Bradford*, 118 AD3d 1254, 1257-1258 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

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

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

677

KA 19-02338

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMON D. MADDOX, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 (Kenneth F. Case, J.), rendered October 30, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]), defendant contends that he did not validly waive his right to appeal and that count 3 of the indictment, charging him with robbery in the second degree (Penal Law § 160.10 [1]), was amended without leave of County Court in violation of CPL 200.70. We affirm.

Even assuming, arguendo, that defendant's contention would survive a valid waiver of the right to appeal, we note that defendant's contention is raised for the first time on appeal and, thus, is not preserved for our review (*see People v Mathis*, 185 AD3d 1094, 1097 [3d Dept 2020]; *People v Lamont*, 125 AD3d 1106, 1106 [3d Dept 2015], *lv denied* 26 NY3d 969 [2015]).

In any event, contrary to defendant's assertion, the indictment was not amended without leave of the court. Rather, with the permission of the court and with the consent of the People, defendant entered a plea of guilty of attempted robbery in the second degree as a lesser included offense of robbery in the second degree as charged in count 3 of the indictment (*see* CPL 220.10 [4] [b]; *People v Gamble*,

248 AD2d 896, 896 [3d Dept 1998]; *see generally People v Williams*, 44 AD2d 216, 218 [4th Dept 1974]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

679

KA 21-01446

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER L. ROCHE, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (MICHAEL T. JOHNSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered September 30, 2021. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, arson in the first degree and arson in the second degree (seven counts).

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

Memorandum: In this prosecution arising from a fire that was intentionally set in an apartment building, resulting in a fatality, defendant appeals from a judgment convicting her, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]), arson in the first degree (§ 150.20 [1]), and seven counts of arson in the second degree (§ 150.15). We affirm.

Contrary to defendant's contention, we conclude that County Court properly denied that part of her omnibus motion seeking to dismiss as multiplicitous the counts of the indictment charging arson in the second degree. Those counts are not multiplicitous inasmuch as each count involved a different victim present in the apartment building at the time of the fire (*see People v VanGorden*, 147 AD3d 1436, 1439 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]; *People v Cunningham*, 12 AD3d 1131, 1132 [4th Dept 2004], *lv denied* 4 NY3d 829 [2005], *reconsideration denied* 5 NY3d 761 [2005]; *People v Kindlon*, 217 AD2d 793, 795 [3d Dept 1995], *lv denied* 86 NY2d 844 [1995]).

Defendant contends that the People improperly introduced, without obtaining an advance ruling and in violation of *People v Molineux* (168 NY 264 [1901]), testimony of four prosecution witnesses that defendant used an illegal drug on various occasions. Defendant further contends that the People improperly referred to that testimony during summation. Inasmuch as defense counsel did not object to the testimony of three of the witnesses or the prosecutor's reference

during summation, defendant's contention with respect thereto is unpreserved (*see People v Delacruz*, 193 AD3d 1340, 1341-1342 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]; *People v Howard*, 167 AD3d 1499, 1501 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]). Defendant's contention is also unpreserved with respect to the testimony of the fourth witness inasmuch as the court sustained defense counsel's objection to that testimony and struck it from the record and, "in the absence of further objection or a request for a mistrial, [the court's remedy] 'must be deemed to have corrected the error to the defendant's satisfaction' " (*People v Acosta*, 134 AD3d 1525, 1526 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016], quoting *People v Heide*, 84 NY2d 943, 944 [1994]; *see People v Contreras*, 154 AD3d 1320, 1321-1322 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). 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]; *Howard*, 167 AD3d at 1501; *Acosta*, 134 AD3d at 1527). We reject defendant's related contention that she was denied effective assistance of counsel by defense counsel's failure to object to that evidence. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]), and defendant failed to meet that burden here (*see People v Francis*, 206 AD3d 1605, 1606 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *People v Conley*, 192 AD3d 1616, 1620 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

