SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 2, 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, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED FEBRUARY 2, 2024

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_____	611	CA 23 00235	ROBERT WINTERMUTE V PALONE ENTERPRISES, LLC
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

764/22
OP 22-00744
PRESENT: WHALEN, P.J., CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF BOWERS DEVELOPMENT, LLC, AND
ROME PLUMBING & HEATING SUPPLY CO., INC.,
PETITIONERS,

V MEMORANDUM AND ORDER

ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY AND
CENTRAL UTICA BUILDING, LLC, RESPONDENTS.

FOGEL & BROWN, P.C., SYRACUSE (MICHAEL A. FOGEL OF COUNSEL), FOR PETITIONERS.

PAUL J. GOLDMAN, ALBANY, FOR RESPONDENT ONEIDA COUNTY INDUSTRIAL DEVELOPMENT AGENCY.

COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR RESPONDENT CENTRAL UTICA BUILDING, LLC.

Proceeding pursuant to Eminent Domain Procedure Law § 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul the determination of respondent Oneida County Industrial Development Agency to condemn certain real property. The determination was annulled and the petition was granted by order of this Court entered December 23, 2022 (211 AD3d 1495), and respondents were granted leave to appeal to the Court of Appeals from the order of this Court (214 AD3d 1417), and the Court of Appeals on December 14, 2023 reversed the order and remitted the case to this Court for consideration of the issues raised but not determined on the appeal to this Court (40 NY3d 1061 [2023]).

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

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*Matter of Bowers Dev., LLC v Oneida County Indus. Dev. Agency*, 40 NY3d 1061 [2023], *revg* 211 AD3d 1495 [4th Dept 2022]). We previously annulled the determination of respondent Oneida County Industrial Development Agency (OCIDA) to acquire by eminent domain certain property in the City of Utica. A majority of this Court

concluded that, although OCIDA's determination and findings indicated that the property was to be acquired for use as a surface parking lot, the primary purpose of the acquisition was not a commercial purpose, and thus OCIDA lacked the requisite authority to acquire the property (*Bowers Dev., LLC*, 211 AD3d at 1495-1496; *see* General Municipal Law § 858). The Court of Appeals reversed our order, holding that OCIDA "had a rational basis for concluding that the use of the property was for a 'commercial' purpose," and that "its determination was not 'without foundation' " (*Bowers Dev., LLC*, 40 NY3d at 1064). The Court of Appeals remitted the matter to this Court "for consideration of issues raised but not determined" previously (*id.*).

We reject petitioners' contention that OCIDA's determination should be annulled because OCIDA's financial assistance to the project violated the anti-pirating provisions contained in General Municipal Law § 862 (1). That contention does not fall within the limited scope of this Court's statutory review (*see* EDPL 207 [C]; *see generally Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 546 [2006]; *Matter of Niagara Falls Redevelopment, LLC v City of Niagara Falls*, 218 AD3d 1306, 1309 [4th Dept 2023], *appeal dismissed* 40 NY3d 1059 [2023]). The proper procedural vehicle for raising such a contention is a proceeding pursuant to CPLR article 78 (*see* CPLR 7803 [3]; *Matter of Dudley v Town Bd. of Town of Prattsburgh*, 59 AD3d 1103, 1104 [4th Dept 2009]).

We also reject petitioners' contention that the acquisition at issue will not serve a public use, benefit or purpose (*see* EDPL 207 [C] [4]). "What qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010] [internal quotation marks omitted]; *see also Matter of PSC, LLC v City of Albany Indus. Dev. Agency*, 200 AD3d 1282, 1285 [3d Dept 2021], *lv denied* 38 NY3d 909 [2022]). Here, the acquisition of the property will serve the public use of mitigating parking and traffic congestion, notwithstanding the fact that the need for the parking facility is, at least in part, due to the construction of a private medical facility (*see Matter of Truett v Oneida County*, 200 AD3d 1721, 1722 [4th Dept 2021], *lv denied* 38 NY3d 907 [2022]; *see generally* General Municipal Law § 72-j [1]). We therefore conclude that OCIDA's determination to exercise its eminent domain power "is rationally related to a conceivable public purpose" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425 [1986] [internal quotation marks omitted]).

Petitioners further contend that the determination must be annulled because OCIDA failed to comply with certain provisions of EDPL article 2. Contrary to petitioners' contention, we conclude that OCIDA fulfilled the requirements of EDPL 202 (C) (1) by serving notice of the hearing to the owners of record. Also contrary to petitioners' contention, we conclude that the location of the project was adequately identified for purposes of EDPL 203. On this record,

petitioners have not demonstrated a basis, within the limited review identified by EDPL 207, on which to set aside the determination based on noncompliance with EDPL article 2 (*see Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1604 [4th Dept 2020]).

We reject petitioners' contention that OCIDA failed to comply with the requirements of the State Environmental Quality Review Act (SEQRA) by relying on the findings set forth by the designated lead agency for the purposes of SEQRA (*see Truett*, 200 AD3d at 1722). Contrary to petitioners' further contention, OCIDA did not improperly segment its SEQRA review. " 'Segmentation occurs when the environmental review of a single action is broken down into smaller stages or activities, addressed as though they are independent and unrelated,' which is prohibited in order to prevent 'a project with potentially significant environmental effects from being split into two or more smaller projects, each falling below the threshold requiring full-blown review' " (*Court St. Dev. Project, LLC*, 188 AD3d at 1603). Here, OCIDA, as an involved agency for SEQRA purposes, adopted a resolution affirming the lead agency's review of the entire project constituting the action under SEQRA and did not improperly limit its review to only a portion of the project.

Finally, we have considered petitioners' remaining contentions and conclude that none warrants annulment of the determination.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

605

CA 23-00234

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

HOWARD WINTERMUTE, PLAINTIFF-RESPONDENT,

V ORDER

PALONE ENTERPRISES, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BARCLAY DAMON LLP, ROCHESTER (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF KENNETH HILLER, PLLC, AMHERST (TIMOTHY E. HILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered August 17, 2022. The order, insofar as appealed from, denied that part of the motion of defendants seeking summary judgment dismissing the complaint against defendant Palone Enterprises, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 26 and November 13, 2023,

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

611

CA 23-00235

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

ROBERT WINTERMUTE, PLAINTIFF-RESPONDENT,

V ORDER

PALONE ENTERPRISES, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BARCLAY DAMON LLP, ROCHESTER (DAVID M. FULVIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF KENNETH HILLER, PLLC, AMHERST (TIMOTHY E. HILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Barry L. Porsch, A.J.), entered August 17, 2022. The order, insofar as appealed from, denied that part of the motion of defendants seeking summary judgment dismissing the complaint against defendant Palone Enterprises, LLC.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 26 and November 13, 2023,

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

630

CA 22-01058

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

NIDIA VASQUEZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GILBANE BUILDING COMPANY, LION CONSTRUCTION SUPPLY & SERVICES, LLC, AND 683 NORTHLAND LLC, DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), AND RUPP PFALZGRAF LLC, FOR DEFENDANTS-APPELLANTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from a judgment of the Supreme Court, Erie County (Henry J. Nowak, J.), entered June 24, 2022. The judgment, inter alia, denied defendants' motions to set aside the verdict and awarded plaintiff money damages as against defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained at a construction site and alleging, inter alia, that her injuries were caused by defendants' violation of Labor Law § 240 (1). Plaintiff's injuries occurred while she was working as a laborer and a 32-foot-long extension ladder that had been leaning against a wall fell, hitting her on the head and left shoulder. According to plaintiff, the ladder fell as a result of the ground vibrations created by the heavy demolition debris falling in the vicinity of the ladder. Plaintiff moved for partial summary judgment on, inter alia, the issue of liability with respect to section 240 (1) and defendants cross-moved for, inter alia, summary judgment dismissing that claim. Supreme Court, among other things, granted plaintiff's motion with respect to her section 240 (1) claim against defendants and denied defendants' cross-motions with respect to that claim. After a trial on the issue of damages, the jury returned a verdict awarding plaintiff approximately $2.3 million. Defendants now appeal from a judgment awarding damages upon the jury verdict and denying their motions to set aside the verdict pursuant to CPLR 4404.

At the outset, we note that defendants' appeals from the final judgment bring up for review the propriety of the non-final order resolving the parties' respective motion and cross-motions for summary

judgment (*see* CPLR 5501 [a] [1]; *Hall v New York Cent. Mut. Fire Ins. Co.*, 211 AD3d 1585, 1586 [4th Dept 2022]; *Baum v Javen Constr. Co., Inc.*, 195 AD3d 1378, 1378-1379 [4th Dept 2021]). We further note that, in their appeals, defendants do not contend that plaintiff failed to meet her initial burden on her motion for partial summary judgment with respect to the Labor Law § 240 (1) claim (*cf. Vicki v City of Niagara Falls*, 215 AD3d 1285, 1287 [4th Dept 2023]), and instead raise a pure question of law by contending that plaintiff's motion should be denied and their cross-motions should be granted with respect to the Labor Law § 240 (1) claim inasmuch as that statute is inapplicable here because the ladder that fell on plaintiff was not in use at the time of the accident. We reject that contention. Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011] [internal quotation marks omitted]). "Whether a plaintiff is entitled to recovery under Labor Law § 240 (1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (*id.*). Further, "liability is not limited to cases in which the falling object was in the process of being hoisted or secured" (*id.* at 9; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]). Here, plaintiff submitted evidence that she was struck by a 32-foot-long extension ladder that was folded and leaning against a wall. Plaintiff testified at her deposition that the ladder was a "heavy duty one[ ]," and the force of the ladder striking plaintiff caused her to fall to the ground. Thus, plaintiff's submissions established that she suffered a gravity-related injury and that, at the time the ladder fell, it was an object that "required securing for the purpose of the undertaking" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014] [internal quotation marks omitted]; *see Wilinski*, 18 NY3d at 10; *Outar v City of New York*, 286 AD2d 671, 672 [2d Dept 2001], *affd* 5 NY3d 731 [2005]; *Spero v 3781 Broadway, LLC*, 214 AD3d 546, 547 [1st Dept 2023]; *see generally Rodriguez v DRLD Dev. Corp.*, 109 AD3d 409, 409-410 [1st Dept 2013]; *Orner v Port Auth. of N.Y. & N.J.*, 293 AD2d 517, 517-518 [2d Dept 2002]).

In the alternative, defendants contend that plaintiff's motion with respect to Labor Law § 240 (1) should be denied because there are issues of fact whether plaintiff bumped into the ladder with a wheelbarrow and thus knocked it over and was the sole proximate cause of the accident. We reject that contention. In support of her motion, plaintiff submitted her own deposition testimony in which she unequivocally denied bumping into the ladder. In opposition, defendants merely speculate that plaintiff may have caused the accident by bumping into the ladder with her wheelbarrow–an assertion based upon the equivocating testimony of a witness who did not personally observe the accident. Thus, defendants failed to raise an issue of fact whether the actions of plaintiff were the sole proximate cause of the accident (*see Handley v White Assoc.*, 288 AD2d 855, 856 [4th Dept 2001]; *see generally Ortega v Trinity Hudson Holding LLC*, 176 AD3d 625, 626 [1st Dept 2019]). Moreover, even if defendants had

submitted non-speculative evidence that plaintiff bumped into the ladder, that would be insufficient to raise an issue of fact with respect to sole proximate cause inasmuch as the record established that "the [ladder] tipped over in part due to being inadequately secured, [thus] raising only [the issue of] comparative negligence by plaintiff" (*Ortega*, 176 AD3d at 626; *see Wolf v Ledcor Constr. Inc.*, 175 AD3d 927, 930 [4th Dept 2019]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

Defendants also contend that the court erred in denying their posttrial motions to set aside the verdict because the amount awarded for future pain and suffering and future loss of earnings and benefits was unreasonable and contrary to the weight of the evidence. We reject that contention. In evaluating whether the jury award is excessive, we consider whether the verdict deviates materially from what is considered reasonable compensation (*see* CPLR 5501 [c]; *Hotaling v Carter*, 137 AD3d 1661, 1662 [4th Dept 2016]; *Swatland v Kyle*, 130 AD3d 1453, 1454-1455 [4th Dept 2015]). Because monetary awards for pain and suffering "are not subject to precise quantification . . . , we look to comparable cases to determine at which point an award deviates materially from what is considered reasonable compensation" (*Grasha v Town of Amherst*, 191 AD3d 1286, 1287 [4th Dept 2021], *lv denied* 37 NY3d 906 [2021] [internal quotation marks omitted]).

Here, plaintiff was 57 years old at the time of the accident and had a projected future life expectancy of 28 years. The evidence at trial established that, as a result of the accident, plaintiff sustained injuries to her cervical spine and left rotator cuff and had suffered headaches, chronic neck pain, weakness and numbness in her left arm, and loss of range of motion in her neck and arm. Plaintiff underwent an anterior discectomy and spinal fusion, which required the removal of the discs at C4-5, C5-6, and C6-7, and the insertion of spacers and bone graft. Plaintiff also established that she would require a similar surgery within the next two years because the herniation at C3-4 had gotten worse over time. Plaintiff further established that she would require surgery to repair a labral or posterior labral tear of the shoulder. Plaintiff's injuries caused persistent pain in her neck, shoulder, and arm, and she would need continued medical care in the future. We thus conclude that the jury's award of $1,250,000 for future pain and suffering does not deviate materially from reasonable compensation (*see Demetro v Dormitory Auth. of the State of N.Y.*, 199 AD3d 605, 605-606, 610 [1st Dept 2021]; *Nieva-Silvera v Katz*, 195 AD3d 1035, 1037-1038 [2d Dept 2021]). Further, with respect to future lost earnings and benefits, we similarly conclude that the jury's award of $356,150 over five years did not deviate materially from reasonable compensation (*see generally Nayberg v Nassau County*, 149 AD3d 761, 762 [2d Dept 2017]; *Guallapa v Key Fat Corp.*, 98 AD3d 650, 651 [2d Dept 2012]). Defendants' contention that the award for future earnings and benefits should be reduced on the ground that plaintiff's attorney conceded that the jury should deduct a year from future earnings is based on a misreading of the record. The record reveals that, at the time in question, plaintiff's attorney was discussing *past* earnings, not

future ones. Thus, plaintiff did not concede that the award for future earnings and benefits should be reduced.

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

677

CA 23-00193

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

ANTHONY D'AURIA AND LYNN D'AURIA,
PLAINTIFFS-RESPONDENTS,

V ORDER

DAVID R. DOUGHERTY, D.O., ET AL., DEFENDANTS,
AND ROBERT R. CONTI, M.D., DEFENDANT-APPELLANT.

RICOTTA MATTREY CALLOCHIA MARKEL & CASSERT, BUFFALO (COLLEEN K. MATTREY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

CONNORS, LLP, BUFFALO (JOHN LOSS OF COUNSEL), FOR DEFENDANTS DAVID R. DOUGHERTY, D.O., NAGARAJA SRIDHAR, M.D., JOHN GRISWOLD, M.D., AND BUFFALO MEDICAL GROUP, P.C.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered August 11, 2022. The order denied the motion of defendant Robert R. Conti, M.D., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 13, 17 and 24, 2023,

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

742

CA 22-01375

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

ANTHONY MANCUSO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF ALDEN, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MEGHAN M. HAYES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRIEDMAN & RANZENHOFER, P.C., AKRON (MICHAEL H. RANZENHOFER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered August 16, 2022. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff homeowner commenced this action seeking to recover damages caused by flooding on his property during a July 2017 rainstorm. Plaintiff's home is located on the west side of Sullivan Road in defendant, Town of Alden. Sullivan Road runs north to south and contains a drainage system consisting of ditches and culverts. Defendant is responsible for maintenance of six of the culverts that flow beneath Sullivan Road, two of which are south of, and close to, plaintiff's property. In 2012, defendant replaced the steel culvert nearest plaintiff's property with a high-density polyethylene (HDPE) culvert. During the July 2017 rainstorm, one of the ends of the HDPE culvert began to float and was pushed up into the air, cutting off the flow of water through that culvert. As a result, surface water instead flowed toward plaintiff's property and into a concrete culvert, which was overwhelmed with water. Water ultimately entered plaintiff's property, causing damage.

In his complaint, plaintiff asserted a cause of action for negligence, based on defendant's allegedly negligent installation and maintenance of the HDPE culvert, and a cause of action for trespass. Defendant appeals from an order denying its motion for summary judgment dismissing the complaint.

Initially, defendant contends that Supreme Court erred in denying

its motion with respect to the negligence cause of action because it was entitled to governmental immunity. Although defendant asserts that, as a municipality, it generally may not be held liable for the design of the culvert (*see Gilberti v Town of Spafford*, 117 AD3d 1547, 1548-1549 [4th Dept 2014]), plaintiff's complaint clearly alleges that defendant was negligent in the installation and maintenance of the HDPE culvert; actions for which defendant may not claim immunity (*see id.* at 1548-1550; *see generally Lobianco v City of Niagara Falls*, 213 AD3d 1341, 1342-1343 [4th Dept 2023]).

Defendant further contends that plaintiff failed to raise a triable issue of fact regarding its allegedly negligent installation or maintenance of the HDPE culvert. We reject that contention. Defendant's own submissions raised an issue of fact whether defendant failed to maintain the HDPE culvert in proper working order inasmuch as it submitted evidence that part of the surface cover keeping the HDPE culvert in place had eroded at least three months prior to the July 2017 rainstorm. In other words, defendant's submissions raised an issue of fact whether its failure to replace the eroded surface cover allowed the HDPE culvert to float, thereby impeding proper water flow. Inasmuch as defendant failed to meet its initial burden on that issue, the burden never shifted to plaintiff, and denial of the motion to that extent "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]).

Even, assuming, arguendo, that defendant met its initial burden of demonstrating the proper installation and maintenance of the HDPE culvert, we conclude that plaintiff raised triable issues of fact in opposition (*see Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781, 783 [2d Dept 2004], *lv dismissed* 3 NY3d 738 [2004]). With respect to the installation, plaintiff's expert opined that defendant failed to account for the different installation requirements of the HDPE culvert from a steel culvert, which the HDPE culvert was replacing. Plaintiff's expert also opined that the improper installation of the HDPE culvert resulted in the culvert floating, thereby preventing the flow of water.

Contrary to defendant's contention, the court properly determined that issues of fact also exist whether the failure of the HDPE culvert proximately caused the damage to plaintiff's property. Plaintiff's "expert [affidavit] squarely opposes the affidavit of [defendant's] expert [with respect to proximate cause], result[ing in] a classic battle of the experts that is properly left to a jury for resolution" (*Peevey v Unity Health Sys.*, 196 AD3d 1139, 1140 [4th Dept 2021]).

Defendant further contends that it lacked prior written notice of the allegedly defective HDPE culvert as required by Town Law § 65-a (1) and Code of Town of Alden § 304-1. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party and drawing every available inference in his favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that plaintiff raised an issue

of fact whether the condition of the HDPE culvert, i.e., the lack of sufficient surface cover over it, "existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence" (Town Law § 65-a [1]; *see* Code of Town of Alden § 304-1; *see also Lobianco*, 213 AD3d at 1342; *Gilberti*, 117 AD3d at 1551).

Additionally, defendant contends that it cannot be held liable for the negligent installation or maintenance of the HDPE culvert because the failure of the culvert was the unanticipated result of an unusually severe storm. We reject that contention. Defendant failed to meet its initial burden on that issue thereby requiring the denial of the motion to that extent "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see generally Mal-Bon, LLC v Smith*, 163 AD3d 1415, 1416 [4th Dept 2018]).

However, we agree with defendant that the court erred in denying its motion with respect to the second cause of action, for trespass, and we therefore modify the order accordingly. "Trespass is an intentional harm" and, in order for the trespasser to be liable, they "must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what [they] willfully do[ ], or which [they] do[ ] so negligently as to amount to willfulness" (*Buckeye Pipeline Co. v Congel-Hazard, Inc.* [appeal No. 1], 41 AD2d 590, 590 [4th Dept 1973] [internal quotation marks omitted]). Here, defendant met its initial burden of establishing its "lack of intent to intrude upon plaintiff['s] property, and plaintiff[ ] failed to raise a triable issue of fact" in opposition (*Vanderstow v Acker*, 55 AD3d 1374, 1376 [4th Dept 2008]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

751

KA 20-00241

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUESE SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 29, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed on each count to a determinate term of three and one-half years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of three counts of burglary in the second degree (Penal Law § 140.25 [2]). Initially, as defendant contends and the People correctly concede, the waiver of the right to appeal was invalid because Supreme Court's "oral colloquy mischaracterized it as an absolute bar to the taking of an appeal" (*People v McCrayer*, 199 AD3d 1401, 1401 [4th Dept 2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant further contends that his plea was involuntary because he was misinformed with respect to his maximum sentencing exposure. Although this contention would survive even a valid waiver of the right to appeal (*see People v Halsey*, 108 AD3d 1123, 1124 [4th Dept 2013]), "[b]y failing to move to withdraw the . . . plea[ ] or to vacate the . . . judgment[ ] of conviction" on the ground asserted, "defendant failed to preserve his contention for our review" (*People v Ablack*, 126 AD3d 1410, 1411 [4th Dept 2015], *lv denied* 25 NY3d 1197 [2015]; *see People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's contention, the court did not err in enhancing his sentence. It is well settled that a court may impose an enhanced sentence on a defendant if the court informs the defendant that the promised sentence is conditioned on being truthful in any subsequent presentence interview and the defendant then is not truthful in that interview (*see People v Hicks*, 98 NY2d 185, 187-188 [2002]; *People v Terry*, 217 AD3d 1582, 1582-1583 [4th Dept 2023], *lv denied* 40 NY3d 1041 [2023]; *People v Stanley*, 128 AD3d 1472, 1474 [4th Dept 2015]). Indeed, "the violation of an explicit and objective plea condition that was accepted by the defendant can result in the imposition of an enhanced sentence" (*People v Pianaforte*, 126 AD3d 815, 816 [2d Dept 2015]; *see Terry*, 217 AD3d at 1582). Here, the court informed defendant during the plea colloquy that the sentencing promise was conditioned on defendant's "full cooperation" during the presentence interview, including "being truthful" when answering the probation officer's questions.

In the presentence investigation report, the probation officer stated that defendant "said he never committed the three burglaries" to which he had pled guilty. At sentencing, the court offered to call the probation officer to testify regarding the details of the conversation with defendant; defendant declined that offer and opted to proceed with sentencing. The court then determined that defendant violated the conditions of the plea agreement and sentenced him to an enhanced term of incarceration. Inasmuch as defendant waived his right to a hearing by declining the court's offer to have the probation officer testify (*see People v Alexander*, 194 AD3d 1261, 1263 [3d Dept 2021], *lv denied* 37 NY3d 1094 [2021]; *People v Cruz*, 169 AD3d 611, 611 [1st Dept 2019], *lv denied* 33 NY3d 1068 [2019]), and the undisputed language of the presentence report reflects that defendant violated an explicit and objective plea condition that he accepted, we conclude that the court did not err in enhancing defendant's sentence (*see Hicks*, 98 NY2d at 189).

