SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 19, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

823

KA 17-00271

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID ALLIGOOD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered June 23, 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 modified on the law by directing that the sentence imposed on count three of the indictment shall run concurrently with the sentence imposed on count one of the indictment, and as modified the judgment is affirmed.

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

Defendant's contention that the evidence supporting his conviction is legally insufficient is preserved only with respect to the murder count. Regarding that count, defendant contends that the evidence is legally insufficient to establish that he perpetrated the shooting or that, in doing so, he intended to kill the victim. We reject that contention. "Viewing the evidence in the light most favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that the evidence is legally sufficient to support the murder conviction (*see People v Cross*, 174 AD3d 1311, 1314 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]). Here, at trial, defendant identified himself in surveillance footage taken prior to the shooting as an individual wearing a red hat and a red shirt, which was the same clothing that the shooter was depicted wearing on video footage of the shooting. Additionally, multiple witnesses testified to observing

defendant engage in a confrontation that night, one witness was able to identify as the shooter an individual matching defendant's description, and defendant was apprehended shortly after the shooting wearing the aforementioned clothing. Moreover, a DNA profile taken from the barrel of a handgun found in a nearby hedgerow just after the shooting matched defendant's DNA profile.

Further, "[i]t is well established that a defendant's [i]ntent to kill may be inferred from [his] conduct as well as the circumstances surrounding the crime . . . , and that a jury is entitled to infer that a defendant intended the natural and probable consequences of his acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks omitted]). Here, defendant shot the victim six times, with at least one of the shots being fired at close range when the victim was already on the floor.

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 also reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that the jury rendered a repugnant verdict. Here, the court clerk, who elicited the verdict from the jury, asked the jury how it found with respect to the first count, i.e., murder in the second degree, and the foreman responded, "Guilty." Then the court clerk asked, "[a]s to the second count in the indictment, manslaughter in the first degree, how do you find?" and the foreperson began to respond "Guilt - -." County Court interrupted the foreperson and corrected the court clerk's error stating, "I'm sorry. That's a lesser-included charge, so I am going to ask you to go on to Count 2. That would be criminal possession of a weapon." The foreperson thereafter announced the jury's verdict of guilty on the two counts of criminal possession of a weapon in the second degree. Moreover, after the verdict had been fully rendered, the court individually polled the jury to ensure the accuracy of its verdict, which did not include a finding of guilt with respect to manslaughter in the first degree. Thus, contrary to defendant's assertion, the record establishes that the court clerk merely misspoke, the error was immediately corrected, and no jury verdict was rendered on manslaughter in the first degree (*see generally People v Lynch*, 81 AD3d 1292, 1292-1293 [4th Dept 2011], *lv denied* 17 NY3d 807 [2011]; *People v Rodriguez*, 276 AD2d 326, 327 [1st Dept 2000], *lv denied* 96 NY2d 738 [2001]). We therefore conclude that the basis for defendant's claim of repugnancy is belied by the record.

We agree with defendant, however, that the court erred in directing that the sentence imposed on count three of the indictment, charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), run consecutively to the sentence imposed on count one, i.e., murder in the second degree. The People had the burden of establishing that the consecutive sentences were legal, i.e., that the crimes were committed through separate acts or omissions (*see People v Rodriguez*, 25 NY3d 238, 244 [2015]; *see*

generally Penal Law § 70.25 [2]), and they failed to meet that burden. The People failed to present evidence at trial that defendant's act of possessing the loaded firearm "was separate and distinct from" his act of shooting the victim (*People v Harris*, 115 AD3d 761, 763 [2d Dept 2014], *lv denied* 23 NY3d 1062 [2014], *reconsideration denied* 24 NY3d 1084 [2014]; *see People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]; *see generally People v Brown*, 21 NY3d 739, 750-752 [2013]). We therefore modify the judgment accordingly. The sentence, as so modified, is not unduly harsh or severe.

Finally, we have considered defendant's remaining contention and conclude that it is without merit.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

824

KA 19-00034

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRICK J. SETTLES, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, DAVISON LAW OFFICE PLLC (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered October 18, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree (two counts), assault in the second degree (two counts), burglary in the first degree (four counts) and robbery in the first degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on the conviction of assault in the second degree under count three of the indictment, and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Ontario County, for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the first degree (Penal Law § 120.10 [1], [4]), two counts of assault in the second degree (§ 120.05 [2], [6]), four counts of burglary in the first degree (§ 140.30 [1], [2], [3], [4]), and four counts of robbery in the first degree (§ 160.15 [1], [2], [3], [4]). The conviction arises from a home invasion robbery by two perpetrators during which one victim was struck in the head with the end of a shotgun and another victim was shot in the abdomen, rendering him paraplegic.

Defendant contends that Supreme Court committed reversible error by permitting the People to impeach one of their own witnesses with her prior inconsistent grand jury testimony because the witness's trial testimony did not affirmatively damage the People's case (*see generally* CPL 60.35 [1]; *People v Saez*, 69 NY2d 802, 804 [1987]; *People v Fitzpatrick*, 40 NY2d 44, 50-51 [1976]). Defendant failed to preserve that contention for our review, however, because he did not object to the prosecutor's line of questioning impeaching the witness

(*see* CPL 470.05 [2]; *People v Acevedo*, 136 AD3d 1386, 1387 [4th Dept 2016], *lv denied* 27 NY3d 1127 [2016]). Indeed, defendant's sole objection to the prosecutor's questioning was on a ground different than that raised on appeal (*see People v Roberts*, 75 AD3d 564, 565 [2d Dept 2010], *lv denied* 15 NY3d 895 [2010]; *People v Reid*, 298 AD2d 191, 191 [1st Dept 2002], *lv denied* 99 NY2d 563 [2002]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's related contention that he was denied effective assistance of counsel when defense counsel did not object to the prosecutor's questioning of the witness on the ground now raised on appeal. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]), and that is not the case here (*see People v Tendilla-Fuentes*, 157 AD3d 721, 723 [2d Dept 2018], *lv denied* 31 NY3d 1122 [2018]). Moreover, defendant has not demonstrated "the absence of strategic or other legitimate explanations for [defense] counsel's alleged shortcoming[]" (*People v Benevento*, 91 NY2d 708, 712 [1998] [internal quotation marks omitted]; *see People v Young*, 134 AD2d 639, 639 [2d Dept 1987], *lv denied* 71 NY2d 904 [1988]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence with respect to his identity as one of the perpetrators (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Clark*, 142 AD3d 1339, 1341 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *see generally Bleakley*, 69 NY2d at 495).

Defendant challenges the restitution imposed as part of his sentence on the ground that the court did not direct such restitution to an appropriate person or entity (*see* Penal Law § 60.27 [4] [b]). Defendant did not object, but rather consented, to the imposition of restitution in favor of the recipient and, therefore, he failed to preserve for our review his challenge to the restitution award (*see People v Mothersell*, 167 AD3d 1580, 1581 [4th Dept 2018]; *People v Graves*, 163 AD3d 16, 24 [4th Dept 2018], *lv denied* 35 NY3d 970 [2020]). Contrary to defendant's contention, the restitution award does not implicate the illegal sentence exception to the preservation rule under the circumstances of this case (*see Graves*, 163 AD3d at 24-25). It is well established that the "expansive definition of the term 'victim' " (*People v Horne*, 97 NY2d 404, 412 [2002]) to whom restitution may be ordered includes "the representative of a crime victim" (§ 60.27 [4] [b]), i.e., "one who represents or stands in the place of another person, *including but not limited to* an agent [or] . . . a guardian" (Executive Law § 621 [6] [emphasis added]). Here, defendant's "failure to object below means that the People were never called upon to show that restitution was being directed to a proper

recipient in this instance" (*Graves*, 163 AD3d at 25). We thus conclude that defendant's challenge to the restitution award "depends on the resolution of at least one evidentiary dispute, and it therefore does not implicate the illegal sentence exception to the preservation rule" (*id.*; *accord People v Roberites*, 153 AD3d 1650, 1651 [4th Dept 2017], *lv denied* 30 NY3d 1108 [2018], *reconsideration denied* 31 NY3d 986 [2018]; *People v Daniels*, 75 AD3d 1169, 1171 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]). We decline to exercise our power to review defendant's unpreserved challenge to the restitution award as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We note, however, that a discrepancy between the sentencing minutes and the certificate of conviction requires vacatur of the sentence imposed on the conviction of assault in the second degree under count three of the indictment. Although the sentencing minutes are silent with respect to whether the sentence imposed on count three is to run consecutively or concurrently to the sentence imposed on count one, the certificate of conviction indicates that the sentences are to be served consecutively. Where, as here, "the record is silent on the consecutive or concurrent nature of the sentences, such sentences are deemed to run concurrently by operation of law" (*People v Brooks*, 125 AD3d 1381, 1382 [4th Dept 2015]; *see* Penal Law § 70.25 [1] [a]). We note, however, that the court had just previously sentenced the codefendant, who was tried jointly with defendant, to a consecutive term on the subject count, and the restitution order signed by the court at sentencing also indicates that the sentence under count three was intended to be served consecutively to the sentence imposed on count one. Consequently, inasmuch as the record leaves open the possibility that the court's failure to specify at sentencing that those sentences are to run consecutively was accidental (*cf. People v Vasquez*, 88 NY2d 561, 580-581 [1996]), we modify the judgment by vacating the sentence imposed on the conviction of assault in the second degree under count three of the indictment, and we remit the matter to Supreme Court for resentencing on that count (*see People v Delp*, 156 AD3d 1450, 1451, 1453 [4th Dept 2017], *lv denied* 31 NY3d 983 [2018]; *Brooks*, 125 AD3d at 1382).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

838

CA 19-02244

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

DARA E. RENNERT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MORDECHAI S. RENNERT, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

VANLOON LAW, ROCHESTER (NATHAN A. VANLOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARA E. RENNERT, PLAINTIFF-RESPONDENT PRO SE.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered February 7, 2019. The order, insofar as appealed from, granted those parts of plaintiff's applications seeking to hold defendant in civil contempt, the imposition of a fine, and an award of costs and attorneys' fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and those parts of the applications seeking to hold defendant in civil contempt, the imposition of a fine, and an award of costs and attorneys' fees are denied.

Memorandum: Plaintiff mother and defendant father are the divorced parents of five children. Plaintiff filed an application by order to show cause seeking, inter alia, modification of the parties' joint custody arrangement by awarding her sole custody of the children and to hold defendant in contempt for willfully violating the terms of the existing custody order. After Supreme Court commenced a hearing on that application, plaintiff filed two additional applications by order to show cause seeking, inter alia, an order holding defendant in contempt for violating temporary custody orders entered during those proceedings, the imposition of a term of incarceration and fine against defendant, and the award of costs and attorneys' fees. Thereafter, the court bifurcated the custody and contempt proceedings. After the custody hearing concluded and before the contempt hearing commenced, defendant moved to dismiss the contempt applications on the ground that they were, inter alia, jurisdictionally defective because they did not contain the warning language required by Judiciary Law § 756. The court determined that the contempt applications substantially complied with Judiciary Law § 756 but, out of "an

abundance of caution," it nevertheless allowed plaintiff to amend the applications to, inter alia, ensure that they "contain the language [required by that section]." Although plaintiff amended the contempt applications, she did not include, verbatim, the warning language of Judiciary Law § 756.

Defendant again moved to dismiss the contempt applications on, inter alia, the ground that even as amended they still did not include the required warning language. The court denied the motion, concluding that defendant had waived his argument by challenging the merits of the contempt allegations during the custody hearing and by failing to object to the absence of the requisite warning language in a timely manner. Thereafter, the court held a hearing on the contempt applications. As limited by his brief, defendant now appeals from an order insofar as it effectively granted those parts of plaintiff's applications seeking to hold defendant in civil contempt, the imposition of a fine, and an award of costs and attorneys' fees.

Initially, we agree with defendant that the court erred in determining that he waived the argument that the contempt applications were jurisdictionally defective. It is well settled that the protections of Judiciary Law § 756 may be waived where the defendant fails to object to the jurisdictional defects in a timely manner and contests the underlying contempt application on the merits (*see Matter of Rappaport*, 58 NY2d 725, 726 [1982]; *Matter of Gregoire v Gregoire*, 278 AD2d 925, 925 [4th Dept 2000]).

Here, although defendant did not raise his jurisdictional argument on the first contempt application before the hearing commenced, after plaintiff filed the second and third contempt applications, the court bifurcated the contempt and custody proceedings, considered the custody issue first, and directed defendant not to contest the contempt allegations during the bifurcated custody hearing. Thus, defendant did not have an opportunity to challenge the merits of the contempt applications until after the custody hearing concluded, and therefore he did not waive his contention that the contempt applications were jurisdictionally defective prior to that time (*cf. Gregoire*, 278 AD2d at 925). In other words, because the court did not consider the merits of the contempt applications until after the custody hearing concluded, defendant timely raised his jurisdictional objection to those applications based on Judiciary Law § 756 when he moved to dismiss them on that ground before the contempt hearing commenced.

We further conclude that the court erred in granting in part plaintiff's contempt applications because they were jurisdictionally defective under Judiciary Law § 756. Section 756 provides that a contempt "application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend . . . : WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT." It is well settled that the failure to include the notice or the warning language of

Judiciary Law § 756 constitutes a jurisdictional defect, requiring the court to deny the application (*see Community Preserv. Corp. v Northern Blvd. Prop., LLC*, 139 AD3d 889, 890 [2d Dept 2016]; *Matter of Devine*, 126 AD2d 491, 495 [1st Dept 1987]; *Barreca v Barreca*, 77 AD2d 793, 793 [4th Dept 1980]). Because "contempt is a drastic remedy, . . . strict adherence to procedural requirements is mandated" (*Matter of Roajas v Recant*, 249 AD2d 95, 95 [1st Dept 1998]; *see Matter of Loeber v Teresi*, 256 AD2d 747, 749 [3d Dept 1998]).

Here, it is undisputed that plaintiff's initial and amended contempt applications did not include, verbatim, the required warning language of Judiciary Law § 756. Importantly, plaintiff's contempt applications omitted the language warning defendant that his "failure to appear in court may result in [his] immediate . . . imprisonment for contempt of court" (*id.*). Thus, because plaintiff's contempt applications failed to include the required warning language, they did not strictly comply with Judiciary Law § 756, rendering them jurisdictionally defective (*see Community Preserv. Corp.*, 139 AD3d at 890; *Barreca*, 77 AD2d at 793).

Defendant's contention that the court deprived him of his right to due process by bifurcating the custody and contempt proceedings without making that determination on the record is unpreserved for our review (*see generally Matter of Ashley L.C. [James L.C.]*, 68 AD3d 1742, 1743 [4th Dept 2009]; *Matter of Longo v Wright*, 19 AD3d 1078, 1079 [4th Dept 2005]) and, in any event, is without merit.

In light of our determination, defendant's remaining contentions are academic.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

839

CA 19-02245

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

DARA E. RENNERT, PLAINTIFF-RESPONDENT,

V ORDER

MORDECHAI S. RENNERT, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

VANLOON LAW, ROCHESTER (NATHAN A. VANLOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARA E. RENNERT, PLAINTIFF-RESPONDENT PRO SE.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an amended order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered February 8, 2019. The amended order, inter alia, granted sole custody of the subject children to plaintiff.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

847

KA 13-02064

PRESENT: SMITH, J.P., CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE W. JOHNSTON, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

JERMAINE W. JOHNSTON, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered November 7, 2013. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), attempted murder in the second degree (two counts), robbery in the first degree (three counts), assault in the first degree (two counts), attempted assault in the first degree and criminal possession of a weapon in the second degree (seven counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal possession of a weapon in the second degree under counts 8, 11, and 16 of the indictment and dismissing those counts of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1]), two counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]), three counts of robbery in the first degree (§ 160.15 [1], [2], [3]), and seven counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), arising from a series of incidents in June and July 2012 in which two men were killed and three others were injured. Defendant contends in his main brief that the police lacked reasonable suspicion or probable cause to stop a vehicle in which he was a passenger, and that County Court therefore erred in refusing to suppress, as the fruits of that illegal stop, physical evidence seized following his arrest several hours later at a hospital and his subsequent statements to the police. In his omnibus motion papers and subsequent affidavits, however, defendant sought suppression only with respect to his statements, and only on the grounds that they were involuntarily made and that the

police lacked probable cause to effect the arrest. Consequently, his challenge to the earlier stop of the vehicle is not preserved for our review (*see People v Crouch*, 70 AD3d 1369, 1370 [4th Dept 2010], *lv denied* 15 NY3d 773 [2010]; *see generally People v Lopez*, 139 AD3d 1381, 1383 [4th Dept 2016]). In any event, defendant's contention lacks merit. The police officers released defendant immediately after that stop, and the only evidence they obtained as the result of it was defendant's identity. It is well settled "that the body or identity of a defendant . . . in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred" (*People v Tolentino*, 14 NY3d 382, 384-385 [2010], *cert dismissed* 563 US 123 [2011] [internal quotation marks omitted]; *see People v Pleasant*, 54 NY2d 972, 973-974 [1981], *cert denied* 455 US 924 [1982]; *see also INS v Lopez-Mendoza*, 468 US 1032, 1039 [1984]).

Defendant further contends in his main brief that the court erred for several additional reasons in refusing to suppress his statements to the police. We reject defendant's first such reason, i.e., that his statements were involuntary due to psychological coercion, the length of the interrogation, and the deception employed by the investigators who interviewed him. It is well settled that, in order to introduce evidence at trial that a defendant made a statement to the police, the People "must show that the statements were not products of coercion, either physical or psychological (*see Miranda v Arizona*, 384 US 436, 448 [1966]), or, in other words, that they were given as a result of a 'free and unconstrained choice by [their] maker' (*Culombe v Connecticut*, 367 US 568, 602 [1961]). The task is the same where deception is employed in the service of psychologically oriented interrogation; the statements must be proved, under the totality of the circumstances . . . —necessarily including any potentially actuating deception—the product of the maker's own choice" (*People v Thomas*, 22 NY3d 629, 641-642 [2014]).

Here, we conclude that any alleged police deception in the form of exaggeration of the evidence is insufficient under the circumstances presented to warrant suppression (*see People v Deitz*, 148 AD3d 1653, 1654 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *see generally People v Tarsia*, 50 NY2d 1, 11 [1980]), and "the duration of the interview did not render the resulting statement involuntary" (*People v Huff*, 133 AD3d 1223, 1225 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *see People v Clyburn-Dawson*, 128 AD3d 1350, 1351 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *cf. People v Guilford*, 21 NY3d 205, 210-212 [2013]). We further conclude that "[d]efendant . . . was not subjected to the type of deprivations and psychological pressure . . . [that] 'bespeak such a serious disregard of defendant's rights, and [are] so conducive to unreliable and involuntary statements, that the prosecutor has not demonstrated beyond a reasonable doubt that the defendant's will was not overborne' " (*People v Jin Cheng Lin*, 26 NY3d 701, 725 [2016]; *cf. Thomas*, 22 NY3d at 641).

We agree in part with defendant's further challenge in his main

brief to the admissibility of his statements to the police, i.e., that the statements that he made after he invoked his right to remain silent should have been suppressed. " 'It is well settled . . . that, in order to terminate questioning, the assertion by a defendant of his right to remain silent must be unequivocal and unqualified' . . . Whether that request was 'unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' (*People v Glover*, 87 NY2d 838, 839 [1995]). The court's determination that defendant did not unequivocally invoke his right to remain silent is 'granted deference and will not be disturbed unless unsupported by the record' " (*People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]).

Here, defendant told the police three times that he did not wish to speak to them. We conclude that the court's determination that defendant did not unequivocally invoke his right to remain silent is supported by the record with respect to the first such instance, because in that instance he "did not clearly communicate a desire to cease all questioning indefinitely" (*People v Caruso*, 34 AD3d 860, 863 [3d Dept 2006], *lv denied* 8 NY3d 879 [2007]; *see People v Reibel*, 181 AD3d 1268, 1270-1271 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]), "especially in light of his continued participation in the conversation" (*People v Flowers*, 122 AD3d 1396, 1397 [4th Dept 2014], *lv denied* 24 NY3d 1219 [2015]). We further conclude, however, that the remainder of the court's determination is not supported by the record, inasmuch as, twice more during the questioning, "defendant said that he did not want to talk about [the crimes], thus unequivocally invoking his right to remain silent" (*People v Brown*, 266 AD2d 838, 838 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999]; *see People v Henry*, 133 AD3d 1085, 1086-1087 [3d Dept 2015]; *People v Graham*, 48 AD3d 265, 266 [1st Dept 2008], *lv denied* 10 NY3d 959 [2008]). Consequently, the court was required to suppress the statements that defendant made after invoking his right to remain silent for the second time. Nevertheless, we conclude that the error in failing to suppress those statements is harmless inasmuch as the proof of guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant if the court had suppressed the statements that he made after that point (*see People v Brown*, 120 AD3d 954, 955 [4th Dept 2014], *lv denied* 24 NY3d 1118 [2015]; *Brown*, 266 AD2d at 838-839; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). We note that, at the time of his arrest, defendant possessed the handgun that was taken from the stabbing victim in the first set of crimes that defendant was charged with committing, and that handgun was used in the remaining crimes. Defendant also matched the description of the person involved in all of the crimes, and he was depicted in video surveillance recordings from businesses near several of the crime scenes before or after the crimes were committed. In addition, the police recovered clothing of the same type and color as that worn by the perpetrator from a house where defendant was staying, DNA consistent with defendant's DNA was found on some of that clothing, a police investigator identified defendant as being at the scene of one of the crimes when the

investigator arrived, several witnesses identified defendant as the perpetrator in court, and defendant made statements to the police before invoking his right to remain silent in which he admitted possessing the handgun at issue and being at the scene of the crimes.

Defendant also contends in his main brief that the court erred in declining to suppress identification testimony by several witnesses. Defendant's "contention that the court erred in failing to suppress the prospective in-court identification testimony of [two witnesses] is moot, inasmuch as [those witnesses] did not identify defendant at trial" (*People v Goodrell*, 130 AD3d 1502, 1503 [4th Dept 2015]; *see People v Cormack*, 170 AD3d 1628, 1629 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019]). We further conclude that, contrary to defendant's contention, the viewing by certain witnesses of still photos from "a surveillance video of [one of] the [crime scenes] did not constitute an identification procedure" (*People v Justice*, 127 AD3d 786, 786 [2d Dept 2015], *lv denied* 27 NY3d 1000 [2016]; *see also People v Cascio*, 79 AD3d 1809, 1811 [4th Dept 2010], *lv denied* 16 NY3d 893 [2011]; *see generally People v Gee*, 99 NY2d 158, 161-164 [2002], *rearg denied* 99 NY2d 652 [2003]). For the same reason, we reject defendant's contention in his pro se supplemental brief that the court erred in permitting evidence that bolstered those identifications. Defendant's challenge in his main brief to the identification procedure involving the stabbing victim, in which he contends that the identification was not confirmatory, is moot inasmuch as "[d]efendant does not challenge the court's determination that the photo array shown to the [victim] was not unduly suggestive and, thus, there is no need to consider his challenge" (*People v Craven*, 48 AD3d 1183, 1185 [4th Dept 2008], *lv denied* 10 NY3d 861 [2008]).

Defendant further contends in his pro se supplemental brief that the evidence is not legally sufficient to support the conviction with respect to the element of serious physical injury sustained by the stabbing victim, as charged in several counts of the indictment. We reject that contention because we conclude that, "[g]iven the proof that the victim suffered a collapsed lung, the jury reasonably found that he sustained a serious physical injury within the meaning of Penal Law § 10.00 (10)" (*People v Addison*, 184 AD3d 1099, 1100 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; *see also People v Barbuto*, 126 AD3d 1501, 1502 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). In addition, contrary to defendant's contention in his main and pro se supplemental briefs, based on our review of the admissible evidence, and viewing that 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]).

Defendant contends in his pro se supplemental brief that the court erred in admitting certain hearsay testimony. Even assuming, arguendo, that the evidence constituted inadmissible hearsay, any error in admitting it was harmless. As noted above, the evidence of defendant's guilt is overwhelming, and the testimony in question established only that a person in a surveillance video was the person who committed the crime. Inasmuch as the purported hearsay evidence

did not establish that defendant was the person in the video, "there is no significant probability that defendant would have been acquitted but for the admission of the hearsay testimony" (*People v Harrington*, 182 AD3d 1000, 1001 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]; *see generally Crimmins*, 36 NY2d at 241-242). Defendant's challenge to the court's instructions to the jury regarding the purported hearsay testimony is not preserved for our review inasmuch as the court "provided . . . curative instruction[s] that, in the absence of an objection or a motion for a mistrial, 'must be deemed to have corrected the error to the defendant's satisfaction' " (*People v Szatanek*, 169 AD3d 1448, 1449 [4th Dept 2019], *lv denied* 33 NY3d 981 [2019], quoting *People v Heide*, 84 NY2d 943, 944 [1994]; *see People v Marvin*, 162 AD3d 1744, 1745 [4th Dept 2018], *lv denied* 32 NY3d 1066 [2018]).