Defendant additionally contends that the court erred in failing to instruct the jury that a prosecution witness—a participant in the crime who agreed to testify against defendant as part of a plea bargain—was an accomplice as a matter of law and that her testimony therefore required corroboration pursuant to CPL 60.22. Defendant failed to preserve her contention for our review because she did not request such an instruction or object to the jury charge as given (*see People v Lipton*, 54 NY2d 340, 351 [1981]; *People v Ortiz*, 194 AD3d 1351, 1351 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]). In any event, we conclude that "the failure of the court to give that instruction is of no moment, inasmuch as the testimony of the witness was in fact amply corroborated" (*People v Fortino*, 61 AD3d 1410, 1411 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]; *see People v Reed*, 115 AD3d 1334, 1336 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]; *People v Peoples*, 66 AD3d 1419, 1419 [4th Dept 2009], *lv denied* 14 NY3d 843 [2010]). Consequently, we reject defendant's related contention that defense counsel was ineffective for failing to request such an instruction (*see People v Clarke*, 101 AD3d 1646, 1647 [4th Dept 2012], *lv denied* 20 NY3d 1097 [2013]; *see also People v Covington*, 222 AD3d 1166, 1171 [3d Dept 2023], *lv denied* 41 NY3d 964 [2024]; *People v Barber*, 133 AD3d 868, 870 [2d Dept 2015], *lv denied* 28 NY3d 926 [2016]; *People v Leffler*, 13 AD3d 164, 165 [1st Dept 2004], *lv denied* 4 NY3d 800 [2005]; *see generally People v Caban*, 5 NY3d 143, 155-156 [2005]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that,

contrary to defendant's further contention, the evidence is legally sufficient to establish that defendant intended to damage the apartment building by starting the fire (*see People v Dillard*, 189 AD3d 2137, 2137-2138 [4th Dept 2020], *lv denied* 36 NY3d 1119 [2021]; *People v Utsey*, 182 AD2d 575, 575-576 [1st Dept 1992], *lv denied* 80 NY2d 839 [1992]). 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, even if a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see Dillard*, 189 AD3d at 2138; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, her sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

680

KA 19-02348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMARR J. RAINEY, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 30, 2019. The judgment convicted defendant upon a jury verdict of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), arising from defendant's actions in forcibly stealing by gunpoint a vehicle and jewelry from a victim. We affirm.

Defendant contends that the conviction is not supported by legally sufficient evidence because the People failed to establish that defendant committed the robbery or displayed what appeared to be a firearm. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's identity as one of the two people who committed the robbery (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim testified at trial that defendant was the individual who stole her property, identifying him based on her observations of him during their confrontation. Further, defendant was apprehended near the victim's vehicle that was abandoned, and the victim's personal property was found in defendant's pockets. We further conclude that the evidence is legally sufficient to establish that defendant displayed what appeared to be a firearm (*see generally People v Lopez*, 73 NY2d 214, 220 [1989]). The victim testified at trial that she saw and felt the gun that defendant held to her side when he demanded her property. 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).

Defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress identification testimony on the ground that the photo array and the initial identification procedure was unduly suggestive. We reject that contention. Because "the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection," the photo array itself was not unduly suggestive (*People v Quinones*, 5 AD3d 1093, 1093 [4th Dept 2004], *lv denied* 3 NY3d 646 [2004]). Likewise, the procedures used by the police in presenting the photo array were not unduly suggestive (*see People v Floyd*, 45 AD3d 1457, 1459 [4th Dept 2007], *lv denied* 10 NY3d 811 [2008]). Even assuming, arguendo, that the photographic identification procedures were suggestive, we conclude that the People proved by clear and convincing evidence that the victim had an independent basis for her in-court identification of defendant (*see generally People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]).

Defendant contends that the court, in response to a jury note, erred in submitting to the jury an exhibit, which defendant asserts was not admitted in evidence (*see* CPL 310.20 [1]). Defense counsel, however, did not object to the submission of the exhibit to the jury, and thus the issue is not preserved for our review (*see People v Mills*, 188 AD3d 1655, 1656 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021]; *People v Dame*, 144 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 29 NY3d 948 [2017]). 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]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

682

CAF 23-01133

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

IN THE MATTER OF JUN CARNEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. CARNEY, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered May 16, 2023, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection.

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

Memorandum: Respondent appeals from an order of protection issued upon a finding that he committed the family offense of harassment in the second degree under Penal Law § 240.26 (3). We affirm.