Defendant's contention that he was denied effective assistance of counsel because defense counsel declined the court's offer to call the probation officer to testify prior to sentencing relies on matters outside the record on appeal and must therefore be raised by motion pursuant to CPL 440.10 (*see People v Spencer*, 185 AD3d 1440, 1442 [4th Dept 2020]; *People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *People v Mangiarella*, 128 AD3d 1418, 1418 [4th Dept 2015]).

We agree with defendant, however, that the enhanced sentence is unduly harsh and severe under the circumstances of this case. Defendant pled guilty with a sentence promise of between six and eight years' imprisonment, and with the possibility of a further reduction to three and one-half years' imprisonment on recommendation by the People. After defendant violated the plea agreement with his statements during the presentence interview, the court increased the sentence to an aggregate term of 15 years' imprisonment, nearly double the maximum of the original sentence promise. We conclude that a reduction in the sentence is appropriate and, as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]), we therefore modify the judgment by reducing the sentence imposed on each count to a determinate term of three and one-half years' imprisonment to be followed by five years' postrelease supervision, which thereby produces an aggregate term of imprisonment of 10½ years.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

773

KA 22-01228

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH P. HEVERLY, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (JOHN C. TUNNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. The judgment convicted defendant upon a jury verdict of bail jumping in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of bail jumping in the second degree (Penal Law § 215.56), defendant contends that he is entitled to a new trial because County Court abused its discretion in denying his challenges for cause to two prospective jurors who expressed biases during voir dire. Defendant further contends that the People failed to comply with their discovery obligations under CPL article 245. We agree with defendant that he is entitled to a new trial.

"Prospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused" (*People v Arnold*, 96 NY2d 358, 363 [2001]; *see People v Harris*, 19 NY3d 679, 685 [2012]; *People v Chambers*, 97 NY2d 417, 419 [2002]). Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*Arnold*, 96 NY2d at 362; *see People v Mitchum*, 130 AD3d 1466, 1467 [4th Dept 2015]).

Here, one of the prospective jurors at issue stated at the outset of voir dire that she was the mother of five children and that she would have a difficult time concentrating on the trial due to myriad

family obligations. After some discussion with the prosecutor about whether child care arrangements could be made during the trial, the prospective juror raised another concern about her ability to serve as a juror, explaining that she was indecisive. When asked by the prosecutor whether she could follow the court's instructions and "apply the law to the evidence," the prospective juror stated, "[h]onestly, no." Later during voir dire, the prosecutor asked the prospective juror: "Do you think you can do what you need to do to be a juror?" The prospective juror answered "[y]es."

When defendant later challenged the prospective juror for cause, the court denied defendant's challenge, explaining that the prospective juror said "I can" when asked by the prosecutor whether she could serve on the jury. We conclude that the court abused its discretion in denying defendant's challenge for cause to the prospective juror (*see generally People v Betances*, 147 AD3d 1352, 1354 [4th Dept 2017]).

As the People concede, the prospective juror's initial comments reflected "a state of mind that [was] likely to preclude [her] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]). The question thus becomes whether she ultimately gave an "unequivocal assurance" that she could put aside the specific concerns she expressed and render an impartial verdict based on the evidence (*People v Johnson*, 94 NY2d 600, 614 [2000]). We conclude that she did not. Indeed, the prospective juror never stated, unequivocally or otherwise, that she would follow the court's instructions and apply the law to the facts. Nor did she state that her child care concerns had been alleviated such that she could devote her undivided attention to the trial.

Just as a "general statement of impartiality that does not explicitly address the specific cause of the preexisting bias is not sufficient" (*People v Cahill*, 2 NY3d 14, 76 [2003, Smith, J., concurring]), a general statement from a prospective juror that they can do what it takes to be a juror is not sufficient to rehabilitate the prospective juror where, as here, the prospective juror had previously offered specific reasons for being unable to serve impartially. We therefore conclude that the court abused its discretion in denying defendant's challenge for cause and, inasmuch as defendant exercised a peremptory challenge with respect to the prospective juror at issue and then exhausted all of his peremptory challenges, the denial of his challenge for cause constitutes reversible error (*see People v Padilla*, 191 AD3d 1347, 1348 [4th Dept 2021]; *People v Hargis*, 151 AD3d 1946, 1948 [4th Dept 2017]).

Because we are granting a new trial, we must address defendant's remaining contention related to CPL article 245. We agree with defendant that the People failed to comply with their discovery obligations under CPL 245.20, which became effective while the instant charges were pending (*see* L 2019, ch 59, part LLL, § 2). Six days before trial and almost one year after the People filed their original certificate of compliance (*see* CPL 245.50 [1]), the People filed a supplemental certificate of compliance (*see id*. para [1-a]), enclosing

a court transcript from a prior proceeding. On the first day of trial, the People provided defense counsel with additional documents, including a police incident report, a notice of arraignment and two additional court transcripts from prior proceedings. Defense counsel objected to the untimely disclosure, specifically citing CPL article 245, but the court stated that the trial was "going forward."

During the testimony of the People's second witness, who was the prosecutor on the underlying drug charges with respect to which defendant had failed to appear, the People sought to introduce a one-page photocopy of notes the prosecutor had made on his case file. Those notes had never been disclosed to the defense. In response to defense counsel's objections related to, inter alia, CPL article 245, the prosecutor argued that his failure to disclose the notes was a mere *Rosario* violation that could be cured. The court agreed and provided defense counsel with additional time to review the document and prepare cross-examination questions. Having lost his bid to exclude the document, defense counsel requested certain redactions, to which the People stipulated. We agree with defendant that, by proposing redactions, he did not waive his initial objections to the case notes.

On appeal, the People maintain their position that the *Rosario* violation was cured and, as a result, reversal is not warranted (*see People v Socciarelli*, 203 AD3d 1642, 1643 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]). Where "there is an issue of delayed disclosure of *Rosario* material, reversal is required [under *Rosario*] only 'if the defense is substantially prejudiced by the delay' " (*id.*, quoting *People v Martinez*, 71 NY2d 937, 940 [1988]). Here, however, the failure to disclose the case notes *also* constitutes a violation of CPL 245.20 (1) inasmuch as those notes "relate to the subject matter of the case and [were] in the possession, custody or control of the prosecution" (*id*.).

We agree with defendant that CPL article 245 broadened the scope of automatic discovery to include *Rosario* material (*see People v Faison*, 73 Misc 3d 900, 909 [Crim Court, Queens County 2021]). "[A] plain reading of the statute indicates a broader interpretation of CPL 240.20. *Rosario* material relates 'to the subject matter of the *witness'* testimony' (emphasis added), in contrast to the more encompassing requirement of CPL 245.20 to disclose all material related to the subject matter *of the case*" (*id.*). Moreover, "[t]he purpose of and justification for article 245 was specifically to eliminate 'trial by ambush' and to remedy . . . inequities by mandating earlier and broader discovery obligations by the prosecution, increasing efficiency in prosecutions and fairness to both sides" (*People v Godfred*, 77 Misc 3d 1119, 1124 [Crim Ct, Bronx County 2022]). Such open disclosure was enacted, in part, to enhance "defendants' ability to reach reasonable pretrial dispositions of their cases precisely because [under the old discovery rules] they lacked sufficient early access to the evidence against them" (*id*.).

We further agree with defendant that the prosecutor's failure to timely disclose the three transcripts constituted a violation of CPL

article 245 even if those documents were equally available to both the prosecution and the defense. The People do not dispute that, at some point, the transcripts came into the prosecutor's possession and that those transcripts related to the subject matter of the case. Although the prosecutor submitted a supplemental certificate of compliance and disclosed one of the three transcripts six days before trial, he did not turn over to the defense the other two transcripts. CPL 245.20 (2) requires the prosecutor to "make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; . . . the prosecutor shall not be required to obtain *by subpoena duces tecum* material or information which the defendant may thereby obtain" (emphasis added). There is no evidence that the transcripts were obtained by subpoena duces tecum.

Although transcripts that are *not* in the People's possession and control are not subject to *Brady* and *Rosario* disclosure requirements (*see People v McGuire*, 196 AD3d 1155, 1156 [4th Dept 2021], *lv denied* 37 NY3d 1163 [2022], *reconsideration denied* 39 NY3d 964 [2022]), that fact is of no moment for purposes of CPL 245.20. Even where documents are "beyond the prosecutor's control under *Rosario* and constructive possession under CPL 245.20 (2), the presumption of openness, (CPL 245.20 [7]), the duty to maintain the flow of information (CPL 245.55), the continuing duty to disclose (CPL 245.60), and, perhaps most importantly, the goals of article 245 require that when the prosecutor becomes aware [after making the requisite reasonable inquiries] that an agency outside their control holds information that relates to the subject matter of the case, best practice dictates that the People take steps . . . to obtain those records *notwithstanding the fact [that] the information may be available to the defendant by equivalent process*" (*People v Weiss*, 79 Misc 3d 931, 936 [Crim Ct, Queens County 2023] [emphasis added]; *see People v Soto*, 72 Misc 3d 1153, 1160-1161 [Crim Ct, NY County 2021]; *see also People v Mercado*, 80 Misc 3d 430, 441-443 [Sup Ct, Queens County 2023]). CPL 245.20 (2) does not relieve the People of their disclosure requirement where, as here, the "discovery material at issue is within the People's custody and control, [and does not require them to] resort to a subpoena" (*Soto*, 72 Misc 3d at 1161; *cf. People v Lustig*, 68 Misc 3d 234, 243-244 [Sup Ct, Queens County 2020]).

Inasmuch as the People violated CPL 245.20, it was incumbent upon the court to impose a remedy or sanctions proportionate to the prejudice suffered by defendant (*see* CPL 245.80 [1]). While the court may have provided a remedy for the *Rosario* violation arising from the People's failure to turn over the case notes, it did not provide any remedy or sanction for the discovery violations. We thus conclude that, upon remittal for a new trial, the court should impose any

remedies or sanctions it deems appropriate under CPL 245.80.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

783

CA 22-01252

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

MARK LOSTRACCO, PLAINTIFF,

V MEMORANDUM AND ORDER

LEWISTON-PORTER CENTRAL SCHOOL DISTRICT, JAVEN CONSTRUCTION CO., INC., AND CAMPUS CONSTRUCTION MANAGEMENT GROUP, INC., DEFENDANTS.

LEWISTON-PORTER CENTRAL SCHOOL DISTRICT, JAVEN CONSTRUCTION CO., INC., AND CAMPUS CONSTRUCTION MANAGEMENT GROUP, INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

EMPIRE BUILDING DIAGNOSTICS, THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

HURWITZ FINE P.C., BUFFALO (MARC A. SCHULZ OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered July 28, 2022. The order, among other things, denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiff commenced this Labor Law action against defendants-third-party plaintiffs (defendants), Lewiston-Porter Central School District (District) as the owner of the property on which construction was being performed (project), Javen Construction Co., Inc. (Javen) as the general contractor, and Campus Construction Management Group, Inc. (Campus) as the construction manager, seeking to recover damages for injuries he sustained after tripping on debris located on the project site. Defendants subsequently commenced a third-party action against third-party defendant, Empire Building Diagnostics (Empire), which had subcontracted with Javen to provide demolition services on the project. Defendants asserted causes of action for contractual and common-law indemnification and breach of

contract against Empire. Empire now appeals from an order that, inter alia, denied its motion for summary judgment dismissing the third-party complaint. We affirm.

Initially, Empire contends that defendants are not entitled to contractual indemnification because the accident was caused by defendants' negligence, and not by any negligence of Empire. We reject that contention. Empire's own submissions on the motion raised an issue of fact whether Empire created the dangerous condition that caused plaintiff's accident (*see generally Brioso v City of Buffalo*, 210 AD3d 1440, 1442 [4th Dept 2022]). Here, there was extensive deposition and General Municipal Law § 50-h testimony that the debris that plaintiff tripped over was debris from demolition done in the area where plaintiff was working and that Empire was the entity responsible for that demolition. Inasmuch as Empire failed to meet its initial burden on its motion regarding the creation of the dangerous condition, the burden never shifted to defendants on that issue, and denial of the motion with respect to the contractual indemnification cause of action "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 generally Brioso*, 210 AD3d at 1442-1443).

Empire next contends that Supreme Court erred in denying its motion with respect to the common-law indemnification cause of action because it did not exercise control over plaintiff's work and because, even if it had been negligent, Javen would have also necessarily been negligent, thereby barring Javen from receiving common-law indemnification. "The right of common-law indemnification belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their own part" (*Colyer v K Mart Corp.*, 273 AD2d 809, 810 [4th Dept 2000]). "An owner's or contractor's general authority to coordinate the work and monitor its progress and safety conditions is not a basis for denying common-law indemnification" (*id.*). Rather, the "obligation of common-law indemnification runs against those parties who, by virtue of their direction and supervision over the injury-producing work, were actively at fault in bringing about the injury" (*id.*; *see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]; *Ross v Northeast Diversification, Inc.*, 218 AD3d 1244, 1247 [4th Dept 2023]).

Here, there is no dispute that Empire did not direct, supervise, or control plaintiff's work; rather, defendants' cause of action for common-law indemnification is based upon their assertion that Empire was negligent in failing to remove the demolition debris from the site, causing plaintiff's accident. For the reasons noted above, Empire's own submissions raised an issue of fact whether it was negligent in creating a dangerous condition by failing to remove the demolition debris. Additionally, Empire's submissions failed to demonstrate that the liability of Javen was anything but vicarious, "arising solely from [its] status as general contractor" (*Niethe v Palombo*, 283 AD2d 967, 968 [4th Dept 2001]). Empire failed to meet its initial burden of establishing that Javen was negligent based on a dangerous condition on the premises, i.e., that Javen had control over

the work site and had created or had actual or constructive notice of the dangerous condition (*see Pelonero v Sturm Roofing, LLC*, 175 AD3d 1062, 1064 [4th Dept 2019]; *Parkhurst v Syracuse Regional Airport Auth.*, 165 AD3d 1631, 1632 [4th Dept 2018]; *Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011]).

Finally, Empire contends that the court erred in denying its motion with respect to the breach of contract cause of action because, by obtaining insurance with an automatic enrollment provision, it satisfied the requirement in its subcontract with Javen regarding adding additional insureds. We reject that contention. "Summary judgment dismissing a cause of action alleging failure to procure additional insured coverage is warranted where the movant demonstrates, prima facie, that it procured the requisite insurance" (*Meadowbrook Pointe Dev. Corp. v F&G Concrete & Brick Indus., Inc.*, 214 AD3d 965, 969 [2d Dept 2023]; *see Olivieri v Barnes & Noble, Inc.*, 208 AD3d 1001, 1007 [4th Dept 2022]). Empire's subcontract with Javen required that not only Javen, but the District and Campus, be named as additional insureds. The automatic-enrollment provision in Empire's insurance policy, which Empire contends proves that it complied with the additional insured requirement, made any organization an additional insured if Empire had a written contract with that organization. Inasmuch as Empire did not have any contracts with the District or Campus, the automatic-enrollment provision did not encompass those parties. Empire therefore failed to meet its initial burden on its motion of establishing that it procured the requisite insurance and thus did not breach its contract with Javen (*see Clyde v Franciscan Sisters of Allegany, N.Y., Inc.*, 217 AD3d 1353, 1356 [4th Dept 2023]; *Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 1509 [4th Dept 2009]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

830

CA 22-01724

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

JOHN PM DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA HOUK, DEFENDANT-APPELLANT,
FABIUS-POMPEY CENTRAL SCHOOL DISTRICT,
ET AL., DEFENDANTS.

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

KRANTZ & BERMAN LLP, NEW YORK CITY (HUGH D. SANDLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Jeffrey A. Tait, J.), entered September 28, 2022. The order denied the motion of defendant Barbara Houk for summary judgment.

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

Memorandum: Plaintiff was a student in the late 1970s and early 1980s in defendant Fabius-Pompey Central School District, during which time Barbara Houk (defendant), who was then in her late 20s and early 30s, was plaintiff's French teacher. According to plaintiff, he first met defendant when he was a 14-year-old student in defendant's freshman French class, and defendant continued to teach plaintiff's class each year of high school as he aged from 14 years old to 17 years old. Eventually, starting in January 1980 during plaintiff's junior year when he was 16 years old, defendant allegedly began engaging plaintiff in progressively more intimate and personal conversations during a study hall period. Defendant thereafter allegedly began hosting plaintiff at her apartment, ostensibly to continue their conversations. Starting in late March and early April 1980, defendant allegedly began engaging plaintiff in various forms of sexual contact, including intercourse, at her apartment and elsewhere. The purported sexual conduct continued from April to August 1980, during which period plaintiff turned 17 years old in late April 1980.

Plaintiff commenced this action pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g) against defendant and several school district defendants seeking damages for personal injuries he sustained as a result of the purported incidents of sexual abuse, which plaintiff alleged constituted sexual offenses as defined in Penal Law article

130 against a child who was less than 18 years old. Supreme Court, in denying defendant's motion for summary judgment dismissing the complaint against her, agreed with defendant that the CVA revived only those claims for injuries suffered as a result of conduct that constituted a specified sexual offense as defined by the Penal Law at the time that the conduct occurred, but nonetheless concluded that sexual abuse in the third degree (Penal Law former § 130.55) could serve as the predicate sexual offense for revival of plaintiff's claims against defendant. With respect to defendant's alternative argument that any claims premised on conduct occurring after plaintiff turned 17 years old must be dismissed on the ground that the sexual relationship was consensual and there was no statutory bar to consent at that point, the court concluded that defendant was not entitled to summary judgment because the issue of plaintiff's consent could not be resolved on the record before it. Defendant appeals, and we now affirm.

Defendant contends on both procedural and substantive grounds that the court erred in determining that plaintiff could rely on the offense of sexual abuse in the third degree as defined in Penal Law former § 130.55 to revive his tort claims under the CVA. Defendant contends in particular that, as a matter of procedure, plaintiff improperly raised the offense of sexual abuse in the third degree for the first time in opposition to her motion for summary judgment, and thus the court erred in considering the conduct proscribed by that provision as a basis upon which plaintiff could revive his claims against defendant under the CVA. We reject that contention. Initially, we note that plaintiff adequately stated a cause of action under the CVA by pleading that defendant's alleged conduct detailed in the complaint constituted sexual offenses as defined in Penal Law article 130 against a child who was less than 18 years old (*see Brown v University of Rochester*, 216 AD3d 1328, 1330, 1332-1333 [3d Dept 2023]). Moreover, contrary to defendant's contention, we conclude under the circumstances of this case that plaintiff "may properly rely on [Penal Law former § 130.55] despite the fact that it is raised for the first time in opposition to the motion . . . and is not set forth in the complaint or [a] bill of particulars" inasmuch as his "reliance thereon 'raises no new factual allegations or theories of liability and results in no discernible prejudice to [defendant]' " (*Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1386 [4th Dept 2013]; *see Martin v Niagara Falls Bridge Commn.*, 162 AD3d 1604, 1606 [4th Dept 2018]).

Next, defendant contends as a matter of substance that a claimed violation of Penal Law former § 130.55 cannot revive plaintiff's claims against her because the provision, as it existed in 1980, did not place defendant and others similarly situated on notice that a female could commit the crime of sexual abuse in the third degree by subjecting a male to sexual contact without his consent. Plaintiff responds that defendant's contention lacks merit because statutory definitions, rules of construction, New York jurisprudence, and common sense all demonstrate that Penal Law former § 130.55 was gender neutral at the time that the alleged sexual abuse occurred. Plaintiff does not reprise on appeal, even as an alternative ground for

affirmance, the argument he raised in opposition to the motion that the CVA allows for the revival of claims to recover for harm that resulted from prior conduct that would constitute a sexual offense under the current Penal Law. Inasmuch as we agree with plaintiff that defendant's purported conduct would constitute sexual abuse in the third degree as defined by Penal Law former § 130.55 even as it existed in 1980, we need not address on this appeal the issue of statutory interpretation whether the conduct bringing a tort claim within the scope of the CVA must constitute a specified offense under the current Penal Law or under the applicable criminal law as it existed at the time of the conduct.

In 1980, Penal Law former § 130.55 provided, along with an affirmative defense that would not apply here due to the age gap between defendant and plaintiff, that "[a] person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent" (Penal Law former § 130.55, as added by L 1965, ch 1030). According to defendant, inasmuch as the statute used the word "he" to describe the perpetrator of the offense, females were exempt from that criminal prohibition and could not be guilty of sexually abusing a male until 2001 after the legislature updated the statute to add the language "or she" (§ 130.55, as amended by L 2000, ch 1, § 39). Contrary to defendant's contention, we conclude that the statute proscribed sexual abuse committed by females in 1980 because Penal Law former § 130.55 applied to any "person"—relevantly defined as a "human being" (§ 10.00 [7])—and, as the court correctly determined, the term "he" in the statute was the "universal 'he' " in common usage at the time that referred generally to males, females, and fictitious persons such as corporations. The universal, gender-neutral language in Penal Law former § 130.55 was in contrast to the gender-specific language used in the statutes concerning rape, such as the provision prohibiting statutory rape, which provided at that time that "[a] *male* is guilty of rape in the third degree when . . . [b]eing [21] years old or more, he engages in sexual intercourse with a *female* less than [17] years old" (former § 130.25 [2] [emphasis added]). Even beyond the statutory text itself, General Construction Law former § 22, which would have applied to Penal Law former § 130.55, provided that "[w]ords of the masculine gender include the feminine and the neuter" (*see People v Reilly*, 85 Misc 2d 702, 710-711 [Westchester County Ct 1976]). Moreover, contrary to defendant's suggestion, it was understood that, even prior to the addition of the "or she" language to the sexual abuse offenses under the Penal Law effective in 2001 (*see* L 2000, ch 1, §§ 39, 40, 41), females could be prosecuted and found guilty of sexual abuse for their own personal conduct directed against another person (*see People v Bockeno*, 124 AD2d 1008, 1008-1009 [4th Dept 1986], *lv denied* 69 NY2d 744 [1987]).

Inasmuch as plaintiff was incapable of consent by virtue of his age prior to turning 17 years old (*see* Penal Law former § 130.05 [3] [a]) and there is no merit to defendant's contention that she could not have engaged in conduct constituting the sexual offense of sexual abuse in the third degree in 1980 (*see* former § 130.55), plaintiff is entitled to rely on that offense as a predicate for the revival of his

tort claims against defendant under the CVA, and defendant's related contentions therefore necessarily fail.