Contrary to the further contention of defendant in his pro se supplemental brief, the court did not abuse its discretion in denying his request for a missing witness charge concerning a witness who was not called to testify at trial. The court properly denied that request because the People established the cumulative nature of the witness's testimony (*see generally People v Smith*, 33 NY3d 454, 458 [2019]), and that "the witness was uncooperative with them and thus not under their control" (*People v Cruz-Rivera*, 174 AD3d 1512, 1514 [4th Dept 2019], *lv denied* 34 NY3d 1127 [2020]).

Defendant contends in his main brief that the court erred in admitting in evidence statements that police investigators made to him during a videotaped interrogation of him that was played for the jury. Specifically, defendant contends, inter alia, that those statements contained improper opinion evidence expressing that defendant's statements were not truthful and contrary to the other evidence. Defendant did not object to the admission in evidence of those statements, however, and thus he failed to preserve his contention for our review (*see* CPL 470.05 [2]; *People v Crumpler*, 163 AD3d 1457, 1458 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018], *reconsideration denied* 32 NY3d 1125 [2018]; *People v Wright*, 126 AD3d 1036, 1038-1039 [3d Dept 2015], *lv denied* 26 NY3d 1094 [2015]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Davis*, 213 AD2d 665, 665 [2d Dept 1995], *lv denied* 86 NY2d 734 [1995]).

Although we agree with the further contention of defendant in his main brief that the court abused its discretion in precluding defense counsel from engaging in additional cross-examination of a prosecution witness concerning that witness's allegedly perjurious prior testimony (*see generally People v Smith*, 27 NY3d 652, 668 [2016]), we conclude that the error is harmless (*see generally Crimmins*, 36 NY2d at 241-242).

We reject defendant's further contention in his main brief that the court erred in declining to grant his motion for a *Frye* hearing concerning the testimony of the prosecution's ballistics experts, which was based on defendant's contention that such testimony was no

longer accepted within the relevant scientific community. It is well settled that, "[a]bsent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted" (*People v Brooks*, 31 NY3d 939, 941 [2018]), and "[t]he determination whether a trial court erred in admitting disputed scientific evidence in the absence of a *Frye* hearing turns on whether the court abused its discretion as a matter of law" (*People v Williams*, 35 NY3d 24, 37-38 [2020]). Furthermore, "[a] court need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. 'Once a scientific procedure has been proved reliable, a *Frye* inquiry need not be conducted each time such evidence is offered [and courts] may take judicial notice of reliability of the general procedure' " (*People v LeGrand*, 8 NY3d 449, 458 [2007]; *see Williams*, 35 NY3d at 38; *People v Frederick*, 186 AD3d 1398, 1399-1400 [2d Dept 2020]).

Here, the testimony to which defendant objected concerned the examination of tool markings on casings, projectiles, and weapons, coupled with the testimony of experts concerning the results of comparisons among those objects, all of which falls under the general umbrella of ballistics. It is well settled that, "[a]lmost daily, . . . ballistic evidence, among a variety of kindred scientific methods, [is] freely accepted in our courts for their general reliability, without the necessity of offering expert testimony as to the scientific principles underlying [it]" (*People v Magri*, 3 NY2d 562, 566 [1958]). In 2010, a trial court indicated that, upon a search of case law in New York, it "was unable to find any cases where firearms and toolmark identification was found to be unreliable or no longer scientifically acceptable. Nor were there instances where the testimony was ruled to be inadmissible" in this State's courts (*People v Givens*, 30 Misc 3d 475, 478 [Sup Ct, Bronx County 2010]). Since that time, no New York State court has ruled such testimony inadmissible. Consequently, based on the long-standing and widespread acceptance of the principles involved and on the evidence that defendant proffered in support of his motion, we conclude that the court did not abuse its discretion in concluding that defendant failed to meet his burden of demonstrating that the evidence at issue is no longer accepted within the relevant scientific community.

Defendant additionally contends in his main brief that the court erred in refusing to dismiss various counts of the indictment charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) inasmuch as the indictment charged him with multiple counts of that crime based on his commission of a singular continuing offense. We agree. "An indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless there has been an interruption in the course of conduct" (*People v Quinones*, 8 AD3d 589, 589-590 [2d Dept 2004], *lv denied* 3 NY3d 710 [2004]; *see People v Young*, 141 AD3d 551, 553-554 [2d Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Jackson*, 138 AD3d 1143, 1143 [2d Dept 2016]). Here, the indictment charged defendant with four separate counts of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) for the

uninterrupted possession of a single weapon at different times. We conclude that such possession "constituted a single offense for which he could be prosecuted only once" (*People v Wright*, 160 AD3d 667, 668 [2d Dept 2018], *lv denied* 31 NY3d 1154 [2018], *reconsideration denied* 32 NY3d 1069 [2018]; *see People v Gardner*, 132 AD3d 1349, 1350-1351 [4th Dept 2015]). Consequently, we affirm that part of the judgment convicting defendant of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) in count 17 of the indictment, and we modify the judgment by reversing those parts convicting him of that crime under counts 8, 11, and 16 of the indictment and dismissing those counts of the indictment.

Contrary to defendant's further contention in his main brief concerning count 17 of the indictment, the court did not err in directing that the sentence imposed on that count run consecutively to the consecutive sentences imposed on certain other counts charging that he used the weapon in question to commit other crimes. The evidence at trial establishes with respect to count 17 that defendant possessed the loaded handgun at a hospital, i.e., outside his home or place of business, at the time that he was arrested, and that he had reloaded it after having used it to commit other crimes; thus, we conclude that there was a completed possession of the gun at the time of defendant's arrest that was separate and distinct from his unlawful use of the gun to commit the other crimes for which consecutive sentences were imposed, which occurred at other times and places (*see e.g. People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *People v Rodriguez*, 118 AD3d 451, 452 [1st Dept 2014], *lv denied* 21 NY3d 964 [2014]).

We have considered defendant's remaining contentions in his main and pro se supplemental briefs, and we conclude that they do not require reversal or further modification of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

848

KA 17-00683

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL JONES, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 20, 2016. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We affirm.

Defendant contends that Supreme Court erred in precluding him from presenting at trial certain hearsay testimony of third-party culpability (*see generally People v Thibodeau*, 31 NY3d 1155, 1158-1159 [2018]). We reject that contention. At trial, defendant made an offer of proof with respect to the prospective testimony of a police officer that she had been told by another person that someone else—i.e., a person other than defendant—was responsible for killing the victim. The officer's proposed testimony about another person's statements concerning the statements of yet another person constituted double hearsay. "Double hearsay is admissible only if each hearsay statement falls within an exception to the hearsay rule" (*Kamenov v Northern Assur. Co. of Am.*, 259 AD2d 958, 959 [4th Dept 1999]; *see People v Myhand*, 120 AD3d 970, 973 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]). Here, the court properly determined that the officer's proposed testimony was inadmissible inasmuch as the statement made to her relaying the purported third-party admission constituted hearsay and did not fall within any of the exceptions to the hearsay rule (*see generally People v Brensic*, 70 NY2d 9, 14 [1987], *remittitur amended* 70 NY2d 722 [1987]; *People v Meadow*, 140 AD3d 1596, 1598 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016], *reconsideration denied* 28 NY3d

972 [2016]).

In light of our conclusion that the officer's proposed testimony was inadmissible hearsay, it is unnecessary for us to consider whether the court properly determined that the initial declarant's purported hearsay admission of culpability did not fall within the declaration against penal interest exception to the hearsay rule (*see generally Thibodeau*, 31 NY3d 1158-1159). To the extent defendant contends that he was deprived of his constitutional right to present a defense by the court's ruling precluding the proposed testimony, we conclude that his contention is unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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 People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that " 'the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). The witness testimony and video footage admitted at trial provided ample evidence from which the jury could conclude that defendant and the victim engaged in an argument and that defendant stabbed the victim while the victim was taking a shower. Moreover, the jury was entitled to infer that defendant intended to cause serious physical injury to the victim inasmuch as the evidence established that defendant inflicted a stab wound in the vicinity of the victim's vital organs, which resulted in the victim's death (*see People v Goley*, 113 AD3d 1083, 1083 [4th Dept 2014]; *see also People v Ross*, 270 AD2d 36, 36 [1st Dept 2000], *lv denied* 95 NY2d 803 [2000]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

882

CA 20-00123

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

ANDREA ROOT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SALAMANCA CENTRAL SCHOOL DISTRICT, SALAMANCA CITY SCHOOL DISTRICT BOARD OF EDUCATION, ROBERT J. BREIDENSTEIN, DEFENDANTS-APPELLANTS, AND LLOYD LONG, DEFENDANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK HOUSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered December 20, 2019. The amended order, among other things, denied in part the motion of defendants Salamanca Central School District, Salamanca City School District Board of Education and Robert J. Breidenstein to dismiss plaintiff's second amended complaint against them.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting that part of the motion seeking to dismiss the first cause of action against defendant Robert J. Breidenstein and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff, a teacher formerly employed by defendant Salamanca Central School District (District), was allegedly subjected to sexually inappropriate behavior by her immediate supervisor, defendant Lloyd Long, which plaintiff reported to the District to little effect. She served a notice of claim on the District and defendant Salamanca City School District Board of Education (School Board) and thereafter commenced the instant action against the District, the School Board, and Robert J. Breidenstein, the Superintendent of the District (collectively, defendants), among others, asserting causes of action for, inter alia, a hostile work environment under Executive Law § 296 (1) (a) and the negligent hiring, training, supervision, and retention of an unfit employee under New York common law. Defendants appeal from an amended order that granted in part their motion to dismiss the second amended complaint against them but denied the motion with respect to the first cause of action, for a hostile work environment claim, insofar as it

is premised on events occurring after November 6, 2017, and the second cause of action, for negligent hiring, training, supervision, and retention.

We reject defendants' contention that Supreme Court erred in denying the motion to dismiss the second amended complaint against them based on plaintiff's failure to comply with the pleading requirements of Education Law § 3813 (1). Section 3813 (1) provides, in relevant part, that "[n]o action or special proceeding . . . involving the rights or interests of any district . . . shall be prosecuted or maintained against any school district . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented to the governing body of said district or school within three months after the accrual of such claim, and that the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

Here, it is undisputed that plaintiff failed to allege that a notice of claim was served, that the requisite time had passed, or that payment had been neglected or refused. However, inasmuch as it is also undisputed that plaintiff's notice of claim was timely served and that plaintiff did not commence this action until 30 days had passed with no adjustment or payment of her claim and inasmuch as there is no allegation of any prejudice arising from her failure to comply with the pleading requirement, we conclude that the court did not abuse its discretion in permitting plaintiff to further amend the second amended complaint to bring it into compliance with Education Law § 3813 (1) rather than dismissing it (*see generally Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]; *Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1592 [4th Dept 2016]).

We reject defendants' contention that the court should have granted the motion with respect to the first cause of action, asserting a hostile work environment under Executive Law § 296 (1) (a), on the ground that plaintiff did not adequately raise that cause of action in her notice of claim. Initially, we agree with defendants that plaintiff's cause of action under section 296 (1) (a) is subject to Education Law § 3813 (1), which broadly requires the filing of a notice of claim as a condition precedent to an "action . . . for any cause whatever" (*see United States v New York City Dept. of Educ.*, 2017 WL 1319695, *1 [SD NY, Apr. 4, 2017, Nos. 16-CV-4291 (LAK), 16-CV-4844 (LAK)]; *see also Peritz v Nassau County. Bd. of Coop. Educ. Servs.*, 2019 WL 2410816, *2-3 [ED NY, June 7, 2019, No. 16-CV-5478 (DRH) (AYS)]). Contrary to defendants' contention, however, we conclude that plaintiff's notice of claim sufficiently informed defendants of the hostile work environment claim. While plaintiff could have provided more information about the precise nature of the claim, the notice of claim included a detailed factual chronology and a description of her complaints that indirectly described a hostile work environment legal theory based on sexual harassment (*see generally Gonzalez v Povoski*, 149 AD3d 1472, 1474 [4th Dept 2017]).

We further conclude that the court properly denied defendants' motion insofar as it sought to dismiss the first cause of action against the District and the School Board for failure to state a cause of action (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiff alleged that Long subjected her to "unwelcome sexually harassing conduct and comments" during her employment and that Long's behavior became physical on at least one occasion. Plaintiff further alleged that defendants effectively acquiesced to Long's conduct inasmuch as they did not reasonably investigate or take corrective action after plaintiff reported Long's inappropriate and offensive conduct to the appropriate representative at the District (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 53-54 [4th Dept 1996], *lv denied* 80 NY2d 809 [1997]). As plaintiff correctly concedes, however, the court should have dismissed the first cause of action against Breidenstein. We therefore modify the amended order by granting that part of the motion seeking to dismiss the first cause of action against Breidenstein.

We reject defendants' contention that the court erred in denying the motion with respect to the second cause of action. The second amended complaint, which included allegations that defendants failed to properly train and supervise Long even after plaintiff reported his conduct, alleged facts sufficient to state a cause of action for negligent hiring, training, supervision, and retention (*see Kerzhner v G4S Govt. Solutions, Inc.*, 138 AD3d 564, 564-565 [1st Dept 2016]; *see generally Leon*, 84 NY2d at 87-88).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

886

KA 17-01521

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ORLANDO HERNANDEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered March 30, 2017. The judgment convicted defendant upon a jury verdict of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the second degree (Penal Law § 120.05 [7]), arising out of separate incidents in which he struck fellow inmates while incarcerated in the Livingston County Jail. We reject the contention of defendant that he was denied his statutory right to testify before the grand jury. Defendant failed to serve the requisite written notice upon the District Attorney that he intended to testify before the grand jury (*see* CPL 190.50 [5] [a]; *see also People v Perez*, 67 AD3d 1324, 1325 [4th Dept 2009], *lv denied* 13 NY3d 941 [2010]), and County Court was entitled to credit the hearing testimony of defendant's former attorney that he had met with defendant, and that he and defendant had discussed the charges and both agreed that defendant should not testify before the grand jury (*see People v Weis*, 56 AD3d 900, 902 [3d Dept 2008], *lv denied* 12 NY3d 763 [2009]; *People v Dickens*, 259 AD2d 450, 450 [1st Dept 1999], *lv denied* 93 NY2d 1002 [1999]). We note that, although defendant sent a letter to the District Attorney three days prior to the grand jury proceeding, defendant did not indicate in that letter that he intended to testify before the grand jury.

To the extent that defendant further contends that he was denied effective assistance of counsel on the ground that his former attorney failed to effectuate his intent to testify before the grand jury, we reject that contention. The attorney testified that he and defendant had agreed to "a strategic decision not to testify at the [g]rand

[j]ury," and defendant's conclusory allegations fail to establish that there were no strategic or other legitimate explanations for defense counsel's alleged failure (*see People v Galleria*, 264 AD2d 899, 900 [3d Dept 1999], *lv denied* 94 NY2d 880 [2000]). In any event, defense counsel's alleged failure would not constitute ineffective assistance of counsel absent a showing of prejudice (*see generally People v Hogan*, 26 NY3d 779, 787 [2016]; *Dickens*, 259 AD2d at 450-451), and defendant has failed to "establish[ ] that 'he was prejudiced by the failure of [defense counsel] to effectuate his appearance before the grand jury' " (*People v James*, 92 AD3d 1207, 1208 [4th Dept 2012], *lv denied* 19 NY3d 962 [2012], quoting *People v Simmons*, 10 NY3d 946, 949 [2008]) "or that, had he testified in the grand jury, the outcome would have been different" (*People v Coleman*, 134 AD3d 1555, 1557 [4th Dept 2015], *lv denied* 27 NY3d 963 [2016] [internal quotation marks omitted]; *see People v Robinson*, 151 AD3d 1701, 1701 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]).

We similarly reject defendant's contention that he was denied effective assistance of counsel by defense counsel's failure to file a motion to dismiss the indictment pursuant to CPL 190.50 (5) (c). As noted above, defendant did not serve the requisite written notice upon the District Attorney that he intended to testify before the grand jury (*see* CPL 190.50 [5] [a]), and 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 Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]).

We also reject defendant's contention that defense counsel was ineffective for failing to adequately challenge the composition of the jury pool. A defendant objecting to the composition of the jury pool bears "the burden of demonstrating 'that a substantial and identifiable segment of the community was not included in the jury pool based on a systematic exclusion of that group' " (*People v Blanchard*, 279 AD2d 808, 811 [3d Dept 2001], *lv denied* 96 NY2d 826 [2001]). Thus, in order to meet defendant's burden, defense counsel needed to "demonstrat[e] 'that the alleged underrepresentation was caused by intentional discrimination or that the jurors had been systematically excluded from the jury pool' " (*id.*). Inasmuch as there is no evidence in the record to establish that Hispanics were underrepresented in the jury pool or that "the absence of [Hispanics] on the jury panel was a result of a flawed selection process intended to exclude them" (*People v Levy*, 52 AD3d 1025, 1025 [3d Dept 2008]; *see People v Clarke*, 5 AD3d 807, 810 [3d Dept 2004], *lv denied* 2 NY3d 797 [2004]), we cannot conclude that defense counsel's failure to make those arguments deprived defendant of effective assistance of counsel.

Defendant further contends that defense counsel was ineffective for failing to "raise a mental health or defect defense" and for failing to request to call an expert witness to testify about posttraumatic stress disorder. Defendant's conclusory allegations, however, fail to " 'demonstrate the absence of strategic or other

legitimate explanations' for [those] alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see People v Johnson*, 103 AD3d 1251, 1251-1252 [4th Dept 2013], *lv denied* 21 NY3d 1005 [2013]). Viewing the evidence, the law and the circumstances of the case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the evidence at trial is legally insufficient to establish that he intended to cause physical injury to the victims (*see People v Moreland*, 103 AD3d 1275, 1275-1276 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013]; *People v Green*, 74 AD3d 1899, 1900 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]). In any event, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that defendant possessed the requisite intent. Here, both incidents were captured by the surveillance cameras in the jail, and the video evidence established, inter alia, that defendant approached the first victim and struck him numerous times. Defendant then approached the second victim, grabbed him by his hair, pulled his head back, let go and punched him in the side of his head. The first victim's injuries included a fractured jaw, and the second victim sustained a ruptured eardrum with hearing loss.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to credit the victims' testimony (*see id.*), which was corroborated by the video recording and also by the evidence of their injuries, and which "was not rendered incredible as a matter of law . . . by the fact that [the victims] had criminal histories" (*People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]; *see People v Huff*, 133 AD3d 1223, 1226 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]). Although defendant testified that he feared for his own safety and did not intend to injure either of the two inmates, the video evidence fails to support defendant's testimony that those inmates instigated the incidents, and the jury was justified in inferring based on defendant's actions that he intended to cause them physical injury (*see Moreland*, 103 AD3d at 1276).

Defendant contends that he was denied his right to present a defense because the court precluded him from calling a proposed witness to provide testimony on the issue of justification. We reject that contention inasmuch as it is not supported by the record (*see generally People v Yancey*, 277 AD2d 931, 931 [4th Dept 2000], *lv denied* 96 NY2d 740 [2001]). Indeed, the record establishes that the court did not preclude defendant from calling the proposed witness in question. Following defendant's offer of proof, the court reserved decision on whether the proposed witness's testimony would be relevant

until after defendant testified. After defendant testified, the court asked whether the defense had any further witnesses. The defense declined to call any further witnesses and immediately rested.

Defendant further contends that he was denied a fair trial based on several instances of prosecutorial misconduct. Defendant's contention is preserved for our review only in part, and in any event we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013] [internal quotation marks omitted]).

Defendant also contends that the court abused its discretion in denying his request to adjourn sentencing because he did not have a prepared written statement with him at that time. "The determination of whether to allow a defendant to adjourn sentencing proceedings . . . rests within the sound discretion of the trial court and should not be disturbed unless there is a clear abuse of that discretion" (*People v Payne*, 176 AD2d 827, 827 [2d Dept 1991], *lv denied* 79 NY2d 862 [1992]). Here, defendant was afforded the opportunity to make a statement before he was sentenced (*see* CPL 380.50 [1]; *cf. People v Jackson*, 58 AD2d 741, 741 [4th Dept 1977]) and, contrary to defendant's contention, we conclude that the court did not abuse its discretion in denying his request (*see People v McGuay*, 1 AD3d 930, 930 [4th Dept 2003], *lv denied* 5 NY3d 791 [2005]; *People v Williams*, 302 AD2d 903, 903 [4th Dept 2003]).

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

890

KA 15-01580

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. LEWIS, DEFENDANT-APPELLANT.

MICHAEL JOS. WITMER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 3, 2015. The judgment convicted defendant upon a jury verdict of attempted criminal sexual act in the first degree, attempted sexual abuse in the first degree, attempted criminal sexual act in the third degree, coercion in the first degree, endangering the welfare of a child and unlawfully dealing with a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [1]). We affirm.

We reject defendant's contention that he was denied his right to testify before the grand jury inasmuch as the record establishes that neither defendant nor defense counsel served upon the People a written notice invoking that right (*see* CPL 190.50 [5] [a]; *People v Rumph*, 93 AD3d 1346, 1348 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]). Although defendant further contends that defense counsel's failure to invoke that right constitutes ineffective assistance of counsel, we conclude that defense counsel was not ineffective for that reason or for any other reason claimed by defendant. Defendant "has not shown that [he] was prejudiced by [his] attorney's failure to effectuate [his] appearance before the grand jury or that the outcome of the grand jury proceeding would have been different if [he] had testified" (*People v Robinson*, 151 AD3d 1701, 1701 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *see People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *People v Coleman*, 134 AD3d 1555, 1557 [4th Dept 2015], *lv denied* 27 NY3d 963 [2016]). Viewing the evidence, the law and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel

provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant's contention that Supreme Court erred in refusing to suppress his statements to the police is moot because the People did not introduce those statements at trial (*see Coleman*, 134 AD3d at 1557).

Even assuming, arguendo, that defendant preserved for our review his challenge to the court's *Sandoval* ruling (*see generally People v Jackson*, 29 NY3d 18, 23-24 [2017]), that ruling did not constitute an abuse of discretion inasmuch as "the parties' arguments before the trial court and the court's subsequent determination show that it weighed the probative value of defendant's prior conviction[s] against [their] potential for undue prejudice" (*People v Micolo*, 171 AD3d 1484, 1485 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]).

We reject defendant's contention that he was denied the right to be present at all material stages of trial due to his absence from nine sidebar conferences. A presumption of regularity attaches to judicial proceedings, and that presumption may be overcome only by substantial evidence to the contrary (*see People v Velasquez*, 1 NY3d 44, 48 [2003]; *People v Schilling*, 185 AD3d 1433, 1434 [4th Dept 2020], *lv denied* 35 NY3d 1097 [2020]). Although a defendant need not preserve a challenge regarding the right to be present at a sidebar conference, a defendant alleging the denial of that right must present an adequate record for our review (*see Velasquez*, 1 NY3d at 47-48; *People v Kinchen*, 60 NY2d 772, 773-774 [1983]). Inasmuch as the record does not indicate that defendant was absent from any of the sidebar conferences in question, we conclude that defendant failed to overcome the presumption of regularity with substantial evidence of his absence from those sidebar conferences (*see Schilling*, 185 AD3d at 1434).

With respect to defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]), defendant failed to preserve his contentions that the race-neutral reason offered by the prosecutor was pretextual and that the court employed an erroneous procedure in denying the application (*see People v Massey*, 173 AD3d 1801, 1802 [4th Dept 2019]). Defendant also failed to preserve his contentions regarding alleged instances of prosecutorial misconduct during summation inasmuch as "defense counsel did not object to certain instances . . . , made 'only unspecified, general objections' to others . . . , and failed to take any further actions such as requesting a curative instruction or moving for a mistrial when his objections were sustained" (*People v Gibson*, 134 AD3d 1512, 1512-1513 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court failed to give meaningful notice of jury notes Nos. 1, 2, and 6 inasmuch as each inquiry in those notes "was nothing more than an inquiry of a ministerial nature . . . , unrelated to the substance of the verdict .

. . As a result, the [court] was not required to notify defense counsel nor provide [him] with an opportunity to respond, as neither defense counsel nor defendant could have provided a meaningful contribution" (*People v Ochoa*, 14 NY3d 180, 188 [2010]; *see People v Gelling*, 163 AD3d 1489, 1491 [4th Dept 2018], *amended on rearg* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]). Contrary to defendant's further contention, we conclude that the court "respond[ed] meaningfully to the jury's request" in jury note No. 5 (*People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]; *see People v Williams*, 181 AD3d 1298, 1299 [4th Dept 2020], *lv denied* 35 NY3d 1049 [2020]).