Contrary to respondent's contention, the record supports Family Court's determination that petitioner met her burden of establishing by a fair preponderance of the evidence that respondent committed the family offense of harassment in the second degree (*see* Family Ct Act §§ 812 [1]; 832; Penal Law § 240.26 [3]). A person commits harassment in the second degree under Penal Law § 240.26 (3) when that person, " 'with intent to harass, annoy or alarm another person[,] engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose' " (*Matter of Wandersee v Pretto*, 183 AD3d 1245, 1245 [4th Dept 2020]; *see Matter of Rohrback v Monaco*, 173 AD3d 1774, 1775 [4th Dept 2019]). "Although one 'isolated incident' is insufficient to establish such a course of conduct . . . , 'a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose can support such a finding' " (*Wandersee*, 183 AD3d at 1245; *see Matter of Amber JJ. v Michael KK.*, 82 AD3d 1558, 1560 [3d Dept 2011]).

Petitioner submitted evidence at the hearing establishing that respondent, inter alia, held open her car door, thereby preventing her from driving away from him, on at least two occasions, and parked in

front of her garage door for up to 30 minutes at a time, thereby blocking her from being able to remove her car, on at least three occasions. An eyewitness further testified that respondent parked his car in that manner, blocking petitioner's movement, almost every other day. We conclude that the evidence at the hearing established that respondent committed the conduct alleged in the petition, and that respondent's course of conduct in doing so evidenced a continuity of purpose to harass, annoy or alarm petitioner (*see Matter of Marvin I. v Raymond I.*, 193 AD3d 1279, 1279-1281 [4th Dept 2021]; *Matter of Jodi S. v Jason T.*, 85 AD3d 1239, 1241 [3d Dept 2011]; *see also Matter of Ohler v Bartkovich*, 215 AD3d 1283, 1284 [4th Dept 2023], *lv denied* 40 NY3d 901 [2023]). Although respondent contends that he had a legitimate purpose for parking in petitioner's driveway inasmuch as he went there to pick up his daughters for visitation, and that he was at most merely acting immaturely, "based on respondent's 'conduct as well as the surrounding circumstances,' the court had a reasonable basis to infer that respondent's intent was to harass, annoy or alarm petitioner" (*Wandersee*, 183 AD3d at 1246; *see People v Kelly*, 79 AD3d 1642, 1642 [4th Dept 2010], *lv denied* 16 NY3d 832 [2011]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

684

CA 23-01731

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

SUZANNE K. CIANCI, LIMITED ADMINISTRATOR OF THE ESTATE OF DONALD J. TUOHEY, SR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE UNIVERSITY OF ROCHESTER, DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

PETERSON SPATORICO LLP, ROCHESTER (STEVEN A. LUCIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered October 10, 2023. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: Defendant appeals from an order that, upon treating its motion solely as one to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, denied the motion. "The right to appeal from an intermediate order terminates with the entry of a final judgment" (*McCann v Gordon*, 204 AD3d 1449, 1449 [4th Dept 2022], *appeal dismissed* 38 NY3d 1158 [2022] [internal quotation marks omitted]; *see Matter of Aho*, 39 NY2d 241, 248 [1976]; *see generally* CPLR 5501 [a] [1]). Inasmuch as the record of this case in the New York State Courts Electronic Filing System establishes that a final judgment in favor of plaintiff following a jury trial was entered on July 12, 2024, of which we may take judicial notice (*see McCann*, 204 AD3d at 1449), defendant's appeal from the intermediate order must be dismissed (*see id.*; *McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]). Defendant may raise its contentions in an appeal from the judgment (*see McDonough*, 164 AD3d at 1603; *Deuser v Precision Constr. & Dev., Inc.*, 149 AD3d 1540, 1540 [4th Dept 2017]).

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court

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

685

CA 23-01617

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

IN THE MATTER OF THE ESTATE OF CAROL E. FORD,
DECEASED.

CHRISTINE E. FORD, PETITIONER-RESPONDENT-APPELLANT;

ORDER

JONATHAN D. FORD AND BARBARA L. ZAPALOWSKI,
RESPONDENTS-APPELLANTS-RESPONDENTS.

MUSCATO VONA LLP, LOCKPORT (GEORGE V.C. MUSCATO OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross-appeal from an order of the Surrogate's Court, Niagara County (Caroline Wojtaszek, S.), entered May 26, 2023. The order, inter alia, determined the distribution of the proceeds of a sale of real property.

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

Entered: October 4, 2024

Ann Dillon Flynn
Clerk of the Court