Defendant contends in the alternative that the court erred in determining that she was not entitled to summary judgment dismissing plaintiff's claims for damages arising from alleged sexual conduct that occurred after he turned 17 years old—i.e., the legal age of consent—because, contrary to the court's conclusion, the record establishes as a matter of law that plaintiff consented to all alleged sexual contact during that time period. We reject that contention.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Under our case law, a CVA claim premised on conduct that occurred when the plaintiff was 17 years old will be revived under CPLR 214-g for statute of limitations purposes only where the plaintiff lacked consent within the meaning of Penal Law § 130.05 because, otherwise, the conduct upon which the claim is predicted would not "constitute a sexual offense as defined in [Penal Law article 130]" (CPLR 214-g; *see Shapiro v Syracuse Univ.*, 208 AD3d 958, 959 [4th Dept 2022]; *Druger v Syracuse Univ.*, 207 AD3d 1153, 1153 [4th Dept 2022]). Here, viewing the facts in the light most favorable to plaintiff as the nonmovant and drawing every available inference in his favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that defendant failed to eliminate the material issue of fact whether there were "any circumstances . . . in which [plaintiff] d[id] not expressly or impliedly acquiesce in [defendant's] conduct" during the relevant time period (Penal Law former § 130.05 [2] [c]) and, in any event, plaintiff's submissions in opposition to the motion raised an issue of fact in that regard (*see generally Alvarez*, 68 NY2d at 324).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

832

CA 23-00529

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

TAMMY L. KELLY AND MICHELLE MOUDY, AS GUARDIANS OF THE PERSON AND PROPERTY OF JOHN M. MOUDY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NICHOLAS J. PROHASKA, DEFENDANT, AND SNAP-ON CREDIT LLC, DEFENDANT-RESPONDENT.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JOSEPH R. DARIN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 17, 2023. The order granted the motion of defendant Snap-on Credit LLC for summary judgment and denied the cross-motion of plaintiffs for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part, reinstating the complaint against defendant Snap-on Credit LLC insofar as the complaint, as amplified by the bill of particulars, alleges that defendant Snap-on Credit LLC is vicariously liable for the negligence of defendant Nicholas J. Prohaska, granting the cross-motion in part, and dismissing the 11th affirmative defense in the amended answer of defendant Snap-on Credit LLC, and as modified the order is affirmed without costs.

Memorandum: In this personal injury action arising from a motor vehicle accident, plaintiffs, as guardians of the person and property of John M. Moudy (Moudy), appeal from an order that granted the motion of defendant Snap-on Credit LLC (Snap-on Credit) seeking summary judgment dismissing the complaint against it and denied the cross-motion of plaintiffs seeking, inter alia, partial summary judgment dismissing Snap-on Credit's affirmative defense based on the Graves Amendment (49 USC § 30106). Defendant Nicholas J. Prohaska was a franchisee of a company affiliated with Snap-on Credit and was the operator of the vehicle (Snap-on van) that struck Moudy. The Snap-on van was owned by Snap-on Credit and was leased to Prohaska.

Plaintiffs initially contend that Supreme Court erred in granting Snap-on Credit's motion because Snap-on Credit failed to establish the

applicability of the Graves Amendment. "[T]he Graves Amendment provides, generally, that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle by reason of being the owner of the vehicle for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)" (*Quinniey v Blumlein*, 151 AD3d 1763, 1763 [4th Dept 2017] [internal quotation marks omitted]; *see* 49 USC § 30106).

With respect to the second factor, Snap-on Credit established on its motion that it was free of direct negligence inasmuch as it was not responsible for hiring or supervising Prohaska, who was not a Snap-on Credit employee. In opposition to the motion, plaintiffs failed to raise a triable issue of fact in that regard. Indeed, plaintiffs did not oppose the motion to the extent that it sought dismissal of their direct claims of negligence and do not address the dismissal of those claims in their brief on appeal, and plaintiffs have therefore abandoned those claims (*see Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]; *Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]).

With respect to the first factor, however, we agree with plaintiffs that Snap-on Credit failed to establish on its motion that it was "engaged in the trade or business of renting or leasing motor vehicles" within the meaning and intent of the Graves Amendment (49 USC § 30106 [a] [1]; *see generally Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *rearg denied* 31 NY3d 1136 [2018]; *New York State Workers' Compensation Bd. v Episcopal Church Home & Affiliates, Inc.*, 218 AD3d 1317, 1319 [4th Dept 2023]). Snap-on Credit's submissions established that it leased only one type of vehicle, i.e., vans of the same type as the Snap-on van, to franchisees such as Prohaska, and that Snap-on Credit did not lease vehicles to the general public. Although Snap-on Credit submitted the deposition testimony of a representative establishing that approximately 15% of Snap-on Credit's business involved the financing of business loans to franchisees and the leasing of vans to franchisees, who were required to either buy or lease such vans under the terms of the franchise agreements, Snap-on Credit's submissions did not indicate how many franchisees leased the vans as opposed to buying them. Under these circumstances, we conclude that Snap-on Credit failed to meet its initial burden on its motion of establishing that the Graves Amendment protects it from liability in this case, and that the court thus erred in granting Snap-on Credit's motion insofar as it sought summary judgment dismissing plaintiffs' vicarious liability claims against it (*see* 49 USC § 30106 [a] [1]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the order accordingly.

We further agree with plaintiffs that they established on their cross-motion that the Graves Amendment is inapplicable to protect Snap-on Credit from liability in this case and that, in opposition, Snap-on Credit failed to raise a triable issue of fact (*see generally*

Alvarez, 68 NY2d at 324). Thus, Snap-on Credit's affirmative defense based on the Graves Amendment should be dismissed, and we therefore further modify the order accordingly.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

838

KA 17-00450

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, GREENWOOD, AND NOWAK, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR CRAWFORD, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

VICTOR CRAWFORD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 14, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

Defendant contends in his main brief that the evidence is legally insufficient to support the conviction and that the verdict is against the weight of the evidence. We reject those contentions. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crimes of which he was convicted based on the evidence presented at trial (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends in his main brief that County Court committed a mode of proceedings error when it failed to read the exact text of a jury note to defense counsel before counsel and the court agreed on a response to the note. We agree with defendant that the

record fails to reflect that the court provided defense counsel with meaningful notice of the substantive jury note (*see* CPL 310.30; *People v O'Rama*, 78 NY2d 270, 277-278 [1991]).

The jury note, marked as court exhibit 18, stated, in relevant part, "[w]e, the Jury, request: to hear the read-back of [a restaurant worker's] cross-examination where she is asked how many times she had seen the defendant at the restaurant. *She indicates that she had seen him 2 times while she was working at the counter, and multiple times while she was not at the counter but through the security camera play-back. We wish to hear this portion read back.* We also request to hear the portion of the cross-examination where she is asked and answers when she identified [a shooter shown in the surveillance video] as the defendant to the police" (emphasis added). The court did not read the note aloud verbatim and the record does not reflect that the court showed the note to the parties. Rather, the record reflects that the court addressed the note before counsel and the jury by stating, "the readback that you have requested of [the restaurant worker's] cross-examination where she is asked how many times she had seen the defendant at the restaurant will now be read back for you along with the second portion of that which reads, 'We also request to hear that portion of the cross-examination where she is asked and answers when she identified [the shooter] as the defendant to the police.' We'll read both those portions." The court failed to read the second and third sentences contained within the jury note. We conclude that by improperly paraphrasing the jury note, the court failed to give meaningful notice of the note (*see People v Zenon*, 208 AD3d 1634, 1635 [4th Dept 2022], *lv denied* 39 NY3d 1076 [2023]; *People v Copeland*, 175 AD3d 1316, 1318-1319 [2d Dept 2019], *lv denied* 34 NY3d 1016 [2019]).

Relying on *People v Ramirez* (60 AD3d 560 [1st Dept 2009], *affd* 15 NY3d 824 [2010]), the People contend that "[t]he record warrants an inference" (*id.* at 561) that defense counsel had seen the note during an off-the-record conference with the court, and, thus, the court's failure to read the note in its entirety into the record does not constitute a mode of proceedings error (*see generally People v Nealon*, 26 NY3d 152, 158 [2015]). We reject that contention. The inference the People ask us to draw is based on the fact that the transcript shows that the attorneys were "working on finding the correct video portions that the jury requested" when the court went back on the record following receipt of the note. The jury note in question did not, however, request the replaying of any video evidence. The jury had requested such evidence in a prior note (court exhibit 17), which was read into the record by the court and is not at issue on this appeal. We conclude that "[i]n the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30, a mode of proceedings error occurred requiring reversal" (*People v Morrison*, 32 NY3d 951, 952 [2018] [internal quotation marks omitted]; *see People v Weaver*, 89 AD3d 1477, 1479 [4th Dept 2011]).

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

remaining contentions raised in his main and pro se supplemental briefs.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

863

CAF 21-01414

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

IN THE MATTER OF SIRBARINDER DHIR,
PETITIONER-APPELLANT,

V ORDER

RAIMOND WINSLOW, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), dated August 25, 2021, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to dismiss the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Matter of Rusiecki v Marshall*, 147 AD3d 1395, 1395-1396 [4th Dept 2017]; *Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

864

CAF 21-01415

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

IN THE MATTER OF SIRBARINDER DHIR,
PETITIONER-APPELLANT,

V ORDER

RAIMOND WINSLOW, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), dated August 25, 2021, in a proceeding pursuant to Family Court Act article 8. The order vacated an order of protection which was issued on behalf of petitioner as against respondent and dismissed the petition without prejudice.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Matter of Schultz v Schultz* [appeal No. 2], 107 AD3d 1616, 1616 [4th Dept 2013]; *Matter of Kristine Z. v Anthony C.*, 43 AD3d 1284, 1284-1285 [4th Dept 2007], *lv denied* 10 NY3d 705 [2008]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

865

CAF 21-01824

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

IN THE MATTER OF SIRBARINDER DHIR,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RAIMOND WINSLOW, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), dated November 16, 2021, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to dismiss the petition and dismissed the petition without prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the second petition insofar as it alleges that respondent, on or after November 16, 2020, committed the family offenses of harassment in the second degree under Penal Law § 240.26 (3), aggravated harassment in the second degree under Penal Law § 240.30 (2), stalking in the fourth degree under Penal Law § 120.45 (1) to the extent that respondent allegedly engaged in a course of conduct that he knew or reasonably should have known was likely to cause petitioner reasonable fear of material harm to her property, and stalking in the fourth degree under Penal Law § 120.45 (2), and as modified the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to Family Court Act article 8 by filing a petition seeking an order of protection against respondent, her estranged husband with whom she was engaged in divorce proceedings, which petition was superseded by a second petition seeking the same relief based on allegations that respondent committed various family offenses. Family Court, upon respondent's motion, dismissed the second petition for failure to state a cause of action. Petitioner appeals.

Preliminarily, we note that petitioner has expressly abandoned any contention that the court erred in dismissing the second petition to the extent it alleged the commission of family offenses based on conduct before November 16, 2020 (*see generally Matter of Rohrback v*

Monaco, 173 AD3d 1774, 1774 [4th Dept 2019]). With respect to our review of the remaining allegations, we further note that "a family offense petition 'may be dismissed without a hearing where the petition fails to set forth factual allegations which, if proven, would establish that the respondent has committed a qualifying family offense' " (*id.*).

We agree with petitioner that the second petition alleges conduct on or after November 16, 2020, that would constitute harassment in the second degree under Penal Law § 240.26 (3), and we therefore modify the order accordingly. With respect to the qualifying family offense alleged in the second petition, "[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]). "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" (*id.* [internal quotation marks omitted]).

Here, petitioner alleged that respondent installed spyware on her Apple laptop computer and that petitioner first noticed in mid-April 2021 that her username had been changed to "Creep" and that all documents related to the divorce proceedings between the parties had been deleted. Petitioner further alleged that, after taking the laptop to a computer store to have the laptop reset, she noticed about a week later that the laptop began showing the matrimonial files, which then disappeared again. Petitioner alleged that respondent was again controlling her laptop remotely. Petitioner also alleged a series of other related incidents. For example, she noticed in late April 2021 that her iPhone password had changed; she received a "spoofed" text message in early May 2021 and she discovered about a day later that respondent had accessed her Dropbox account; and she received another alarming or annoying text message in mid-May 2021 that referred to respondent's pet name for her. Petitioner thus alleged more than an isolated incident and, upon " '[l]iberally construing the allegations of the [second] family offense petition and giving it the benefit of every possible favorable inference,' " we conclude that the second petition alleges acts that, if committed by respondent, would constitute the family offense of harassment in the second degree (*Matter of Little v Little*, 175 AD3d 1070, 1072 [4th Dept 2019]; *see generally Wandersee*, 183 AD3d at 1245).

We also agree with petitioner that the second petition alleges conduct on or after November 16, 2020, that would constitute aggravated harassment in the second degree under Penal Law § 240.30 (2), and we therefore further modify the order accordingly. The relevant subdivision provides that a person is guilty of aggravated harassment in the second degree when, "[w]ith intent to harass or threaten another person, [the actor] makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication" (§ 240.30 [2]). "Such intent may, and in most

instances must, be established by inferences drawn from the surrounding circumstances . . . , and [i]ntent may be inferred from the totality of conduct of the [actor]" (*Matter of Kristine Z. v Anthony C.*, 21 AD3d 1319, 1320 [4th Dept 2005], *lv dismissed* 6 NY3d 772 [2006] [internal quotation marks omitted]).

Here, petitioner alleged that she received a telephone call in mid-May 2021, during which the caller began breathing heavily into the phone, which petitioner recognized as the same sound, pattern, and rhythm as in an earlier call that she received from respondent. Respondent's intent to harass could be established by inferences drawn from the surrounding circumstances and totality of his alleged conduct, and we therefore conclude that the second petition sufficiently alleges that respondent committed aggravated harassment in the second degree under Penal Law § 240.30 (2) (*see Matter of Shank v Miller*, 148 AD3d 1160, 1161 [2d Dept 2017]).

Next, we agree with petitioner that the second petition alleges conduct on or after November 16, 2020, that would constitute stalking in the fourth degree under Penal Law § 120.45 (1) to the extent that respondent allegedly engaged in a course of conduct that he knew or reasonably should have known was likely to cause petitioner reasonable fear of material harm to her property. We therefore further modify the order accordingly. The relevant subdivision provides, in pertinent part, that "[a] person is guilty of stalking in the fourth degree when [the actor] intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct . . . is likely to cause reasonable fear of material harm to the physical health, safety or property of such person" (§ 120.45 [1]). Given the allegations that respondent gained access to petitioner's laptop and iPhone, and made changes to a username, password, and functionality of those devices, we agree that the second petition sufficiently alleges that respondent intentionally and for no legitimate purpose engaged in a course of conduct directed at petitioner that he knew or reasonably should have known was likely to cause petitioner reasonable fear of material harm to her property (*see id.*).

Additionally, we agree with petitioner that the second petition alleges conduct on or after November 16, 2020, that would constitute stalking in the fourth degree under Penal Law § 120.45 (2), and we therefore further modify the order accordingly. That subdivision provides, in relevant part, that "[a] person is guilty of stalking in the fourth degree when [the actor] intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct . . . causes material harm to the mental or emotional health of such person, where such conduct consists of following, telephoning or initiating communication or contact with such person . . . , and the actor was previously clearly informed to cease that conduct" (§ 120.45 [2]). For purposes of subdivision two, the term " 'following' shall include the unauthorized tracking of such person's movements or location through the use of a global positioning system or other device" (§ 120.45).

Here, petitioner alleges numerous instances in which respondent, among other things, controlled her laptop remotely through the installation of spyware and initiated communications by telephone or text message that have materially harmed her mental or emotional health. The second petition also sufficiently alleges that petitioner had previously confronted respondent about his behavior following a prior call, and the favorable inference to be drawn from that allegation is that respondent had been clearly informed to cease his conduct (*see* § 120.45 [2]). We thus conclude that the allegations, if proven, would establish that respondent committed the family offense of stalking in the fourth degree under Penal Law § 120.45 (2) (*see Matter of Pamela N. v Neil N.*, 93 AD3d 1107, 1109 [3d Dept 2012]).

Finally, we have considered petitioner's remaining contentions and conclude that they do not require reversal or further modification of the order.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

866

CAF 21-01825

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

IN THE MATTER OF SIRBARINDER DHIR,
PETITIONER-APPELLANT,

V ORDER

RAIMOND WINSLOW, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

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

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), dated November 16, 2021, in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to dismiss the petition and scheduled a hearing for the Quantum Meruit fee application.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see generally Matter of Rusiecki v Marshall*, 147 AD3d 1395, 1395-1396 [4th Dept 2017]; *Kimmel v State of New York*, 267 AD2d 1079, 1081 [4th Dept 1999]; *Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

872

TP 23-00666

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

IN THE MATTER OF STEVEN J. PARSONS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, RESPONDENT.

LEONARD CRIMINAL DEFENSE GROUP, PLLC, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS 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, Oneida County [Scott J. DelConte, J.], entered November 30, 2022) to review a determination of respondent. The determination revoked petitioner's driver's license.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test. We confirm the determination. Petitioner contends that he was denied due process because the refusal report lacked reasonable grounds for the arrest, including details to support the claim of impairment or intoxication and the claim that petitioner refused the test. Petitioner did not preserve that contention for our review inasmuch as he did not raise an objection based on his due process rights before the Administrative Law Judge (*see Matter of Gorman v New York State Dept. of Motor Vehs.*, 34 AD3d 1361, 1361 [4th Dept 2006]). We have no discretionary authority to review that contention in this CPLR article 78 proceeding (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Finally, we conclude that the determination is supported by substantial evidence (*see Matter of Geary v Commissioner of Motor Vehs. of State of N.Y.*, 92 AD2d 38, 41 [4th Dept 1983], *affd* 59 NY2d 950 [1983]; *see also Matter of Huttenlocker v New York State Dept. of*

Motor Vehs. Appeals Bd., 156 AD3d 1464, 1464 [4th Dept 2017]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

881

KA 22-00360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR ROJAS-APONTE, DEFENDANT-APPELLANT.

THE RENNIE LAW OFFICE, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 28, 2022. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of predatory sexual assault against a child (Penal Law § 130.96).

Defendant's contention that he was denied his right to due process by preindictment delay is unpreserved for our review (*see People v Flores*, 83 AD3d 1460, 1460 [4th Dept 2011], *affd* 19 NY3d 881 [2012]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice, particularly in view of the fact that the lack of preservation deprived the People of an opportunity to refute defendant's claims of prejudice or to demonstrate that there were legitimate reasons for the delay (*see* CPL 470.15 [6] [a]; *Flores*, 83 AD3d at 1460; *People v Johnson*, 305 AD2d 1097, 1097 [4th Dept 2003]).

Defendant further contends that the evidence is legally insufficient to support the conviction. We reject that contention. The testimony of the witnesses established each element of the offenses submitted to the jury, and the witnesses' testimony "was not incredible as a matter of law" (*People v Streeter*, 166 AD3d 1509, 1509 [4th Dept 2018], *lv denied* 82 NY3d 1210 [2019] [internal quotation marks omitted]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against

the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

With respect to defendant's contention that he was denied effective assistance of counsel, we conclude that, under the circumstances presented on this record, defendant has "failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings" (*People v Dickeson*, 84 AD3d 1743, 1743 [4th Dept 2011], *lv denied* 19 NY3d 972 [2012]). Indeed, viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude on the record before us that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]). To the extent that defendant's claim of ineffective assistance of counsel is based on matters outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim (*see generally People v Parnell*, 221 AD3d 1437, 1438 [4th Dept 2023]).

Defendant further contends that County Court erred in denying his motion to strike the People's certificate of compliance as untimely and to dismiss the indictment pursuant to CPL 30.30. In support of the motion, defendant asserted that the People's failure to turn over disciplinary records concerning the law enforcement witness who later testified at trial rendered the People's certificate of compliance invalid (*see* CPL 245.20 [1] [k] [iv]; *see generally* CPL 245.50 [1]) and that, therefore, the People's statement of readiness was also invalid (*see* CPL 245.50 [3]). Before the People filed a response to the motion, the court issued a letter decision in which it denied the motion, concluding that "the People's method of reviewing [law enforcement] disciplinary records (i.e., having a group of assistant district attorneys review all records prior to dissemination) is not in any way improper," and thus that there was no basis for concluding that the People failed to comply with their discovery obligations or that the certificate of compliance was invalid.

We agree with defendant that the court erred in denying his motion to strike and to dismiss on the ground that the People's method of review of law enforcement disciplinary records fulfilled their obligation under CPL 245.20 (1) (k) (iv). As relevant here, CPL 245.20 (1) (k) (iv) requires the People to automatically disclose to defendant "all items and information that relate to the subject matter of the case . . . , including but not limited to . . . [a]ll evidence and information . . . that tends to . . . impeach the credibility of a testifying prosecution witness." The statute does not authorize the use of a screening panel to decide what evidence and information should be disclosed, or to otherwise act as a substitute for the disclosure of the required material. Thus, we conclude that the court erred in denying defendant's motion on that basis. As noted above, however, the court decided defendant's motion before the People submitted a response. Morever, the court, in deciding the motion, did not consider the People's previously announced compliance with CPL article 245 as expressed in their papers responding to defendant's prior omnibus motion, i.e., that "[a]ll materials that may qualify as

exculpatory or impeachment material [have] been previously provided via electronic discovery as outlined in the [c]ertificate of [c]ompliance." Inasmuch as the court did not allow the People an opportunity to respond to defendant's motion and did not address the issue whether the People complied with their obligations under CPL 245.20 (1) (k) (iv) by producing the evidence and information required under that statute, including with respect to any law enforcement disciplinary records constituting impeachment material, we hold the case, reserve decision, and remit the matter to County Court to afford the People an opportunity to file a response to the motion, and to then determine the motion by ruling on the abovementioned outstanding issue (*see generally People v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]; *People v Kniffin*, 176 AD3d 1601, 1601-1602 [4th Dept 2019]; *People v Ballowe*, 173 AD3d 1666, 1668 [4th Dept 2019]), including "whether the prosecution . . . 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*People v Bay*, — NY3d —, —, 2023 NY Slip Op 06407, *2 [2023]).

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

896

CA 22-01096

PRESENT: LINDLEY, J.P., MONTOUR, NOWAK, AND DELCONTE, JJ.

SAMUEL J. CAPIZZI, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

BROWN CHIARI LLP, DONALD P. CHIARI AND JAMES E. BROWN, DEFENDANTS-APPELLANTS-RESPONDENTS.

RUPP PFALZGRAF LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), AND HODGSON RUSS, LLP, FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross-appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 13, 2022. The judgment, inter alia, declared that plaintiff's equity interest in disputed files as of the date of his departure is 20%.

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

Memorandum: After resigning from defendant law firm, Brown Chiari LLP (firm), which operated without a written partnership agreement, plaintiff commenced this action seeking a declaration that he was an equity partner in the firm and other relief not relevant to this appeal. Defendants have steadfastly maintained that plaintiff was *not* an equity partner and that, pursuant to an oral agreement, he was entitled to nothing more than the ability to take his own files with him when he left, i.e., the files that he originated with the firm.

Following a trial on the issue of plaintiff's status with the firm, Supreme Court issued a judgment, which was affirmed by this Court, declaring that, "as of the date of his resignation from [the firm] . . . Plaintiff, Samuel J. Capizzi, was an equity partner in the [firm]" (*Capizzi v Brown Chiari LLP*, 65 Misc 3d 1202[A], 2019 NY Slip Op 51471[U], *9 [Sup Ct, Erie County 2019], *affd* 194 AD3d 1457 [4th Dept 2021]). The matter thereafter continued in the trial court to determine the extent of plaintiff's equity share in the firm. Relying on the alleged oral agreement between plaintiff and the individual defendants, James E. Brown and Donald P. Chiari, defendants moved for partial summary judgment seeking a determination that plaintiff's equity interest in the firm was limited to his right to income during the time he was contributing to the firm and that he had *no* interest

in the files that remained at the firm after he departed (disputed files). Plaintiff, contending that there was no such agreement between the parties, moved for summary judgment seeking a determination that plaintiff's equity interest was 33a% based on the default provisions of Partnership Law § 40 or, in the alternative, a determination that his equity interest was 20%. Defendants appeal and plaintiff cross-appeals from a judgment that denied defendants' motion and granted plaintiff's motion insofar as it sought a declaration that plaintiff had an equity interest of 20% in the firm's disputed files as of the date of his departure. We affirm.