We have reviewed defendant's remaining contentions and conclude that they do not require reversal or modification of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

892

KA 14-01862

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

CHARLES J. WASHINGTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 2, 2014. The judgment convicted defendant upon a jury verdict of criminal contempt in the first degree and aggravated family offense (seven counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count of criminal contempt in the first degree (Penal Law § 215.51 [c]) and seven counts of aggravated family offense (§ 240.75 [1]). We reject defendant's contention that he was deprived of effective assistance of counsel. With respect to defendant's claim that defense counsel was ineffective for purportedly failing to discuss with him his right to testify before the grand jury, defendant has not established "that he was prejudiced by that purported failure or that the outcome would have been different if he had testified" (*People v Lostumbo*, 182 AD3d 1007, 1009 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]; *see People v Hogan*, 26 NY3d 779, 787 [2016]; *People v Robinson*, 151 AD3d 1701, 1701 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). Indeed, we note that defendant testified at trial and was nonetheless found guilty (*see Hogan*, 26 NY3d at 787; *Lostumbo*, 182 AD3d at 1009). Furthermore, we reject defendant's claim that defense counsel was ineffective for failing to discuss with him his rights to a speedy trial under CPL 30.30 and for waiving those rights without his consent (*see generally People v Strauss*, 179 AD3d 1487, 1489 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020], *reconsideration denied* 35 NY3d 1049 [2020]; *People v Wheeler*, 159 AD3d 1138, 1141-1142 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]).

Defendant's contention that the accusatory instrument filed in Rochester City Court is facially insufficient is academic in light of the subsequent indictment issued by the grand jury (*see People v Hart*,

25 AD3d 815, 816 [3d Dept 2006], *lv denied* 6 NY3d 834 [2006]; *see also People v Washington*, 173 AD3d 1644, 1645-1646 [4th Dept 2019], *lv denied* 34 NY3d 985 [2019]; *People ex rel. Van Steenburg v Wasser*, 69 AD3d 1135, 1136 [3d Dept 2010], *lv denied in part and dismissed in part* 14 NY3d 883 [2010]).

We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

911

KA 16-02356

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE J. SINGLETON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 26, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree (three counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and three counts of criminally using drug paraphernalia in the second degree (§ 220.50 [1], [2], [3]). Because he made only a general motion for a trial order of dismissal, defendant "failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction" (*People v Arroyo*, 111 AD3d 1299, 1299 [4th Dept 2013], *lv denied* 23 NY3d 960 [2014]; *see People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, defendant further contends that the verdict is against the weight of the evidence, and " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of [that contention]' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Viewing the evidence in light of the elements of the crimes as charged to the jury, we conclude that "the People proved beyond a reasonable doubt all elements of the crimes charged" (*Stepney*, 93 AD3d at 1298; *see Danielson*, 9 NY3d at 349; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence presented by the People established, inter alia, that defendant was the sole lessee of

the apartment where the cocaine and drug paraphernalia were found and that defendant was observed by police officers leaving the premises just minutes before the search warrant was executed. Moreover, defendant's fingerprints were found on items from the apartment—a beaker and a plate—that contained cocaine (*see generally People v Delamota*, 18 NY3d 107, 113 [2011]).

Defendant further contends that Supreme Court erred in failing to conduct the three-step process required under *Batson v Kentucky* (476 US 79 [1986]) following his objection to the People's peremptory challenge of an African-American prospective juror. We agree. After defendant made a prima facie showing of discrimination in step one, the prosecutor offered a race-neutral explanation for the peremptory challenge (*see generally People v Smocum*, 99 NY2d 418, 422 [2003]), namely, that the prospective juror had a sister who was incarcerated for assaulting someone with a gun and that the prospective juror said that the criminal justice system could have treated her sister better. When defense counsel attempted to respond, the court interrupted him and stated, "I ruled. There is no *Batson* issue." Defense counsel timely objected to the court's ruling. In our view, defense counsel should have been "given the opportunity to argue that the prosecutor's explanation[was] a pretext for discrimination" (*People v Watson*, 141 AD3d 23, 30 [1st Dept 2016]; *see generally People v Jenkins*, 75 NY2d 550, 560 [1990]).

The Court of Appeals has consistently held that courts cannot merge *Batson's* second step, the proffer of a race-neutral reason, with its third step, the determination whether the proffered reason is pretextual (*see Smocum*, 99 NY2d at 422; *People v Payne*, 88 NY2d 172, 186 [1996]). Indeed, the Court has implored trial courts "to avoid undue haste and compression in th[e] crucial process" of the three-step *Batson* inquiry (*Smocum*, 99 NY2d at 423) and to avoid any "merger of the step two and three requirements" (*Payne*, 88 NY2d at 186). "The legal burdens of production and persuasion must be correctly allocated and maintained, and a meaningful record must reflect that these prerequisites have been satisfied . . . [T]he trial courts bear the judicial responsibility of ensuring that an adequate record is made and of reflecting the basis for their rulings" (*id.* at 184; *see People v Sprague*, 273 AD2d 861, 862 [4th Dept 2000]).

Here, when it interrupted defense counsel, "the court improperly rushed and compressed the *Batson* inquiry," precluding defendant from meeting "his burden of establishing an equal protection violation" (*Smocum*, 99 NY2d at 422). To be distinguished are situations in which defense counsel does not make "any attempt to respond or protest[ ]" (*People v Acevedo*, 141 AD3d 843, 847 [3d Dept 2016]; *see People v Brown*, 17 AD3d 283, 284 [1st Dept 2005], *lv denied* 5 NY3d 804 [2005]) or in which the court implicitly rejects the pretext argument by letting the challenge stand *after* hearing a defense counsel's arguments concerning pretext (*see People v Hardy*, 61 AD3d 616, 616 [1st Dept 2009], *lv denied* 13 NY3d 744 [2009]).

We note that *People v Ramos* (124 AD3d 1286, 1287 [4th Dept 2015],

lv denied 25 NY3d 1076 [2015], *reconsideration denied* 26 NY3d 933 [2015]) does not compel a different result. In *Ramos*, we stated that "[a]lthough the court initially denied the *Batson* challenge before defense counsel had an opportunity to argue that the prosecutor's stated reasons were pretextual, defense counsel nevertheless placed on the record why he believed the reasons were pretextual, whereupon the court again denied the motion. In any event, the court, by initially rejecting the challenge prematurely, can be said to have implicitly determined that the prosecutor's proffered race-neutral reasons were not pretextual" (*id.*). The case at hand is factually distinguishable in that the court here interrupted defense counsel when he attempted to speak after the prosecutor offered a race-neutral reason, reiterating its denial of the *Batson* challenge. Defense counsel was thus deprived of an opportunity to argue that the reason given was pretextual. There was no such interruption or deprivation in *Ramos*.

Because the court erred in failing to afford defense counsel an opportunity to respond to the prosecutor and attempt to meet his ultimate burden of demonstrating that the reason offered for striking the prospective juror was a pretext for discrimination, we hold the case and remit the matter to Supreme Court "for further proceedings as are necessary to satisfy the requirements of *Batson*" (*Watson*, 141 AD3d at 30; *see also People v Herrod*, 163 AD3d 1462, 1463 [4th Dept 2018]; *People v Davis*, 153 AD3d 1631, 1632 [4th Dept 2017]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

912

KA 15-01421

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD R. WHITE, ALSO KNOWN AS PROPHET,
DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

HOWARD R. WHITE, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 14, 2015. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Although defendant contends in his pro se supplemental brief that the felony complaint was defective, the felony complaint was superseded by the indictment to which defendant pleaded guilty, and he therefore may not challenge the felony complaint on appeal (*see People v Kates*, 162 AD3d 1627, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019]). We reject defendant's contention in his main brief that he was denied effective assistance of counsel (*see generally People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]; *People v Campbell*, 62 AD3d 1265, 1266 [4th Dept 2009], *lv denied* 13 NY3d 795 [2009]). We agree with defendant, however, 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]).

Defendant further contends in his main brief that Supreme Court erred in denying his request for a probable cause hearing, and we agree. "When made before trial, suppression motions must be in writing, state the legal ground of the motion and contain sworn allegations of fact made by defendant or another person" (*People v Mendoza*, 82 NY2d 415, 421 [1993] [internal quotation marks omitted]). A hearing may be denied "unless the papers submitted raise a factual

dispute on a material point which must be resolved before the court can decide the legal issue" (*id.* at 426 [internal quotation marks omitted]).

Here, defendant specifically alleged that officers "responded to [the scene] after . . . defendant, or someone at his behest, called 911" and that defendant, upon their arrival, told them that he "found [the victim] on the stairs bleeding and was trying to help him." Defendant alleged that, based on that information, "[t]he police removed [him] from the scene and placed him in the back of a police vehicle, and took his personal cell phone from him" without reasonable suspicion or probable cause justifying the intrusion. Although the People contended that defendant made other statements to the officers that heightened their level of suspicion and justified the intrusion, defendant's motion papers disputed this assertion, alleging instead that, at the time of the intrusion, "the police knew nothing more than [that the victim] appeared to have been shot, and [that defendant] . . . had discovered him and summoned help while trying to give assistance at the scene." Indeed, at oral argument on the motion, defendant further explained that he specifically disputed what information the police had at the time of the intrusion. We conclude that, under these circumstances, defendant sufficiently raised a factual issue necessitating a hearing (*see generally People v Jones*, 132 AD3d 1388, 1388-1389 [4th Dept 2015]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to conduct a suppression hearing.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

913

KA 16-01830

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH V. WILCOX, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM 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 (Francis A. Affronti, J.), rendered August 16, 2016. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (2 counts), criminal sexual act in the first degree (2 counts), criminal sexual act in the second degree (10 counts), criminal sexual act in the third degree (14 counts), sexual abuse in the first degree and endangering the welfare of a child (5 counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of predatory sexual assault against a child (Penal Law § 130.96), two counts of criminal sexual act in the first degree (§ 130.50 [2]), 10 counts of criminal sexual act in the second degree (§ 130.45 [1]), 14 counts of criminal sexual act in the third degree (§ 130.40 [2]), one count of sexual abuse in the first degree (§ 130.65 [4]) and five counts of endangering the welfare of a child (§ 260.10 [1]). We reject defendant’s contention that Supreme Court erred in refusing to suppress statements he made to the Child Protective Service (CPS) caseworker who interviewed him while he was in custody inasmuch as the CPS caseworker was not acting as an agent of the police (*see People v Worthy*, 109 AD3d 1140, 1141 [4th Dept 2013], *lv denied* 23 NY3d 970 [2014]). Although the CPS caseworker was part of a joint task force that included members of law enforcement, he testified that he did not consult with any law enforcement agents regarding his plans to interview defendant. Furthermore, no law enforcement agents were present at that interview, and there was no police involvement in the preparation or performance of the interview (*see People v Rodriguez*, 135 AD3d 1181, 1185 [3d Dept 2016], *lv denied* 28 NY3d 936 [2016]; *People v Whitmore*, 12 AD3d 845, 847 [3d Dept 2004], *lv denied* 4 NY3d 769, 892 [2005]).

Defendant's contention that the jury charge was confusing and improper is unpreserved for our review (*see People v Whitfield*, 72 AD3d 1610, 1610 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also contends that the evidence is legally insufficient to support the conviction because the testimony of the victims was incredible as a matter of law. Although defendant failed to preserve his contention for our review (*see People v Gaston*, 100 AD3d 1463, 1464 [4th Dept 2012]), 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 (*see People v Wilson*, 175 AD3d 1800, 1800 [4th Dept 2019]). 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]), however, we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that "the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]; *see People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct is not preserved for our review (*see* CPL 470.05 [2]; *People v Szatanek*, 169 AD3d 1448, 1449 [4th Dept 2019], *lv denied* 33 NY3d 981 [2019]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that he was denied effective assistance of counsel. Defendant's claim that counsel was ineffective for failing to object to the allegedly confusing and misleading jury charge was raised for the first time in his reply brief and therefore is not properly before us (*see People v Daigler*, 148 AD3d 1685, 1686 [4th Dept 2017], *lv denied* 30 NY3d 1018 [2017]). Several of defendant's other alleged instances of ineffective assistance, e.g., defense counsel's failure to call prospective witnesses that defendant suggested and his failure to introduce into evidence voluminous records that defendant provided, are based on matters outside the record on appeal and thus must be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 81 AD3d 1428, 1428 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]). We reject defendant's contention with respect to his remaining claims of ineffective assistance, including his claim that defense counsel was ineffective in failing to object to the alleged instances of prosecutorial misconduct. Here, defendant failed to demonstrate the absence of any strategic or other legitimate explanations for the alleged deficient conduct (*see People v Lundy*, 165 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). On this record, we conclude that " 'the evidence, the law, and the circumstances of [this] particular case,

viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation' " (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]).

We reject defendant's contention that the court erred in denying his request for new counsel. Defendant's request for defense counsel to be relieved was based on conclusory assertions of disagreements concerning strategy and of ineffectiveness of counsel, and the request was thus insufficient to require any inquiry by the court (*see People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]; *cf. People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]).

Defendant's contention that he was punished for exercising his right to trial is unpreserved (*see People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). In any event, that contention is without merit inasmuch as " '[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 punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial' " (*id*.). Finally, the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

914

CA 20-00131

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

JOHN CARDENAS, AS ADMINISTRATOR OF THE ESTATE OF
ABRAHAM E. CARDENAS, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER REGIONAL HEALTH, UNITY MENTAL HEALTH,
ROCHESTER GENERAL HOSPITAL, MARC JOHNSON, MHC,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 25, 2019. The order denied the motion of defendants Rochester Regional Health, Unity Mental Health, Rochester General Hospital and Marc Johnson, MHC, to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint against defendants Rochester Regional Health, Unity Mental Health, Rochester General Hospital, and Marc Johnson, MHC, is dismissed.

Memorandum: Plaintiff, as administrator of decedent's estate, commenced this medical malpractice and wrongful death action against Rochester Regional Health, Unity Mental Health (UMH), Rochester General Hospital (RGH), and Marc Johnson, MHC (collectively, defendants), among others, seeking damages for, inter alia, the negligent treatment of plaintiff's wife and failure to provide proper instruction to her family members regarding her mental health care. The complaint alleges that plaintiff's wife was hospitalized for several weeks at RGH due to her mental health status. In the days immediately following her discharge, plaintiff's wife twice treated with Johnson at UMH. Shortly after his wife's second session with Johnson, plaintiff, prompted by his wife's worsening condition, began calling UMH at various times over the course of two days seeking additional care. He was advised that his wife should keep her upcoming psychiatric appointment, which was scheduled for

approximately two weeks in the future. On the evening of the second day, plaintiff's wife killed their son (decedent) with a knife.

Defendants moved to dismiss the complaint against them pursuant to CPLR 3211 (a) (7), contending that they bore no duty to decedent because he was not their patient. Supreme Court denied defendants' motion. We reverse.

Whether defendants owed a duty of care to the child of their patient is an issue of law for a court to determine (*see Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015]; *Pingtella v Jones*, 305 AD2d 38, 40 [4th Dept 2003], *lv dismissed* 100 NY2d 640 [2003], *rearg denied* 1 NY3d 594 [2004]). "Foreseeability of injury does not determine the existence of duty" (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]; *see Pingtella*, 305 AD2d at 40). Instead, "[c]ourts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty" (*Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997]).

Generally, medical providers owe a duty of care only to their patients, and courts have been reluctant to expand that duty to encompass nonpatients because doing so would render such providers liable "to a prohibitive number of possible plaintiffs" (*McNulty v City of New York*, 100 NY2d 227, 232 [2003]; *see Pingtella*, 305 AD2d at 41). The scope of that duty of care has, on occasion, been expanded to include nonpatients where the defendants' relationship to the tortfeasor " 'place[d] [them] in the best position to protect against the risk of harm,' " and "the balancing of factors such as the expectations of the parties and society in general, the proliferation of claims, and public policies affecting the duty proposed herein . . . tilt[ed] in favor of establishing a duty running from defendants to plaintiffs under the facts alleged" (*Davis*, 26 NY3d at 576; *see also Tenuto*, 90 NY2d at 613-614). Under the circumstances of this case, however, we conclude that those factors do not favor establishing a duty running from defendants to decedent. The complaint herein does not allege that plaintiff's wife sought treatment specifically in order to prevent physical injury to decedent or her family, that defendants were aware whether she had threatened or displayed violence towards her family in the past, or that defendants directly put in motion the danger posed by the patient (*see Pingtella*, 305 AD2d at 41-42; *cf. Davis*, 26 NY3d at 576-577; *Tenuto*, 90 NY2d at 613-614). As we have previously stated, "[w]hile the temptation is always great to provide a form of relief to one who has suffered, it is well established that the law cannot provide a remedy for every injury incurred . . . Were we to extend defendant[s'] duty to the child herein, there would be a far-reaching effect on physicians who treat patients with children. Physicians should be permitted to limit their treatment to the best interests of the patient and leave to others the responsibility for the nonmedical concerns of third parties who may be affected by that treatment" (*Pingtella*, 305 AD2d at 42-43 [internal quotation marks omitted]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

915

CA 19-01544

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JAMES CRISS, INDIVIDUALLY AND ON BEHALF OF HIS SON, MILES CRISS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, SAMUEL ROBERTS, COMMISSIONER, AND NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, RESPONDENTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CUDDY LAW FIRM, P.L.L.C., AUBURN (BENJAMIN M. KOPP OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), entered June 17, 2019 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted in part petitioner's application seeking fees and expenses.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the application is denied in its entirety, and the award of fees and expenses is vacated.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the decision of respondent New York State Department of Health, issued following a fair hearing, that upheld the initial determination of respondent New York State Office for People with Developmental Disabilities (OPWDD) denying petitioner's application for a home-based community services waiver. Prior to commencing this proceeding, petitioner sought reconsideration of OPWDD's determination from respondent Office of Temporary and Disability Assistance (OTDA). After this proceeding was commenced, OTDA issued an amended decision on reconsideration vacating OPWDD's determination and granting petitioner's application. The parties agree that the amended decision rendered the CPLR article 78 proceeding moot. Nevertheless, petitioner's attorneys filed a motion seeking an award of attorneys' fees and expenses under the New York State Equal Access to Justice Act ([EAJA] CPLR 8600 *et seq.*), "under the 'catalyst theory,' which posits that a plaintiff [or a petitioner] is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a

voluntary change in the defendant's conduct" (*Buckhannon Board & Care Home, Inc. v West Virginia Dept. of Health & Human Resources*, 532 US 598, 601 [2001]). Supreme Court granted the application in part, awarding petitioner some measure of attorneys' fees and expenses. We agree with respondents that the court erred in awarding any fees or expenses, and we therefore reverse the judgment insofar as appealed from, deny the application in its entirety, and vacate the award of fees and expenses.

The State EAJA was enacted in 1989, and it was generally "modeled after" the Federal EAJA (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 353 [1995] [hereinafter *Kaladjian*]; *see* 28 USC § 2412 [d] [1] [A]). In pertinent part, the statute provides that "a court shall award to a *prevailing party*, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (CPLR 8601 [a] [emphasis added]). The statute defines a "[p]revailing party" as "a plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues" (CPLR 8602 [f]). The application for fees and expenses must be made "within thirty days of *final judgment* in the action" (CPLR 8601 [b] [emphasis added]), and a "[f]inal judgment" is defined as "a judgment that is final and not appealable, and settlement" (CPLR 8602 [c]). The intent of the statute was to put small businesses, not-for-profit businesses, and individuals with limited resources on equal footing with the State when the State's administrative position was unjustified (*see* Letter from Assemblymember Robin Schimminger, Sept. 21, 1989, Bill Jacket, L 1989, ch 770 at 6).

Although it is modeled after the Federal EAJA, the state statute differs from the federal statute in several notable respects. The scope of the state statute "is far narrower than that of the federal statute"; the federal statute does not contain any definition of a prevailing party; and the federal statute defines a final judgment to include " '*an order* of settlement' " (*Matter of Solla v Berlin*, 106 AD3d 80, 87 [1st Dept 2013], *revd* 24 NY3d 1192 [2015], *rearg denied* 25 NY3d 1063 [2015] [emphasis added], quoting 28 USC § 2412 [d] [1] [D] [2] [G]). As a result of those differences, the Court of Appeals opined that "the Legislature's departure from the Federal EAJA . . . evinces an intent to impose a *stricter standard* for demonstrating prevailing party status under the State EAJA than under its Federal counterpart" (*Kaladjian*, 85 NY2d at 354 [emphasis added]). The Court wrote that, "as it specifically relates to the term 'prevailing party,' the legislative history suggests that the State EAJA's departure from the Federal model was intended to limit the State's liability for fee awards" (*id.* at 355).

The problem is that the State EAJA specifically provides that it was intended "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York, similar to the provisions of federal law contained in 28 USC § 2412 (d) *and the significant body of case law*

that has evolved thereunder" (CPLR 8600 [emphasis added]; *see* Letter from Assemblymember Robin Schimminger, Oct. 4, 1989, Bill Jacket, L 1989, ch 770 at 8). At the time the State EAJA was enacted, "the 'significant body' of case law across the country and in New York that had interpreted the Federal EAJA routinely applied the catalyst theory" (*Solla*, 106 AD3d at 87).

In 2001, however, the Supreme Court of the United States rejected the catalyst theory as a basis for an award of attorneys' fees and expenses under the fee-shifting provisions of the Fair Housing Amendments Act of 1988 ([FHAA] 42 USC § 3613 [c] [2]) and the Americans with Disabilities Act of 1990 ([ADA] 42 USC § 12205), holding that the term prevailing party, which is a legal term of art and is used in numerous other federal statutes (*see Buckhannon*, 532 US at 602-603), required that there be relief awarded by a court, i.e., a "judicially sanctioned change in the legal relationship of the parties" (*id.* at 605). Inasmuch as the Federal EAJA contains no definition of "prevailing party" so as to distinguish the EAJA from the FHAA and the ADA, federal courts have applied *Buckhannon* to Federal EAJA cases and have denied any award of attorneys' fees or expenses under the catalyst theory (*see e.g. Aronov v Napolitano*, 562 F3d 84, 88-89 [1st Cir 2009], *cert denied* 558 US 1147 [2010], *reh denied* 559 US 964 [2010]; *Ma v Chertoff*, 547 F3d 342, 344 [2d Cir 2008]; *Goldstein v Moatz*, 445 F3d 747, 751 [4th Cir 2006]; *Brickwood Contrs., Inc. v United States*, 288 F3d 1371, 1379 [Fed Cir 2002], *cert denied* 537 US 1106 [2003]).

Shortly after the Supreme Court's decision in *Buckhannon*, the First Department applied it to a State EAJA case without much discussion (*see Matter of Auguste v Hammons*, 285 AD2d 417, 418 [1st Dept 2001]), and other Departments followed suit, rejecting the catalyst theory as a basis for an award under various fee-shifting statutes (*see Matter of Vetter v Board of Educ., Ravena-Coeymans-Selkirk Cent. School Dist.*, 53 AD3d 847, 849 [3d Dept 2008], *affd as modified* 14 NY3d 729 [2010]; *Matter of Wittlinger v Wing*, 289 AD2d 171, 171 [1st Dept 2001], *affd on other grounds* 99 NY2d 425 [2003]; *Murrin v Ford Motor Co.*, 303 AD2d 475, 477 [2d Dept 2003]). The Court of Appeals affirmed that part of the Third Department's decision in *Vetter* denying the petitioner counsel fees, but that appeal addressed counsel fees under a federal statute (*see Vetter*, 14 NY3d at 732). In affirming the First Department in *Wittlinger*, the Court of Appeals determined that the petitioner was not entitled to attorneys' fees because the State's position was substantially justified (99 NY2d at 429). The Court thus declined to "reach the 'catalyst' issue and *Buckhannon's* impact on the interpretation of the [State EAJA]" (*id.* at 433).

In 2013, however, the First Department overruled *Auguste* after noting that the parties in *Auguste* were not afforded an opportunity to address the issue inasmuch as *Buckhannon* was decided after *Auguste* was briefed and argued (*see Solla*, 106 AD3d at 82). The Court wrote that it had not "focused on the qualitative differences between the two statutes" (*id.*). The Court of Appeals reversed the First Department

on different grounds, stating that it was "unnecessary for [the Court] to decide whether the catalyst theory is New York law" and that it took "no position on that question at this time" (*Solla*, 24 NY3d at 1196).

The Second Department, in contrast, has consistently rejected application of the catalyst theory (*see Matter of Gonzalez v New York State Dept. of Corr. & Community Supervision*, 152 AD3d 680, 682-683 [2d Dept 2017]; *Murrin*, 303 AD2d at 477; *Pastore v Sabol*, 230 AD2d 835, 837 [2d Dept 1996]). In *Gonzalez*, the Court wrote that the petitioner in that case could not be considered a " 'prevailing party' under CPLR 8601 (a) and 8602 (f)" because the so-ordered stipulation entered in that case "did not reflect a material change in the legal relationship between the parties because the petitioner's claims had already been rendered moot by [the administrative agency's] voluntary decision" to vacate the earlier decision (152 AD3d at 683). "No material alteration of the legal relationship between the parties occurs until the [petitioner] becomes entitled to enforce a judgment, consent decree, or settlement against the [respondent]" (*Farrar v Hobby*, 506 US 103, 113 [1992]).

Although the *Gonzalez* decision did not mention the catalyst theory by name in its holding, the language and citations used leave no doubt that the Court rejected the catalyst theory of recovery under the State EAJA. Indeed the Court cited to, inter alia, *Pastore* (230 AD2d at 837) and *Ma* (547 F3d at 344), cases in which the Courts specifically rejected application of the catalyst theory in State and Federal EAJA cases.

This Court has yet to address the issue, but we now reject application of the catalyst theory in State EAJA cases. Where, as here, litigation is rendered moot by an administrative change in position, the petitioner or plaintiff has not prevailed "in the civil action" (CPLR 8602 [f]). As the Court of Appeals wrote in *Kaladjian*, "[t]he case law formulation that has developed around the term 'prevailing party' considers whether the parties ' "succeed[ed] on any significant issue *in litigation* which achieve[d] some of the benefit the parties sought in bringing suit" ' " (85 NY2d at 352 [emphasis added], quoting *Hensley v Eckerhart*, 461 US 424, 433 [1983]).

Petitioner correctly notes that CPLR 8600 provides that the State EAJA was intended to provide recovery in a manner similar to the Federal EAJA and the "significant body of case law that has evolved thereunder" and that, at the time the State EAJA was enacted, the catalyst theory was routinely applied to Federal EAJA cases (*see Buckhannon*, 532 US at 602 n 3). The language of the statute, however, requires a party to prevail "in the civil action" (CPLR 8602 [f]; *see* Assembly Mem in Support, Bill Jacket, L 1989, ch 770 at 10). Here, petitioner did not obtain a "[f]inal judgment," i.e., an enforceable judgment or settlement (CPLR 8602 [c]; *cf. Matter of Wright v New York Off. of Children & Family Servs.*, 2003 NY Slip Op 51083 [U] [Sup Ct, Erie County 2003]), and thus did not prevail "in the civil action" (CPLR 8602 [f]). Inasmuch as fee-shifting provisions are an exception

to the "American Rule," they must be strictly construed (*see Baker v Health Mgt. Sys.*, 98 NY2d 80, 88 [2002], *rearg denied* 98 NY2d 728 [2002]; *Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320, 323-324 [1st Dept 2004]). It is for the legislature, not the courts, to decide whether the statute should be broadened to include fee awards to parties whose lawsuits serve as the catalyst for a voluntary change in the agency's determination.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

916

CA 20-00309

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

LINDA GRAUL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. VAN DAMME AND PATRICIA M. LASKOWSKI,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered July 8, 2019. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this action to recover damages for injuries plaintiff sustained when she fell while stepping from a platform inside defendants' restaurant and bar, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. We affirm.

Defendants failed to meet their initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although defendants contend that the platform did not constitute a dangerous condition, the determination of such an issue "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [4th Dept 2012] [internal quotation marks omitted]). Here, defendants failed to establish that the platform, when considered in conjunction with the surrounding lighting conditions and the lack of visual cues marking the change in elevation, did not constitute an unreasonably dangerous condition (*see Sawyers v Troisi*, 95 AD3d 1293, 1294 [2d Dept 2012]; *see generally Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219 [4th Dept 2003]). Moreover, the fact that plaintiff had traversed the platform prior to her fall does not determine, as a matter of law, whether the platform constituted a dangerous condition (*see generally Powers*, 309 AD2d at 1219).

We likewise conclude that defendants failed to establish that the hazard posed by the platform was open and obvious and thus that they had no duty to warn plaintiff (*see Hayes*, 100 AD3d at 1533). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances . . . [, and a] condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Calandrino v Town of Babylon*, 95 AD3d 1054, 1056 [2d Dept 2012] [internal quotation marks omitted]; *see Hayes*, 100 AD3d at 1533-1534). Based on the circumstances discussed above, we conclude that defendants failed to establish that the danger was so obvious that it would necessarily be noticed by any careful observer as a matter of law (*see Hayes*, 100 AD3d at 1534).

Contrary to defendants' further contention, their submissions, which included plaintiff's deposition testimony, failed to establish that plaintiff could not identify the cause of the fall (*see generally Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]). Additionally, although plaintiff may have been comparatively negligent in failing to observe the step or in failing to remember that the step was there, we conclude that, contrary to their contention, defendants failed to establish that plaintiff fell solely due to her own negligence (*see Powers*, 309 AD2d at 1219-1220).

In light of defendants' failure to demonstrate their prima facie entitlement to judgment as a matter of law, Supreme Court properly denied the motion regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

919

CA 19-01569

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF ARBITRATION BETWEEN NIAGARA FRONTIER TRANSPORTATION AUTHORITY, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

NFTA POLICE BENEVOLENT ASSOCIATION, RESPONDENT-RESPONDENT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR PETITIONER-APPELLANT.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered July 25, 2019 in a proceeding pursuant to CPLR article 75. The order denied the petition to vacate an arbitration award and confirmed that award.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR 7511 seeking to vacate an arbitration award determining that it violated the provisions of a collective bargaining agreement (CBA) with respondent union concerning the manner in which police officers were assigned to work at the transportation facilities operated by petitioner. On appeal from an order denying the petition and confirming the award, petitioner contends that Supreme Court erred in its determination inasmuch as the arbitrator violated public policy, manifestly disregarded the law, and exceeded his authority by improperly relying on evidence of the parties' past practices in a way that rewrote the terms of the CBA. We affirm.

"An arbitration award may be vacated on three narrow grounds: 'it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003], quoting *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]). We reject petitioner's contention that the arbitration award violated public policy. Here, petitioner was not prohibited by public policy

considerations from agreeing, through collective bargaining, to limit its discretion as to the manner in which it assigned officers to work at its facilities (*see generally Matter of Professional, Clerical, Tech. Empls. Assn. [Buffalo Bd. of Educ.]*, 90 NY2d 364, 376 [1997]; *Matter of Lucas [City of Buffalo]*, 93 AD3d 1160, 1163 [4th Dept 2012]). Although the arbitrator was not permitted to consider the parties' past practices in a way that rewrote or negated the terms of the CBA (*see Matter of City of Rochester [Rochester Police Locust Club]*, 133 AD3d 1357, 1358 [4th Dept 2015]; *Matter of Manhattan & Bronx Surface Tr. Operating Auth. v Transport Workers Union of Am., AFL-CIO, Local 100*, 182 AD2d 626, 627 [2d Dept 1992], *lv denied* 80 NY2d 755 [1992]), the arbitrator was entitled to rely on evidence of past practices in order to interpret the terms in the existing agreement (*see generally Lucas*, 93 AD3d at 1163; *Matter of City of Watertown [Watertown Professional Firefighters' Assn., Local #191]*, 280 AD2d 893, 894 [4th Dept 2001], *lv denied* 96 NY2d 711 [2001]; *Matter of Village of Spring Val. v Policemen's Benevolent Assn. of Vil. of Spring Val.*, 271 AD2d 615, 615 [2d Dept 2000], *lv denied* 95 NY2d 760 [2000]). Thus, contrary to petitioner's contention, the arbitrator's use of past practices evidence does not warrant vacatur of the award on public policy grounds inasmuch as the arbitrator properly used such evidence only in interpreting the disputed provisions of the CBA (*see Policemen's Benevolent Assn. of Vil. of Spring Val.*, 271 AD2d at 615; *see generally City of Watertown*, 280 AD2d at 894). For the same reason, we conclude that the arbitrator did not "manifestly disregard" the law or exceed his authority through his use of evidence of the parties' past practices (*see City of Watertown*, 280 AD2d at 894; *see generally Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 127 [4th Dept 2017]; *Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Niagara Falls Bridge Commn. Unit, Niagara County Local 832 [Niagara Falls Bridge Commn.]*, 32 AD3d 1186, 1186 [4th Dept 2006]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

921

CA 20-00097

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

EARL POTTORFF, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENTRA FINANCIAL GROUP, INC., HORNOR TOWNSEND & KENT, INC., AND THE PENN MUTUAL LIFE INSURANCE COMPANY, DEFENDANTS-APPELLANTS.

WINGET, SPADAFORA & SCHWARTZBERG, LLP, NEW YORK CITY (ALEXANDER A. TRUITT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Daniel G. Barrett, A.J.), entered June 21, 2019. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action against defendants Centra Financial Group, Inc., Hornor Townsend & Kent, Inc. (HTK), and The Penn Mutual Life Insurance Company (Penn Mutual), alleging causes of action for fraudulent inducement, fraud, constructive fraud, unjust enrichment, and rescission, all arising from the sale of a joint and survivor life annuity policy (annuity) to plaintiff and his late wife. Defendants moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (1) and (7). Defendants now appeal from an order that, inter alia, denied those parts of the motion with respect to the causes of action for fraud, fraudulent inducement, constructive fraud, and rescission. We affirm.

In assessing "a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Affording the allegations in the amended complaint every possible favorable inference (*see Palladino v CNY*

Centro, Inc., 70 AD3d 1450, 1451 [4th Dept 2010]), we conclude that Supreme Court properly denied those parts of defendants' motion seeking dismissal of the causes of action for fraud, fraudulent inducement, and constructive fraud pursuant to CPLR 3211 (a) (7).

Here, the amended complaint alleged, inter alia, that defendants' employees and agents, with intent to induce plaintiff's reliance, falsely represented to plaintiff that the subject annuity was a sound and appropriate investment while knowing that, "without the corresponding life insurance or other risk protection[, the annuity] would almost certainly result in a loss to . . . [p]laintiff and [a] windfall to [d]efendants." Plaintiff alleged damages in the amount of $1,024,688.90. We therefore conclude that plaintiff has sufficiently stated a claim for fraud by alleging "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Gallagher v Ruzzine*, 147 AD3d 1456, 1457 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]; *see generally* CPLR 3016 [b]).

We further conclude that plaintiff has sufficiently stated a claim for fraudulent inducement. The amended complaint alleged detrimental reliance on a material representation known to be false (*see Gelmac Quality Feeds, Inc. v Ronning*, 23 AD3d 1019, 1020 [4th Dept 2005]), and plaintiff pleaded with the requisite specificity the alleged misrepresentations made by defendants (*see Stevens v Perrigo*, 122 AD3d 1430, 1432 [4th Dept 2014]; *see generally* CPLR 3016 [b]) and also alleged compensable damages resulting from defendants' fraud (*see Southwestern Invs. Group, LLC v JH Portfolio Debt Equities, LLC*, 169 AD3d 1510, 1511 [4th Dept 2019]; *see also Wright v Selle*, 27 AD3d 1065, 1067 [4th Dept 2006]). Plaintiff has also sufficiently stated a claim for constructive fraud inasmuch as the amended complaint alleged the existence of a fiduciary relationship between plaintiff and defendants (*see Klembczyk v DiNardo*, 265 AD2d 934, 935 [4th Dept 1999]; *see also Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 99 [1st Dept 1997]).

Defendants further contend that the court erred in refusing to dismiss the causes of action sounding in fraud on the ground that those claims were conclusively negated by documentary evidence before the court, specifically a letter attached to the amended complaint. To the extent that defendants contend that the letter constituted documentary evidence warranting dismissal pursuant to CPLR 3211 (a) (1), we reject that contention (*see generally Porat v Rybina*, 177 AD3d 632, 633 [2d Dept 2019]). Further, although we agree with defendants that the court erred in refusing to consider the letter in support of that part of their motion seeking dismissal of the fraud causes of action pursuant to CPLR 3211 (a) (7), we nevertheless conclude that dismissal is not warranted inasmuch as the letter does not "establish conclusively that . . . plaintiff has no cause of action" (*Jeanty v State of New York*, 175 AD3d 1073, 1074 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020] [internal quotation marks omitted]; *see generally Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 88-91

[4th Dept 2015]).

Defendants also contend that the court erred in denying that part of their motion seeking to dismiss the cause of action for rescission because plaintiff seeks monetary damages. We reject that contention. Pursuant to CPLR 3002 (e), "[a] claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction, shall not be deemed inconsistent with a claim for rescission or based upon rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; but such complete relief shall not include duplication of items of recovery."

Defendants further contend that plaintiff failed to state a claim against HTK and Penn Mutual because neither company made any statement to plaintiff. We reject that contention inasmuch as plaintiff has properly pleaded agency liability against HTK and Penn Mutual (*see generally Kirschner v KPMG LLP*, 15 NY3d 446, 465-466 [2010]; *Chaikovska v Ernst & Young, LLP*, 78 AD3d 1661, 1663 [4th Dept 2010]).

Finally, we have considered defendants' remaining contentions and conclude that they lack merit.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

932

KA 17-00556

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER PEARSON, DEFENDANT-APPELLANT.

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

CHRISTOPHER PEARSON, DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 29, 2016. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, attempted assault in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and assault in the second degree (§ 120.05 [2]).

Defendant contends in his main and pro se supplemental briefs that the evidence is legally insufficient to establish that he had the intent to cause the death of the victim or the intent to cause serious physical injury to the victim. By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Hunt*, 185 AD3d 1531, 1532 [4th Dept 2020]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the conviction of attempted murder in the second degree and attempted assault in the first degree is based on legally sufficient evidence (*see People v Caldwell*, 98 AD3d 1272, 1272-1273 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]; *People v Payne*, 71 AD3d 1289, 1291-1292 [3d Dept 2010], *lv denied* 15 NY3d 777 [2010]). The evidence submitted by the People established that defendant and another man went to the

victim's house, where defendant and the victim had a verbal argument. Defendant then directed the other man to "shoot that bitch." The victim and two witnesses testified that the man with defendant fired in the victim's direction multiple times, striking her once. The victim was standing on her porch, and the man firing the gun was standing close by in the street. The jury could thereby infer from the evidence a shared intent to cause the victim's death and to cause serious physical injury (*see People v Harper*, 132 AD3d 1230, 1232 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]; *People v Menese*, 210 AD2d 22, 22-23 [1st Dept 1994], *lv denied* 85 NY2d 912 [1995]; *see generally People v Steinberg*, 79 NY2d 673, 682 [1992]). In addition, viewing the evidence in light of the elements of the crimes of attempted murder in the second degree and attempted assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends in his main brief that the verdict is inconsistent insofar as the jury found him guilty of both the attempted murder count and the attempted assault count. He further contends in his main and pro se supplemental briefs that County Court should have submitted those counts to the jury in the alternative. Defendant's contentions are not preserved for our review because he did not object to the court's charge and did not object to the verdict as inconsistent before the jury was discharged (*see People v Simmons*, 155 AD2d 893, 893 [4th Dept 1989], *lv denied* 75 NY2d 818 [1990]). In any event, defendant's contentions are without merit. "One may harbor, at the same time, both an intent to cause serious physical injury and an intent to cause death" (*People v McDavis*, 97 AD2d 302, 305 [4th Dept 1983], *lv denied* 61 NY2d 910 [1984]).

Defendant's contention in his main brief that he was denied due process of law when a witness made an in-court identification of him despite the fact that the court precluded that identification as the result of an unduly suggestive pretrial identification is not preserved for our review (*see People v Roberson*, 133 AD3d 793, 793 [2d Dept 2015], *lv denied* 27 NY3d 968 [2016]). In any event, the error is harmless inasmuch as the evidence is overwhelming and there is no reasonable possibility that the error might have contributed to defendant's conviction (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). Defendant's identity as the man arguing with the victim before she was shot was not at issue at trial (*see People v Adams*, 53 NY2d 241, 251-252 [1981]; *People v Davis*, 15 AD3d 930, 931 [4th Dept 2005], *lv denied* 5 NY3d 761 [2005]).

Defendant's contention in his main brief that the sentence constitutes cruel and unusual punishment is not preserved for our review (*see People v Pena*, 28 NY3d 727, 730 [2017]; *People v Bailey*, 181 AD3d 1172, 1175 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020]). Finally, contrary to defendant's contention in his main brief, the

sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

952

KA 17-00193

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BASHAN H. BRADY, DEFENDANT-APPELLANT.

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

BASHAN H. BRADY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 8, 2016. The judgment convicted defendant upon a jury verdict of robbery in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]), defendant contends in his main brief that the conviction is not supported by legally sufficient evidence that he was present at and involved in the robbery and that the victim sustained a physical injury. We reject that contention. The People presented evidence that the victim knew defendant from previous interactions with him and that, while the victim was seated in his car, he was approached by defendant and another individual, who began punching the victim from either side of the driver's seat and then took his property (*see generally People v Ettleman*, 109 AD3d 1126, 1127-1128 [4th Dept 2013], *lv denied* 22 NY3d 1198 [2014]). Further, the victim's testimony that he suffered injuries to his finger, requiring 8 to 10 stitches, as well as injuries to his head and neck, which he testified were "quite painful," is legally sufficient to establish that his pain was substantial, i.e., "more than slight or trivial," and thus that he sustained a physical injury at the hand of defendant (*People v Kraatz*, 147 AD3d 1556, 1557 [4th Dept 2017] [internal quotation marks omitted]). 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 also reject defendant's contention that the verdict is against the weight of the evidence (*see generally*

People v Bleakley, 69 NY2d 490, 495 [1987]).

We reject defendant's contention, raised in his main brief, that County Court erred in refusing to substitute counsel in place of his assigned attorney. A court's duty to consider a motion to substitute counsel is invoked only when a defendant makes a "seemingly serious request[]" for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; *see People v Sides*, 75 NY2d 822, 825 [1990]). When a defendant makes "specific factual allegations of serious complaints about counsel," the court must make at least a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]; *see People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]). Upon conducting that inquiry, the court may substitute counsel only where good cause is shown (*see Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 825; *Gibson*, 126 AD3d at 1302). Here, defendant's request for substitution was based on conclusory assertions that he and defense counsel disagreed about trial strategy and that defense counsel had not spoken to him often enough about the case. Those assertions were insufficient to require an inquiry by the court (*see People v Barnes*, 156 AD3d 1417, 1418 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]; *People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *People v Benson*, 265 AD2d 814, 814-815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]). Nevertheless, the court conducted an inquiry in which it permitted defendant to "articulate his complaints about defense counsel" (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]), following which the court properly denied defendant's request inasmuch as good cause does not exist where, as here, "on the eve of trial, disagreements over trial strategy generate discord" (*People v Linares*, 2 NY3d 507, 511 [2004]; *see Porto*, 16 NY3d at 101-102; *People v Medina*, 44 NY2d 199, 208 [1978]) or where defendant makes only generic complaints concerning a lack of communication with defense counsel (*see People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]).

Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe (*see People v Bonner*, 79 AD3d 1790, 1791 [4th Dept 2010], *lv denied* 17 NY3d 792 [2011]).

Defendant contends in his pro se supplemental brief that he was deprived of his right to testify before the grand jury because he was assigned an attorney after he was indicted. Defendant did not provide a factual record sufficient to enable us to review his contention (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *People v Dixon*, 37 AD3d 1124, 1124 [4th Dept 2007], *lv denied* 10 NY3d 764 [2008]; *People v Harden*, 6 AD3d 181, 182 [1st Dept 2004], *lv denied* 3 NY3d 641 [2004]). Even assuming, arguendo, that defendant was without counsel when the matter was presented to the grand jury, we would nevertheless conclude that reversal is not required inasmuch as defendant did not seek dismissal of the indictment on the ground that he was deprived of his statutory right to testify before the grand jury (*see Dixon*, 37 AD3d at 1124; *cf. People v Backman*, 274 AD2d 432, 433 [2d Dept 2000]; *see*

generally People v Johnston, 178 AD2d 550, 550-551 [2d Dept 1991]).

We have considered defendant's remaining contention in his pro se supplemental brief and conclude that it does not warrant modification or reversal of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

954

KA 16-01405

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID L. BRINSON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 6, 2016. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree (three counts) and criminal possession of a controlled substance in the third degree (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 reducing the sentence of imprisonment imposed on each count to a determinate term of imprisonment of eight years and directing that the sentences shall run concurrently with each other, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and four counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends that the record fails to establish that his plea was knowing, voluntary, and intelligent because he did not recite any of the underlying facts of the crimes and merely provided monosyllabic responses to County Court's questions. We conclude that "defendant failed to preserve that challenge for our review by moving to withdraw the plea or . . . to vacate the judgment of conviction" (*People v Jamison*, 71 AD3d 1435, 1436 [4th Dept 2010], *lv denied* 14 NY3d 888 [2010]; *see People v Lopez*, 71 NY2d 662, 665 [1988]; *People v Gordon*, 98 AD3d 1230, 1230 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012]). In any event, we further conclude that "[d]efendant's monosyllabic responses to [the court's] questions did not render the plea invalid . . . Moreover, there is no requirement that a defendant personally recite the facts underlying his or her crime[s] during the plea colloquy" (*People v Bullock*, 78 AD3d 1697, 1698 [4th Dept 2010], *lv denied* 16 NY3d 742 [2011] [internal quotation

marks omitted]; *see People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Bailey*, 49 AD3d 1258, 1259 [4th Dept 2008], *lv denied* 10 NY3d 932 [2008]). To the extent that defendant's further contention that he was denied effective assistance of counsel survives his guilty plea (*see People v Barnes*, 32 AD3d 1250, 1251 [4th Dept 2006]), it "involves strategic discussions between defendant and his attorney outside the record on appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10" (*People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *see People v Barnes*, 56 AD3d 1171, 1171-1172 [4th Dept 2008]).

We agree with defendant, however, that the sentence of nine years' imprisonment on each count is unduly harsh and severe under the circumstances of this case. Initially, we note that the People's contention that defendant waived his right to appeal the conviction and sentence is not supported by the record.

With respect to the merits, 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 we 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]). Here, the court initially promised to sentence defendant to a concurrent eight-year determinate term of imprisonment on each count of the indictment and agreed to release him until 9:00 a.m. on the ensuing Monday to allow him to attend his mother's wedding on the intervening weekend. Defendant accepted the plea offer and was released as promised but did not surrender himself to the jail until 5:30 p.m. on the appointed date. Nevertheless, the record establishes that he surrendered voluntarily and that he called the jail prior to the appointed time and reported that he was having transportation difficulties. In addition, the record establishes that defendant has a lengthy record, but no violent felonies, and that he had not been arrested in the 10 years preceding these incidents, which involve sale and possession of small amounts of cocaine. Under these circumstances, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence of imprisonment imposed under each count of the indictment to a determinate term of eight years, to be followed by the three years of postrelease supervision imposed by the court, and directing that the sentences run concurrently with each other.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

956

CA 19-01846

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

PAMELA L. RIDER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RAINBOW MOBILE HOME PARK, LLP, ET AL., DEFENDANTS,
AND HOMETTE CORPORATION, DEFENDANT-APPELLANT.

THORN GERSHON TYMANN AND BONANNI, LLP, ALBANY (BRIAN P. HENCHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (BRIAN G. STAMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered September 30, 2019. The order, insofar as appealed from, denied in part the motion of defendant Homette Corporation to dismiss the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking dismissal of the negligence cause of action against defendant Homette Corporation except insofar as it alleges that Homette Corporation performed negligent repairs on or about January 27, 2017, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting, inter alia, a cause of action for negligence alleging that Homette Corporation (defendant) negligently designed, manufactured, constructed, and repaired a house that plaintiff bought through a third party. In lieu of answering, defendant moved to dismiss the amended complaint against it, asserting among its grounds that the negligence cause of action was time-barred by the three-year statute of limitations (*see* CPLR 214 [4]). On appeal, defendant contends that Supreme Court erred in denying that part of the motion seeking dismissal of the negligence cause of action against it.

On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired (*see Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]; *Collins v Davirro*, 160 AD3d 1343, 1343-1344 [4th Dept 2018]). Here, defendant met its burden of establishing that the three-year limitations period had expired. Plaintiff commenced this action on March 14, 2019, and thus any claims arising from injury that occurred prior to March 14, 2016, are time-

barred (*see Brooks v AXA Advisors, LLC* [appeal No. 2], 104 AD3d 1178, 1180 [4th Dept 2013], *lv denied* 21 NY3d 858 [2013]). Although the date or dates of injury are not evident from the face of the amended complaint, defendant's submission in support of the motion established that the last date on which its agent or agents attempted repairs was June 1, 2015, thereby establishing that the three-year limitations period had expired by the time plaintiff commenced the action (*see Franqui v Korol*, 154 AD3d 742, 743 [2d Dept 2017]).

The burden then shifted to plaintiff to " 'aver evidentiary facts' . . . 'establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies' " (*Arnell Constr. Corp. v New York City Sch. Constr. Auth.*, 186 AD3d 543, 543-544 [2d Dept 2020]). Plaintiff met that burden by submitting an affidavit in which she averred that an employee of defendant attempted repairs to the house on January 27, 2017—within the applicable limitations period—when he "went underneath the house and disassembled sections of the underbelly . . . and improperly reassembled those sections leaving them in a worse condition than when he arrived" (*see U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1040 [4th Dept 2020]). However, plaintiff failed to raise a question of fact whether the statute of limitations had expired with respect to her claims of negligent design, manufacture, or construction, and the court thus erred in denying that part of the motion seeking dismissal of those claims (*see Loscalzo v 507-509 President St. Tenants Assn. Hous. Dev. Fund Corp.*, 153 AD3d 614, 616 [2d Dept 2017], *lv denied* 30 NY3d 905 [2017]). We therefore modify the order by granting that part of the motion seeking dismissal of the negligence cause of action against defendant except insofar as it alleges that defendant performed negligent repairs on or about January 27, 2017.