Preliminarily, we note that there is no dispute regarding the income arrangement between the individual defendants and plaintiff. All three individuals agree that net income was to be distributed on a 40/40/20 percent basis, with plaintiff receiving only 20% of the income. The determination of income is thus not at issue on this appeal. In addition, as plaintiff correctly asserts, that division of income does not dictate the resolution of plaintiff's equity percentage. "[D]ivision of income along certain lines does not establish conclusively that the equity in the partnership is divided in the same proportion" (*220-52 Assoc. v Edelman*, 253 AD2d 352, 352 [1st Dept 1998], *lv dismissed* 92 NY2d 1026 [1998], citing *Christal v Petry,* 275 App Div 550, 557 [1st Dept 1949], *affd* 301 NY 562 [1950]).

As a further preliminary matter, we agree with defendants on their appeal that their failure to plead the existence of the alleged oral agreement as an affirmative defense is not fatal to their motion. Parties must plead as affirmative defenses "all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" (CPLR 3018 [b]; *see Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1285 [4th Dept 2015]). We conclude, based on the evidence in this record as well as that in the public record on appeal in *Frascogna v Brown, Chiari, Capizzi & Frascogna, LLP* (28 AD3d 1171 [4th Dept 2006]; *see also Capizzi*, 194 AD3d at 1457; *see generally Matter of Olga L.M.A. v Ronald A.B.M.*, 135 AD3d 741, 742 [2d Dept 2016]), that defendants' claim with respect to the alleged oral agreement was not likely to take plaintiff by surprise and does not raise issues of fact that do not appear on the face of the pleadings.

With respect to the merits, although an oral " 'contract isn't worth the paper it's written on' " (*Charles Hyman, Inc. v Olsen Indus.*, 227 AD2d 270, 275 [1st Dept 1996]), an oral partnership agreement can supersede the terms of Partnership Law § 40 and thereby, for example, place the value of pending contingent-fee cases outside the scope of a law firm's distributed assets (*see Dwyer v Nicholson*, 193 AD2d 70, 73-76 [2d Dept 1993]; *see generally Moses v Savedoff*, 96 AD3d 466, 470 [1st Dept 2012]). We nevertheless reject defendants' contention on their appeal that they established as a matter of law that there was an oral agreement pursuant to which a departing partner could take only their own files. We also reject plaintiff's contention on his cross-appeal that he established his entitlement to an equal share of the partnership pursuant to the default provisions of section 40. The documents submitted on the motions established

that the individual parties agreed that plaintiff would have an equity interest in the firm and that his equity interest was limited to 20%. Defendants thus failed to establish, as a matter of law, that plaintiff lacked any equity interest in the disputed files, and plaintiff failed to establish that his equity interest in those files was any more than 20% (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, the court properly determined that, regardless of the purported terms of any agreement previously existing among the firm's former partners (*see Capizzi*, 194 AD3d at 1457), there was an oral agreement between the three remaining partners pursuant to which plaintiff was entitled to a 20% interest in the disputed files.

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

905

KA 19-00986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD STEPHENS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 12, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sexual act in the first degree (Penal Law § 130.50 [4]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

908

KA 22-01070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OLIVER D. BOOKMAN, DEFENDANT-APPELLANT.

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

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ANDREW W. HALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered June 2, 2022. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of five years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [7]), arising from an incident in which defendant, while incarcerated at the Chautauqua County Jail, struggled with officers as they attempted to remove him from his cell, thereby causing an officer to sustain a physical injury.

Defendant contends that County Court erred in imposing only an adverse inference charge as a remedy pursuant to CPL 245.80 (1) (b) for the People's failure to disclose video footage that "may have depicted the outside portion of [defendant's] cell at the time of the incident." The video footage had been deleted as a matter of course pursuant to jail policy. Contrary to defendant's contention, we conclude that the court did not abuse its discretion in fashioning an appropriate sanction (*see People v Jenkins*, 98 NY2d 280, 284 [2002]; *People v Marr*, 177 AD2d 964, 964 [4th Dept 1991]).

Defendant next contends that the verdict is against the weight of the evidence with respect to the element of intent. 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 that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987];

People v Westbrooks, 213 AD3d 1274, 1276 [4th Dept 2023], *lv denied* 39 NY3d 1144 [2023]; *People v Smith*, 89 AD3d 1148, 1148-1149 [3d Dept 2011], *lv denied* 19 NY3d 968 [2012]). Although a different finding would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see Bleakley*, 69 NY2d at 495). We similarly reject defendant's contention that the verdict is against the weight of the evidence with respect to whether the officer sustained a physical injury within the meaning of Penal Law § 10.00 (9) (*see generally Danielson*, 9 NY3d at 349; *Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the sentence of imprisonment imposed is unduly harsh and severe. This Court has "broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see* CPL 470.15 [6] [b]). We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed to a determinate term of five years, to be followed by the three-year period of postrelease supervision previously imposed by the court.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

910

KA 20-01315

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISMAIL MOHAMED, DEFENDANT-APPELLANT.

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

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered December 6, 2019. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts) and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of robbery in the second degree (Penal Law § 160.10 [1], [3]) and one count of grand larceny in the fourth degree (§ 155.30 [8]).

To the extent that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Inasmuch as defense counsel consented to the annotations on the verdict sheet by stating after his review of the verdict sheet that it was "fine," defendant waived his contention that the verdict sheet was improperly annotated (*see People v Liggins*, 195 AD3d 1464, 1466 [4th Dept 2021], *lv denied* 38 NY3d 928 [2022]).

We reject defendant's contention that he received ineffective assistance of counsel (*see People v Baker*, 58 AD3d 1069, 1072 [3d Dept 2009], *affd* 14 NY3d 266 [2010]; *People v Collins*, 167 AD3d 1493, 1497-1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v Person*,

153 AD3d 1561, 1563-1564 [4th Dept 2017], *lv denied* 30 NY3d 1118 [2018]; *see also People v Conley*, 192 AD3d 1616, 1620-1621 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that, in sentencing him, County Court penalized him for exercising his right to a trial (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Britton*, 213 AD3d 1326, 1328 [4th Dept 2023], *lv denied* 39 NY3d 1140 [2023]). In any event, that contention lacks merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was being punished for asserting [his] right to trial," and there is no indication in the record before us that the court acted in a vindictive manner based on defendant's exercise of the right to a trial (*People v Garner*, 136 AD3d 1374, 1374 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016] [internal quotation marks omitted]; *see People v Moses*, 197 AD3d 951, 954-955 [4th Dept 2021], *lv denied* 37 NY3d 1097 [2021], *reconsideration denied* 37 NY3d 1163 [2022]; *People v Urrutia*, 2 AD3d 1475, 1476 [4th Dept 2003], *lv denied* 2 NY3d 765 [2004]). Finally, defendant's sentence is not unduly harsh or severe.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

913

CAF 22-00291

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

IN THE MATTER OF ADAM B.-L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DARRYL P., RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT-APPELLANT.

BENJAMIN MANNION, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 28, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had abused the subject child.

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 10, respondent appeals from an order of fact-finding and disposition that, among other things, determined that he abused the subject child. We affirm.

Respondent, who was the boyfriend of the child's mother, contends that petitioner failed to establish that he was a person legally responsible for the child within the meaning of the Family Court Act. We reject that contention. Pursuant to Family Court Act § 1012 (g), a " '[p]erson legally responsible' includes the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time." "The term includes the partner of a parent where that partner participates in the family setting on a regular basis and therefore shares responsibility for supervising the child[ ]" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]). Here, we conclude that Family Court properly determined that respondent acted as "the functional equivalent of a parent in a familial or household setting" for the child (*id.* at 1623 [internal quotation marks omitted]; *see Matter of Kevin N. [Richard D.]*, 113 AD3d 524, 524 [1st Dept 2014]). Contrary to respondent's contention, the court, in reaching its determination, was entitled to draw the strongest possible inference against respondent in light of his failure to testify (*see Matter of Nassau County Dept. of Social Servs.*

v Denise J., 87 NY2d 73, 79 [1995]).

We reject respondent's further contention that petitioner failed to establish that he abused the subject child. Petitioner established a prima facie case against respondent by demonstrating that respondent, the child's mother, and the child's grandmother all "shared responsibility for [the child's] care" during the time period in which the child's injuries were sustained and, thus, the "presumption of culpability extends" to him (*Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1649 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022] [internal quotation marks omitted]). In response, respondent failed to offer any explanation for the child's injuries or to otherwise rebut the presumption of culpability (*see id.*).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

916

CA 23-00388

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

IN THE MATTER OF RENEW 81 FOR ALL, BY ITS PRESIDENT FRANK L. FOWLER, CHARLES GARLAND, GARLAND BROTHERS FUNERAL HOME, NATHAN GUNN, ANN MARIE TALIERCIO, TOWN OF DEWITT, TOWN OF SALINA, PETITIONERS-RESPONDENTS-APPELLANTS, AND TOWN OF TULLY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, MARIE THERESE DOMINGUEZ, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TRANSPORTATION, NICOLAS CHOUBAH, P.E., IN HIS OFFICIAL CAPACITY AS NEW YORK STATE DEPARTMENT OF TRANSPORTATION CHIEF ENGINEER, MARK FRECHETTE, P.E., IN HIS OFFICIAL CAPACITY AS NEW YORK STATE DEPARTMENT OF TRANSPORTATION I-81 PROJECT DIRECTOR, RESPONDENTS-APPELLANTS-RESPONDENTS, AND CITY OF SYRACUSE, INTERVENOR-APPELLANT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MEREDITH G. LEE-CLARK OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

SUSAN KATZOFF, CORPORATION COUNSEL, SYRACUSE (DANIELLE R. SMITH OF COUNSEL), FOR INTERVENOR-APPELLANT-RESPONDENT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

GUADALUPE V. AGUIRRE, NEW YORK CITY, FOR NEW YORK CIVIL LIBERTIES UNION FOUNDATION, AMICUS CURIAE.

MONACO COOPER LAMME & CARR PLLC, ALBANY (JONATHAN E. HANSEN OF COUNSEL), FOR NEW YORK STATE MOTOR TRUCK ASSOCIATION, INC., DOING BUSINESS AS THE TRUCKING ASSOCIATION OF NEW YORK, AMICUS CURIAE.

Appeals and cross-appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 14, 2023, in a proceeding pursuant to CPLR article 78. The judgment granted in part the petition and supplemental petition.

It is hereby ORDERED that the judgment so appealed from is

unanimously modified on the law by dismissing the petition and supplemental petition in their entirety and, as modified, the judgment is affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul certain approvals made by respondents, New York State Department of Transportation (DOT) and certain of its officials, in connection with a joint federal-state project (Project) to reconfigure the viaduct portion of Interstate 81 (I-81) in Syracuse. Petitioners alleged that respondents failed to comply with governing environmental laws, including the State Environmental Quality Review Act (SEQRA). Respondents and intervenor-appellant-respondent City of Syracuse (City) appeal and petitioners-respondents-appellants (petitioners) cross-appeal from a judgment that granted the petition and the supplemental petition to the extent of requiring respondents to issue a Supplemental Environmental Impact Statement (SEIS) addressing certain alleged deficiencies in the Final Environmental Impact Statement (FEIS), permitting respondents to proceed with specified contracted work on the Project but precluding certain demolition activities, and directing respondents to continue to perform necessary maintenance for the Project area, but otherwise denied the petition.

"Judicial review of an agency determination under SEQRA is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [internal quotation marks omitted]; *see Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). "[A]n agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA" (*Jackson*, 67 NY2d at 417 [internal quotation marks omitted]). Thus, an agency's determination will be upheld if "it is not arbitrary, capricious, or unsupported by substantial evidence" (*Matter of Davis v Zoning Bd. of Appeals of City of Buffalo*, 177 AD3d 1331, 1333 [4th Dept 2019]; *see Jackson*, 67 NY2d at 417).

Initially, we agree with petitioners on their cross-appeal that, to the extent that Supreme Court determined that respondents failed to comply with the requirements of SEQRA, the court erred in directing respondents to address the alleged deficiencies in their consideration of the environmental impact of the Project on air quality and stormwater management in a SEIS rather than annulling the challenged approvals (*see Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v City of Rochester*, 150 AD3d 1678, 1679-1680 [4th Dept 2017]). We nonetheless agree with respondents on their appeal that, contrary to the court's determination and petitioners' further contentions on their cross-appeal, respondents complied with their substantive obligations under SEQRA inasmuch as they took the requisite " 'hard look' " at the relevant environmental factors, including air quality and stormwater management, and "made a 'reasoned

elaboration' of the basis for [their] determination" (*Jackson*, 67 NY2d at 417). Further, "the degree of detail with which each factor [was] discussed . . . [was commensurate] with the circumstances and nature of the [Project]" (*id.*). We therefore modify the judgment by dismissing the petition in its entirety.

We also agree with respondents and the City on their respective appeals that, even assuming, arguendo, that all petitioners have standing to raise this challenge, the court erred in directing respondents to prepare a SEIS addressing the effect of the anticipated development of a semiconductor manufacturing campus north of the Project area that was announced after the FEIS was completed. Pursuant to 6 NYCRR 617.9 (a) (7) (i), a lead agency such as DOT "may require" a SEIS to address specific adverse environmental impacts not otherwise adequately addressed in the FEIS that arise as a result of, inter alia, newly discovered information or a change in circumstances. "A lead agency's determination whether to require a SEIS . . . is discretionary" (*Riverkeeper, Inc.*, 9 NY3d at 231; *see Matter of McGraw v Town Bd. of Town of Villenova*, 186 AD3d 1014, 1015 [4th Dept 2020]). Thus, to the extent that petitioners sought relief in the form of mandamus to compel respondents to perform a SEIS, they failed to establish "a clear legal right to the relief demanded" in the absence of "a corresponding nondiscretionary duty" on respondents' part (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]). Further, to the extent that respondents' failure to respond to petitioners' request to conduct a SEIS constituted a constructive denial thereof, we conclude that the discretionary denial was not arbitrary and capricious in light of the absence of evidence in the record that sufficient concrete information on the anticipated semiconductor manufacturing campus project existed to permit effective review at that time (*see McGraw*, 186 AD3d at 1015; *see generally Riverkeeper, Inc.*, 9 NY3d at 232). We therefore further modify the judgment by dismissing the supplemental petition.

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

920

CA 23-00764

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

LILIAN C., INDIVIDUALLY AND AS GUARDIAN OF
STEFANIE C., AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), AND SUSAN R. KATZOFF, CORPORATION COUNSEL, FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered May 1, 2023. The order denied the motion of defendant City of Syracuse for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the amended complaint against defendant City of Syracuse is dismissed.

Memorandum: Plaintiff commenced this action on behalf of herself and her daughter seeking damages for injuries they sustained as passengers in a motor vehicle accident that occurred in defendant City of Syracuse (City). The vehicle plaintiff and her daughter were riding in was heading west on Burnet Avenue when it collided with an eastbound vehicle that was attempting to turn left onto South Collingwood Avenue (Collingwood). Burnet Avenue and Collingwood are city roads, but across from Collingwood at the intersection is a ramp to I-690 West, a state highway. Plaintiff alleged that the subject intersection was dangerous because of improper lane alignment and inadequate sight lines for eastbound drivers turning left onto Collingwood due to the number of vehicles heading west and turning left onto the I-690 West ramp. Plaintiff alleged that, in place of the traffic island on Burnet Avenue, there should have been a left-turn-only lane for eastbound drivers turning left onto Collingwood. Supreme Court denied the City's motion for summary judgment dismissing the amended complaint against it, and we now reverse.

"A municipality will not be held responsible for negligent design or maintenance of a highway it does not own or control" (*Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 675 [1999], *rearg denied* 93 NY2d

1042 [1999]). In addition, "[a] municipality has no duty to maintain in a reasonably safe condition a road that it does not own or control unless it affirmatively undertakes such a duty" (*id.*; *see Nicholas T. v Town of Tonawanda*, 213 AD3d 1333, 1334 [4th Dept 2023]). "Under the Vehicle and Traffic Law, the State Department of Transportation has jurisdiction over all State highways and the obligation to maintain and sign 'any highway intersecting or meeting a state highway maintained by the state for a distance not exceeding one hundred feet from such state highway' " (*Ledet v Battle*, 231 AD2d 884, 884-885 [4th Dept 1996], quoting Vehicle and Traffic Law § 1621 [a]; *see Monica v County of Jefferson*, 262 AD2d 947, 947-948 [4th Dept 1999], *lv denied* 94 NY2d 753 [1999]). Here, the City met its burden of establishing that it did not design or assume control over the intersection, and plaintiff failed to raise a triable issue of fact in opposition (*see Sinski v Town of Brookhaven*, 276 AD2d 547, 547 [2d Dept 2000]; *Hough v Hicks*, 160 AD2d 1114, 1116 [3d Dept 1990], *lv denied* 77 NY2d 802 [1991]; *cf. Ham v Giffords Fuel Oil Co.*, 235 AD2d 457, 458 [2d Dept 1997]).

Plaintiff's reliance on *Costanzo v County of Chautauqua* (110 AD3d 1473 [4th Dept 2013]) is misplaced. In that case, the plaintiff alleged that the defendant County of Chautauqua (County) "was negligent in, inter alia, 'causing and creating an unsafe intersection' " (*id.* at 1473), and we rejected the County's contention "that it cannot be held liable as a matter of law for this accident because it does not control the intersection" (*id.* at 1473-1474). Here, however, unlike in *Costanzo*, the City established that it did not design the allegedly unsafe intersection.

In light of our determination, there is no need to address the City's remaining contentions.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

926

KA 22-01386

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVION GARBUTT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 11, 2020. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]) and, in appeal No. 2, he appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). In both appeals, defendant contends that his waivers of the right to appeal are invalid and that the sentences are unduly harsh and severe. Even assuming, arguendo, that defendant's waivers of the right to appeal from the judgments are invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Montgomery*, 204 AD3d 1439, 1440 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]) and thus do not preclude our review of his challenges to the severity of his sentences (*see People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

927

KA 22-01387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVION GARBUTT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTINE BIALY-VIAU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 11, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Garbutt* ([appeal No. 1] — AD3d — [Feb. 2, 2024] [4th Dept 2024]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

934

KA 22-01743

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONIA M. SMITH, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered July 19, 2022. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the second degree, vehicular manslaughter in the second degree and reckless endangerment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a nonjury verdict, of manslaughter in the second degree (Penal Law § 125.15 [1]), vehicular manslaughter in the second degree (§ 125.12 [1]), and reckless endangerment in the second degree (§ 120.20).

Defendant contends that the People failed to lay a proper foundation for the admission of her blood test results because they were unable to establish that the blood test kit used to administer the blood draw had not expired. We reject that contention. Here, although the blood test kit did not contain an expiration date, the People provided, through the testimony of the toxicologist who tested the blood sample, " 'reasonable assurance of the identity and unchanged condition of the evidence' " (*People v Hagin*, 238 AD2d 714, 716 [3d Dept 1997], *lv denied* 90 NY2d 894 [1997]; *see generally People v Yocher*, 197 AD2d 890, 890-891 [4th Dept 1993], *lv denied* 82 NY2d 905 [1993]).

Defendant further contends that County Court abused its discretion in denying her motion insofar as it sought to preclude the blood test results based upon the loss or destruction of *Rosario* material consisting of the blood test kit instructions. We reject that contention. "It is well settled that 'nonwillful, negligent loss or destruction of *Rosario* material does not mandate a sanction unless

the defendant establishes prejudice' " (*People v McFadden*, 189 AD3d 2086, 2088 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021], quoting *People v Martinez*, 22 NY3d 551, 567 [2014]). "If prejudice is shown, the choice of the proper sanction is left to the sound discretion of the trial judge, who may consider the degree of prosecutorial fault . . . The focus, though, is on the need to eliminate prejudice to the defendant" (*Martinez*, 22 NY3d at 567; *see People v Brown*, 148 AD3d 1547, 1548 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]). Here, we conclude that the court did not abuse its discretion in denying defendant's motion insofar as it sought to preclude the blood test results and instead granting the motion insofar as it sought, in the alternative, an adverse inference (*see generally People v Brown*, 148 AD3d 1547, 1548 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]; *People v Denslow*, 217 AD2d 947, 948 [4th Dept 1995], *lv denied* 87 NY2d 900 [1995]).

Defendant contends that her conviction for manslaughter in the second degree is based upon legally insufficient evidence because the People failed to establish recklessness. We reject that contention. Under the Penal Law, a person is guilty of manslaughter in the second degree when they "recklessly cause[ ] the death of another person" (§ 125.15 [1]). Insofar as relevant here, "[a] person acts recklessly with respect to a result or to a circumstance . . . when [the person] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto" (§ 15.05 [3]). "Thus, pursuant to that statute, [a] person who fails to perceive a substantial and unjustifiable risk by reason of [their] intoxication acts recklessly rather than with criminal negligence" (*People v McCabe*, 155 AD3d 1572, 1573 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018] [internal quotation marks omitted]).

Here, the evidence at trial, viewed in the light most favorable to the People (*see People v Danielson*, 9 NY3d 342, 349 [2007]), established that defendant drove her vehicle with over twice the legal limit of alcohol in her system. Furthermore, a witness testified that, prior to the collision, defendant's vehicle drove so far over the center yellow line that he had to maneuver his UPS truck off onto the shoulder of the road to avoid a head-on collision. The People also established that the collision occurred in the early afternoon of a sunny day and that defendant's vehicle was being driven partially over the center line when it struck the victim, who was over six feet tall and wearing a bright green reflective vest. The People's reconstruction expert testified that defendant's vehicle was driving between 47 and 49 miles per hour and that it struck the victim with such force that he was propelled 57 feet in the air before landing. Thus, the evidence is legally sufficient to establish that defendant acted recklessly (*see McCabe*, 155 AD3d at 1573-1574; *People v DeLong*, 269 AD2d 824, 824-825 [4th Dept 2000], *lv denied* 94 NY2d 946 [2000]; *see also People v Peryea*, 68 AD3d 1144, 1146-1147 [3d Dept 2009], *lv*

denied 14 NY3d 804 [2010], *reconsideration denied* 14 NY3d 843 [2010]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

948

KA 20-00691

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM L. MCMULLEN, IV, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered December 12, 2019. The judgment convicted defendant upon his plea of guilty of aggravated harassment of an employee by an inmate (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of aggravated harassment of an employee by an inmate (Penal Law former § 240.32), defendant contends that his waiver of the right to appeal is invalid and thus that his contention concerning the severity of his sentence is properly before us. " 'Because defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot' " (*People v Bald*, 34 AD3d 1362, 1362 [4th Dept 2006]; *see People v Seppe*, 188 AD3d 1716, 1716 [4th Dept 2020]). We therefore need not reach defendant's contention with respect to the alleged invalidity of the waiver of the right to appeal.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

954

KA 19-02223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK GIPSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 9, 2019. The judgment convicted defendant, upon a nonjury verdict, of burglary in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a bench trial, of burglary in the second degree (Penal Law § 140.25 [2]) and petit larceny (§ 155.25). The conviction arises from an incident in which defendant broke into his cousin's home and stole a necklace, purse and video game system. Although no one was home at the time and there were no witnesses to the break-in, video footage of defendant entering the home was captured on the victim's home surveillance system, and defendant subsequently admitted to a police detective that he entered the victim's home and removed certain items.