Defendant's contention that the claims of negligent design and manufacture are barred by the economic loss doctrine (*see generally Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, 84 NY2d 685, 693 [1995]) is academic.

We reject defendant's further contention that the claim of negligent repair is barred by documentary evidence, i.e., service records documenting defendant's efforts to repair the home, an affidavit of defendant's service manager, and certain in-court remarks by counsel for a codefendant. A motion to dismiss pursuant to CPLR 3211 (a) (1) may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017]). "Documentary evidence 'must be unambiguous, authentic, and undeniable' " (*Porat v Rybina*, 177 AD3d 632, 633 [2d Dept 2019]; *see VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). Examples of documentary evidence are judicial records, contracts, deeds, wills, and mortgages, but not affidavits or deposition testimony (*see Amsterdam Hospitality Group, LLC v*

Marshall-Alan Assoc., Inc., 120 AD3d 431, 432 [1st Dept 2014]; *see Porat*, 177 AD3d at 633). Here, the only documents that arguably qualify as "documentary" within the meaning of CPLR 3211 (a) (1) are the service records. Those records refute plaintiff's allegations only if we accept them to be a complete record of all repairs made by defendant at the house; however, we cannot say whether the service records are complete without consulting the affidavit of defendant's service manager, which is not documentary evidence (*see Amsterdam Hospitality Group, LLC*, 120 AD3d at 432). Thus, we conclude that the documents submitted in support of defendant's motion " 'failed to utterly refute . . . plaintiff's allegations or conclusively establish a defense as a matter of law' " (*Lots 4 Less Stores, Inc.*, 152 AD3d at 1183).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

957

CA 19-01968

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

PATRICK WARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CORNING PAINTED POST AREA SCHOOL DISTRICT,
ORMSBY IRON, LLC, STREETER ASSOCIATES, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

STREETER ASSOCIATES, INC., THIRD-PARTY PLAINTIFF,

V

TAP STEEL, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Ann Marie Taddeo, J.), entered August 30, 2019. The order, inter alia, denied the motion of plaintiff for partial summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law §§ 200, 240 (1), 241 (6), and common-law negligence action to recover damages for injuries he sustained when he fell from an extension ladder while carrying a 10-foot metal “pour stop” to the second floor of a building at a construction site. Plaintiff appeals from an order that, inter alia, denied that part of his motion seeking partial summary judgment on the issue of liability with respect to his section 240 (1) claim and granted those parts of the cross motions of Corning Painted Post Area School District, Ormsby Iron, LLC, and Streeter Associates, Inc. (collectively, defendants) seeking summary judgment dismissing plaintiff’s section 241 (6) claim. We affirm.

We reject plaintiff’s contention that Supreme Court erred in

denying that part of his motion with respect to the Labor Law § 240 (1) claim. Plaintiff failed to meet his initial burden on the motion inasmuch as his own submissions in support of the motion raised an issue of fact whether his conduct in "refusing to use available, safe and appropriate equipment" was the sole proximate cause of the accident (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015] [internal quotation marks omitted]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Specifically, plaintiff submitted deposition testimony establishing the availability at the site of safer means for moving the pour stop, including a forklift and ropes that could have been used to lift or hoist the pour stop to the second floor. Deposition testimony also established that plaintiff could have handed the pour stop to a coworker on the second level. The foreman testified that he told plaintiff not to transport materials to the second floor by carrying items up the ladder. Plaintiff testified that he knew he should climb a ladder only when he was able to maintain three points of contact with the ladder and admitted that he was not able to do so while carrying the pour stop. Thus, we conclude that there is a triable issue of fact "whether plaintiff, based on his training, prior practice, and common sense, knew or should have known" not to carry the pour stop by hand up the ladder and to use other means available to him (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427 [4th Dept 2007]; *cf. Smith v Picone Constr. Corp.*, 63 AD3d 1716, 1716-1717 [4th Dept 2009]).

We reject plaintiff's contention that the court erred in granting those parts of defendants' cross motions with respect to the Labor Law § 241 (6) claim, which is premised on alleged violations of 12 NYCRR 23-1.7 (f) and 12 NYCRR 23-6.2.

12 NYCRR 23-1.7 (f) provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." Defendants submitted evidence establishing that, at the time of the incident, the work had not yet progressed to the point that it was appropriate to install a temporary stair tower. Further, there is no dispute that the ladder provided as a means of access to the second floor was not defective in that regard. Thus, defendants met their burden of establishing as a matter of law that they did not violate that regulation and that any alleged violation was not a proximate cause of plaintiff's injuries (*cf. Baker v City of Buffalo*, 90 AD3d 1684, 1685-1686 [4th Dept 2011]), and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562).

Defendants also met their initial burden on their cross motions of establishing that 12 NYCRR 23-6.2, which is entitled "Rigging, rope and chains for material hoists" and concerns standards for hoisting, is inapplicable to the facts of this case because plaintiff was not hoisting the pour stop at the time of the incident (*see Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 821-822 [2d Dept 2017]; *Soles v*

Eastman Kodak Co., 162 Misc 2d 406, 409 [Sup Ct, Monroe County 1994], *affd* 216 AD2d 973 [4th Dept 1995]), and plaintiff failed to raise a triable issue of fact in opposition.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

958

TP 19-00574

PRESENT: SMITH, J.P., CARNI, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF EL AGAVE MEXICAN GRILL, INC., DOING BUSINESS AS AGAVE MEXICAN GRILL AND ALFREDO RAMIREZ, OWNER, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, ON BEHALF OF AMY LYNN GAGLIANO, RESPONDENT-PETITIONER, AND AMY LYNN GAGLIANO, RESPONDENT.

LELAND T. WILLIAMS, ROCHESTER, FOR PETITIONER-RESPONDENT ALFREDO RAMIREZ.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Debra A. Martin, A.J.], entered June 27, 2017) to review a determination of respondent-petitioner New York State Division of Human Rights. The determination found that petitioners-respondents unlawfully discriminated against respondent Amy Lynn Gagliano.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioners-respondents are directed to pay respondent Amy Lynn Gagliano the sum of $9,543.31 for lost wages with interest at the rate of 9% per annum commencing October 14, 2013, and $2,500 for mental anguish with interest at the rate of 9% per annum commencing March 29, 2016, and to pay the Comptroller of the State of New York the sum of $5,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing March 29, 2016.

Memorandum: Petitioners-respondents (petitioners) commenced this proceeding pursuant to Executive Law § 298 and CPLR article 78 seeking to annul the determination of respondent-petitioner, New York State Division of Human Rights (SDHR), that petitioners unlawfully discriminated against respondent Amy Lynn Gagliano (complainant) by constructively discharging her from her employment as a waitress at petitioners' restaurant based on complainant's pregnancy. SDHR awarded complainant $9,543.31 for lost wages and $2,500 in compensatory damages for emotional distress and mental anguish and imposed a civil penalty of $5,000 against petitioners. SDHR filed a

cross petition seeking to confirm and enforce the determination.

We conclude that SDHR's determination, which adopted the findings of the Administrative Law Judge (ALJ), is supported by substantial evidence that petitioners discriminated against complainant based on her pregnancy (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1656 [4th Dept 2018]; *see also Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 330 [2003]). The ALJ credited the testimony of complainant, who stated that the individual petitioner told her that she would not remain on the shift schedule of the restaurant because of her pregnancy. Although the individual petitioner told complainant that the removal decision had been made by a newly-hired manager, the individual petitioner admitted during his hearing testimony that he and another waitress were responsible for scheduling decisions and that the alleged newly-hired manager was merely a substitute waiter who had worked for the restaurant for only four or five weeks. We see no reason to disturb the ALJ's resolution of the credibility issues before him (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *Stellar Dental Mgt. LLC*, 162 AD3d at 1657).

Contrary to petitioners' contention, the individual petitioner may be held liable for the discrimination inasmuch as he is the sole owner of the corporate petitioner and was a perpetrator of the discrimination against complainant (*see Matter of West Taghkanic Diner II, Inc. v New York State Div. of Human Rights*, 105 AD3d 1106, 1109 [3d Dept 2013]; *Matter of New York State Div. of Human Rights v Nancy Potenza Design & Bldg. Servs., Inc.*, 87 AD3d 1365, 1365-1366 [4th Dept 2011]; *see also Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]).

Contrary to petitioners' further contention, the monetary awards and civil penalty are proper. The award for lost wages is reasonably related to the discriminatory conduct and is supported by the evidence (*see Matter of New York State Div. of Human Rights v Independent Auto Appraisers, Inc.*, 78 AD3d 1541, 1542 [4th Dept 2010]; *see also Nancy Potenza Design & Bldg. Servs., Inc.*, 87 AD3d at 1366). The award for emotional distress and mental anguish is supported by substantial evidence in the form of complainant's testimony, is reasonably related to the wrongdoing, and is comparable to awards in similar cases (*see Matter of KT's Junc., Inc. v New York State Div. of Human Rights*, 74 AD3d 1910, 1911 [4th Dept 2010]; *Matter of Young Fu Hsu v New York State Div. of Human Rights*, 241 AD2d 913, 913 [4th Dept 1997]; *see also Stellar Dental Mgt. LLC*, 162 AD3d at 1658). Furthermore, we conclude that the civil penalty does not constitute an abuse of discretion, particularly in light of petitioners' constructive discharge of the pregnant complainant, which thrust her into a state of emotional and financial distress (*see Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014]; *see generally Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]).

We have examined petitioners' remaining contentions and conclude that they do not require a different result.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

972

KA 19-00007

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GENESIS COLON, ALSO KNOWN AS GENESIS COLON-LOPEZ,
DEFENDANT-APPELLANT.

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

SANDRA J. DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered December 3, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), kidnapping in the first degree, burglary in the first degree, robbery in the first degree, robbery in the second degree, tampering with physical evidence and criminal possession of marihuana 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 directing that all sentences except the sentence imposed on the count of tampering with physical evidence (Penal Law § 215.40 [2]) shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), and one count each of kidnapping in the first degree (§ 135.25 [3]), burglary in the first degree (§ 140.30 [4]), robbery in the first degree (§ 160.15 [4]) and tampering with physical evidence (§ 215.40 [2]). Before trial, defendant sought suppression of all evidence seized in connection with search warrants for her vehicle and her residence, which were issued on May 13, 2017 and May 15, 2017, respectively. She did not raise any challenge to the other six warrants issued during the criminal investigation. Supreme Court rejected defendant's contentions related to those two warrants and determined that a warrant issued for a particular iCloud account was valid. The court therefore refused to suppress evidence obtained as a result of those warrants.

Contrary to defendant's contentions, the warrants for her vehicle and residence were supported by the requisite probable cause and the

hearsay information of a confidential informant (CI) used in the search warrant applications satisfied both prongs of the *Aguilar-Spinelli* test. The reliability of the CI was established by the officers' statements that the CI had given credible and accurate information in the past (*see People v Rodriguez*, 52 NY2d 483, 489 [1981]; *see generally People v Barnes*, 139 AD3d 1371, 1373 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]), and the CI's basis of knowledge was established because the police investigation corroborated the information provided by the CI (*see People v Bigelow*, 66 NY2d 417, 423-424 [1985]; *Barnes*, 139 AD3d at 1373).

Even assuming, arguendo, that defendant's challenge to the iCloud warrant is preserved for our review because its validity was expressly decided by the court (*see* CPL 470.05 [2]), we nevertheless conclude that any error in refusing to suppress evidence obtained as a result of that warrant is harmless beyond a reasonable doubt (*see People v Couser*, 12 AD3d 1040, 1042 [4th Dept 2004], *lv denied* 4 NY3d 762 [2005]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). The evidence of defendant's guilt is overwhelming, and there is no reasonable possibility that the error contributed to defendant's conviction (*see Crimmins*, 36 NY2d at 237). No evidence obtained from the iCloud account appears to have been used at defendant's trial.

We reject defendant's further contention that she was denied effective assistance of counsel based on defense counsel's failure to challenge the remaining search warrants. All of the remaining warrant applications generally contained the same allegations as the warrants we have determined were properly issued, and "[t]here can be no denial of effective assistance of trial counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]).

Defendant contends that numerous evidentiary errors, either individually or cumulatively, deprived her of a fair trial. We reject that contention. Even assuming, arguendo, that the People failed to lay an adequate foundation for the content from Facebook messenger accounts (*see People v Upson*, 186 AD3d 1270, 1271 [2d Dept 2020]; *cf. People v Serrano*, 173 AD3d 1484, 1487-1488 [3d Dept 2019], *lv denied* 34 NY3d 937 [2019]; *see generally People v Price*, 29 NY3d 472, 476 [2017]), we conclude that "the admission of such evidence was harmless as the evidence of . . . defendant's guilt was overwhelming, and there was no significant probability that the error contributed to . . . defendant's conviction[]" (*Upson*, 186 AD3d at 1271; *see generally Crimmins*, 36 NY2d at 241-242).

Defendant further contends that the court erred in permitting the People to elicit testimony that the owner and landlord of a codefendant's apartment had died from natural causes before trial because such testimony would cause the jury to speculate about how the landlord died and would prejudice defendant. That contention is not preserved for our review inasmuch as defendant failed to object to the

testimony on that ground (*see People v Johnson*, 184 AD3d 1102, 1104 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]). In any event, we have reviewed that contention as well as defendant's other evidentiary challenge, and we conclude that they lack merit.

At trial, defendant moved for a trial order of dismissal on the murder counts, contending that she was not present in the basement when the murder was committed and that there was no proof that she "had anything to do with the commission of the murder." Assuming, arguendo, that such a motion was "sufficiently specific" to preserve for our review her appellate contention that she lacked the requisite intent to commit murder in the second degree (*People v Dalton*, 164 AD3d 1645, 1646 [4th Dept 2018], *lv denied* 32 NY3d 1170 [2019]), we conclude that the contention lacks merit. Defendant's intent to kill the victim is readily inferable from her conduct and the surrounding circumstances (*see People v Spencer*, 181 AD3d 1257, 1258 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]). Based on defendant's substantial involvement before, during and after the entire criminal spree, the jury could rationally find that defendant shared the codefendants' intent to kill the victim (*see id.*; *People v Booker*, 53 AD3d 697, 703 [3d Dept 2008], *lv denied* 11 NY3d 853 [2008]; *see generally People v Rossey*, 89 NY2d 970, 972 [1997]). We therefore reject defendant's contention that the evidence of intent is legally insufficient to support the conviction of intentional murder in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence with respect to that count (*see generally Bleakley*, 69 NY2d at 495).

Finally, defendant contends that the sentence is unduly harsh and severe. For the kidnapping and murder counts, defendant was sentenced to concurrent terms of incarceration of 25 years to life. For the burglary and robbery counts, related to the crimes committed at the victim's residence, defendant received determinate terms of incarceration of 15 years. Although those sentences run concurrently with each other, they were directed to run consecutively to the kidnapping and murder sentences. In addition, defendant received an indeterminate term of incarceration of 1⅓ to 4 years for the count of tampering with physical evidence, which was to run consecutively to all other counts.

It is well settled that this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]), and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). Here, the record establishes that defendant, who was 22 years old and gainfully employed at the time of the crimes, had no prior criminal history. In addition, although she was an accessory to the crimes committed at the victim's residence, the evidence establishes that she was one block away during that

incident and did not physically participate in those crimes. There is also evidence suggesting that defendant was the victim of repeated acts of domestic abuse perpetrated by one of the codefendants.

Under the circumstances, we conclude that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all sentences except the sentence imposed on the count of tampering with physical evidence run concurrently with each other (*see* CPL 470.15 [6] [b]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

994

KA 18-01614

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY L. BARR, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered August 13, 2018. The judgment convicted defendant, upon a plea of guilty, of assault 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 assault in the first degree (Penal Law § 120.10 [1]). Contrary to defendant's initial contention, the Court of Appeals has rejected the assertion that waivers of the right to appeal should be invalid per se (*see People v Thomas*, 34 NY3d 545, 557-558, 558 n 1 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 8-9 [1989]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe. Furthermore, we conclude that County Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019], *lv denied* 34 NY3d 1132 [2020]; *People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]), and we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see Rice*, 175 AD3d at 1826).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1005

CA 19-01503

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

JOSEPH DENNIS, PLAINTIFF-APPELLANT,

V ORDER

MARK CERRONE, INC., DEFENDANT-RESPONDENT,
AND VINCENT CERRONE, DEFENDANT.
(APPEAL NO. 1.)

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a decision of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 15, 2019. The decision granted the motion of defendant Mark Cerrone, Inc. for a directed verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1006

CA 19-01769

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

JOSEPH DENNIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VINCENT CERRONE, DEFENDANT,
AND MARK CERRONE, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 28, 2019. The judgment awarded costs to defendant Mark Cerrone, Inc.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion for a directed verdict is denied, the amended complaint against defendant Mark Cerrone, Inc. is reinstated and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained while performing framing work at a residential construction project. Defendant Vincent Cerrone was the owner of the residence, and we previously affirmed that part of an order granting his cross motion for summary judgment dismissing the amended complaint against him (*Dennis v Cerrone*, 167 AD3d 1475 [4th Dept 2018]). Cerrone was also a part owner, general superintendent, and vice president of defendant Mark Cerrone, Inc. (MCI), and several employees of MCI completed work on various aspects of the project. In the prior appeal, we also determined, inter alia, that Supreme Court had erred in granting that part of MCI's cross motion for summary judgment seeking to dismiss the Labor Law § 240 (1) cause of action against it. We noted that MCI had "correctly conceded in its brief and at oral argument that questions of fact exist[ed] with respect to whether it had the requisite authority to control or supervise the work" (*id.* at 1477).

The matter proceeded to a nonjury trial, at which the court granted MCI's motion for a directed verdict. Inasmuch as the proof at trial established that the same triable issues of fact still existed, we conclude that the court erred in directing a verdict in favor of

MCI. "In determining a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and resolve all issues of credibility in favor of the nonmoving party . . . , and may grant the motion only if there is no rational process by which the [factfinder] could find for the plaintiff[] as against the moving defendant" (*Wolf v Persaud*, 130 AD3d 1523, 1524 [4th Dept 2015]; *see Matter of Wright v State of New York*, 134 AD3d 1483, 1484-1485 [4th Dept 2015]). "[T]he trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *see Wright*, 134 AD3d at 1485).

When the evidence is viewed in the light most favorable to plaintiff, the issues of credibility are resolved in his favor, and he is afforded every inference, we conclude that there is a rational process by which a factfinder could find that MCI had either the power to enforce safety standards and choose responsible contractors or the power to coordinate and supervise the overall project as required for liability under Labor Law §§ 240 (1) and 241 (6) (*see generally Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098 [4th Dept 2014]; *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [4th Dept 2007]).

We further conclude that there is a rational process by which a factfinder could determine that MCI is liable under Labor Law § 200 or the common law, i.e., that it had the ability to supervise and control the method and manner of work of plaintiff's employer (*see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]), and that MCI actually exercised such authority (*see generally Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]).

We therefore reverse the judgment, deny the motion, reinstate the amended complaint against MCI, and grant a new trial.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1008

CA 19-00360

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

ERINN BARSKI, DAVID BARSKI AND BARSKI'S XTREME LAZER TAG, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF AURELIUS, DEFENDANT-RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered January 9, 2019. The order granted defendant's motion for summary judgment and dismissed plaintiffs' amended complaint.

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

Memorandum: The individual plaintiffs, the owners of plaintiff Barski's Xtreme Lazer Tag, LLC, entered into a lease for premises in a shopping mall located in defendant Town of Aurelius. Plaintiffs applied for a building permit to enable them to renovate the leased premises, submitting the necessary documentation and plans. Defendant issued the building permit to plaintiffs and, upon completion of the renovations, plaintiffs received a certificate of occupancy. They opened the business, but defendant revoked the certificate of occupancy shortly thereafter, asserting that a specific fire protection system was required. That fire protection system was cost-prohibitive, and plaintiffs had to close the business. Plaintiffs thereafter commenced this action asserting, inter alia, causes of action for negligent misrepresentation and violation of their procedural due process rights. Supreme Court granted defendant's motion to dismiss the amended complaint pursuant to CPLR 3211, and plaintiffs appealed. On appeal, we modified the order by denying the motion in part and reinstating the cause of action for negligent misrepresentation (*Barski v Town of Aurelius*, 147 AD3d 1483, 1484-1485 [4th Dept 2017]). Specifically, we held that, "[a]ffording the allegations in the amended complaint every possible favorable inference[,] . . . plaintiffs have alleged a cause of action for negligent misrepresentation, and they correctly acknowledged that liability may not be imposed without the existence of a special

relationship" (*id*.). After the completion of discovery, defendant moved for summary judgment dismissing the amended complaint pursuant to CPLR 3212, and the court granted that motion. Plaintiffs appeal, and we affirm.

Preliminarily, it is undisputed that, during the events that led to this lawsuit, defendant was acting in a governmental capacity (*see Applewhite v Accuhealth, Inc*., 21 NY3d 420, 425-426 [2013]). "Under the public duty rule, although a municipality owes a general duty to the public at large . . . , this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created" (*Valdez v City of New York*, 18 NY3d 69, 75 [2011]). Therefore, in this case, defendant cannot be held liable unless there existed a special relationship between it and plaintiffs (*see id.*). "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]; *see Applewhite*, 21 NY3d at 426). According to plaintiffs, a special relationship was formed in this case by the second method, i.e., the voluntary assumption of a duty of care by defendant that generated a justifiable reliance by plaintiffs. That method requires plaintiffs to establish "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Valdez*, 18 NY3d at 80 [internal quotation marks omitted]).

Contrary to plaintiffs' contention, as the proponent of the motion for summary judgment, defendant met its initial burden of establishing that there was no voluntary assumption of a duty of care, and plaintiffs failed to raise a triable issue of fact (*see Davis v County of Onondaga*, 31 AD3d 1156, 1157-1158 [4th Dept 2006]; *Emmerling v Town of Richmond*, 13 AD3d 1150, 1151 [4th Dept 2004]; *Yan Shou Kong v Town of Huntington*, 4 AD3d 419, 419-420 [2d Dept 2004]; *see generally Matter of Lo Tempio v Erie County Health Dept*., 17 AD3d 1161, 1162 [4th Dept 2005]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1009

CA 20-00498

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

FOUNDERS PAVILION, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAVILION OPERATIONS, LLC, DEFENDANT-APPELLANT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (AMY SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (JAMES P. NONKES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), entered November 18, 2019. The order and judgment, among other things, granted in part plaintiff's motion for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying those parts of plaintiff's motion seeking summary judgment on its first and second causes of action with respect to liability for the amount owed as a result of the audit performed by the Office of the Medicaid Inspector General and the release and allocation of the escrow funds and vacating the declaration with respect to the release and allocation of the escrow funds, and as modified the order and judgment is affirmed without costs.

Memorandum: This appeal arises from plaintiff's sale of a skilled nursing facility (facility) to defendant pursuant to an asset purchase agreement (APA) in which the parties detailed which assets and liabilities of the facility would be retained by plaintiff or be transferred to defendant. The APA stated that plaintiff would retain certain "excluded assets," including funds received post-sale as a result of Medicaid rate appeals arising from services rendered prior to the effective date of the APA. After the APA's effective date, the State of New York entered into a universal settlement agreement with various skilled nursing facilities, including the facility at issue in this case. The universal settlement agreement was executed at a time when the State was transitioning to a new Medicare reimbursement methodology, and provided that "the State desires, in exchange for the cessation of the Facilities' pending rate appeals and pending litigation that dispute or contest all aspects of the prior reimbursement methodology . . . to settle any claims or counterclaims it may have against the Facilities relating to the prior reimbursement

methodology . . . and to pay to the Facilities' current and former owners, as appropriate, $850 million . . . as such sum is allocated among the Nursing Home Facilities themselves." From that sum of $850 million, the universal settlement agreement allocated over $644,000 to the facility.

The APA further provided that liability for "all overpayment or audit liabilities" would be retained by the party who provided the services resulting in the overpayment "unless such overpayments or audit liabilities result[ed] from . . . [the] acts or omissions" of the other party. Following the sale of the facility to defendant, the Office of the Medicaid Inspector General (OMIG) concluded its audit of the facility and found that the facility had been overpaid approximately $165,000 for services rendered during both plaintiff's and defendant's operation of the facility. Because the OMIG audit had been ongoing at the time of the sale, plaintiff had placed $1,000,000 of the purchase price into an escrow account. At the conclusion of the audit, the amount plaintiff owed as a result of the OMIG audit would be withdrawn to offset any audit liability attributable to plaintiff.

Plaintiff commenced this action seeking a declaration that, inter alia, plaintiff is entitled to all of the funds received pursuant to the universal settlement agreement, and is entitled to the funds in the escrow account, minus approximately $55,000 that plaintiff concedes it owes as a result of the OMIG audit. Plaintiff also asserted causes of action for breach of contract and breach of implied duty of good faith and fair dealing. Defendant answered and asserted affirmative defenses and counterclaims. Defendant alleged, inter alia, that plaintiff is liable for the entire amount owed as a result of the OMIG audit and that the funds received pursuant to the universal settlement agreement belong to defendant.

Plaintiff moved for summary judgment, seeking the relief requested in the complaint and dismissal of defendant's affirmative defenses and counterclaims. Defendant cross-moved for summary judgment, seeking, inter alia, release of approximately $165,000 from the escrow on the ground that plaintiff is liable for the full amount owed as a result of the OMIG audit, and a declaration that defendant is the rightful owner of the full amount obtained under the universal settlement agreement. Supreme Court, inter alia, granted those parts of plaintiff's motion seeking summary judgment on its first cause of action, for a declaratory judgment, and second cause of action, for breach of contract, and denied defendant's cross motion. Defendant appeals.

Contrary to defendant's contention, the court properly granted that part of plaintiff's motion seeking a determination that plaintiff is entitled to the entire amount received under the universal settlement agreement. " '[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1529 [4th Dept 2017]; *see Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 31 NY3d 1002, 1006 [2018],

rearg denied 31 NY3d 1141 [2018]). " 'Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous' " (*Auburn Custom Millwork, Inc.*, 148 AD3d at 1529; *see generally Tomhannock, LLC v Roustabout Resources, LLC*, 33 NY3d 1080, 1082 [2019]; *Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). "An agreement is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014] [internal quotation marks omitted]). "[A] party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Auburn Custom Millwork, Inc*., 148 AD3d at 1529 [internal quotation marks omitted]).

Here, the universal settlement agreement, by its terms, provided that the entire $850 million in settlement funds, a portion of which was received by the facility, was allocated "in exchange for the cessation of" pending rate appeals, litigation, claims, and counterclaims arising from the State's prior reimbursement methodology. It is undisputed that the only relevant pending rate appeals regarding the prior reimbursement methodology had been filed by plaintiff, that those appeals arose from services provided by plaintiff during the period when it owned the facility, and that the APA stated that plaintiff was entitled to those sums that, although received after the sale, arose "from services rendered before the effective date" of the APA. In light of the above, we conclude that the universal settlement agreement unambiguously provides that the entire amount of funds received by the facility thereunder was allocated in exchange for the cessation of rate appeals filed by plaintiff for services rendered by plaintiff (*see generally Matter of Shore Winds, LLC v Zucker*, 179 AD3d 1208, 1210 [3d Dept 2020], *lv denied* 35 NY3d 914 [2020]), and that the unambiguous terms of the APA provide that plaintiff is entitled to all such funds.

We agree with defendant, however, that the court erred in granting plaintiff's motion with respect to the release and allocation of the escrow funds inasmuch as there is a question of fact regarding the extent of plaintiff's liability for the amount of overpayment determined by the OMIG audit, and we therefore modify the order and judgment accordingly. Although it is undisputed that the amount of the overpayments, minus the portion for which plaintiff concedes it is liable, pertains to services provided by defendant, there is a question of fact with respect to whether the liability for such overpayments nevertheless resulted from plaintiff's "acts or omissions," thus rendering plaintiff liable for the entire audit amount. Specifically, defendant contends that the overpayments were the result of plaintiff's pre-sale submission of cost reports that resulted in an inflated Medicaid reimbursement rate for services thereafter provided by defendant. The APA provides that a party is liable for overpayments caused by its own acts or omissions, but it does not, however, define what constitutes an "act or omission" under the relevant clause. Under the circumstances of this case, we

conclude that those terms do not "ha[ve] a definite and precise meaning" and that there is a "reasonable basis for a difference of opinion" (*Ellington*, 24 NY3d at 244 [internal quotation marks omitted]) with respect to whether the submission of erroneous cost reports constitutes an "act or omission" as contemplated by the APA, and that the clause is therefore ambiguous (*see Ames v County of Monroe*, 162 AD3d 1724, 1726-1727 [4th Dept 2018]). Because that clause of the APA is ambiguous, we may look to extrinsic evidence (*see id.* at 1726). Nevertheless, although the parties submitted extrinsic evidence, neither party met its respective initial burden on its motion or cross motion "of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Auburn Custom Millwork, Inc.*, 148 AD3d at 1529 [internal quotation marks omitted]; *see Romilly v RMF Prods., LLC*, 106 AD3d 1465, 1466 [4th Dept 2013]; *Morales v Asarese Matters Community Ctr.* [appeal No. 2], 103 AD3d 1262, 1264 [4th Dept 2013], *lv dismissed* 21 NY3d 1033 [2013]; *Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042 [4th Dept 2008]). Thus, we conclude that the court properly denied defendant's cross motion for summary judgment with respect to the issue of liability for the amount owed as a result of the OMIG audit, and that the court erred in granting plaintiff's motion with respect to that issue. In reaching that conclusion, we reject plaintiff's contention that section 8.19 of the APA bars defendant's contention that plaintiff is liable for the entire amount owed as a result of the OMIG audit.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1013

CA 19-02091

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THERESA I. MARIANI, CLAIMANT-APPELLANT,
ET AL., CLAIMANT,

V MEMORANDUM AND ORDER

WILSON CENTRAL SCHOOL DISTRICT,
RESPONDENT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (JOHN B. LICATA OF COUNSEL), FOR CLAIMANT-APPELLANT.

BAXTER SMITH & SHAPIRO, P.C., BUFFALO (LOUIS B. DINGELDEY, JR., OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 21, 2019. The order denied the application of claimants for leave to serve a late notice of claim.

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

Memorandum: Theresa I. Mariani (claimant) appeals from an order that denied claimants' application for leave to serve a late notice of claim alleging that claimant sustained injuries when she slipped and fell on snow and ice in a parking lot owned by respondent. We affirm.

A notice of claim must be served within 90 days after the claim accrues (*see* General Municipal Law § 50-e [1] [a]), although a court may grant leave extending the time to serve the notice of claim (*see* § 50-e [5]). The decision whether to grant such leave requires "consideration of all relevant facts and circumstances," including the "nonexhaustive list of factors" provided in section 50-e (5) (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [respondent] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [respondent] in maintaining a defense on the merits" (*Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169 [4th Dept 2020] [internal quotation marks omitted]). Although no single factor is determinative, " 'one factor that should be accorded great weight is whether the [respondent] received actual knowledge of the

facts constituting the claim in a timely manner' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]; *see Matter of Darrin v County of Cattaraugus*, 151 AD3d 1930, 1931 [4th Dept 2017]). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Matter of Diaz v Rochester-Genesee Regional Transp. Auth. [RGRTA]*, 175 AD3d 1821, 1822 [4th Dept 2019] [internal quotation marks omitted]).

Here, claimant's excuse for the delay, i.e., that she was unaware of the severity of her injury, is unavailing without supporting medical evidence explaining why the effects of that injury took so long to become apparent (*see Diez v Lewiston-Porter Cent. Sch. Dist.*, 140 AD3d 1665, 1665-1666 [4th Dept 2016]). Despite that failure, it is well established that a claimant's inability to demonstrate a reasonable excuse "is not necessarily fatal to the application" to serve a late notice of claim (*Dusch*, 184 AD3d at 1169 [internal quotation marks omitted]). Stated differently, "[a] claimant's failure to demonstrate a reasonable excuse for the delay 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]' " (*Matter of Mary Beth B. v West Genesee Cent. Sch. Dist.*, 186 AD3d 979, 980 [4th Dept 2020]). "The actual knowledge requirement of General Municipal Law § 50-e (5) contemplates actual knowledge of the essential facts constituting the claim, not knowledge of a specific legal theory" (*Dusch*, 184 AD3d at 1170 [internal quotation marks omitted]). Nevertheless, a respondent's "knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim" (*Mary Beth B.*, 186 AD3d at 980 [internal quotation marks omitted]). "It is well established that [k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim" (*Diaz*, 175 AD3d at 1822 [internal quotation marks omitted]). Here, claimants failed to establish that respondent received actual knowledge of the essential facts constituting the claim in a timely manner (*see id.*; *Geneva Assn. of Retired Teachers v Geneva City Sch. Dist.*, 155 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 31 NY3d 902 [2018]). Although we agree with claimant that respondent failed to establish substantial prejudice resulting from the delay (*see generally Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016], *rearg denied* 29 NY3d 963 [2017]), we cannot conclude that the court clearly abused its broad discretion in denying claimants' application inasmuch as claimants failed to provide a reasonable excuse and to establish actual knowledge (*see Diaz*, 175 AD3d at 1822).

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1020

KA 16-00922

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. ZDATNY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 20, 2016. The judgment convicted defendant upon a jury verdict of attempted assault in the first degree, assault in the second degree, attempted robbery in the first degree and attempted robbery 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 sentences of imprisonment imposed for attempted assault in the first degree under count two of the indictment and for attempted robbery in the first degree under count four of the indictment to determinate terms of eight years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), assault in the second degree (§ 120.05 [2]), attempted robbery in the first degree (§§ 110.00, 160.15 [3]), and attempted robbery in the second degree (§§ 110.00, 160.10 [2]). The charges arose from defendant's unsuccessful attempt to rob a cab driver at knifepoint. Sitting behind the victim, defendant pulled out a knife and put it to the victim's neck. The victim grabbed the knife and a struggle ensued during which the vehicle, which had been stopped, started moving and crashed into a tree. During the struggle, the victim sustained a wound to his hand (from grabbing the knife) and a cut on his neck that was not life threatening. Both men then exited the vehicle.

After realizing that the victim had been injured, defendant yelled for help and said, "I did it." Defendant took off his sweatshirt and offered it to the victim to staunch the bleeding. When neighbors and others arrived at the scene, they saw defendant crying

and pleading with them to help the victim. Although no one prevented him from fleeing, defendant remained at the scene until the police arrived and was taken into custody without incident. When approached by the responding officer, defendant said, "Officer, I stabbed him. I was trying to rob him." While in custody, defendant repeatedly asked whether the victim was going to be all right. The victim was given stitches for his wounds and released from the hospital later that night.

The People's initial plea offer to defendant involved him pleading guilty to attempted murder in the second degree with a sentence of between 8 and 10 years. Defendant rejected that offer and went to trial. The jury acquitted defendant of attempted murder but convicted him of the four remaining counts. Supreme Court sentenced defendant to determinate terms of imprisonment of 12 years for attempted assault in the first degree and attempted robbery in the first degree, and to determinate five-year terms of imprisonment for assault in the second degree and attempted robbery in the second degree. All sentences are concurrent.

We agree with defendant that, under the unique circumstances of this case, the sentence is unduly harsh and severe. Defendant was 41 years old when he committed the crimes in this case, and he had previously been convicted of only one other crime, a misdemeanor in 2001 for which he was sentenced to probation. The presentence report indicates that defendant has an extensive history of mental illness and no prior incidents of violence. Defendant expressed extreme remorse about his actions, both in a long letter to the court and orally at sentencing, and the court stated that it believed that every word stated by defendant "is from the heart and is true." This was no doubt a horrific experience for the victim to endure, and defendant deserves stern punishment. In our view, however, 12 years in prison is too severe for this defendant, who is by no means a hardened criminal.

Thus, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentences of imprisonment imposed for attempted assault in the first degree under count two of the indictment and attempted robbery in the first degree under count four of the indictment to determinate terms of eight years (*see* CPL 470.15 [6] [b]), to be followed by the five-year period of postrelease supervision imposed by the court. We note that the sentence as modified is within the sentencing range contemplated by the People's initial plea offer, which was to the top count of the indictment for which defendant was acquitted.

We have reviewed defendant's remaining contentions and conclude that they do not require reversal or further modification of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1031

CA 19-01276

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF CHARLES B. FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Michael L. Dwyer, A.J.), entered May 30, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. The amended order, inter alia, continued petitioner's confinement to a secure treatment facility.

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

Memorandum: Petitioner appeals from an amended order, entered after an annual review hearing held pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We reject petitioner's contention that his due process rights were violated by a delay in holding a hearing in this case (*see Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1134 [4th Dept 2020]; *Matter of State of New York v Kerry K.*, 157 AD3d 172, 181-182 [2d Dept 2017]; *Matter of State of New York v Keith F.*, 149 AD3d 671, 672-673 [1st Dept 2017], *lv denied* 29 NY3d 917 [2017], *appeal dismissed* 30 NY3d 1032 [2017]). The record reflects that much of the delay was attributable to petitioner's request for an independent psychological examiner, the completion of that examiner's report, petitioner's request to proceed pro se, and petitioner's motion to dismiss, all of which are not chargeable to respondent (*see Wayne J.*, 184 AD3d at 1134).

Petitioner contends that Supreme Court erred in allowing respondent's expert witness to provide testimony based on hearsay

evidence concerning petitioner's criminal history. Petitioner was indicted on charges stemming from four incidents that occurred in 1997, and he pleaded guilty to sexual abuse in the first degree and sexual abuse in the second degree in connection with two of those incidents. Petitioner contends that the expert witness should not have relied upon the other two incidents because he did not plead guilty to those charges and there is no indication that those charges were satisfied by his guilty plea. It is well settled that hearsay basis evidence is admissible in Mental Hygiene Law article 10 proceedings if the evidence is reliable and the probative value in assisting the factfinder to evaluate the expert's opinion outweighs its prejudicial effect (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109 [2013]). "Criminal charges that resulted in neither acquittal nor conviction require close scrutiny" (*id.* at 110; *see Matter of State of New York v John S.*, 23 NY3d 326, 343 [2014], *rearg denied* 24 NY3d 933 [2014]).

We agree with petitioner that the allegations underlying the two charges at issue "are not supported by an admission from [petitioner] or extrinsic evidence substantiating those allegations" (*John S.*, 23 NY3d at 343), but we conclude that the court, as the trier of fact, was "presumed to be able to distinguish between admissible evidence and inadmissible evidence [and to abide by the limited purpose of hearsay evidence when admitted] and to render a determination based on the former" (*Matter of State of New York v Bass*, 119 AD3d 1356, 1357 [4th Dept 2014], *lv denied* 24 NY3d 908 [2014], *cert denied* 575 US 941 [2015] [internal quotation marks omitted]; *see Matter of State of New York v Breeden*, 140 AD3d 1649, 1650 [4th Dept 2016]). In any event, we further conclude that any error was harmless. "[T]here is no reasonable possibility that, had the [hearsay testimony] been excluded, the court would have reached a different determination" (*Breeden*, 140 AD3d at 1650 [internal quotation marks omitted]; *see John S.*, 23 NY3d at 348-349; *Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1349-1350 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

We reject petitioner's contention that the evidence is legally insufficient to establish that he is a dangerous sex offender requiring confinement. Pursuant to the Mental Hygiene Law, a person is classified as a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). Respondent established by clear and convincing evidence that petitioner continues to suffer from a mental abnormality inasmuch as it presented evidence establishing that petitioner has been diagnosed with exhibitionistic disorder, bipolar I disorder, cannabis use

disorder, and antisocial personality disorder, and provisionally diagnosed with unspecified paraphilic disorder, which, along with his high degree of psychopathy, predispose him to commit sex offenses and result in serious difficulty in controlling such conduct (*see Matter of Luis S. v State of New York*, 166 AD3d 1550, 1551-1552 [4th Dept 2018], *appeal dismissed* 35 NY3d 985 [2020]; *Matter of Vega v State of New York*, 140 AD3d 1608, 1609 [4th Dept 2016]; *Matter of State of New York v Williams*, 139 AD3d 1375, 1377-1378 [4th Dept 2016], *lv denied* 28 NY3d 910 [2016], *cert denied* — US —, 137 S Ct 2276 [2017]).

Contrary to petitioner's contention, a finding of mental abnormality under Mental Hygiene Law § 10.03 (i) does not need to be based on a diagnosis of a sexual disorder, and legally sufficient evidence of a mental abnormality exists within the meaning of the statute if there is evidence linking the nonsexual disorder to a predisposition to commit sex crimes (*see Matter of State of New York v Dennis K.*, 27 NY3d 718, 743 [2016], *cert denied* — US —, 137 S Ct 579 [2016]). Here, respondent established that petitioner's exhibitionistic disorder was sufficiently connected to his sex-offending behavior (*see id.*). Respondent's expert witness testified that petitioner's sex-offending behavior had escalated from noncontact exhibitionistic conduct to contact offenses in which he broke into homes and had forcible sexual contact with females. In addition, petitioner repeatedly exposed himself and masturbated in front of female staff at the secure treatment facility, as recently as one week before the hearing (*see Matter of State of New York v Peters*, 144 AD3d 1654, 1654-1656 [4th Dept 2016]).

Respondent also established by clear and convincing evidence that petitioner requires continued confinement. Respondent's expert witness testified that petitioner's attendance at treatment groups was infrequent, and that he did not have a relapse prevention plan (*see Breeden*, 140 AD3d at 1650; *Matter of Billinger v State of New York*, 137 AD3d 1757, 1758 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]). She further testified that petitioner posed a high risk of reoffending based on, inter alia, his score on the Violence Risk Scale—Sex Offender Version, a test designed to evaluate an individual's risk of sexual violence (*see Wayne J.*, 184 AD3d at 1135; *Luis S.*, 166 AD3d at 1552). Finally, we reject petitioner's contention that the court's determination is against the weight of the evidence (*see Wayne J.*, 184 AD3d at 1135; *Billinger*, 137 AD3d at 1758-1759).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1050

CA 19-01135

PRESENT: SMITH, J.P., CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

JOSEPH H. HUBBARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, CENTRAL NEW YORK PSYCHIATRIC CENTER, PATRICIA BARDO, MAUREEN BOSCO, MARY CARLI, COREY CONLEY, AND DONALD SAWYER, DEFENDANTS-RESPONDENTS.

BOSMAN LAW, L.L.C., BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DUSTIN J. BROCKNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (David A. Murad, J.), entered March 14, 2019. The judgment dismissed plaintiff's amended and supplemental complaint in its entirety.

It is hereby ORDERED that the judgment so appealed from is modified on the law by denying that part of the motion for a directed verdict with respect to the fourth cause of action except insofar as asserted against defendant Mary Carli and reinstating the third through sixth and ninth through twelfth causes of action except insofar as asserted against Carli, and a new trial is granted on those causes of action and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff, an Iraq War veteran suffering from posttraumatic stress disorder, commenced this action alleging, inter alia, employment discrimination based upon military status and disability and retaliation. Following a trial, the jury returned a verdict in favor of defendants. Plaintiff now appeals from the ensuing judgment.

In his "amended and supplemental complaint," plaintiff asserted 15 causes of action based upon various federal and state statutes, including the Rehabilitation Act of 1973 (Rehabilitation Act) (29 USC § 701 *et seq.*). Before trial, plaintiff stipulated to the dismissal of the first, eighth, and thirteenth causes of action, and Supreme Court additionally dismissed the seventh, fourteenth, and fifteenth causes of action. Those causes of action were asserted against defendants New York State Office of Mental Health (OMH) and Central New York Psychiatric Center (CNYPC) only, and were dismissed on the

ground that the Court of Claims had exclusive jurisdiction.

The trial testimony of plaintiff established that he was formerly employed as a security hospital treatment assistant (SHTA) at CNYPC and that, during his employment, he applied for the position of senior SHTA on several occasions, only to be rejected each time. After plaintiff filed a complaint with the Equal Employment Opportunity Commission, defendants continued to reject his applications for promotion. Other witnesses who testified on plaintiff's behalf included five persons currently or formerly employed in the position of senior SHTA or supervisor SHTA. One senior SHTA testified that plaintiff had not been promoted because "[t]here was a question after [his] military service about his stability, mental stability." One supervisor SHTA testified that defendant Patricia Bardo, CNYPC's director of human resources, told him something to the effect that plaintiff's application had been "set . . . aside . . . because he's suing [CNYPC]."

Following the close of all proof, defendants moved for a directed verdict. The court granted the motion in part, dismissing the causes of action for discrimination and retaliation based on military status and all causes of action insofar as asserted against defendant Mary Carli. In summation, defendants' attorney argued that plaintiff had to meet his burden of proof before "Bardo, for example, can be forced to open up her checkbook and write somebody a check." Plaintiff's attorney made a contemporaneous objection and, following the completion of summations, requested a curative instruction. Plaintiff's attorney argued that the remark was prejudicial, particularly in light of Public Officers Law § 17, which provides for indemnification of state officers and employees, such as the individual defendants. The court denied plaintiff's request on the ground that the individual defendants "can be on the hook for damages." The causes of action based on disability were submitted to the jury, which returned a verdict in favor of defendants.

Plaintiff contends that the court erred in dismissing the seventh and fourteenth causes of action. More particularly, plaintiff contends that Supreme Court has jurisdiction over claims against state entities based on the Rehabilitation Act because the state has waived its sovereign immunity by accepting federal funds. We reject that contention. The federal statute upon which plaintiff relies provides in relevant part that states receiving federal financial assistance "shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of" the Rehabilitation Act (42 USC § 2000d-7 [a] [1]). The statute by its own terms applies only to federal courts. Moreover, the Eleventh Amendment preserves the state's sovereign immunity from suit in federal courts (*see Edelman v Jordan*, 415 US 651, 662-663 [1974]; *Hans v Louisiana*, 134 US 1, 10 [1890]), and in no way implicates the state's sovereign immunity from suit in its own courts, which is derived not from the US Constitution, but from the ancient common law (*see Glassman v Glassman*, 309 NY 436, 440 [1956]). Significantly, all of the cases upon which plaintiff relies are unpublished cases from United States District Courts. In light of the unambiguous statutory language, any pronouncement by

those courts that New York has waived its sovereign immunity from suit must be understood to apply only in federal court. Nevertheless, New York waived sovereign immunity from actions principally to recover money damages long ago on the condition that the claimants bring suit in the Court of Claims (*see* Court of Claims Act §§ 8, 9). Thus, "[t]he Court of Claims has exclusive jurisdiction over actions for money damages against State agencies, departments, officials, and employees acting in their official capacity in the exercise of governmental functions" (*Byvalets v State of New York*, 171 AD3d 1125, 1126 [2d Dept 2019]; *see Morell v Balasubramanian*, 70 NY2d 297, 300 [1987]).

Plaintiff further contends that the court erred in granting defendants' motion for a directed verdict with respect to plaintiff's cause of action under the New York Human Rights Law alleging discrimination based on military status, i.e., the fourth cause of action. We agree. Initially, we note that plaintiff does not contend that the court erred in granting the motion for a directed verdict with respect to Carli, and therefore we deem any challenge thereto to be abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). A directed verdict is properly granted where, " 'upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party . . . In determining whether to grant a motion for a directed verdict pursuant to CPLR 4401, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant' " (*Bolin v Goodman*, 160 AD3d 1350, 1351 [4th Dept 2018]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Based upon the senior SHTA's testimony that plaintiff was not promoted because "[t]here was a question after [plaintiff's] military service about his [mental] stability," the jury could have rationally inferred that defendants refused to promote plaintiff in part because they perceived that combat veterans, such as plaintiff, develop dangerous and disqualifying mental health issues as a result of their military service. Thus, "it cannot be said that 'it would . . . be utterly irrational for a jury to reach [a verdict in favor of plaintiff]' " (*Polka v Mount St. Mary's Hosp. of Niagara Falls*, 187 AD3d 1538, 1539 [4th Dept 2020], quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Insofar as the dissent relies on contrary testimony, such testimony merely creates a question of fact for resolution by the jury (*see Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015]). We therefore modify the judgment by denying that part of the motion for a directed verdict with respect to the fourth cause of action except insofar as it is asserted against Carli and reinstating that cause of action to that extent.

We further agree with plaintiff that he was denied a fair trial by the defense attorney's reference to his clients' checkbooks. As a preliminary matter, we conclude that plaintiff preserved that contention for our review by lodging a timely objection and unsuccessfully seeking a curative instruction (*cf. Country Park Child Care, Inc. v Smartdesign Architecture PLLC*, 129 AD3d 1636, 1637 [4th Dept 2015]; *Lucian v Schwartz*, 55 AD3d 687, 689 [2d Dept 2008], *lv*

denied 12 NY3d 703 [2009]). On the merits, remarks about a party's financial status "have been universally condemned by the courts of this State" (*Vassura v Taylor*, 117 AD2d 798, 799 [2d Dept 1986], *appeal dismissed* 68 NY2d 643 [1986]; *see also Leotta v Plessinger*, 8 NY2d 449, 461 [1960], *rearg denied* 9 NY2d 688 [1961], *mot to amend remittitur granted* 9 NY2d 686 [1961]; *Constable v Matie* [appeal No. 3], 199 AD2d 1004, 1005 [4th Dept 1993]). The defense attorney's argument that his clients should not be "forced to open [their] checkbook" likely conveyed that the individual defendants would be required to pay any damages out-of-pocket. That remark was "grossly improper" (*Vassura*, 117 AD2d at 799) and "may very well have engendered sympathy in the jurors' minds" (*Rendo v Schermerhorn*, 24 AD2d 773, 773 [3d Dept 1965]). Moreover, it misrepresented the law to the jury. The State has a duty to indemnify its employees for judgments that arise out of actions within the scope of their public duties, although that duty does not arise from injury or damage resulting from intentional wrongdoing on the part of the employee (*see* Public Officers Law § 17 [3] [a]). We conclude, under the circumstances, that the defense attorney's remark deprived plaintiff of a fair trial (*see Depelteau v Ford Motor Co.*, 28 AD2d 1178, 1179 [3d Dept 1967]; *Rendo*, 24 AD2d at 773; *cf. Boehm v Rosario*, 154 AD3d 1298, 1298 [4th Dept 2017]). Therefore, we further modify the judgment by reinstating the third, fifth, sixth and ninth through twelfth causes of action except insofar as they are asserted against Carli, and we grant a new trial on those causes of action (*see generally Rendo*, 24 AD2d at 773).