Defendant contends that Supreme Court erred in admitting the surveillance video footage in evidence at trial inasmuch as the victim's testimony was insufficient to authenticate the footage because she did not witness the events recorded. We reject that contention. "The decision to admit or exclude video[footage] evidence generally rests . . . within a trial court's founded discretion" (*People v Patterson*, 93 NY2d 80, 84 [1999]; *see People v Cardoza*, 218 AD3d 1291, 1292-1293 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]). A proper foundation authenticating surveillance video footage may be laid by, inter alia, eliciting "the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the video[footage] accurately represents the subject matter depicted" (*Patterson*, 93 NY2d at 84).

Operators and maintainers of a surveillance video system include residents of a dwelling who are familiar with the system installed in their place of residence (*see People v Little*, 139 AD3d 1356, 1357 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]; *see also People v Jones*, 208 AD3d 1632, 1632 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]; *People v Oquendo*, 152 AD3d 1220, 1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). Here, the court did not abuse its discretion in admitting the home surveillance video footage based on testimony from the victim that she was familiar with the surveillance system and that the video footage was not altered and fairly and accurately depicted the events that were recorded.

Defendant also contends, with respect to his burglary conviction, that the evidence is legally insufficient to establish that he entered the victim's dwelling with an intent to commit a crime within the premises. We reject that contention. In burglary cases, the defendant's intent to commit a crime within the premises may be inferred beyond a reasonable doubt from the defendant's conduct and the surrounding circumstances, including the defendant's "unexplained presence on the premises" (*People v James*, 114 AD3d 1202, 1205 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014] [internal quotation marks omitted]), "[t]he fact that [the] defendant used force in obtaining entry" (*People v Bergman*, 70 AD3d 1494, 1494 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]), and the fact that the defendant damaged or disturbed the victim's belongings while inside the dwelling (*see People v Owens*, 204 AD2d 1055, 1056 [4th Dept 1994]). Here, the People submitted evidence establishing that defendant did not have permission to be in the victim's dwelling, that he obtained entry by breaking a door, and that, once inside, he took several items belonging to the victim and her children and left with those items (*see Little*, 139 AD3d at 1356; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Additionally, viewing the evidence in light of the elements of burglary in the second degree in this nonjury trial and deferring to the court's determinations on credibility (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to burglary in the second degree is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Sabines*, 121 AD3d 1409, 1410-1411 [3d Dept 2014], *lv denied* 25 NY3d 1171 [2015]).

Finally, we reject defendant's contention that the period of postrelease supervision imposed is unduly harsh and severe.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

955

KA 20-00479

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE THOMAS, DEFENDANT-APPELLANT.

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

WILLIE THOMAS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 18, 2020. The judgment convicted defendant, upon his plea of guilty, of conspiracy in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of conspiracy in the second degree (Penal Law § 105.15) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as both the signed written waiver of the right to appeal and the oral waiver colloquy mischaracterized the nature of the right to appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jones*, 186 AD3d 1069, 1070 [4th Dept 2020]). Nevertheless, contrary to defendant's contentions in his main and pro se supplemental briefs, we conclude that the sentence is not unduly harsh or severe. We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

956

KA 19-00776

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY H. MILLER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Judith A. Sinclair, J.), entered January 8, 2019. The order, insofar as appealed from, denied that part of the motion of defendant seeking DNA testing pursuant to CPL 440.30.

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

Memorandum: Defendant appeals from an order insofar as it denied without a hearing that part of his postjudgment motion seeking, pursuant to CPL 440.30 (1-a), to have forensic DNA testing performed with respect to certain items of evidence related to his conviction of murder in the second degree (Penal Law § 125.25 [1]) and three other crimes. On a prior appeal, we reversed the judgment convicting him following an initial jury trial of the same four crimes and granted him a new trial on the counts of the indictment charging him with those crimes (*People v Miller*, 73 AD3d 1435, 1435-1436 [4th Dept 2010], *affd* 18 NY3d 704 [2012]). On a subsequent appeal following the retrial, we modified the sentence imposed, and as modified, we affirmed the judgment convicting him of those crimes (*People v Miller*, 148 AD3d 1689, 1690 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

Contrary to defendant's contention, Supreme Court properly denied that part of his postjudgment motion that sought relief under CPL 440.30 (1-a). Defendant failed to establish that "there exists a reasonable probability that the verdict would have been more favorable to [him]" if the DNA evidence in question had been tested and the test results were admitted in evidence (CPL 440.30 [1-a] [a] [1]; *see People v Mixon*, 129 AD3d 1509, 1509 [4th Dept 2015], *lv denied* 26 NY3d 1090 [2015], *cert denied* 578 US 980 [2016]; *People v Swift*, 108 AD3d

1060, 1061-1062 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

957

KA 20-01133

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN F. RIOS, ALSO KNOWN AS RYAN RIOS, ALSO KNOWN AS RYAN FERNANDO RIOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered February 18, 2020. The judgment convicted defendant upon his plea of guilty of rape 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 rape in the second degree (Penal Law § 130.30 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude his challenge to the severity of the sentence (*see People v Hoffman*, 191 AD3d 1262, 1263 [4th Dept 2021], *lv denied* 36 NY3d 1097 [2021]), we conclude that the sentence is not unduly harsh or severe.

Defendant also contends that his guilty plea was not knowing, voluntary, and intelligent because County Court failed to advise him of the possibility of civil confinement pursuant to the Sex Offender Management and Treatment Act (Mental Hygiene Law § 10.01 *et seq.*). Defendant failed to move to withdraw the plea or to vacate the judgment of conviction on that ground, however, and thus he failed to preserve his contention for our review (*see People v Colbert*, 84 AD3d 1755, 1755 [4th Dept 2011], *lv denied* 17 NY3d 815 [2011]; *see also People v Miller*, 166 AD3d 812, 813 [2d Dept 2018], *lv denied* 33 NY3d 951 [2019]). This case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

960

CAF 22-01749

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

IN THE MATTER OF ZYION B.

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

MEMORANDUM AND ORDER

FREDISHA B., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MILITI OF COUNSEL), FOR PETITIONER-RESPONDENT.

H. KATHRYN KILMARTIN, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered September 21, 2022, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed the subject child with petitioner.

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

Memorandum: In this Family Court Act article 10 proceeding, Family Court entered an order in July 2020 that, among other things, temporarily removed the subject child from respondent mother's care based on allegations made by petitioner, Onondaga County Department of Children and Family Services (DCFS), that the mother had, inter alia, failed to maintain a safe and sanitary home. The subject child was then placed with a relative, but was later returned to the mother's care after the mother moved into a new apartment. Subsequently, the court entered an order of fact-finding and disposition, premised on the mother's admission of neglect, pursuant to which the subject child was to remain in the mother's custody and the mother was to be placed under DCFS supervision for a period of 12 months between April 2022 and April 2023. However, in August 2022, the court, on its own motion and over the objection of DCFS, held a fact-finding hearing to determine whether the subject child should be removed from the mother's care. At the close of the hearing, the court issued a temporary removal order determining, inter alia, that it was in the best interests of the child to be placed with DCFS until the completion of the next permanency hearing in February 2023. The mother now appeals from that order.

We conclude that the appeal must be dismissed as moot "inasmuch as it is undisputed that superseding permanency orders have since been entered, in which [the mother] stipulated that it would be in the best interests of the child[ ] to continue [her] placement with" DCFS (*Matter of Nyjeem D. [John D.]*, 174 AD3d 1424, 1425 [4th Dept 2019], *lv denied* 34 NY3d 911 [2020]; *see Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580 [2d Dept 2018]; *cf. Matter of Kenneth QQ. [Jodi QQ.]*, 77 AD3d 1223, 1224 [3d Dept 2010]). Moreover, during the pendency of this appeal, an order of release was issued returning the subject child to the mother with a 12-month order of supervision, which provides an additional basis for dismissing the appeal as moot (*see generally Matter of Faith B. [Rochelle C.]*, 158 AD3d 1282, 1282-1283 [4th Dept 2018], *lv denied* 31 NY3d 910 [2018]; *Matter of Gaige F. [Carolyn F.]*, 144 AD3d 1575, 1576 [4th Dept 2016]).

Nevertheless, under the unusual circumstances of this case, we are compelled to express our deep concern with the Family Court Judge's abandonment of her neutral judicial role during the sua sponte removal hearing. Family Court Act § 1061 provides, as relevant here, that the court may, "[f]or good cause shown and after due notice, . . . on its own motion . . . set aside, modify or vacate any order issued in the course of a proceeding under this article" (*see generally Matter of Mario D. [Marina L.]*, 147 AD3d 828, 828 [2d Dept 2017]; *Matter of Tina XX.*, 73 AD2d 1013, 1014 [3d Dept 1980]). That broad grant of authority is necessary inasmuch as "[i]t is the Family Court and not [DCFS] which acts as *parens patriae* to do what is in the best interests of the child[ ]" (*Matter of Shinice H.*, 194 AD2d 444, 444 [1st Dept 1993]), and thus the court is "empowered to guard the welfare of the child" (*Matter of Dale P.*, 84 NY2d 72, 80 [1994]). Here, however, we conclude that the Judge failed to properly balance her role in parens patriae with her statutory obligation to ensure that the parties received due process at the hearing, specifically with respect to the due process requirement that the hearing be conducted before an impartial jurist (*see* Family Ct Act § 1011; *People v Novak*, 30 NY3d 222, 225 [2017]; *Matter of Marie B.*, 62 NY2d 352, 358 [1984]).

At the hearing, the Judge "took on the function and appearance of an advocate" by choosing which witnesses to call and "extensively participating in both the direct and cross-examination of . . . witnesses" (*Matter of Jacqulin M.*, 83 AD3d 844, 845 [2d Dept 2011]), with a clear intention of strengthening the case for removal. For example, she asked a DCFS caseworker whether the mother was "hostile, aggressive, violent or out of control," and repeated questions to that caseworker using the same or similar phrasing at least 10 times. When the mother's counsel objected to the Judge's leading questions of another witness regarding incidents outside the relevant time period, the Judge overruled the objection, stating that "there's no one else to run the hearing except for me." She also introduced and admitted several written documents during the mother's testimony over the objection of the mother's counsel, and despite the mother's statement that she could not read and was not familiar with the documents. In short, the Judge "essentially 'assumed the parties' traditional role

of deciding what evidence to present' " while simultaneously acting as the factfinder (*id.*, quoting *People v Arnold*, 98 NY2d 63, 68 [2002]) and thereby "transgressed the bounds of adjudication and arrogated to [herself] the function of advocate, thus abandoning the impartiality required of [her]" (*Matter of Carroll v Gammerman*, 193 AD2d 202, 206 [1st Dept 1993]; *see Matter of Kyle FF.*, 85 AD3d 1463, 1463-1464 [3d Dept 2011]).

This " 'clash in judicial roles,' " in which the Judge acted both as an advocate and as the trier of fact, "[a]t the very least . . . created the appearance of impropriety" (*Matter of Stampfler v Snow*, 290 AD2d 595, 596 [3d Dept 2002]; *see Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894-895 [2d Dept 2016]), particularly when the Judge aggressively cross-examined the mother regarding topics that were not relevant to the issue of the child's removal and seemed designed to embarrass and upset the mother (*see Matter of Siegell v Iqbal*, 181 AD3d 951, 952 [2d Dept 2020]). One such area of cross-examination concerned the fact that the mother had become pregnant several months before the hearing, but had been forced to terminate the pregnancy when it was determined to be ectopic. The Judge repeatedly questioned the mother regarding how many times the mother had engaged in sexual intercourse with the father of the terminated fetus, even though such information does not appear to have been relevant to the issue of the subject child's placement inasmuch as, inter alia, there was no indication that the man was ever in the subject child's presence. The Judge also asked the mother baseless questions about whether that man was a pedophile.

We reiterate that "it is the function of the judge to protect the record at trial, not to make it[, and] the line is crossed when," as here, "the judge takes on either the function or appearance of an advocate at trial" (*Arnold*, 98 NY2d at 67). We are thus compelled here to remind the Judge that even difficult or obstreperous litigants are entitled to "patient, dignified and courteous" treatment from the court, and that judges must perform their duties "without bias or prejudice" (22 NYCRR 100.3 [B] [3], [4]; *see generally Matter of O'Connor [New York State Commn. on Jud. Conduct]*, 32 NY3d 121, 126 [2018]). Given the "lack of impartiality repeatedly exhibited by the . . . Judge in this case" (*Matter of Amanda G.*, 64 AD3d 595, 596 [2d Dept 2009]), we strongly recommend that she consider whether recusal is appropriate for future proceedings involving the mother (*see Stampfler*, 290 AD2d at 596; *see generally Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340-1341 [4th Dept 2020]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

961

CAF 22-01247

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

IN THE MATTER OF AMBER DINOFF,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AARON P. KNECHTEL AND REBECCA MANCHESTER,
RESPONDENTS-RESPONDENTS.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 1.)

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

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

CAMBARERI & BRENNECK, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT REBECCA MANCHESTER.

Appeals from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered July 8, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal by the Attorney for the Child is unanimously dismissed, the order is reversed on the law without costs, the petition is reinstated, the petition is granted and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following memorandum: These appeals involve a custody dispute between the subject child's biological mother (mother), who is a respondent in appeal No. 1 and the petitioner in appeal No. 2, and Amber Dinoff (petitioner), a former friend of the mother who has raised the child since the child was six months old and who is the petitioner in appeal No. 1 and a respondent in appeal No. 2. In appeal No. 1, petitioner appeals and the Attorney for the Child (AFC) purports to appeal from an order that dismissed petitioner's petition seeking sole legal and physical custody of the child. In appeal No. 2, petitioner appeals and the AFC purports to appeal from an order that, inter alia, awarded petitioner and the mother joint legal custody of the child, with petitioner having "interim physical custody" and the mother having visitation. In its decision regarding the petitions, Family Court noted that its order in appeal No. 2 was "subject to [the mother's] right to re-petition the [c]ourt for a modification of [that] order to seek a transfer of custody after she has completed no less than a [six-month]

period of parental access."

Preliminarily, although we conclude that the AFC's notice of appeal with respect to both appeals was untimely and that the AFC's direct appeals should therefore be dismissed (*see* Family Ct Act § 1113; *Matter of Liliana G. [Orena G.]* [appeal No. 2], 91 AD3d 1325, 1326 [4th Dept 2012]), we may nevertheless consider the contentions raised in the AFC's brief inasmuch as such contentions are also raised by petitioner (*see generally Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345 [4th Dept 2012]). Addressing the contentions raised by petitioner, as echoed by the AFC, we conclude with respect to both appeals that the determination to award joint custody to petitioner and the mother with the goal of ultimately awarding physical custody of the child to the mother "lacks a sound and substantial basis in the record" (*Fox v Fox*, 177 AD2d 209, 211-212 [4th Dept 1992]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]).

The testimony at the trial on the petitions established that the mother left the child with petitioner when the child was only six months old. For several years thereafter, the mother was abusing drugs, attempting to evade law enforcement officials, or incarcerated. Even after the mother was released from jail, she did not visit the child. In fact, up until the time petitioner filed the petition in appeal No. 1, the mother had seen the child only once since leaving the child with petitioner. Meanwhile, the child has been living with petitioner, her five biological children, and her current husband.

Petitioner commenced the proceeding in appeal No. 1 when she learned that she lacked the legal authority and paperwork to enroll the child, who was four years old at the time of trial, in school. Approximately nine months later, the mother filed the petition in appeal No. 2. At trial, the only witnesses were petitioner and the mother due to the court's determination that testimony from petitioner's proposed witnesses would be irrelevant and cumulative.

It is well settled that, " 'as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]). Here, the court's determination with respect to petitioner's petition that extraordinary circumstances existed is not disputed on appeal (*see Matter of Wilson v Hayward*, 128 AD3d 1475, 1476 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]; *see generally* Domestic Relations Law § 72 [2] [a]). Thus, the only issue before us in these appeals concerns the best interests of the child.

"Ordinarily, the custody determination of the trial court is entitled to great deference . . . Such deference is not warranted,

however, where the custody determination lacks a sound and substantial basis in the record" (*Fox*, 177 AD2d at 211-212; *see generally Eschbach*, 56 NY2d at 173). "Among the factors or circumstances to be considered in ascertaining the child's best interests are: (1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the [relevant parties] and the length of time the present custodial arrangement has continued; (2) [the] quality of the child's home environment and that of the [party or parties] seeking custody; (3) the ability of each [party] to provide for the child's emotional and intellectual development; (4) the financial status and ability of each [party] to provide for the child; (5) the individual needs and expressed desires of the child; and (6) the need of the child to live with siblings" (*Fox*, 177 AD2d at 210).

Addressing first the continuity and stability of the existing custodial arrangement, we agree with the court that the mother's decision to ask petitioner for help in caring for the child during a time of crisis does not establish that the mother was unfit as a parent. However, in addressing the existing custodial arrangement, the court focused solely on the mother's fitness and did not address *the child's* need for continuity and stability. Indeed, the court did not address the bonds and relationships that the child has formed with petitioner and her children over the last several years.

With respect to the second and fourth factors, both petitioner and the mother can provide adequate housing. Although the mother is gainfully employed outside the home and petitioner is not, both petitioner and the mother have the ability to provide financially for the child. Petitioner's husband is employed, and petitioner has other sources of income. The mother currently resides with her father, and there was evidence presented at trial that called into question the safety of that environment.

With respect to the third factor, only petitioner has cared for the emotional and intellectual development of the child. Indeed, it was petitioner's desire to enroll the child in school that led to the petition in appeal No. 1, thus establishing her care for the child's intellectual development. In addition, petitioner has taken care of all of the child's medical needs without any support from the mother. In particular, petitioner has taken the child to routine medical appointments and had the child placed on her insurance, thus establishing her ability to care for the physical needs of the child. With respect to the child's emotional needs, the mother repeatedly stated that, if and when she obtained custody of the child, she would cut off all contact with petitioner and petitioner's five children, thus effectively cutting all bonds with the only family the subject child has ever known. In fact, the mother testified that she wanted no contact with petitioner's family "whatsoever." While petitioner and the mother testified inconsistently about petitioner's attempts to provide visitation between the mother and the child, irrefutable evidence established that petitioner attempted to arrange such visitation on numerous occasions. The mother never took advantage of those attempts. In addition, the mother blocked contact from

petitioner, who was then left with no means to make further attempts at arranging visitation.

With respect to the fifth factor, i.e., the needs and expressed interests of the child, we note that, due to the child's age, the court did not conduct a *Lincoln* hearing, but the trial AFC advocated for petitioner to have sole legal and physical custody, and the appellate AFC requests the same relief. We also note that, according to the appellate AFC, the mother has failed to avail herself of the visitation provided for in the order in appeal No. 2, and thus it does not appear that there have been any changed circumstances during the pendency of these appeals regarding the child's needs and interests that would support the court's award of joint custody or warrant a new hearing on the issue of custody (*see generally Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *Matter of Gunn v Gunn*, 129 AD3d 1533, 1534 [4th Dept 2015]).

As discussed above, although the AFC's appeals are untimely (*see* Family Ct Act § 1113), the AFC is not seeking any affirmative relief beyond that requested by petitioner, who filed timely appeals. As a result, "any issue regarding whether the AFC has standing to seek affirmative relief on behalf of the child[ ] is moot" (*Burns v Grandjean*, 210 AD3d 1467, 1473 [4th Dept 2022]).

With respect to the sixth factor, i.e., the need to live with siblings, the mother's expressed intention of ceasing all communication with petitioner and her five children will effectively deprive the subject child of all sibling relationships the child has ever known. Although physical custody with the mother would allow for the child to have relationships with her two half-brothers, one of those half-brothers was no longer living with the mother at the time of the trial and, again, the mother testified that she wanted no contact with petitioner's family "whatsoever."

We note that the court indicated that it based its determinations, in part, on the fact that petitioner, after a period of time, allowed the child to call her "mommy," which the court characterized as the "perpetrat[ion of] a fraud" on the child. At trial, petitioner testified that, at first, she corrected the child and attempted to have the child call her "Aunt," but she eventually stopped making such corrections due to a concern that the child would feel unloved or excluded from the family. We conclude that the court gave undue weight to petitioner's actions in that regard under the circumstances of this case.

Based on the foregoing, we agree with petitioner and the AFC in appeal No. 1 that the court should have awarded petitioner sole legal and physical custody of the subject child, and we further agree with petitioner and the AFC in appeal No. 2 that the court should have dismissed the mother's petition. We therefore reverse the order in appeal No. 1, reinstate petitioner's petition, grant that petition and remit the matter to Family Court for further proceedings with respect to the issue of visitation between the child and the mother, and we

reverse the order in appeal No. 2 and dismiss the mother's petition.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

962

CAF 22-01249

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

IN THE MATTER OF REBECCA MANCHESTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AARON P. KNECHTEL, RESPONDENT,
AND AMBER DINOFF, RESPONDENT-APPELLANT.

SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.
(APPEAL NO. 2.)

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

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Oswego County (Thomas Benedetto, J.), entered July 8, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted joint custody of the subject child to Rebecca Manchester and Amber Dinoff.

It is hereby ORDERED that said appeal by the Attorney for the Child is unanimously dismissed, the order is reversed on the law without costs and the petition is dismissed.

Same memorandum as in *Matter of Dinoff v Knechtel* ([appeal No. 1] — AD3d — [Feb. 2, 2024] [4th Dept 2024]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

963

CAF 22-01038

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

IN THE MATTER OF LAVELLE S., LAVEIA S.,
DEVIN S., AND LEVI S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

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

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered April 8, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children.

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

Same memorandum as in *Matter of Leo M. (Alicia M.)* ([appeal No. 2] — AD3d — [Feb. 2, 2024] [4th Dept 2024]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

964

CAF 22-01039

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

IN THE MATTER OF LEO M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered April 8, 2022, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had abused the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent appeals, in appeal Nos. 1 and 2, from two orders of fact-finding and disposition. In appeal No. 2, respondent appeals from an order that, inter alia, determined that she abused her grandson. In appeal No. 1, respondent appeals from an order that, inter alia, determined that she neglected her four minor children.

Contrary to the contention of respondent in appeal No. 2, we conclude that petitioner established a prima facie case of abuse against her with respect to the grandson (*see Matter of Damien S.*, 45 AD3d 1384, 1384 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]; *see generally Matter of Philip M.*, 82 NY2d 238, 243 [1993]). Family Court Act § 1046 (a) (ii) "provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child which would ordinarily not occur absent an act or omission of [the] respondent[ ], and (2) that [the] respondent[was a] caretaker[ ] of the child at the time the injury occurred" (*Philip M.*, 82 NY2d at 243; *see Matter of Grayson R.V. [Jessica D.]* [appeal No. 2], 200 AD3d 1646, 1648 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]). Here, there is no dispute that the grandson's injuries, which included fractured ribs and a lacerated liver, were non-accidental and would not have occurred in the absence of abuse. Moreover, petitioner established that the

grandson had been in respondent's care for the four to five days prior to the onset of severe symptoms requiring his hospitalization, and that the injuries were sustained during a time span including those four to five days within which respondent and the grandson's mother were his only caretakers (*see Philip M.*, 82 NY2d at 243; *Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1523-1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *see also Matter of Nancy B.*, 207 AD2d 956, 957 [4th Dept 1994]).