Because a new trial is required, we address plaintiff's challenges to the jury instructions in the interest of judicial economy, and we reject plaintiff's contentions in that regard. With respect to plaintiff's request for a missing witness charge, we note that plaintiff failed to name or identify the supervisor SHTAs who defendants failed to call as witnesses and thereby failed to demonstrate that the witnesses were available and under defendants' control (*cf. R. T. Cornell Pharmacy v Guzzo*, 135 AD2d 1000, 1001-1002 [3d Dept 1987], *appeal dismissed* 71 NY2d 928 [1988]; *see generally People v Gonzalez*, 68 NY2d 424, 427 [1986]). The remaining challenges lack merit because the relevant portions of the jury instructions substantially conformed to the Pattern Jury Instructions and stated the relevant legal principles (*see Spensieri v Lasky*, 94 NY2d 231, 239-240 [1999]).

In light of our determination, we do not consider plaintiff's remaining contentions.

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would affirm the judgment. With respect to the majority's conclusion that Supreme Court erred in granting defendants' motion for a directed verdict with respect to the fourth cause of action except insofar as asserted against defendant Mary Carli, I submit that the majority's reliance on one sentence of testimony from the senior security hospital treatment assistant (SHTA) does not warrant denying the motion to that extent. It is well settled that " 'a directed verdict is appropriate where the

. . . court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party' " (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1287 [4th Dept 2014]; *see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Here, viewed as a whole, there is no rational view of the evidence through which the jury could conclude that the one sentence of testimony from the senior SHTA supports a verdict in favor of plaintiff on the fourth cause of action, for discrimination under the New York Human Rights Law based on military status (*see generally Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]; *Estate of Smalley v Harley-Davidson Motor Co. Group LLC*, 170 AD3d 1549, 1551 [4th Dept 2019]; *City of Plattsburgh v Borner*, 38 AD3d 1047, 1049 [3d Dept 2007]).

First, the senior SHTA's testimony was predicated on the expressed "concerns" of unspecified administrators about promoting plaintiff. Second, the brief testimony establishing those "concerns" related to plaintiff's "mental stability" "*after* [his] military service," and were not *about* his military service per se (emphasis added). Third, the witness also testified that, after plaintiff complained about not being promoted, the witness attended a meeting with an administrator and plaintiff wherein the administrator expressed concern that plaintiff "might not be stable enough" for the promotion. Fourth, the senior SHTA testified that he did not think "anybody negatively looked at [plaintiff] because he served" in the military and never heard any "negative comments [about plaintiff] because of his military service." Thus, when the evidence is viewed in totality, the one sentence of testimony from the senior SHTA that has been identified by the majority does not warrant a new trial on the causes of action for discrimination based on military status because it does not rationally permit the inference that plaintiff was not promoted due to his military status (*see generally Montas v JJC Constr. Corp.*, 92 AD3d 559, 560-561 [1st Dept 2012], *affd* 20 NY3d 1016 [2013]).

I also respectfully disagree with the majority that plaintiff is entitled to a new trial due to defense counsel's improper comment on summation. Plaintiff effectively waived his objection to the challenged remark by not moving for a mistrial and choosing instead to "speculate upon a favorable verdict" (*Virgo v Bonavilla*, 49 NY2d 982, 984 [1980]). In any event, "the single instance of alleged misconduct of . . . [defense counsel] was not so egregious or prejudicial as to deny [plaintiff] his right to a fair trial" (*Matter of State of New York v Chrisman*, 75 AD3d 1057, 1058 [4th Dept 2010]; *see generally Dennis v Massey*, 134 AD3d 1532, 1533 [4th Dept 2015]; *Guthrie v Overmyer*, 19 AD3d 1169, 1171 [4th Dept 2005]). The single challenged comment, which implied that the individual defendants would have to pay damages out-of-pocket, although improper, was not "so flagrant or excessive" to warrant a new trial (*Backus v Kaleida Health*, 91 AD3d 1284, 1287 [4th Dept 2012] [internal quotation marks omitted]).

Further, the court did not err in refusing to give the jury a curative instruction advising them, inter alia, that the "defendants are indemnified" by the State of New York (*see generally Jarvis v*

LaFarge N. Am., Inc. [appeal No. 4], 52 AD3d 1179, 1181 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]). Any such instruction would have been an incorrect statement of the law inasmuch as plaintiff was seeking, inter alia, punitive damages for the individual defendants' intentional wrongdoing, which is not subject to indemnification by the State (*see* Public Officers Law § 17 [3] [a]). In short, I perceive no basis on this record upon which to conclude that the single comment made by defense counsel on summation, and the court's failure to issue the requested curative instruction, deprived plaintiff of a fair trial.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1070

CA 19-00236

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

SONYA H. HAWRAMEE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID L. SERENA, III, DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 23, 2019. The order granted the motion of defendant for summary judgment and, insofar as appealed from, dismissed the complaint as amplified by the amended and supplemental bill of particulars, with respect to the permanent consequential limitation of use, significant limitation of use and 90/180-day categories of serious injury.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the complaint, as amplified by the amended and supplemental bill of particulars, is reinstated with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury within the meaning of Insurance Law § 5102 (d).

Memorandum: In this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident, plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint, as amplified by the amended and supplemental bill of particulars, with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury (*see* Insurance Law § 5102 [d]). We agree with plaintiff that Supreme Court erred in granting the motion to that extent, and we therefore reverse the order insofar as appealed from.

Defendant failed to meet his initial burden of establishing that plaintiff did not sustain a serious injury under the permanent consequential limitation of use or significant limitation of use categories inasmuch as defendant's own submissions in support of his motion raised triable issues of fact with respect to those categories

(*see Barnes v Occhino*, 171 AD3d 1455, 1456 [4th Dept 2019]). Defendant submitted the affirmed reports of an orthopedic surgeon who examined plaintiff on behalf of defendant, in which the orthopedic surgeon noted that plaintiff had significant limited range of motion in her cervical spine and that such restriction was causally related to the accident. Defendant also submitted the reports of a neurologist who examined plaintiff on behalf of defendant. Those reports contain a review of plaintiff's imaging studies, which showed a posterior bulge at 5-6 and 6-7 of the cervical spine and noted that plaintiff had spasms in her cervical paraspinals and a significant limited range of motion in her cervical spine with cervical straining that was causally related to the motor vehicle accident. Thus, defendant's submissions in support of the motion raised a triable issue of fact whether there was objective evidence of an injury (*see id.*; *Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017]), and whether the accident caused plaintiff to sustain a serious injury under the permanent consequential limitation of use and significant limitation of use categories (*see Schaubroeck v Moriarty*, 162 AD3d 1608, 1609 [4th Dept 2018]; *Landman v Sarcona*, 63 AD3d 690, 690-691 [2d Dept 2009]; *see generally Harrity v Leone*, 93 AD3d 1204, 1206 [4th Dept 2012]).

Defendant also failed to meet his initial burden of establishing that plaintiff was not prevented from performing substantially all of the material acts that constituted her usual and customary daily activities during no less than 90 of the first 180 days following the accident (*see generally Zeigler v Ramadhan*, 5 AD3d 1080, 1081 [4th Dept 2004]). Although defendant's orthopedic surgeon and neurological expert opined that plaintiff was capable of performing her activities of daily living and that there was no need for any restriction on her work or school activities, the experts' examinations were conducted more than a year after the motor vehicle accident and did not address plaintiff's limitations during the 180 days immediately following the accident (*see Ames v Paquin*, 40 AD3d 1379, 1380 [3d Dept 2007]; *Burford v Fabrizio*, 8 AD3d 784, 786 [3d Dept 2004]), and defendant also submitted the deposition testimony of plaintiff, who testified that she was unable to return to her job in retail after the accident because she had difficulty standing for long periods of time due to her neck pain (*cf. McIntyre v Salluzzo*, 159 AD3d 1547, 1547-1548 [4th Dept 2018]). Furthermore, although plaintiff's academic performance did not suffer as a result of her injuries, plaintiff was on summer break from college when the accident occurred and did not resume classes until approximately three months after the accident.

Finally, inasmuch as defendant failed to meet his initial burden on the motion, there is no need to consider the sufficiency of plaintiff's opposing papers (*see Schaubroeck*, 162 AD3d at 1609; *Sobieraj v Summers*, 137 AD3d 1738, 1739 [4th Dept 2016]). In light of our determination, plaintiff's remaining contention is academic.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1072

CA 19-02241

PRESENT: PERADOTTO, J.P., NEMOYER, WINSLOW, AND BANNISTER, JJ.

MICHAEL CHRISMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SYRACUSE SOMA PROJECT, LLC, AND BURKE CONTRACTING, LLC, DEFENDANTS-APPELLANTS.

BURKE CONTRACTING, LLC, THIRD-PARTY PLAINTIFF-APPELLANT,

V

WHITACRE ENGINEERING CO., AND EJ CONSTRUCTION GROUP, INC., THIRD-PARTY DEFENDANTS-RESPONDENTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-APPELLANT.

STANLEY LAW OFFICES, SYRACUSE (STEPHANIE VISCELLI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ADAM P. CAREY OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 15, 2019. The order, among other things, granted the motion of third-party defendants for summary judgment dismissing the amended third-party complaint and granted that part of the cross motion of plaintiff seeking partial summary judgment on liability on the Labor Law § 241 (6) claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of third-party defendants and reinstating the fifth cause of action in the amended third-party complaint, and denying plaintiff's cross motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action against defendant Syracuse SOMA Project, LLC, the property owner, and defendant-third-party plaintiff Burke Contracting, LLC (Burke) (collectively, defendants), the general contractor, seeking damages for injuries that he allegedly sustained on a work

site involving an addition to a building when he slipped and fell on metal decking upon which there was some amount of snow. Burke subsequently commenced a third-party action seeking indemnification from third-party defendants Whitacre Engineering Co. (Whitacre), a subcontractor responsible for supplying steel mesh for the project, and EJ Construction Group, Inc. (EJ), a subcontractor that was hired by Whitacre to install the steel mesh and employed plaintiff. Defendants appeal from an order that, inter alia, granted third-party defendants' motion for summary judgment dismissing the amended third-party complaint, denied defendants' cross motion seeking, inter alia, summary judgment on Burke's causes of action for contractual indemnification, and granted that part of plaintiff's cross motion for partial summary judgment on liability under Labor Law § 241 (6).

We agree with defendants that Supreme Court erred in granting that part of plaintiff's cross motion for partial summary judgment on liability under Labor Law § 241 (6). We therefore modify the order accordingly. Section 241 (6) "requires owners and contractors to 'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). There is, however, a "clear distinction between a violation of an administrative regulation promulgated pursuant to statute, and a violation of an explicit provision of a statute proper: while the latter gives rise to absolute liability without regard to whether the failure to observe special statutory precautions was caused by the fault or negligence of any particular individual, the former is simply some evidence of negligence which the jury could take into consideration with all the other evidence bearing on that subject" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [internal quotation marks omitted]).

Here, plaintiff's claim that defendants are liable under Labor Law § 241 (6) is based on the alleged violation of 12 NYCRR 23-1.7 (d), which, in pertinent part, directs that workers not be permitted to use "a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition" and requires that substances such as snow and ice be "removed . . . or covered to provide safe footing." It is undisputed that "12 NYCRR 23-1.7 (d) mandates a distinct standard of conduct, rather than a general reiteration of common-law principles, and [thus] is precisely the type of 'concrete specification' " upon which liability under section 241 (6) may be premised (*Rizzuto*, 91 NY2d at 351; *see Kobel v Niagara Mohawk Power Corp.*, 83 AD3d 1435, 1436 [4th Dept 2011]). Moreover, defendants do not challenge plaintiff's showing that the subject regulation was violated. As defendants correctly contend, however, the violation of 12 NYCRR 23-1.7 (d) is not conclusive with respect to defendants' liability and, instead, merely constitutes "*some evidence of negligence* and thereby reserve[s], for resolution by a [factfinder], the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto*, 91 NY2d at 351). In particular, we conclude that plaintiff's own submissions, including the deposition

of Burke's owner who testified—in contrast to plaintiff's testimony—regarding his efforts to clear snow from the metal decking upon arriving at the work site prior to any workers, "raised factual issues with respect to the reasonableness of the safety measures undertaken at the work site" (*Irwin v St. Joseph's Intercommunity Hosp.*, 236 AD2d 123, 131-132 [4th Dept 1997]; *cf. Thompson v 1241 PVR, LLC*, 104 AD3d 1298, 1298-1299 [4th Dept 2013]).

Defendants also contend that the court erred in granting that part of third-party defendants' motion for summary judgment dismissing Burke's contractual indemnification cause of action against Whitacre and in denying that part of their cross motion for summary judgment on that cause of action. We reject that contention. " '[W]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances' " (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). Here, Whitacre's submissions in support of its motion, including the deposition testimony of Burke's owner, established that Burke and Whitacre operated under a purchase agreement only rather than pursuant to any "full blown contract," i.e., the parties' agreement did not include an American Institute of Architects (AIA) Contract A401, and such a contract was never provided to Whitacre or executed (*see Staub v William H. Lane, Inc.*, 58 AD3d 933, 935 [3d Dept 2009]). Whitacre thus established that the AIA Contract A401, and the contractual indemnification provision included in that standard form contract, was neither intended to be, nor made, part of the agreement between Burke and Whitacre (*cf. id.*). Defendants failed to raise a question of fact in opposition. The averments in the affidavit of Burke's owner, which contradicted his deposition testimony, " 'clearly constituted an attempt to avoid the consequences of [his] prior deposition testimony by raising feigned issues of fact, and was [thus] insufficient to avoid summary judgment' " (*Martin v Savage*, 299 AD2d 903, 904 [4th Dept 2002]; *see Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]).

We agree with defendants, however, that the court erred in granting that part of third-party defendants' motion for summary judgment dismissing the contractual indemnification cause of action against EJ. We therefore further modify the order accordingly. In relevant part, the subcontract between Whitacre and EJ required EJ to indemnify the owner and general contractor for any claim "arising from or relating to [EJ's] performance" under the subcontract. Contrary to third-party defendants' contention and the court's determination, the claim arose from or relates to EJ's performance under the subcontract inasmuch as plaintiff was an employee of EJ and slipped and fell while walking along the metal decking during his preparation of the materials necessary to complete the steel mesh installation (*see DePaul v NY Brush LLC*, 120 AD3d 1046, 1048 [1st Dept 2014]; *cf. Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 951 [2d Dept 2015]). We conclude that third-party defendants' remaining contention in that

regard is without merit. We nonetheless further conclude that the court properly denied that part of defendants' cross motion seeking summary judgment on Burke's cause of action for contractual indemnification against EJ inasmuch as Burke failed to establish that it was not negligent as a matter of law (*see Divens v Finger Lakes Gaming & Racing Assn., Inc., LP*, 151 AD3d 1640, 1642 [4th Dept 2017]; *Calloway v Adventure Golf & Games, Inc.*, 8 AD3d 1015, 1016 [4th Dept 2004]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1073

CA 20-00212

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

KEVIN F. GARVEY, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLOBAL ASSET MANAGEMENT SOLUTIONS, INC.,
DEFENDANT,
AND JONATHAN J. HARRINGTON,
DEFENDANT-RESPONDENT.

ROACH, LENNON & BROWN, PLLC, BUFFALO (J. MICHAEL LENNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered January 15, 2020. The order granted the motion of defendant Jonathan J. Harrington to vacate a default judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this derivative action seeking, inter alia, damages arising from the conduct of Jonathan J. Harrington (defendant) regarding defendant Global Asset Management Solutions, Inc., an entity for which plaintiff and defendant served as, among other things, its only officers. After defendant failed to appear or answer, a default judgment was entered against him. Defendant thereafter moved to vacate the default judgment based upon lack of personal jurisdiction (*see* CPLR 5015 [a] [4]). Supreme Court granted defendant's motion without a hearing. Plaintiff appeals.

Plaintiff initially contends that the court should have denied defendant's motion because the record established that defendant was properly served pursuant to CPLR 308 (2). We reject plaintiff's contention. That section permits personal service on a party "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by . . . mailing the summons to the person to be served at his or her last known residence" (CPLR 308 [2]). " 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' " (*Cach, LLC v Ryan*, 158 AD3d 1193, 1194 [4th Dept 2018]; *see Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept

2017]; *Wachovia Bank, N.A. v Greenberg*, 138 AD3d 984, 985 [2d Dept 2016]). Although " 'bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing' " (*Cach, LLC*, 158 AD3d at 1194; *see Wachovia Bank, N.A.*, 138 AD3d at 985; *Fabian v Mullen*, 20 AD3d 896, 897 [4th Dept 2005]). Here, the presumption of service was created by the affidavit of plaintiff's process server, but defendant rebutted that presumption by submitting, inter alia, his sworn affidavit in which he averred that he had never been personally served, that since at least 2013 he had rented out the dwelling at the address reflected on the affidavit of the process server, that it had been rented to the individual reflected on the affidavit of service, that defendant "did not live or otherwise reside [at the address] in any form," and instead that he had been living at another address at the time of the purported service. Contrary to plaintiff's contention, defendant's submissions raised " 'a genuine question' " on the issue whether service was properly effected in accordance with CPLR 308 (2) (*Fabian*, 20 AD3d at 897).

In light of that determination, however, we agree with plaintiff's alternative contention that defendant's submissions rebutting the presumption of service " 'necessitate[d] an evidentiary hearing' " (*Cach, LLC*, 158 AD3d at 1194; *see Federal Natl. Mtge. Assn. v Alverado*, 167 AD3d 987, 988 [2d Dept 2018]), and thus we conclude that the court erred in granting defendant's motion without a hearing. We therefore reverse the order and remit the matter to Supreme Court to conduct a hearing on that issue and to determine defendant's motion following the hearing (*see generally Fabian*, 20 AD3d at 897).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1087

CA 19-02258

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

JUSTIN RIBBECK, PLAINTIFF-RESPONDENT,

V ORDER

BIG "G" ROOFING & SIDING, LLC, RGGT, LLC, AND BIELMEIER BUILDERS, INC., DEFENDANTS-APPELLANTS.

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

GROSS SHUMAN P.C., BUFFALO (HARRY J. FORREST OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered December 6, 2019. The order, inter alia, granted the motion of plaintiff for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 15, 2021,

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1105

KA 18-00561

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN T. SMITH, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Ontario County Court (William F. Kocher, J.), rendered September 12, 2017. Defendant was resentenced upon his conviction of criminal sale of a controlled substance in the third degree (three counts).

It is hereby ORDERED that the resentence so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentences of imprisonment imposed on counts one and two of the indictment to consecutive determinate terms of 2½ years, and as modified the resentence is affirmed.

Memorandum: Defendant appeals from a resentence upon his conviction of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We agree with defendant that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Here, County Court provided no oral explanation of the waiver of the right to appeal and the written waiver executed by defendant "mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar to the taking of an appeal" (*People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020] [internal quotation marks omitted]; *see also People v Brito*, 184 AD3d 900, 900-901 [3d Dept 2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020] [internal quotation marks omitted]).

We further agree with defendant that, under the circumstances of this case, the resentence is unduly harsh and severe. We therefore modify the resentence as a matter of discretion in the interest of

justice by reducing the sentences of imprisonment imposed on counts one and two of the indictment to determinate terms of 2½ years (*see* Penal Law § 70.70 [2] [a] [i]), which will continue to run consecutively to each other and to the third count, and will be followed by the two years of postrelease supervision imposed by the court (*see generally* CPL 470.15 [6] [b]; 470.20 [6]; *People v Delgado*, 80 NY2d 780, 783 [1992]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1106

KA 18-01872

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID RATH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 19, 2017. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (three counts), attempted rape in the first degree (two counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of attempted rape in the first degree under the fifth count of the indictment and dismissing that count of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of predatory sexual assault against a child (Penal Law § 130.96), two counts of attempted rape in the first degree (§§ 110.00, 130.35 [3]), and one count of endangering the welfare of a child (§ 260.10 [1]). Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct is not preserved for our review (*see People v Fick*, 167 AD3d 1484, 1485 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]). In any event, we conclude that it is without merit. There was no improper conduct by the prosecutor in questioning a forensic biologist regarding her analysis of the DNA evidence in the case and, viewing the prosecutor's summation as a whole, we conclude that the prosecutor did not mischaracterize the probativeness of that evidence (*see generally People v Wright*, 25 NY3d 769, 780-782 [2015]). To the extent that there was any mischaracterization during summation, it " 'did not rise to the flagrant and pervasive level of misconduct [that] would deprive defendant of due process' " (*People v Glass*, 150 AD3d 1408, 1411 [3d Dept 2017], *lv denied* 30 NY3d 1115 [2018]). Additionally, the prosecutor did not impermissibly vouch for the credibility of the

victim but rather made a fair response to defense counsel's summation, in which defense counsel attacked the victim's credibility (*see People v Graham*, 174 AD3d 1486, 1489 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *Fick*, 167 AD3d at 1485; *People v Roman*, 85 AD3d 1630, 1632 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]). We reject defendant's further contention that the prosecutor mischaracterized the testimony of the victim and a nurse but, even if the prosecutor had, the challenged remark was not so egregious as to deprive defendant of a fair trial (*see People v Burton*, 175 AD3d 1847, 1847-1848 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]; *People v Ali*, 89 AD3d 1412, 1414 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012]). Based on our determination that the challenged conduct of the prosecutor either did not constitute misconduct or did not deprive defendant of a fair trial, we reject defendant's further contention that he received ineffective assistance of counsel based on defense counsel's failure to object to the alleged misconduct (*see People v Lively*, 163 AD3d 1466, 1468-1469 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *People v Lyon*, 77 AD3d 1338, 1339 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010]).

We reject defendant's contention that County Court's evidentiary rulings deprived him of a fair trial. The court properly allowed the victim's aunt to testify that the victim told her that defendant had raped her. The victim made that disclosure at the first suitable opportunity after the abuse occurred, and the testimony was therefore admissible under the prompt outcry exception to the hearsay rule (*see People v Peckham*, 8 AD3d 1121, 1121-1122 [4th Dept 2004], *lv denied* 3 NY3d 679 [2004]; *see generally People v Rosario*, 17 NY3d 501, 511 [2011]; *People v McDaniel*, 81 NY2d 10, 16-17 [1993]). Contrary to defendant's contention, the aunt did not give impermissible details of the incident (*see McDaniel*, 81 NY2d at 17-18; *People v Gross*, 172 AD3d 741, 744 [2d Dept 2019], *lv denied* 33 NY3d 1105 [2019]; *People v Garrow*, 126 AD3d 1362, 1363 [4th Dept 2015]). The court also properly allowed a nurse to testify regarding statements made by the victim during the sexual assault examination inasmuch as the majority of those statements fell within the exception to the hearsay rule of statements relevant to medical diagnosis or treatment (*see People v Barnes*, 140 AD3d 443, 443 [1st Dept 2016], *lv denied* 28 NY3d 969 [2016]; *People v Mirabella*, 126 AD3d 1367, 1367 [4th Dept 2015], *lv denied* 25 NY3d 1168 [2015]; *see generally People v Ortega*, 15 NY3d 610, 617-618 [2010]). To the extent that some of the statements went beyond that exception, defendant was not deprived of a fair trial because the error was harmless (*see Ortega*, 15 NY3d at 619-620). The victim gave the same description of the incidents during her testimony as she gave in her statements to the nurse. The evidence against defendant was overwhelming, and there was no significant probability that, had the error not occurred, the outcome of the trial would have been different (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Defendant's contention that the court erred in allowing a witness to give impermissible opinion testimony is not preserved for our review (*see People v Ukasoanya*, 101 AD3d 911, 913 [2d Dept 2012], *lv denied* 21 NY3d 1020 [2013]). In any event, that contention is without merit because the witness did not give opinion testimony.

We agree with defendant, and the People properly concede, that the evidence is legally insufficient to support the conviction of attempted rape in the first degree under the fifth count of the indictment. Although defendant did not preserve that issue for our review, we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The People alleged in their bill of particulars under count five of the indictment that defendant attempted to engage in sexual intercourse with the victim after striking her in the face. The victim, however, did not testify to any attempted rape that occurred after defendant punched her in the eye. We therefore modify the judgment by reversing the conviction of attempted rape in the first degree under count five of the indictment and dismissing that count.