Inasmuch as petitioner "established a prima facie case, the burden of going forward shift[ed] to respondent to rebut the evidence of [caretaker] culpability" (*Philip M.*, 82 NY2d at 244; *see generally Matter of Devre S. [Carlee C.]*, 74 AD3d 1848, 1849 [4th Dept 2010]). We reject respondent's contention that she rebutted the evidence of her culpability. Respondent "fail[ed] to offer any explanation for the child's injuries" and simply denied inflicting them (*Philip M.*, 82 NY2d at 246; *see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389-1390 [4th Dept 2018]; *Damien S.*, 45 AD3d at 1384). We therefore affirm the order in appeal No. 2.

With respect to the order in appeal No. 1, respondent has not raised any contentions concerning that order in her main brief on appeal, and we thus dismiss that appeal as abandoned (*see Matter of Dagan B. [Calla B.]* [appeal No. 3], 192 AD3d 1458, 1458-1459 [4th Dept 2021], *appeal dismissed* 37 NY3d 977 [2021]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

976

KA 18-02137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICK O. FIGUEROA, ALSO KNOWN AS OMAR FIGUEROA,
DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered December 19, 2017. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). We affirm.

Preliminarily, we agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). However, defendant failed to preserve for our review his challenges to the validity of his plea because he did not move to withdraw the plea or to vacate the judgment of conviction (*see generally People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). Moreover, we conclude that this case does not fall within the narrow exception to the preservation requirement that applies where "the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" and the court accepts the plea without further inquiry (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see generally People v Worden*, 22 NY3d 982, 985 [2013]; *People v Busch-Scardino*, 158 AD3d 988, 988-989 [3d Dept 2018]). Although defendant's initial statements during the factual allocution may have negated an essential element of the offense, upon additional inquiry "his further statements removed any doubt" about his guilt (*People v*

Trinidad, 23 AD3d 1060, 1061 [4th Dept 2005], *lv denied* 6 NY3d 760 [2005]).

Finally, although defendant failed to preserve for our review his contention that the court's statements during the plea colloquy regarding the possible sentences that could be imposed if he were convicted after trial were coercive, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We nonetheless conclude that defendant's contention lacks merit because "those statements were merely 'a proper explanation of defendant's sentence exposure in the event that defendant chose not to plead guilty' " (*People v Janes*, 218 AD3d 1367, 1367-1368 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *see People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

981

CAF 22-00559

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

IN THE MATTER OF ADAM M.C.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HANANE M., RESPONDENT-APPELLANT.

CHARU NARANG, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered March 28, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order of Family Court (Nesser, J.), following a dispositional hearing, that, inter alia, terminated her parental rights with respect to the subject child on the ground that she severely abused the child. In a prior Family Court Act article 10 proceeding, the court (Romeo, J.) determined, inter alia, that the mother severely abused the subject child (*see* Family Ct Act § 1012 [e] [i]; Social Services Law § 384-b [8] [a] [i]). We affirm.

Inasmuch as the mother never appealed from the order of disposition in the Family Court Act article 10 proceeding (*see* Family Ct Act §§ 1052, 1112 [a]), which "clearly advised the mother of her obligation to timely appeal from that order" (*Matter of Byler v Byler*, 207 AD3d 1072, 1076 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]; *see* § 1113), we conclude that her challenge to the court's determination that she severely abused the subject child as defined by Social Services Law
§ 384-b (8) (a) (i) is not properly before us (*see generally Byler*, 207 AD3d at 1076).

We have reviewed the mother's remaining contention and conclude

that it is without merit.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

988

CA 22-01447

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

IN THE MATTER OF BARBERRY COVE, LLC, AND TOM THOMAS, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF HENRIETTA BOARD OF ASSESSMENT REVIEW, ASSESSOR OF TOWN OF HENRIETTA AND TOWN OF HENRIETTA, RESPONDENTS-APPELLANTS.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JACOBSON LAW FIRM, P.C., PITTSFORD (ROBERT L. JACOBSON OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered August 24, 2022, in a proceeding pursuant to RPTL article 7. The order and judgment, among other things, determined the assessment values of certain real properties for the years 2018, 2019, 2020 and 2021.

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

Memorandum: In these consolidated proceedings pursuant to RPTL article 7, respondents appeal from an order and judgment that determined the assessed value of real property owned by petitioner Barberry Cove, LLC for the 2018-2021 tax years.

At issue is the valuation of a 70-parcel residential rental community (property) comprised of 35 structures. Each structure contains two adjacent apartments, and each apartment has a two-car garage. There is also an internal firewall within each structure between the two apartments. The structures are individually divided along the firewalls such that each apartment sits upon its own lot, has its own tax account number, is separately assessed, and receives its own tax bill. Tenants pay rent and utilities; petitioners pay the taxes and are responsible for lawn maintenance, driveway snowplowing, and general repairs and maintenance. After respondents determined assessment values for 2018, 2019, 2020, and 2021, petitioners sought to challenge those initial valuations under RPTL article 7, filing a separate petition in Supreme Court for each subject tax year. Following an exchange of expert appraisals, a trial was held on the petitions with respect to the tax years 2018, 2019, and 2020, and the

parties stipulated that the court's determination with respect to the 2020 tax year would be adopted by the court as the value for the 2021 tax year.

On appeal, respondents contend, inter alia, that petitioners failed to rebut the presumption that each initial assessment was valid, and that the court improperly valued the property as a multi-unit apartment complex as opposed to individual single-family townhomes.

Preliminarily, although "a property valuation by the tax assessor is presumptively valid" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187 [1998]), that presumption disappears "when a petitioner challenging the assessment comes forward with 'substantial evidence' to the contrary" (*id.*; *see Matter of Carriage House Motor Inn v City of Watertown*, 136 AD2d 895, 895-896 [4th Dept 1988], *affd* 72 NY2d 990 [1988]). A "credible and competent" appraisal provided by a petitioner is sufficient to establish that "a valid dispute exists concerning the property's valuation" (*FMC Corp.*, 92 NY2d at 191). Here, we reject respondents' contention that petitioners failed to rebut the presumption of a valid assessment, because we conclude that petitioners submitted an appraisal sufficient to demonstrate that a valid dispute exists with respect to each valuation (*see Matter of Rite Aid Corp. v Darling*, 162 AD3d 1599, 1601 [4th Dept 2018]).

Respondents further contend that the court abused its discretion in determining that the property should be taxed as a multi-unit rental property, because the property is located in an R-1-20 residential zoning district, which permits single-family dwellings. We reject that contention. We note that "the trial court enjoys broad discretion in that it can reject expert testimony and arrive at a determination of value that is either within the range of expert testimony or supported by other evidence and adequately explained by the court" (*ARC Machining & Plating v Dimmick*, 238 AD2d 849, 850 [3d Dept 1997]; *see Rite Aid Corp.*, 162 AD3d at 1601; *see generally W.T. Grant Co. v Srogi*, 52 NY2d 496, 510 [1981]). Valuation must be based upon the property's "existing use" (*Matter of Addis Co. v Srogi*, 79 AD2d 856, 857 [4th Dept 1980], *lv denied* 53 NY2d 603 [1981]), "without regard to future potentialities or possibilities" (*Matter of Hampshire Recreation, LLC v Board of Assessors*, 137 AD3d 1029, 1031 [2d Dept 2016], *lv denied* 28 NY3d 908 [2016] [internal quotation marks omitted]; *see Matter of Stonegate Family Holdings v Board of Assessors of Town of Long Lake*, 222 AD2d 997, 998 [3d Dept 1995], *lv denied* 92 NY2d 817 [1998]). Here, a fair interpretation of the evidence presented at trial supports the court's determination that the property was actually used as a 70-unit rental property.

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

995

CA 22-01342

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

STACIE COMBS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JULIE A. MADEJSKI, M.D., AND ARTEMIS INSPIRED MEDICINE, P.C., DEFENDANTS-APPELLANTS-RESPONDENTS, THOMAS MICHAEL KOWALAK, M.D., RANDALL JAMES LOFTUS, M.D., SVETLANA V. KOVTUNOVA, M.D., AND EASTERN NIAGARA HOSPITAL, INC., DEFENDANTS-RESPONDENTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KATHLEEN M. SWEET OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (THERESA M. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT THOMAS MICHAEL KOWALAK, M.D.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal and cross-appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered August 23, 2022. The order denied in part and granted in part the motion of defendants Julie A. Madejski, M.D., and Artemis Inspired Medicine, P.C., for summary judgment, granted the motion of defendants Randall James Loftus, M.D., Svetlana V. Kovtunova, M.D., and Eastern Niagara Hospital, Inc., for summary judgment and dismissed all claims and cross-claims against defendant Thomas Michael Kowalak, M.D.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants Julie A. Madejski, M.D., and Artemis Inspired Medicine, P.C., in its entirety and reinstating the complaint and cross-claims in their entirety against those defendants, denying in part the motion of defendants Randall James Loftus, M.D., Svetlana V. Kovtunova, M.D., and Eastern Niagara Hospital, Inc., and reinstating the complaint and cross-claims against defendants Randall James Loftus, M.D., and Eastern Niagara Hospital, Inc., and vacating the third ordering paragraph and reinstating the complaint and cross-claims against defendant Thomas Michael Kowalak, M.D., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action after she sustained a perforated bowel during a right salpingo-oophorectomy performed by defendant Julie A. Madejski, M.D., an obstetrician/gynecologist (OB/GYN), on August 27, 2013. The surgery was done laparoscopically using robotic assistance, and the perforation went undetected for several days. A few hours after she was discharged from defendant Eastern Niagara Hospital, Inc. (ENH), plaintiff contacted Dr. Madejski and reported severe abdominal pain and fever, and Dr. Madejski instructed her to go to ENH's emergency room. After consulting with a nonparty general surgeon, Dr. Madejski contacted the emergency room and ordered an abdominal and pelvic CT scan with oral, intravenous (IV), and rectal contrast. Emergency room physician defendant Thomas Michael Kowalak, M.D., wrote an order for a CT scan with oral and rectal contrast, but ENH's radiologic technologist who performed the CT scan on August 28, 2013, did so with only oral and IV contrast. The perforation was not shown on the CT scan, read by defendant radiologist Randall James Loftus, M.D. Plaintiff was discharged from the hospital on August 31, 2013, but she returned to the emergency room the following day with worsening symptoms. An exploratory surgical procedure, which was performed on September 2, 2013, by the nonparty general surgeon, assisted by Dr. Madejski, revealed the perforation.

As against Dr. Madejski and her practice, defendant Artemis Inspired Medicine, P.C. (Artemis), plaintiff alleged negligence in the performance of the August 27, 2013 surgery and postoperative care and treatment of plaintiff. As against Dr. Kowalak, Dr. Loftus, and ENH, plaintiff alleged that they were negligent in the postoperative care and treatment of plaintiff, particularly as it pertained to the August 28, 2013 CT scan.

Dr. Madejski and Artemis moved for summary judgment dismissing the complaint and cross-claims against them. Dr. Loftus, defendant Svetlana V. Kovtunova, M.D., and ENH similarly moved for summary judgment dismissing the complaint and cross-claims against them. Supreme Court denied the motion of Dr. Madejski and Artemis to the extent that plaintiff alleged that Dr. Madejski was negligent in her performance of the August 27, 2013 surgery, and otherwise granted the motion, thereby dismissing the claims of negligence based on Dr. Madejski's postoperative care of plaintiff. The court granted the motion of Dr. Loftus, Dr. Kovtunova, and ENH, thereby dismissing the complaint and cross-claims against them, and also sua sponte dismissed the complaint and cross-claims against Dr. Kowalak. Dr. Madejski and Artemis appeal, and plaintiff cross-appeals.

Contrary to the contention of Dr. Madejski and Artemis on their appeal, the court properly denied that part of their motion seeking dismissal of plaintiff's claim of negligence during the August 27, 2013 surgery. Defendants met their initial burden of establishing that Dr. Madejski did not deviate from the applicable standard of care during the surgery, that a perforation was a known and accepted risk, and that it was appropriate to perform the surgery laparoscopically using robotic assistance, rather than as an open procedure (*see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]; *Wick v O'Neil*,

173 AD3d 1659, 1660 [4th Dept 2019]). In opposition to the motion, however, plaintiff raised a triable issue of fact through the affirmation of her expert (*see Bristol*, 189 AD3d at 2116-2117). The expert opined that performing the surgery in a laparoscopic fashion was contraindicated for plaintiff and that performing the surgery in an open fashion was the required method given plaintiff's risk factors. Contrary to the contention of Dr. Madejski and Artemis, the expert opinion was not conclusory or speculative (*see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Rather, this case presents a classic battle of the experts, and "conflicting expert opinions may not be resolved on a motion for summary judgment" (*Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013] [internal quotation marks omitted]; *see Mason*, 159 AD3d at 1439).

We reject the contention of Dr. Madejski and Artemis that plaintiff's expert, a board certified general surgeon, was not qualified to give an expert opinion on the services provided by Dr. Madejski. The expert demonstrated an understanding of the standards of care applicable to open versus laparoscopic procedures sufficient to give an opinion as to the risks and propriety of both, an opinion that "did not concern [Dr. Madejski's] specialty" as an OB/GYN (*Revere v Burke*, 200 AD3d 1607, 1609 [4th Dept 2021]; *see generally Humphrey v Jewish Hosp. & Med. Ctr. of Brooklyn*, 172 AD2d 494, 494-495 [2d Dept 1991]). It is well settled that "[a] physician need not be a specialist in a particular field to qualify as a medical expert and any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" (*Moon Ok Kwon v Martin*, 19 AD3d 664, 664 [2d Dept 2005]; *see Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1471 [4th Dept 2020]). The general surgeon demonstrated that they possessed " 'the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable' " (*Mustello v Berg*, 44 AD3d 1018, 1019 [2d Dept 2007], *lv denied* 10 NY3d 711 [2008]; *see Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629-1630 [4th Dept 2012]).

We have considered the remaining contention raised by Dr. Madejski and Artemis on their appeal and conclude that it is without merit.

Addressing next plaintiff's cross-appeal, we note that plaintiff has raised no contentions with respect to Dr. Kovtunova, and thus plaintiff has abandoned any issues with respect to that defendant (*see Sharkey v Chow*, 84 AD3d 1719, 1720 [4th Dept 2011]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We agree with plaintiff that the court erred in sua sponte dismissing the complaint and cross-claims against Dr. Kowalak, and we therefore modify the order by vacating the third ordering paragraph and reinstating the complaint and any cross-claims against him. Preliminarily, "a court has the authority to search the record and grant summary judgment to a nonmoving party . . . with respect to a [claim] or issue that is the subject of the motions before the court" (*Bondanella v Rosenfeld*, 298 AD2d 941, 942-943 [4th Dept 2002] [internal quotation marks omitted]; *see Diamond Roofing Co., Inc. v PCL Props., LLC*, 153 AD3d 1577, 1579

[4th Dept 2017]), when it appears that the nonmoving party is entitled to such relief (*see* CPLR 3212 [b]; *Sindoni v Board of Educ. of Skaneateles Cent. Sch. Dist.*, 217 AD3d 1363, 1366 [4th Dept 2023]).

Here, plaintiff alleged that Dr. Kowalak should have ensured that rectal contrast was used on the CT scan as he had ordered, and we conclude that the evidence before the court did not establish as a matter of law that Dr. Kowalak had no duty to ensure that his order was carried out (*see generally Kless v Paul T.S. Lee, M.D., P.C.*, 19 AD3d 1083, 1084 [4th Dept 2005]). In support of their motion, Dr. Loftus and ENH submitted the affidavit of the radiologic technologist at ENH, who averred that, in August and September 2013, patients at ENH who underwent a diagnostic imaging study could be administered only two types of contrast mediums, i.e., IV and oral contrast, but also stated that "*[p]rior to* August 2013, rectal contrast was not available at [ENH] and could not be given to a patient, even if requested by a physician" (emphasis added). During his deposition, the technologist testified that he had never received the order that requested rectal contrast and that, if he had seen it, he would have used that contrast. We therefore conclude that, contrary to the court's determination, it was not "undisputed" that at the relevant time ENH did not use or have available rectal contrast, and that the court erred in dismissing the complaint and cross-claims against Dr. Kowalak on that basis.

We further agree with plaintiff on her cross-appeal that the court erred in granting that part of the motion of Dr. Madejski and Artemis for summary judgment dismissing the complaint against them to the extent that the complaint, as amplified by the bill of particulars, alleged that Dr. Madejski was negligent in her postoperative care of plaintiff. We also agree with plaintiff that the court erred in granting the motion of Dr. Loftus and ENH for summary judgment dismissing the complaint and cross-claims against them. We therefore further modify the order accordingly. Plaintiff alleged that Dr. Madejski, Artemis, Dr. Loftus, and ENH failed to ensure that rectal contrast was given to plaintiff for the CT scan. On the issue whether those defendants departed from good and accepted medical practice, we conclude that ENH failed to meet its initial burden on its motion for summary judgment. It is well settled that a hospital "may be liable in malpractice for the conceded failure of its staff to carry out a physician's order" (*Kless*, 19 AD3d at 1084). As a result of ENH's failure to meet its initial burden, the burden never shifted to plaintiff to raise triable issues of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On the other hand, Dr. Madejski, Artemis, and Dr. Loftus met their initial burdens by submitting the affirmations of their experts, who opined that they did not have a duty to ensure that the CT had been performed with the contrast that was ordered. Plaintiff, however, raised a triable issue through the affirmation and affidavit of her experts (*see Bristol*, 189 AD3d at 2116-2117). Plaintiff's expert general surgeon opined that, in light of Dr. Madejski's concerns of a potential perforation, it was a deviation from the standard of care not to undertake any reasonable efforts to ensure that her directive to have rectal contrast

administered was followed or to recognize that it had not been followed. Likewise, plaintiff's expert radiologist opined that Dr. Loftus would have been provided with the information concerning the order and its directives and upon proper review of the documentation should have recognized that the administration of rectal contrast was required but had not been administered. They opined that it was a deviation from the standard of care for Dr. Loftus not to be aware of the omission and notify Dr. Kowalak and Dr. Madejski.

On the issue of proximate cause, we agree with plaintiff that Dr. Madejski, Artemis, Dr. Loftus, and ENH failed to meet their initial burdens of establishing that any deviation from the applicable standard of care was not a proximate cause of plaintiff's injuries (*see generally Bubar v Brodman*, 177 AD3d 1358, 1363 [4th Dept 2019]). Those defendants submitted the deposition of Dr. Loftus, who testified that if rectal contrast had been given, he would have expected to have been able to see extravasation of contrast from a bowel perforation on the CT scan. Thus, contrary to the court's determination, there indeed was evidence to support the conclusion that the "lack of use of rectal contrast prevented a more timely diagnosis of the colon perforation." In any event, plaintiff raised a triable question of fact on the issue of causation (*see Kless*, 19 AD3d at 1084).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

996.1

KA 17-00344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. DESMOND, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered October 19, 2016. The appeal was held by this Court by order entered February 10, 2023, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (213 AD3d 1356 [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 a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and robbery in the third degree (§ 160.05). The conviction arises out of an incident in which defendant allegedly broke into a dwelling and forcibly stole property therein. We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal with respect to the second count of the indictment, on which the court had reserved decision but failed to rule (*People v Desmond*, 213 AD3d 1356, 1357 [4th Dept 2023]). Upon remittal, the court denied the motion.

Defendant's contention that the evidence is legally insufficient to support the conviction is unpreserved for our review because defendant's general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19

NY3d 968 [2012]).

Viewing the evidence in light of the elements of the crimes 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]). An acquittal would have been unreasonable on this record given the largely uncontested evidence establishing that, within minutes of the break-in, defendant—who generally matched the victims' description of the intruder—was found by the police in close proximity to the scene of the break-in, he appeared nervous and sweaty, and upon his arrest items stolen from the victims' house were found both in his possession and scattered along the street that he had been walking along when the police encountered him (*see People v McDermott*, 200 AD3d 1732, 1733 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022], *reconsideration denied* 38 NY3d 1009 [2022]; *see generally People v Carmel*, 138 AD3d 1448, 1449 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]). Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; *see McDermott*, 200 AD3d at 1733).

Defendant also contends that he was denied a fair trial by prosecutorial misconduct during summation. Even assuming, arguendo, that defendant's contention is fully preserved for our review, we conclude that the alleged improper remarks by the prosecutor, either alone or cumulatively, were not so egregious as to deny defendant a fair trial (*see People v Logan*, 178 AD3d 1386, 1388-1389 [4th Dept 2019], *lv denied* 35 NY3d 1028 [2020]; *People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]; *People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]).

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

997

TP 23-00406

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

IN THE MATTER OF KEVIN J. HAGBERG, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, RESPONDENT.

LEONARD CRIMINAL DEFENSE GROUP, PLLC, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN 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, Oneida County [Bernadette T. Clark, J.], entered March 1, 2023) to review a determination of respondent. The determination revoked petitioner's driver's license.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination, which revoked his license to operate a motor vehicle after he refused to submit to a chemical test pursuant to Vehicle and Traffic Law § 1194. Petitioner contends that respondent's determination that the police officer who arrested petitioner and attempted to obtain the chemical test had reasonable grounds to believe that petitioner was operating a motor vehicle in violation of Vehicle and Traffic Law § 1192 is not supported by substantial evidence (*see generally Matter of Endara-Caicedo v New York State Dept. of Motor Vehicles*, 38 NY3d 20, 23 [2022]). We reject that contention and confirm the determination.

Petitioner's brief focuses exclusively on whether the evidence at the refusal hearing established that he was intoxicated at the time of his arrest, but a chemical test of a person is authorized when a police officer has, inter alia, "reasonable grounds to believe such person to have been operating in violation of any subdivision of section [1192] of this article" (Vehicle and Traffic Law § 1194 [2] [a] [1]), and Vehicle and Traffic Law § 1192 makes it unlawful to drive while intoxicated *or impaired* by alcohol (*see generally Matter of Linton v State of N.Y. Dept. of Motor Vehs. Appeals Bd.*, 92 AD3d 1205, 1206 [4th Dept 2012]).

Here, although the arresting officer did not testify at the refusal hearing, the officer's refusal report, which was admitted in evidence, states that petitioner had a strong odor of alcohol on his breath, his eyes were bloodshot, watery and glassy, and he failed three field sobriety tests. It is true, as petitioner contends, that the refusal report does not specify which three field sobriety tests petitioner failed and provides no details regarding his performance of those tests, but petitioner declined the offer of the Administrative Law Judge (ALJ) to adjourn the hearing so that the arresting officer could appear and be questioned about those matters, preferring instead to allow the ALJ to make a determination based on the documentary evidence alone. In our view, the documentary evidence admitted in evidence at the refusal hearing establishes that the arresting officer had reasonable grounds to believe that petitioner was at least impaired by alcohol at the time of his arrest (*see id.*).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

999

KA 21-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHNNY BOYD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 5, 2021. The judgment convicted defendant upon his plea of guilty of failure to register or verify status as a sex offender.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of failure to register or verify his status as a sex offender by failing to personally appear for an updated photograph (Correction Law § 168-f [2] [b-2]). In appeal No. 2, defendant appeals from a judgment that, upon his admission to violating conditions of probation, revoked the sentence of probation imposed on his prior conviction of failure to register or verify his status as a sex offender by failing to register a change of address (§ 168-f [4]). In appeal No. 3, defendant appeals from a judgment convicting him upon his guilty plea of failure to register or verify his status as a sex offender by failing to verify his address with law enforcement (§ 168-f [3]).

In appeal Nos. 1 and 3, defendant contends in his main and pro se supplemental briefs that his respective guilty pleas were not knowing, voluntary and intelligent and, in appeal No. 2, defendant contends in his main brief that his admission to a violation of probation was not knowing, voluntary and intelligent. In his main brief, defendant concedes in each of the appeals that he failed to preserve for our review his contention that the guilty pleas and admission were not knowing, voluntary or intelligent " 'inasmuch as [he] failed to move to

withdraw [his] [pleas or] admission on that ground' " or to vacate the judgments (*People v Derrell A.E.*, 128 AD3d 1536, 1536 [4th Dept 2015], *lv denied* 26 NY3d 928 [2015]; *see generally People v Lopez*, 71 NY2d 662, 665 [1988]). Moreover, none of these cases fall within the narrow exception to the preservation requirement (*see Lopez*, 71 NY2d at 666), and we decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

In view of our determination to affirm the judgment in appeal No. 1, we reject defendant's contention in his main brief that the judgment in appeal No. 3 must be reversed on the ground that he pleaded guilty in appeal No. 3 based on the promised sentence in appeal No. 1 (*see generally People v Collins*, 167 AD3d 1493, 1498-1499 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *People v Roig*, 117 AD3d 1462, 1463 [4th Dept 2014], *lv denied* 23 NY3d 1042 [2014]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1000

KA 21-01368

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHNNY BOYD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 5, 2021. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same memorandum as in *People v Boyde* ([appeal No. 1] — AD3d — [Feb. 2, 2024] [4th Dept 2024]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1001

KA 21-01369

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY BOYDE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHNNY BOYD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered August 5, 2021. The judgment convicted defendant upon his plea of guilty of failure to register or verify status as a sex offender.

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

Same memorandum as in *People v Boyde* ([appeal No. 1] — AD3d — [Feb. 2, 2024] [4th Dept 2024]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1003

KA 19-02175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EZIEKIEL SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 Monroe County Court (Stephen T. Miller, A.J.), rendered September 17, 2019. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him, upon a plea of guilty, of assault in the second degree (Penal Law § 120.05 [3]) and, in appeal No. 2, from a judgment convicting him, upon a plea of guilty, of burglary in the second degree (§ 140.25 [2]). As defendant contends in both appeals and the People correctly concede, the respective waivers of defendant's right to appeal are invalid inasmuch as the written waivers and oral waiver colloquies " 'mischaracterized the nature of the right[s] that defendant was being asked to cede, portraying the waiver[s] as [overly broad and] an absolute bar to defendant taking an appeal' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nonetheless, in both appeals we reject defendant's contention that his sentences are unduly harsh and severe.

We do not address defendant's remaining contentions in appeal Nos. 1 and 2 because they were withdrawn by defendant.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1004

KA 20-01043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EZIEKIEL M. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 Monroe County Court (Stephen T. Miller, A.J.), rendered September 17, 2019. The judgment convicted defendant, upon a plea of guilty, of burglary in the second degree.

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

Same memorandum as in *People v Smith* ([appeal No. 1] – AD3d – [Feb. 2, 2024] [4th Dept 2024]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1006

KA 19-01487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH G. BROWN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered May 28, 2019. The judgment convicted defendant upon a jury verdict of attempted criminal purchase or disposal of a weapon.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted criminal purchase or disposal of a weapon (Penal Law §§ 110.00, 265.17 [1]), defendant contends that the conviction is not supported by legally sufficient evidence that he was prohibited from lawfully acquiring a firearm at the time of the attempted purchase. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, 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 Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, County Court properly denied his *Batson* challenge with respect to two prospective jurors. The People gave race-neutral reasons for the peremptory challenges, and defendant did not meet his ultimate burden of establishing that those reasons were pretextual (*see People v Wells*, 7 NY3d 51, 58 [2006]; *People v Thompson*, 59 AD3d 1115, 1117 [4th Dept 2009], *lv denied* 12 NY3d 860 [2009]; *see generally People v Switts*, 148 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]). The court was "in the best position to evaluate the demeanor of the prospective juror[s], the prosecutor, and defense counsel, and . . . its determination that the prosecutor's proffered reasons for striking the prospective juror[s] were not pretextual is entitled to great deference" (*People v Herrod*,

174 AD3d 1322, 1324 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019]; *see People v Ross*, 118 AD3d 1321, 1322 [4th Dept 2014], *lv denied* 23 NY3d 1067 [2014], *reconsideration denied* 24 NY3d 1122 [2015]). With respect to a third prospective juror, defendant's *Batson* challenge is not preserved for our review inasmuch as defendant did not object or attempt to respond after the People offered a race-neutral explanation for the peremptory challenge (*see People v James*, 99 NY2d 264, 271-272 [2002]; *People v Singleton*, 192 AD3d 1536, 1538 [4th Dept 2021]; *People v Scott*, 81 AD3d 1470, 1471 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]).

Finally, we reject defendant's contention that he was denied the right to confrontation with respect to the People's evidence of the operability of the firearm that defendant attempted to purchase (*see generally People v Wakefield*, 38 NY3d 367, 385-386 [2022], *rearg denied* 38 NY3d 1121 [2022], *cert denied* — US —, 143 S Ct 451 [2022], *reh denied* — US —, 143 S Ct 1799 [2023]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1007

KA 22-01427

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN L. MCMURTRY, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered July 25, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree, driving while ability impaired by drugs and use of a child in a sexual performance.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [2]), use of a child in a sexual performance (§ 263.05) and driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]). We conclude that defendant knowingly, voluntarily and intelligently waived her right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023]), and that waiver encompasses her challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Although defendant's challenge to the voluntariness of her plea survives her valid waiver of the right to appeal (*see People v Gimenez*, 59 AD3d 1088, 1088-1089 [4th Dept 2009], *lv denied* 12 NY3d 816 [2009]), the contention that, during the plea colloquy, County Court made misstatements regarding the promised sentence for driving while ability impaired by drugs and regarding the possibility of imposing consecutive sentences if defendant failed to comply with the *Outley* warnings is not preserved for our review because defendant did not move to withdraw the plea or to vacate the judgment of conviction on those grounds (*see People v Halsey*, 108 AD3d 1123, 1124 [4th Dept 2013]). Additionally, defendant's contention that her guilty plea was not knowing, voluntary

and intelligent because the court failed to inform her that she was losing her voting rights is raised for the first time in her reply brief and is thus not properly before us (*see generally People v James*, 162 AD3d 1746, 1747 [4th Dept 2018], *lv denied* 32 NY3d 1112 [2018]; *People v Daigler*, 148 AD3d 1685, 1686 [4th Dept 2017], *lv denied* 30 NY3d 1018 [2017]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1026

KA 21-00342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK L. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Douglas A. Randall, J.), rendered October 22, 2019. Defendant was resentenced upon his conviction of robbery in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant was convicted in 2002 upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]), and County Court failed to impose a period of postrelease supervision (PRS) with respect to those counts as required by Penal Law § 70.45 (1). Defendant contends that, because he had served more than 17 years of his original 25-year sentence of imprisonment, the sentencing court violated his constitutional rights against double jeopardy and to due process by resentencing him pursuant to Correction Law § 601-d and pronouncing the relevant period of PRS. Even assuming, arguendo, that defendant's contentions do not require preservation (*cf. People v Woods*, 122 AD3d 1400, 1401 [4th Dept 2014], *lv denied* 25 NY3d 1210 [2015]; *People v Smikle*, 112 AD3d 1357, 1358 [4th Dept 2013], *lv denied* 22 NY3d 1141 [2014]; *see generally People v Williams*, 14 NY3d 198, 220-221 [2010], *cert denied* 562 US 947 [2010]), we nevertheless conclude that they lack merit.

Inasmuch as defendant had not yet completed his originally imposed sentence of imprisonment when he was resentenced, " 'his resentencing to a term including the statutorily required period of postrelease supervision did not violate the double jeopardy or due process clauses of the United States Constitution' " (*People v Drake*, 126 AD3d 1382, 1383 [4th Dept 2015], *lv denied* 26 NY3d 1144 [2016]; *see People v Lingle*, 16 NY3d 621, 630-633 [2011]; *People v Fox*, 104

AD3d 789, 789-790 [2d Dept 2013], *lv denied* 21 NY3d 943 [2013]; *cf. Williams*, 14 NY3d at 217). Defendant's reliance on cases rejected by the Court of Appeals in *Lingle* is misplaced (*see Lingle*, 16 NY3d at 632).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1028

KA 22-00074

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENO RAMSAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 8, 2021. The judgment convicted defendant upon his plea of guilty of promoting prison contraband in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that his plea was not knowing, intelligent and voluntary because County Court failed to advise him that he could be subject to deportation if he pleaded guilty (*see People v Peque*, 22 NY3d 168, 197 [2013], *cert denied* 574 US 840 [2014]) and due to his alleged mental illness. We conclude that defendant's contentions are not preserved for our review (*see People v Reyes*, 219 AD3d 1685, 1686 [4th Dept 2023]; *People v Smith*, 198 AD3d 1347, 1348 [4th Dept 2021]). Under the circumstances of this case, the narrow exception to the preservation doctrine does not apply (*see Reyes*, 219 AD3d at 1686; *Smith*, 198 AD3d at 1347; *People v Ramirez*, 180 AD3d 1378, 1379 [4th Dept 2020], *lv denied* 35 NY3d 973 [2020]; *cf. Peque*, 22 NY3d at 182-183).

Finally, the sentence is not unduly harsh or severe.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1031

KA 23-00705

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY B. CURIONE, DEFENDANT-APPELLANT.

SCHLATHER, STUMBAR, PARKS & SALK, LLP, ITHACA (EMILY TURNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MACKENZIE M. STUTZMAN, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered February 21, 2023. The judgment convicted defendant upon a nonjury verdict of endangering the welfare of a child and attempted rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of endangering the welfare of a child (Penal Law § 260.10 [1]) and attempted rape in the third degree (§§ 110.00, 130.25 [3]). Defendant contends that County Court erred in imposing consecutive definite sentences of imprisonment, the aggregate of which exceeds one year, because the "offenses . . . were committed as parts of a single incident or transaction" (§ 70.25 [3]). We reject that contention. The incidents giving rise to the conviction involved different victims and occurred several hours apart (*see People v O'Neil*, 116 AD2d 853, 853 [3d Dept 1986]; *see generally People v Pinkard*, 209 AD2d 1051, 1052 [4th Dept 1994]). Inasmuch as the offenses "were committed during separate and distinct incidents or transactions[,] . . . the court legally imposed consecutive definite sentences, the aggregate of which exceeds one year" (*Pinkard*, 209 AD2d at 1052; *see People v Booth*, 119 AD2d 758, 760 [2d Dept 1986]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1032

KA 22-00966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAMIK KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered November 26, 2019. The judgment convicted defendant after a jury trial of rape in the first degree, criminal sexual act in the first degree, burglary in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [1]), criminal sexual act in the first degree (§ 130.50 [1]), burglary in the first degree (§ 140.30 [2]), and assault in the second degree (§ 120.05 [12]). According to the evidence at trial, which is generally undisputed on appeal, defendant unlawfully entered the apartment of the 74-year-old victim, raped her, and struck the victim repeatedly in her face with his fist. Surveillance videos from the victim's apartment complex show defendant on the victim's floor minutes before the attack took place and then leaving the building approximately 10 minutes later. Forensic evidence at trial linked sperm cells recovered from the victim during a vulvar swab to defendant's DNA profile, and linked blood recovered from the clothing that defendant was wearing when he was arrested to the victim's DNA profile.

On appeal, defendant contends that the evidence is legally insufficient and the verdict is against the weight of the evidence with respect to the count charging him with criminal sexual act in the first degree. According to defendant, the evidence is legally insufficient to establish that his penis came into contact with the victim's anus. We reject that contention. After the victim described on direct examination how defendant entered her "[v]aginally" with his

penis, the prosecutor asked what happened next, to which the victim responded, "He flipped me and went to enter me rectally." When asked whether she felt defendant "trying to enter [her] anally," the victim testified, "I felt him try, yes." It is true, as defendant points out, that the victim did not specifically testify that it was defendant's penis that she felt come into contact with her anus, as opposed to some other part of his body, such as his fingers. Nevertheless, viewing the evidence in the light most favorable to the People, as we must when reviewing a contention regarding the legal sufficiency of trial evidence (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" from which a rational jury could have found that it was defendant's penis that came into contact with the victim's anus (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

Further, viewing the evidence in light of the elements of criminal sexual act in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict on that count would not have been unreasonable, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see generally People v Kalinowski*, 118 AD3d 1434, 1436 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

Defendant contends that he was denied a fair trial because the prosecutor engaged in misconduct during summation by, among other things, mischaracterizing evidence, improperly arousing sympathy for the victim, and improperly acting as an unsworn witness. By failing to object to any of the alleged instances of misconduct, however, defendant failed to preserve that contention for our review (*see People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Pendergraph*, 150 AD3d 1703, 1703 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]). In any event, we conclude that any "improper remarks by the prosecutor were not so pervasive or egregious as to deny defendant a fair trial" (*People v Hanes*, 218 AD3d 1175, 1178 [4th Dept 2023]; *see People v Cardoza*, 218 AD3d 1291, 1295 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]).

We reject defendant's contention that County Court erred by imposing consecutive sentences for the crimes of rape in the first degree and criminal sexual act in the first degree. We conclude that the consecutive sentences are lawful because defendant committed "separate and distinct acts," by placing his penis in the victim's vagina and then making contact between his penis and the victim's anus (*People v Laureano*, 87 NY2d 640, 643 [1996]; *see People v Boyd*, 175 AD3d 1030, 1031 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]), " 'notwithstanding that they occurred in the course of a continuous incident' " (*People v Lucie*, 49 AD3d 1253, 1255 [4th Dept 2008], *lv denied* 10 NY3d 936 [2008]). Although the rape and criminal sexual act "took place over a continuous course of activity, they constituted separate and distinct acts, and neither crime was a material element of the other" (*People v Burton*, 83 AD3d 1562, 1563 [4th Dept 2011], *lv*

denied 17 NY3d 805 [2011] [internal quotation marks omitted]; *see People v Curtis*, 195 AD2d 968, 969 [4th Dept 1993], *lv denied* 82 NY2d 752 [1993]).

We reject defendant's contention that the sentence is unduly harsh and severe.

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

Finally, we note that the uniform sentence and commitment sheet incorrectly recites that, under count 3 of the indictment, defendant was convicted of burglary in the first degree under Penal Law § 140.20 (2), and it must be amended to reflect that he was convicted under Penal Law § 140.30 (2) (*see People v Morrow*, 167 AD3d 1516, 1518 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1033

KA 21-01499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA VANWUYCKHUYSE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (James A. Vazzana, A.J.), rendered July 16, 2021. The judgment convicted defendant, upon a jury verdict, of aggravated family offense (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences on all counts shall run concurrently with each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of four counts of aggravated family offense (Penal Law § 240.75), arising from violations of a no-contact order of protection in favor of a protected person.

Defendant contends that Supreme Court erred in denying his motion for a mistrial when the complainant testified, in violation of the court's pretrial ruling, that defendant had "strangled [her] in front of the children." "[T]he decision to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292 [1981]; *see People v Brooks*, 214 AD3d 1425, 1426 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]). Here, we conclude that the court did not abuse its discretion in denying defendant's motion and instead sustaining defendant's objection to the improper testimony, striking it from the record, and "providing the jury with a curative instruction directing them to disregard the improper testimony, which the jury is presumed to have followed" (*People v Urrutia*, 181 AD3d 1338, 1338-1339 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021] [internal quotation marks omitted]; *see Brooks*, 214 AD3d at 1426; *People v McKay*, 197 AD3d 992, 992 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]).

Defendant contends that the court's *Sandoval* ruling, which, as relevant here, permitted the People to cross-examine defendant, should he elect to testify, regarding a prior conviction of a class E felony, as well as two convictions for criminal contempt in 2017, including the underlying facts of those two convictions, constitutes reversible error. We reject that contention. A court's *Sandoval* determination is reviewed for an abuse of discretion (*see People v Colon*, 217 AD3d 1494, 1496 [4th Dept 2023]; *People v Thomas*, 213 AD3d 1359, 1360 [4th Dept 2023], *lv denied* 39 NY3d 1143 [2023]), and will generally be affirmed on appeal where the record reflects that the court properly considered the parties' arguments and "weighed the probative value of [the] defendant's prior conviction against its potential for unfair prejudice" (*People v Micolo*, 171 AD3d 1484, 1485 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]; *see People v Hayes*, 97 NY2d 203, 208 [2002]). "Cross-examination of a defendant concerning a prior crime is not prohibited solely because of the similarity between that crime and the crime charged" (*People v Stanley*, 155 AD3d 1684, 1685 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018] [internal quotation marks omitted]).

Initially, we conclude that the court's *Sandoval* compromise permitting the People to elicit that defendant had been convicted of a class E felony was proper. Contrary to defendant's contention, the court's *Sandoval* determination with respect to that conviction did not violate the rule that "a defendant with a conviction pending appeal may not be cross-examined in another matter about the underlying facts of that conviction until direct appeal has been exhausted" (*People v Cantave*, 21 NY3d 374, 377 [2013], *motion to clarify op denied* 21 NY3d 1070 [2013]), inasmuch as the court limited the People to inquiring whether defendant had been convicted of a class E felony, and did not permit the People to question defendant regarding the facts underlying that conviction.

With respect to the court's *Sandoval* determination concerning defendant's prior criminal contempt convictions, we conclude that the court did not abuse its discretion, inasmuch as the court properly balanced their prejudicial effect against their probative value (*cf. People v Grant*, 23 AD3d 172, 173 [1st Dept 2005], *affd* 7 NY3d 421 [2006]). We note that "the past violation of an order of protection . . . bears heavily on the issue of veracity, since a person who willfully violates a judicial mandate after agreeing to comply with the court's order may logically be presumed to be similarly willing to violate his obligation to tell the truth despite his having made a promise to the court to testify honestly" (*Grant*, 7 NY3d at 424 n 2).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

To the extent that defendant contends that he was penalized for exercising his right to a trial, that contention is not preserved for

our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Herman*, 217 AD3d 1469, 1472 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023]).

We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case. We conclude that a reduction of the aggregate sentence of incarceration is appropriate, and we therefore modify the judgment as a matter of discretion in the interest of justice by directing that all of the sentences shall run concurrently with each other (*see* CPL 470.15 [6] [b]).

We have considered defendant's remaining contention and conclude that it lacks merit.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1036

KA 19-01826

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE PORTIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered August 6, 2019. The judgment convicted defendant upon a plea of guilty of attempted murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and three counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid because County Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Washington*, 208 AD3d 1649, 1649 [4th Dept 2022], *lv denied* 39 NY3d 965 [2022]; *People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]).

Defendant's challenge to the constitutionality of Penal Law § 265.03 (1) (b) and (3) in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) is not preserved for our review (*see* CPL 470.05 [2]; *People v McWilliams*, 214 AD3d 1328, 1329 [4th Dept 2023], *lv denied* 39 NY3d 1156 [2023]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]). Moreover, as defense counsel correctly conceded at oral argument of this appeal, defendant's

"challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, – NY3d –, –, 2023 NY Slip Op 05968, *2-7 [2023]). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

The sentence is not unduly harsh or severe.

As the People concede, however, the certificate of conviction must be corrected to reflect defendant's status as a second felony offender rather than a second violent felony offender (*see People v Nelson*, 206 AD3d 1703, 1704 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *People v Mobayed*, 158 AD3d 1221, 1223 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]). In addition, as the People concede, the certificate of conviction erroneously states that the offense charged in count 5 of the indictment occurred on April 12, 2018, when the actual date of the offense was April 30, 2018. The certificate of conviction must also be amended to correct that clerical error (*see generally People v McCoy*, 174 AD3d 1379, 1382 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1038

CAF 22-01146

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

IN THE MATTER OF ANTHONY J.

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

MEMORANDUM AND ORDER

SIOBVAN M., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered June 13, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the interest of justice and on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order of disposition that, inter alia, adjudicated the subject child to be permanently neglected, terminated the mother's parental rights, and transferred custody of the child to petitioner. We reverse.

We agree with the mother that she was denied due process of law based upon the bias against her displayed by the Family Court Judge. Initially, we note that the mother's contention is unpreserved for our review inasmuch as the mother did not make a motion for the Family Court Judge to recuse herself (*see Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894 [2d Dept 2016]; *see generally Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2020]). Nevertheless, we exercise our power to review that contention in the interest of justice.

It is well established that "[i]n New York, the factfinding stage of a state-initiated permanent neglect proceeding bears many of the

indicia of a criminal trial" (*Santosky v Kramer*, 455 US 745, 762 [1982]). The State "must provide the parents with fundamentally fair procedures" (*id.* at 754; *see Matter of Tammie Z.*, 66 NY2d 1, 4 [1985]; *Matter of Jaleel F.*, 63 AD3d 1539, 1540-1541 [4th Dept 2009]), including the right to a hearing before an impartial factfinder (*see Baby Girl Z.*, 140 AD3d at 894-895). Here, however, the record demonstrates that Family Court "had a predetermined outcome of the case in mind during the hearing" (*id.* at 894). During a break in the hearing testimony, a discussion occurred on the record with regard to a voluntary surrender. When the mother changed her mind and stated that she would not give up her child, the court responded, "Then I'm going to do it." At that point, the only evidence that had been presented was the direct testimony of one caseworker. The court's comments, in addition to expressing a preconceived opinion of the case, amounted to a threat that, should the mother continue with the fact-finding hearing, the court would terminate her parental rights (*cf. Matter of Jenny A. v Cayuga County Dept. of Health & Human Servs.*, 50 AD3d 1583, 1583 [4th Dept 2008], *lv dismissed* 11 NY3d 809 [2008]). Those comments were impermissibly coercive (*see generally* Social Services Law § 383-c [6] [d]). That the court made good on its promise to terminate the mother's parental rights cannot be tolerated.

The record further demonstrates that the Family Court Judge was annoyed with the mother's refusal to surrender her parental rights to the child. We are compelled to remind the Family Court Judge "that even difficult or obstreperous litigants are entitled to 'patient, dignified and courteous' treatment from the court, and that judges must perform their duties 'without bias or prejudice' " (*Matter of Zyion B.*, — AD3d — [Feb. 2, 2024] [4th Dept 2024], quoting 22 NYCRR 100.3 [B] [3], [4]).

Given the preconceived opinion expressed and the lack of impartiality exhibited by the Family Court Judge in this case, the matter must be remitted to Family Court for a new hearing and determination by a different judge (*see Matter of Amanda G.*, 64 AD3d 595, 596 [2d Dept 2009]).

In light of our determination, we do not reach the mother's remaining contentions.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1042

CA 23-00044

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

IN THE MATTER OF THE ARBITRATION BETWEEN
VILLAGE OF NEWARK, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CSEA, INC., WAYNE COUNTY LOCAL 859, VILLAGE
OF NEWARK PD 910800, RESPONDENT-APPELLANT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (AARON E. KAPLAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (MARY LOUISE CONROW OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (John B. Nesbitt, A.J.), entered December 13, 2022. The order determined that petitioner is entitled to attorney's fees and costs.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and that part of the petition seeking costs and attorney's fees pursuant to 22 NYCRR 130-1.1 is denied.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration with respect to a grievance of respondent concerning the provision of retirement benefits and seeking costs, attorney's fees and sanctions pursuant to 22 NYCRR 130-1.1 against respondent for filing an allegedly frivolous demand for arbitration. Respondent thereafter withdrew the demand for arbitration and moved to dismiss the petition as moot. Petitioner opposed the motion on the ground that, although the issue of arbitration was moot, the issues of costs, attorney's fees and sanctions were not moot. Supreme Court agreed with petitioner and directed further submissions on the issues of costs, attorney's fees, and sanctions from the parties. Following those submissions, the court awarded petitioner its attorney's fees and costs pursuant to 22 NYCRR 130-1.1. Respondent appeals, and we reverse.

"The court, in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1 [a]). We agree with respondent that, even assuming, arguendo, section 130-1.1 applies to conduct occurring prior to the commencement of any litigation (*see*

National Union Fire Ins. Co. of Pittsburgh, PA v Odyssey Reins. Co., 143 AD3d 626, 626 [1st Dept 2016]; *cf. Casey v Chemical Bank*, 245 AD2d 258, 258 [2d Dept 1997]), the court abused its discretion in granting that part of the petition seeking costs and attorney's fees for serving an allegedly meritless demand for arbitration. Here, the plain language of the parties' collective bargaining agreement provided at least facially colorable support for the underlying grievance and resulting demand for arbitration. Further, there is no evidence in the record that the demand for arbitration was taken "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure" petitioner or that patently false statements were made by respondent's representatives (§ 130-1.1 [c] [2]). Thus, the circumstances under which the demand for arbitration was served, including the time available for investigating the legal or factual basis of the underlying grievance, and the fact that the conduct was discontinued when its lack of legal or factual basis was apparent all weigh against the award of costs and attorney's fees here (*see generally* § 130-1.1 [c]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1044

CA 22-00546

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

RICHARD J. LIPPES, ESQ., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. TODDY, INDIVIDUALLY, AND AS A MEMBER OF ZARWIN, BAUM, DEVITO, KAPLAN, SCHAER, TODDY, P.C., AND ZARWIN, BAUM, DEVITO, KAPLAN, SCHAER, TODDY, P.C., DEFENDANTS-APPELLANTS.

ZARWIN, BAUM, DEVITO, KAPLAN, SCHAER, TODDY, P.C., PHILADELPHIA, PENNSYLVANIA (JOSEPH M. TODDY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), dated March 11, 2022. The order denied the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion insofar as it sought to dismiss plaintiff's claim for punitive damages and dismissing that claim and as modified the order is affirmed without costs.

Memorandum: In this action for the alleged breach of a fee-sharing agreement, defendants appeal from an order denying their motion pursuant to CPLR 3211 (a) (8) to dismiss plaintiff's complaint for lack of personal jurisdiction or, in the alternative, to dismiss the claim for punitive damages.

Plaintiff, an attorney licensed and practicing in New York, was contacted by a former member of defendant Zarwin, Baum, DeVito, Kaplan, Schaer, Toddy, P.C., which is located in Philadelphia, Pennsylvania, and asked to appear as co-counsel in an environmental litigation suit in Pennsylvania. Prior to trial, the underlying lawsuit settled. According to the complaint, defendants failed to distribute the settlement award pursuant to an oral fee-sharing agreement. As noted, defendants filed a motion to dismiss, which Supreme Court denied.

We reject defendants' contention that the court erred in denying their motion insofar as it sought to dismiss the complaint for lack of

personal jurisdiction pursuant to CPLR 302 (a) (1). CPLR 302 (a) (1) provides, in relevant part, that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state." Jurisdiction can attach on the basis of one transaction, even if the defendant never enters the state, " 'so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted' " (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007], quoting *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006]). "Purposeful" activities are those by which a defendant, "through volitional acts, 'avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws' " (*id.*; *see Cellino & Barnes, P.C. v Martin, Lister & Alvarez, PLLC*, 117 AD3d 1459, 1461 [4th Dept 2014], *lv dismissed* 24 NY3d 928 [2014]).

In this case, defendants initiated contact with plaintiff for the purpose of forming an ongoing business relationship, i.e., that of co-counsel in the underlying lawsuit (*see State of New York v Vayu, Inc.*, 39 NY3d 330, 335 [2023]). Contrary to defendants' contention, *Fischbarg* is controlling despite the difference in the nature of the relationship between the parties here (i.e., co-counsel versus attorney/client), inasmuch as the focus was not on the type of relationship but rather on the "defendants' purposeful attempt to establish an attorney-client relationship [in New York] and their direct participation in that relationship via calls, faxes and e-mails that they projected into this state over many months" (9 NY3d at 380). Here, as in *Fischbarg*, defendants "engage[d] in a sustained and substantial transaction of business" by "project[ing] themselves into New York . . . to solicit plaintiff's legal services, [whereby] they necessarily contemplated establishing a continuing . . . relationship with him" (*id.* at 385). We conclude that, because defendants "established such a relationship and repeatedly project[ed] themselves into New York . . . to advance their legal position in the [Pennsylvania] action through communications with plaintiff . . . , defendants purposefully availed themselves of the benefits and protections of New York's laws" (*id.*).

We agree with defendants, however, that the court erred in denying their motion insofar as it sought dismissal of plaintiff's claim for punitive damages. We therefore modify the order accordingly. On appeal, plaintiff correctly concedes that punitive damages are not recoverable for his breach of contract cause of action (*see Bisimwa v St. John Fisher Coll.*, 194 AD3d 1467, 1473 [4th Dept 2021]), but contends that punitive damages may be recovered in conjunction with his cause of action for unjust enrichment. Here, plaintiff's cause of action for unjust enrichment is directly related to defendants' alleged failure to fulfill their obligations under the oral contract. Thus, plaintiff's cause of action for unjust enrichment may not be considered an independent tort for purposes of a punitive damages claim (*see generally C-Kitchen Assoc., Inc. v Travelers Ins. Co.*, 11 AD3d 961, 961 [4th Dept 2004]; *Hassett v New York Central Mut. Fire Ins. Co.*, 302 AD2d 886, 887 [4th Dept 2003];

Paull v First UNUM Life Ins. Co., 295 AD2d 982, 984-985 [4th Dept 2002]). Further, inasmuch as plaintiff failed "to allege conduct that was directed to the general public or that evinced the requisite high degree of moral turpitude or wanton dishonesty" (*Englert v Schaffer*, 61 AD3d 1362, 1363 [4th Dept 2009] [internal quotation marks omitted]; *see generally New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]), that part of the motion seeking dismissal of the punitive damages claim should have been granted.

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1051

KA 22-02016

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. WEBSTER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Livingston County Court (Kevin Van Allen, J.), entered November 28, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in applying a presumptive override as recommended by the Board of Examiners of Sex Offenders (Board) in its risk assessment instrument (RAI) and that, alternatively, he is entitled to a downward departure to a level two risk. We affirm.

"[T]o determine an offender's risk level, the Board provides the court with a[n RAI] that assigns numerical values to various risk factors in accordance with the SORA Risk Assessment Guidelines and Commentary, resulting in an aggregate score that presumptively places an offender in a particular risk level" (*People v Weber*, 40 NY3d 206, 210 [2023]; *see* Correction Law § 168-l; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3 [2006] [Guidelines]; *see also People v Francis*, 30 NY3d 737, 743-744 [2018]). "An offender may also be subject to an automatic override to a higher [presumptive] risk level than allotted by the point score" (*People v Worley*, 40 NY3d 129, 132 n 1 [2023]; *see* Guidelines at 3-4; *see also People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 418 [2008]). "The risk level calculated from aggregating the risk factors and from applying the overrides is 'presumptive' because the Board or court may depart from it if special circumstances warrant" (Guidelines at 4). Consequently, "[e]ither party to a SORA proceeding may request

that the court depart from the presumptive risk level based on aggravating or mitigating factors 'of a kind or to a degree not adequately taken into account by the [G]uidelines' " (*Worley*, 40 NY3d at 132 n 1, quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]; *see* Guidelines at 4-5). "Given the sequential structure of the departure process[,] . . . a SORA court cannot assess a departure request until an offender's presumptive risk level has been determined" (*Weber*, 40 NY3d at 215). Indeed, "both the Guidelines and [SORA] jurisprudence make clear that the presumptive risk level is first determined through application of the Guidelines and the RAI—whether through allocation of points or a presumptive override to level three—and is the starting point for the departure analysis" thereafter conducted under the framework set forth in *Gillotti* (*id.* at 215 n 6). SORA requires a court making a risk level determination to "render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168-n [3]), including its determination with respect to a request for a departure from the presumptive risk level (*see e.g. People v Snyder*, 218 AD3d 1356, 1356 [4th Dept 2023]; *People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]).

Here, as defendant correctly concedes, his contention that the court erred in applying the presumptive override based on his prior felony conviction for a sex crime (*see* Guidelines at 3-4) is not preserved for our review inasmuch as defendant's "objection to the [application of the override] at the SORA hearing was made on a different ground than the . . . ground[s] he raises on appeal" (*People v Leach*, 158 AD3d 1240, 1240 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018] [internal quotation marks omitted]; *see People v Ratcliff*, 53 AD3d 1110, 1110 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see generally People v Roman*, 179 AD3d 1455, 1455-1456 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]).

Next, although we agree with defendant that the court failed to address his request for a downward departure from his presumptive risk level, we conclude that "[the] omission by the court does not require remittal because the record is sufficient for us to make our own findings of fact and conclusions of law with respect to defendant's request" (*People v Augsbury*, 156 AD3d 1487, 1487 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]; *see Snyder*, 218 AD3d at 1356-1357; *People v Simmons*, 204 AD3d 1445, 1446 [4th Dept 2022], *lv denied* 38 NY3d 912 [2022]).

Defendant contends that he is entitled to a downward departure to a level two risk based on his purportedly exceptional response to both sex offender and mental health treatment. "[W]hile an offender's response to treatment, 'if exceptional' . . . , may constitute a mitigating factor to serve as the basis for a downward departure" (*People v Scott*, 186 AD3d 1052, 1054 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020], quoting Guidelines at 17), we conclude that, here, defendant failed to prove by the requisite preponderance of the evidence (*see Gillotti*, 23 NY3d at 861) that his response to treatment

was exceptional (*see People v Antonetti*, 188 AD3d 1630, 1631 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *Scott*, 186 AD3d at 1054; *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]). Inasmuch as defendant failed to prove the existence of an appropriate mitigating factor, we lack the discretion to order a downward departure (*see People v Loughlin*, 145 AD3d 1426, 1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *People v Johnson*, 120 AD3d 1542, 1542 [4th Dept 2014], *lv denied* 24 NY3d 910 [2014]; *see generally Gillotti*, 23 NY3d at 861).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1052

KA 22-01833

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVIN M. SCHUMACHER, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Livingston County Court (Kevin Van Allen, J.), entered October 24, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as "[t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under th[at] risk factor" (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017] [internal quotation marks omitted]; *see People v Hines*, 171 AD3d 1513, 1513-1514 [4th Dept 2019], *lv denied* 33 NY3d 913 [2019]). Those statements establish that defendant regularly used marihuana and alcohol prior to the commission of the underlying offense, that he had been referred to and had engaged in substance abuse treatment while incarcerated, and that he had a previous diagnosis of cannabis dependence (*see People v Turner*, 188 AD3d 1746, 1747 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *People v Blue*, 186 AD3d 1088, 1090 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *Kunz*, 150 AD3d at 1697). Moreover, the case summary and presentence report establish that defendant made prior admissions about drinking alcohol while on probation and about using LSD (*see generally People v Gerros*, 175 AD3d 1111, 1111-1112 [4th Dept 2019]; *People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

Defendant further contends that remittal is required inasmuch as the court failed to consider his request for a downward departure from his presumptive risk level. Although we agree with defendant that the court failed to consider his request, we conclude that "[the] omission by the court does not require remittal because the record is sufficient for us to make our own findings of fact and conclusions of law with respect to defendant's request" (*People v Augsbury*, 156 AD3d 1487, 1487 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]).

"A sex offender seeking a downward departure has the burden of (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" (*People v Wright*, 215 AD3d 1258, 1259 [4th Dept 2023], *lv denied* 40 NY3d 904 [2023] [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]). "[W]hile an offender's response to treatment, if exceptional . . . , may constitute a mitigating factor to serve as the basis for a downward departure" (*People v Harris*, 217 AD3d 1385, 1386 [4th Dept 2023], *lv denied* 40 NY3d 909 [internal quotation marks omitted]; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), we conclude that, here, defendant failed to prove by the requisite preponderance of the evidence that his response to mental health treatment was exceptional (*see People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *People v June*, 150 AD3d 1701, 1702 [4th Dept 2017]).

Finally, even assuming, arguendo, that defendant established the existence of an appropriate mitigating factor by a preponderance of the evidence, we note that defendant's "successful showing . . . does not automatically result in the relief requested, but merely opens the door to the SORA court's exercise of its sound discretion" under the totality of the circumstances (*People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017] [internal quotation marks omitted]). We conclude, based on the totality of the circumstances, including defendant's escalating behavior of sex abuse against children, that defendant's presumptive risk level does not represent an over-assessment of his dangerousness or risk of sexual recidivism and that a downward departure therefore would not be warranted (*see generally Harris*, 217 AD3d at 1387-1388; *People v Scott*, 186 AD3d 1052, 1054-1055 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1053

KA 22-00340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAN VALERIO-LACEN, DEFENDANT-APPELLANT.

STEVEN G. COX, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered February 3, 2022. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the third degree (Penal Law § 130.40 [2]). We affirm.

At the outset, although defendant purportedly waived his right to appeal, we conclude that there is no reason for us to address his contention that the waiver is invalid inasmuch as defendant's substantive contentions challenging the plea would survive even a valid waiver of the right to appeal (*see People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]).

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because County Court failed to inquire into the People's disclosure concerning the complainant's credibility and because the court coerced defendant into taking the plea. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve those contentions for our review (*see Williams*, 198 AD3d at 1309; *Steinbrecher*, 169 AD3d at 1463). This case does not implicate the narrow exception to the preservation rule applicable "where the particular circumstances of a case reveal that a defendant had no actual or practical ability to object to an alleged error in the taking of a plea that was clear from the face of the record" (*People v Conceicao*, 26 NY3d 375, 381 [2015]; *cf. People v*

Stanley, 191 AD3d 1411, 1412 [4th Dept 2021]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1054

KA 22-01849

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN M. WILLS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered October 11, 2022. The judgment convicted defendant upon a jury verdict of obstructing governmental administration in the second degree, driving while ability impaired and speeding.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, obstructing governmental administration in the second degree (Penal Law § 195.05) and driving while ability impaired by alcohol (DWAI) (Vehicle and Traffic Law § 1192 [1]). Defendant's conviction stems from an incident in which he was pulled over by the police for speeding and refused to comply with the deputy's order to exit the vehicle, which was issued after the deputy made observations that led him to suspect that defendant had been drinking.

Defendant contends that his statutory right to a speedy trial was violated inasmuch as the People's certificate of compliance was invalid. That contention is not preserved for our review (*see People v Hardy*, 47 NY2d 500, 505 [1979]; *People v Valentin*, 183 AD3d 1271, 1272 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]; *People v Pohl*, 160 AD3d 1453, 1454 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Valentin*, 183 AD3d at 1272; *Pohl*, 160 AD3d at 1454).

Defendant further contends that he was denied effective assistance of counsel by both his retained counsel and, after retained counsel was relieved, by his assigned counsel. Defendant contends

that both retained and assigned counsel were ineffective in failing to make certain motions or to request certain hearings. "[A] showing that [defense] counsel failed to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel" (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Nuffer*, 70 AD3d 1299, 1300-1301 [4th Dept 2010]). "To prevail on his claim, defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue colorable claims," and "[o]nly in the rare case will it be possible, based on the trial record alone, to deem counsel ineffective for failure to pursue a suppression motion" (*People v Carver*, 27 NY3d 418, 420 [2016] [internal quotation marks omitted]; *see Rivera*, 71 NY2d at 709).

The record before us does not establish that either retained or assigned counsel had any basis on which to challenge the legality of the traffic stop (*see Carver*, 27 NY3d at 420-421; *People v Green*, 196 AD3d 1148, 1150 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]; *see generally People v Scott*, 189 AD3d 2110, 2110-2111 [4th Dept 2020], *lv denied* 36 NY3d 1123 [2021]) or the statements defendant made to the police during their investigation (*see People v Snyder*, 100 AD3d 1367, 1369-1370 [4th Dept 2012], *lv denied* 21 NY3d 1010 [2013]; *see generally People v Allen*, 15 AD3d 933, 934 [4th Dept 2005], *lv denied* 4 NY3d 883 [2005]). Defendant also "identifies no discoverable evidence that the People failed to disclose" such that a motion to invalidate the People's certificate of compliance would have been successful (*People v Smith*, 217 AD3d 1578, 1579 [4th Dept 2023]). It is well settled that "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success" (*People v Francis*, 63 AD3d 1644, 1644 [4th Dept 2009], *lv denied* 13 NY3d 835 [2009] [internal quotation marks omitted]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant further contends that he was denied effective assistance when retained counsel informed County Court, after defendant failed to appear for the scheduled trial, that defendant had "refused to be [there]" and had not cooperated with him. Defendant, however, discharged retained counsel before the next court appearance and appeared with assigned counsel. The assignment of new counsel thus "remedied any harm" (*People v Glynn*, 21 NY3d 614, 619 [2013]). To the extent that defendant contends that assigned counsel was unprepared for trial, that assertion is not borne out by the record and, indeed, assigned counsel secured defendant's acquittal of the top count of the indictment. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that both retained and assigned counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant's challenge to the legal sufficiency of the evidence with respect to the conviction of DWAI and obstructing governmental administration in the second degree is not preserved for our review inasmuch as defendant made only a general motion for a trial order of

dismissal that was not based on the grounds set forth on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Contreras*, 154 AD3d 1320, 1320 [4th Dept 2017], *lv denied* 30 NY3d 1107 [2018]). In any event, that challenge is lacking in merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to DWAI, " '[c]onviction of [this] offense [does] not require proof of intoxication, but only that defendant's driving ability was impaired to any extent' " (*People v McDonald*, 27 AD3d 949, 950 [3d Dept 2006]; *see* Vehicle and Traffic Law § 1192 [1]). The deputy who initiated the traffic stop testified that defendant did not stop his vehicle immediately and appropriately, that defendant was confused when asked for his registration, and that he dropped the card before handing it over. The deputy further testified that defendant had watery and glassy eyes and slightly slurred speech and that the deputy detected an odor of alcohol on defendant's breath; additional deputies who arrived on the scene also testified that they detected the odor of alcohol. Defendant refused to exit his vehicle, stating that he "had been down this road before," and he was eventually pulled out of his vehicle and placed in a patrol vehicle. The traffic stop and arrest were recorded on the deputy's vehicle surveillance system, which the jury was able to view. That evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that defendant operated a motor vehicle while his ability to do so was impaired by alcohol (*see McDonald*, 27 AD3d at 950).

With respect to the conviction of obstructing governmental administration in the second degree, as relevant here, a person is guilty of that crime when the person "intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of . . . physical force or interference" (Penal Law § 195.05). "[M]ere words alone do not constitute physical force or interference . . . the interference [must] be, in part at least, physical in nature" (*Matter of Davan L.*, 91 NY2d 88, 91 [1997] [internal quotation marks omitted]; *see People v Dumay*, 23 NY3d 518, 524 [2014]; *People v Case*, 42 NY2d 98, 102 [1977]). However, "criminal responsibility should attach to minimal interference set in motion to frustrate police activity" (*Davan L.*, 91 NY2d at 91). Here, the evidence that defendant refused to exit his vehicle when ordered to do so and that he locked the doors is legally sufficient to support the conviction of obstructing governmental administration in the second degree (*see People v Williams*, 55 Misc 3d 134[A], 2017 NY Slip Op 50478[U], *3-4 [App Term, 2d Dept 2017], *lv denied* 29 NY3d 1135 [2017]; *see also People v Salter*, 167 Misc 2d 877, 878 [Nassau Dist Ct, 1st Dist 1996]; *see generally Davan L.*, 91 NY2d at 91-92).

Viewing the evidence in light of the elements of the crimes of DWAI and obstructing governmental administration in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict with respect to those counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1057

KA 23-00657

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

GREGORY W. WILLIAMS, DEFENDANT-RESPONDENT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (AMY CHADWICK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Oswego County Court (Karen M. Brandt Brown, J.), entered October 20, 2022. The order granted that part of the omnibus motion of defendant seeking to suppress certain physical evidence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress physical evidence is denied, and the matter is remitted to Oswego County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress physical evidence seized as the fruit of an unlawful stop of defendant's vehicle. We agree with the People that the stop was based on probable cause and thus that County Court erred in granting that part of defendant's motion seeking suppression. The deputy sheriff who initiated the stop testified at a hearing that he personally observed defendant's vehicle approach from approximately 100 feet away and drive by the location in which the deputy was parked. The deputy further testified that it was "dusk" at that time, and that defendant's vehicle was less than one car length from the vehicle in front while both vehicles were traveling at 65 miles per hour. The deputy, having personally observed defendant violate Vehicle and Traffic Law § 1129 (a), thus had probable cause to stop defendant's vehicle (*see People v Lewis*, 147 AD3d 1481, 1481 [4th Dept 2017]; *see also People v Addison*, 199 AD3d 1321, 1322 [4th Dept 2021]; *see generally People v Robinson*, 97 NY2d 341, 349 [2001]).

We further agree with the People that, to the extent the court's decision also found the stop unlawful on the basis that it was pretextual, that was error. It is well settled that " 'where a police officer has probable cause to believe that the driver of an automobile

has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant' " (*Addison*, 199 AD3d at 1321-1322, quoting *Robinson*, 97 NY2d at 349; *see People v Howard*, 129 AD3d 1469, 1470 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015], *reconsideration denied* 26 NY3d 1089 [2015]). In light of the deputy having personally observed defendant commit a traffic violation, the stop was properly based upon probable cause, and the deputy's other motivations in stopping the vehicle, if any, were irrelevant to determining whether the stop was lawful (*see Robinson*, 97 NY2d at 349; *Howard*, 129 AD3d at 1470).

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court

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

1060

CAF 22-00513

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

IN THE MATTER OF KRISTIN E. MCGONNELL,
PETITIONER-RESPONDENT,

V ORDER

JAMES K. MCGONNELL, RESPONDENT-APPELLANT.

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

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

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 23, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject children.

Now, upon reading and filing the stipulations of discontinuance signed by the attorneys for the parties on December 18, 2023, and January 6, 2024,

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

Entered: February 2, 2024

Ann Dillon Flynn
Clerk of the Court