Defendant failed to preserve for our review his contention that the remaining count of attempted rape in the first degree under count four of the indictment was rendered duplicitous by the trial testimony (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Box*, 145 AD3d 1510, 1512 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017]), nor did he preserve his related contention that the prosecutor elicited evidence of uncharged crimes (*see People v Benton*, 115 AD2d 916, 917 [3d Dept 1985]). Defendant also failed to preserve for our review his contention that the People impermissibly changed the theory of endangering the welfare of a child as set forth in the bill of particulars (*see generally Allen*, 24 NY3d at 449-450). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the court erred in refusing to suppress the cell phone recovered from his person at the time of his arrest because the search warrant application was not supported by probable cause inasmuch as it did not allege that the cell phone actually belonged to him. That contention is not preserved for our review (*see People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]), and we conclude that it is without merit in any event. Search warrant applications are not to be read "hypertechnically and may be 'accorded all reasonable inferences' " (*People v Robinson*, 68 NY2d 541, 552 [1986]; *see generally People v Wright*, 34 AD3d 1274, 1275 [4th Dept 2006], *lv denied* 8 NY3d 886 [2007]). We conclude that it was reasonable to infer that the cell phone in the possession of the police belonged to defendant based on the allegations in the search warrant application.

Finally, the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1110

KA 17-00739

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUTHER BROWN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DEREK HARNSBERGER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a forged instrument in the second degree (two counts), grand larceny in the third degree, grand larceny in the fourth degree, offering a false instrument for filing in the first degree, falsifying business records in the first degree, unauthorized use of a motor vehicle in the third degree and bribing a witness.

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, inter alia, two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25), and one count each of grand larceny in the third degree (§ 155.35 [1]) and grand larceny in the fourth degree (§ 155.30 [8]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence because he failed to renew his motion for a trial order of dismissal at the close of evidence (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). Nevertheless, we " 'necessarily review the evidence adduced as to each of the elements of the crime[s] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Cartagena*, 149 AD3d 1518, 1518 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017], *reconsideration denied* 30 NY3d 1018 [2017]). 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]).

However, we agree with defendant that Supreme Court erred in

removing him from the courtroom without warning during jury selection. On the morning that jury selection was scheduled to begin, but before the prospective jurors had been brought into the courtroom, defendant began shouting, insisting that the court was calling him by the wrong name and that he could not wear the clothes provided to him. The court immediately had defendant removed from the courtroom, stating that it deemed defendant to have waived his right to be present based on his "outburst and behavior." After defendant had been removed, the court stated that defendant's "voice was raised to a level of almost deafening proportions, and it was very clear that it was imminent he was going to turn violent." Defendant was absent for the selection of the first 11 jurors, but returned to the courtroom at the next recess and did not cause any further disruption.

A defendant has a fundamental right to be present at all material stages of trial, and that right is "violated by his or her absence during the questioning of prospective jurors during the impaneling of the jury" (*People v Crespo*, 32 NY3d 176, 182 [2018], *cert denied* — US —, 140 S Ct 148 [2019]; *see generally People v Harris*, 76 NY2d 810, 812 [1990]; *People v Mehmedi*, 69 NY2d 759, 760 [1987], *rearg denied* 69 NY2d 985 [1987]). However, "[a] defendant's right to be present during trial is not absolute" (*People v Joyner*, 303 AD2d 421, 421 [2d Dept 2003], *lv denied* 100 NY2d 563 [2003]). CPL 260.20 provides, in relevant part, "that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct" (*see Illinois v Allen*, 397 US 337, 343 [1970]; *People v Rivera*, 105 AD3d 1343, 1346 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]).

Here, the court erred in removing defendant from the courtroom without first warning him that he would be removed if he continued his disruptive behavior (*cf. Rivera*, 105 AD3d at 1346; *Joyner*, 303 AD2d at 421). Although the court stated that "it was imminent [defendant] was going to turn violent," there is nothing further in the record supporting that statement (*cf. People v Hendrix*, 63 AD3d 958, 959 [2d Dept 2009], *lv denied* 13 NY3d 797 [2009]; *People v Wilkins*, 33 AD3d 409, 410 [1st Dept 2006], *lv denied* 7 NY3d 905 [2006]). Indeed, there is no evidence that defendant engaged in previous disruptions or violence and any potential threat from defendant was mitigated inasmuch as defendant had been accompanied by a deputy at the counsel table that day. "[W]hile . . . defendant's conduct was clearly disruptive," based on the record in this case, we cannot conclude that it was "violent in nature" or that it " 'create[d] an emergency necessitating his immediate removal' " (*People v Burton*, 138 AD3d 882, 884 [2d Dept 2016]).

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1115

CA 20-00128

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

DAVID P. RICE, SR., FARMINGTON TRUCKING INCORPORATED, GREEN BAY SANITATION CORP., BESTWAY CARTING, INC., CITY RECYCLING CORP., AND ELC, LLC, DOING BUSINESS AS SELECT EXPRESS & LOGISTICS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE WORKERS' COMPENSATION BOARD, DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered December 13, 2019. The order and judgment, insofar as appealed from, granted in part the cross motion of plaintiffs for summary judgment and denied the cross motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, plaintiffs' cross motion is denied in its entirety, defendant's cross motion is granted, and the complaint is dismissed.

Memorandum: Plaintiffs are former members of a group self-insurance trust created to satisfy their legal obligation to secure the payment of workers' compensation benefits to their injured employees (*see* Workers' Compensation Law § 50 [3-a]). In 2008, the trust became insolvent and defendant assumed the administration and final distribution of the trust's assets and liabilities. After determining that the trust had a deficit, defendant charged plaintiffs for their alleged pro rata share of that deficit and sent plaintiffs a proposed settlement agreement, releasing them from any further liability in exchange for payment of their pro rata share. Plaintiffs all accepted their individual settlement agreements, which contained a Most Favored Nation (MFN) clause that provided: "[defendant] shall not enter into any Agreement with other former Trust members . . . which contains more favorable terms than this Agreement unless [defendant] shall agree to extend the same terms to the Member."

Plaintiffs commenced this action in Supreme Court alleging that defendant breached the MFN clause by entering into a stipulated settlement with a different set of former trust members (stipulated settlement) that contained more favorable terms than plaintiffs' settlement agreements. Plaintiffs therefore sought a declaration that, on account of the more favorable stipulated settlement, they were not obligated to make any further payments to defendant and further sought to enjoin defendant from, inter alia, enforcing the payment terms of the settlement agreements. Defendant then moved for a change of venue, and plaintiffs cross-moved for, inter alia, summary judgment on the complaint. Defendant thereafter cross-moved to dismiss the complaint on, inter alia, the ground that the court lacked subject matter jurisdiction, contending that plaintiffs' causes of action sought relief that was incidental to a breach of contract claim seeking money damages that plaintiffs had filed in the Court of Claims. As limited by its brief, defendant appeals from an order and judgment insofar as it granted plaintiffs' cross motion in part and denied defendant's cross motion. We reverse the order and judgment insofar as appealed from.

The Court of Claims has subject matter jurisdiction over claims for breach of contract against the State (*see* Court of Claims Act § 9 [2]; *Sarbro IX v State of N.Y. Off. of Gen. Servs.*, 229 AD2d 910, 911 [4th Dept 1996]). As long as the primary claim is for money damages, the Court of Claims "may [also] apply equitable considerations" and grant incidental equitable relief (*Psaty v Duryea*, 306 NY 413, 417 [1954]). Here, because the relief sought in the complaint arises out of an alleged breach of contract, the proper forum for this action is the Court of Claims (*see Main Evaluations v State of New York*, 296 AD2d 852, 853-854 [4th Dept 2002], *appeal dismissed and lv denied* 98 NY2d 762 [2002]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1116

CA 19-01771

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

ANDREW SOLECKI AND DEBORAH SOLECKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

OAKWOOD CEMETERY ASSOCIATION, DEFENDANT-RESPONDENT,
AND WOLCOTT GRASS FARM, INC., DOING BUSINESS AS
WOLCOTT LAWN & CEMETERY MAINTENANCE,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 13, 2019. The interlocutory judgment granted plaintiffs judgment on the issue of liability against defendant Wolcott Grass Farm, Inc., doing business as Wolcott Lawn & Cemetery Maintenance.

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

Memorandum: In appeal No. 1, Wolcott Grass Farm, Inc., doing business as Wolcott Lawn & Cemetery Maintenance (defendant) appeals from an interlocutory judgment entered against it on the issue of liability. In appeal No. 2, defendant appeals from an order that denied its posttrial motion to set aside the verdict and for a new trial on liability. We dismiss the appeal from the order in appeal No. 2 inasmuch as the issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment in appeal No. 1 (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Defendant contends that Supreme Court erred in denying the posttrial motion because defendant was denied a fair trial due to fundamental errors in the jury instructions. Even assuming, arguendo, that defendant's contention is preserved, we nevertheless reject it. Although the court briefly misspoke during the jury charge on the alleged negligence of defendant, "the charge as a whole adequately

explain[ed] general negligence principles" such that we are "confident in concluding that [this] isolated mistake . . . did not affect the jury's verdict" (*Reis v Volvo Cars of N. Am.*, 24 NY3d 35, 43 [2014], *rearg denied* 24 NY3d 949 [2014]). We further conclude that the court properly denied defendant's motion for a directed verdict pursuant to CPLR 4401. Contrary to defendant's contention, there was a rational process by which the jury could have found that defendant failed to exercise the degree of care that a reasonably prudent professional grave digger would have exercised under the same circumstances (*see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). We have reviewed defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1117

CA 19-01794

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

ANDREW SOLECKI AND DEBORAH SOLECKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

OAKWOOD CEMETERY ASSOCIATION, DEFENDANT-RESPONDENT,
AND WOLCOTT GRASS FARM, INC., DOING BUSINESS AS
WOLCOTT LAWN & CEMETERY MAINTENANCE,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered September 13, 2019. The order denied the motion of defendant Wolcott Grass Farm, Inc., doing business as Wolcott Lawn & Cemetery Maintenance to set aside the jury verdict and for a new trial on the issue of liability.

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

Same memorandum as in *Solecki v Oakwood Cemetery Assn.* ([appeal No. 1] — AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1121

CA 19-02055

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

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA AND NORTH TONAWANDA LODGE NUMBER 860 OF BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CREATIVE COMFORT SYSTEMS, INC., AND REIMER HEATING AND AIR CONDITIONING, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 22, 2019. The judgment awarded plaintiffs a money judgment upon a jury verdict.

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

Memorandum: Plaintiffs commenced this action seeking damages sustained as the result of a fire caused by defendants' negligent installation of a boiler in plaintiffs' headquarters, a 20,000-square-foot lodge (Lodge). The fire resulted in the demolition of the Lodge. Defendants stipulated to liability and, after a trial on damages only, a jury awarded plaintiffs, inter alia, $3,200,000 in replacement cost damages less 35% depreciation. In appeal No. 1, defendants appeal from the resulting judgment. In appeal No. 2, defendants appeal from an order that, among other things, denied defendants' motion seeking, inter alia, to set aside the verdict and for a new trial.

As an initial matter, the appeal from the judgment in appeal No. 1 brings up for review the propriety of the order in appeal No. 2, and thus the appeal from the order in appeal No. 2 must be dismissed (*see Gumas v Niagara Frontier Tr. Metro Sys., Inc.*, 189 AD3d 2095, 2095-2096 [4th Dept 2020]; *see also* CPLR 5501 [a]).

Before the damages trial, plaintiffs moved for summary judgment

on, inter alia, the issue whether the Lodge should be classified as specialty property. We reject defendants' contention that Supreme Court erred in granting the motion to that extent and determining that the damages at trial should be evaluated using the reproduction or replacement cost, less depreciation method. Generally, "where a building is destroyed, the usual measure of damages is the difference between the market value of the building before and after the injury" (*Sandoro v Harlem-Genesee Mkt. & Nursery*, 105 AD2d 1103, 1104 [4th Dept 1984]). However, an exception to that rule applies when the building qualifies as a specialty property (*see Matter of Niagara Mohawk Power Corp. v Assessor of Town of Geddes*, 92 NY2d 192, 197 [1998]). The following criteria must be met for such a classification: (1) the property "must be unique and must be specifically built for the specific purpose for which it is designed"; (2) it must have been designed and used for a particular "special use"; (3) there must be no market for the type of property and no sales of property for such use; and (4) it must be "an appropriate improvement at the time of the taking . . . and its use must be economically feasible and reasonably expected to be replaced" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 357 [1992], *rearg denied* 81 NY2d 784 [1993]). "Churches, hospitals, clubhouses and like structures held by nonprofit agencies as centers for community service commonly fall within [the specialty] category" (*Matter of Rochester Urban Renewal Agency [Patchen Post]*, 45 NY2d 1, 9 [1978]).

On appeal, defendants contend only that the first and third criteria for determining whether the Lodge qualified as a specialty property were not met. We reject that contention. Plaintiffs met their initial burden with respect to both of those criteria through the submission of the affidavit and deposition testimony of their expert, a real estate appraiser. The expert averred that the Lodge was unique inasmuch as it was constructed in 1921 for the express purpose of serving as an Elks lodge and had unique features including a "custom-built ceremonial" room, a formal ballroom, "extensive and ornate woodwork, large stained-glass windows, plaster walls and high ceilings," and a custom-built bar. As to marketability, he opined that there were few or no sales of similar buildings and no sales of buildings having a similar use, i.e., a fraternal lodge.

In opposition to the motion, defendants failed to raise a triable issue of fact with respect to the relevant criteria. Although defendants submitted the affidavit of a real estate developer, wherein the developer opined that the Lodge could be converted into "restaurants and bars, event space, office and apartments," he did not opine as to the economic feasibility of such a conversion. Thus, we conclude that the court properly granted plaintiffs' motion in part and determined the Lodge to be specialty property (*see generally Matter of Village of Newark Urban Renewal Agency v Newark Grange No. 366*, 57 AD2d 1065, 1065 [4th Dept 1977], *affd* 45 NY2d 1 [1978]; *Matter of Rochester Urban Renewal Agency [Patchen Post]*, 55 AD2d 1029, 1030 [4th Dept 1977], *affd* 45 NY2d 1 [1978]). Inasmuch as plaintiffs established their entitlement to judgment as a matter of law on the issue of the Lodge being specialty property, the court properly determined that replacement or reproduction cost, less depreciation is

the appropriate method of valuation (*see generally Gramercy Boys' Club Assn. v City of New York*, 141 AD2d 365, 367 [1st Dept 1988], *affd* 74 NY2d 678 [1989]).

We further reject defendants' contention that the court erred by precluding at trial their expert real estate appraiser from testifying regarding his replacement cost calculations. While it appears that the software program the expert utilized to calculate such cost was generally relied upon in the profession of a construction cost evaluator (*see generally Caleb v Sevenson Envtl. Servs., Inc.*, 117 AD3d 1421, 1422 [4th Dept 2014], *lv denied* 23 NY3d 909 [2014]; *Matter of State of New York v Motzer*, 79 AD3d 1687, 1688 [4th Dept 2010]), it was the sole basis for the opinion of defendants' expert on replacement costs. He acknowledged to the court that he had no independent knowledge to confirm the figure. Thus, we conclude that the court did not err in limiting his testimony (*see generally Matter of Fistraw-Del Holding Corp. v Assessor for Town of Colonie*, 235 AD2d 660, 662 [3d Dept 1997]).

Finally, we reject defendants' contention that the court erred in denying that part of their posttrial motion to set aside the verdict as contrary to the weight of the evidence. It is well settled that a motion to set aside a jury verdict as against the weight of the evidence should not be granted unless "the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]). Here, the jury's replacement cost and depreciation percentage was within the range of construction costs and depreciation presented by the witnesses at trial by both parties. We have considered defendants' remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1122.1

CA 20-00401

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

MAGIC CIRCLE FILMS INTERNATIONAL, LLC, DOING BUSINESS AS MAGIC CIRCLE ENTERTAINMENT, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MARY ELLEN BREON, DEFENDANT-APPELLANT-RESPONDENT.

MARY ELLEN BREON, THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT,

V

JOEY DEMAIO, CIRCLE SONG MUSIC, LLC, GOD OF THUNDER PRODUCTIONS, LTD., MAGIC CIRCLE MUSIC GUITARS, LLC, MAGIC CIRCLE FILMS INTERNATIONAL, LTD., MAGIC CIRCLE MUSIC, LLC, AND CAROMARK, LLC, THIRD-PARTY DEFENDANTS-RESPONDENTS-APPELLANTS.

POMERANTZ LLP, NEW YORK CITY (BRIAN CALANDRA OF COUNSEL), AND SHEARMAN & STERLING LLP, FOR DEFENDANT-APPELLANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (JOSEPH A. CAMARDO, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT AND THIRD-PARTY DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Matthew A. Rosenbaum, J.), entered October 8, 2019. The order denied the respective motions of the parties for partial summary judgment.

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

Memorandum: Plaintiff, a music producer and distributor, commenced this action asserting causes of action for, inter alia, breach of contract. In the complaint, plaintiff alleged that defendant-third-party plaintiff (defendant) breached a verbal agreement whereby she agreed to deliver to plaintiff newly recorded musical compositions by her band and to grant plaintiff the copyright

interest in connection with the manufacture, distribution and sale of those recordings in exchange for receiving, inter alia, a 50% share of all net income. According to plaintiff, defendant never delivered the promised recordings and, instead, used plaintiff's trade secrets and property to enrich herself. After commencement of the action, defendant initiated a third-party action against third-party defendant Joey DeMaio, plaintiff's managing member, and various other entities essentially controlled by DeMaio.

Plaintiff and third-party defendants moved and defendant cross-moved for, inter alia, partial summary judgment on the issue of ownership of the recordings and related copyrights. Supreme Court denied the motion and cross motion, determining that there were issues of fact with respect to the ownership of the recordings and copyrights at issue that precluded granting either motion. Following additional discovery, the parties again moved for partial summary judgment on the issue of ownership of the disputed property. Defendant appeals and plaintiff and third-party defendants cross-appeal from an order denying those respective motions. We affirm.

Generally, "successive summary judgment motions . . . are disfavored absent newly discovered evidence or other sufficient cause" (*Giardina v Lippes*, 77 AD3d 1290, 1291 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]; *see Farm Family Cas. Ins. Co. v Brady Farms, Inc.*, 87 AD3d 1324, 1326 [4th Dept 2011]; *Marine Midland Bank v Fisher*, 85 AD2d 905, 906 [4th Dept 1981]). Here, we conclude that the court properly denied the parties' successive motions because the parties' submissions were not based on newly discovered evidence. Although on her second motion defendant submitted deposition testimony elicited after her first motion, that testimony did not constitute newly discovered evidence because it did not "establish facts that were not available to [defendant] at the time [she] made [her] initial motion for summary judgment and which could not have been established through alternative evidentiary means" (*Vinar v Litman*, 110 AD3d 867, 868-869 [2d Dept 2013]; *see Farrell v Okeic*, 303 AD2d 957, 957 [4th Dept 2003]). The court properly denied the motion of plaintiff and third-party defendants because they also failed to demonstrate that the evidence submitted in support of their second motion was unavailable to them at the time they made their first motion (*see Vinar*, 110 AD3d at 868-869). Further, although this Court is not precluded from addressing the merits of a successive summary judgment motion that is not based on newly discovered evidence or lacks sufficient cause (*see Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1593 [4th Dept 2016]; *Giardina*, 77 AD3d at 1291), we decline to exercise our discretion to reach the merits of the parties' second motions.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1122

CA 19-01356

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

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA AND NORTH TONAWANDA LODGE NUMBER 860 OF BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF UNITED STATES OF AMERICA, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CREATIVE COMFORT SYSTEMS, INC., AND REIMER HEATING AND AIR CONDITIONING, INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI, LLP, BUFFALO (THOMAS S. LANE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered June 24, 2019. The order, among other things, denied the motion of defendants seeking, inter alia, to set aside the verdict.

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

Same memorandum as in *Benevolent and Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.* ([appeal No. 1] — AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1134

KA 19-00950

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA Q. JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered October 18, 2017. The judgment convicted defendant upon a jury verdict of assault in the first degree (two counts), assault in the second degree (two counts), burglary in the first degree (four counts) and robbery in the first degree (four counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the first degree (Penal Law § 120.10 [1], [4]), two counts of assault in the second degree (§ 120.05 [2], [6]), four counts of burglary in the first degree (§ 140.30 [1], [2], [3], [4]), and four counts of robbery in the first degree (§ 160.15 [1], [2], [3], [4]). The conviction arises from a home invasion robbery by two perpetrators during which one victim was struck in the head with the end of a shotgun and another victim was shot in the abdomen, rendering him paraplegic.

Defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to suppress testimony regarding a witness's pretrial identification of the perpetrators on video surveillance footage taken from a nearby building to which the perpetrators had been tracked by a K-9 unit on the night of the events. Initially, we conclude "neither defendant's general objection to undue suggestiveness in that part of his omnibus motion seeking suppression of the identification nor his [unspecified] argument[] to the hearing court were sufficient to preserve for our review his contention that the identification procedure was unduly suggestive" as a result of the timing and setting of the witness's viewing of the video recording on the night of the robbery and shooting (*People v Gambale*, 150 AD3d 1667, 1667-1668 [4th Dept 2017]). Defendant "failed

to raise that specific contention either as part of his omnibus motion . . . or at the *Wade* hearing" (*People v Morman*, 145 AD3d 1435, 1436 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]). We note, however, that the court made factual findings regarding the timing and setting of the identification procedure, and drew a legal conclusion that, based on the circumstances, the procedure was entirely proper and not unduly suggestive (*see Gambale*, 150 AD3d at 1668). We therefore agree with defendant that the court "expressly decided the question raised on appeal," thereby preserving his specific contention for our review (CPL 470.05 [2]; *see People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *Gambale*, 150 AD3d at 1668).

We nonetheless conclude that defendant's contention lacks merit. To the extent that defendant relies on trial testimony in support of his contention, we note that "our review is limited to the evidence presented at the suppression hearing" (*People v Jennings*, 295 AD2d 1000, 1000 [4th Dept 2002], *lv denied* 99 NY2d 536 [2002]). " '[T]here is nothing inherently suggestive' in showing a witness a surveillance video depicting the defendant and other individuals, provided that the 'defendant was not singled-out, portrayed unfavorably, or in any other manner prejudiced by police conduct or comment or by the setting in which [the defendant] was taped' " (*People v Davis*, 115 AD3d 1167, 1169 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014], quoting *People v Edmonson*, 75 NY2d 672, 676-677 [1990], *rearg denied* 76 NY2d 846 [1990], *cert denied* 498 US 1001 [1990]), and we conclude that the procedure used here did not suffer from those infirmities (*see People v Perri*, 162 AD3d 1487, 1488 [4th Dept 2018]; *see generally People v Gee*, 286 AD2d 62, 67-68 [4th Dept 2001], *affd* 99 NY2d 158 [2002], *rearg denied* 99 NY2d 652 [2003]). In any event, even assuming, arguendo, that the identification procedure was unduly suggestive, we conclude that any error in receiving the witness's identification testimony that the males on the video recording "[k]inda" "[l]ooked like" and "could've been" the individuals who committed the robbery and shooting was harmless beyond a reasonable doubt (*see People v Owens*, 74 NY2d 677, 678 [1989]; *People v McKee*, 174 AD3d 1444, 1445 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]; *People v Leibert*, 71 AD3d 513, 514 [1st Dept 2010], *lv denied* 15 NY3d 752 [2010]).

Defendant relatedly contends that the court, after sustaining an objection outside the presence of the jury during the trial, erred in failing to instruct the jury to disregard certain testimony of a police detective about the witness's pretrial identification of the perpetrators. Defendant correctly concedes that his contention is not preserved for our review (*see* CPL 470.05 [2]; *People v DeMaio*, 185 AD2d 358, 358 [2d Dept 1992], *lv denied* 80 NY2d 974 [1992]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court erred in admitting in evidence the video surveillance footage. Contrary to defendant's contention, we conclude that "[t]he video recording was sufficiently authenticated with the testimony of [the building manager] who maintained the building and was familiar with the operation of the

building's video recording surveillance system" (*People v Costello*, 128 AD3d 848, 848 [2d Dept 2015], *lv denied* 26 NY3d 927 [2015], *reconsideration denied* 26 NY3d 1007 [2015]), as well as with the testimony of the police detectives who viewed the video recording immediately after the events while investigating the crime and testified that the recording admitted at trial " 'truly and accurately represent[ed] what was before the camera' " (*People v Patterson*, 93 NY2d 80, 84 [1999]; *see People v Flowers*, 166 AD3d 1492, 1495 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]). Contrary to defendant's suggestion, "[a]ny gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Oquendo*, 152 AD3d 1220, 1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]).

Defendant correctly concedes that he failed to preserve for our review his additional contention that the court erred in permitting the testimony of police detectives identifying him in the video surveillance footage (*see* CPL 470.05 [2]; *People v Sampson*, 289 AD2d 1022, 1023 [4th Dept 2001], *lv denied* 97 NY2d 733 [2002]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's related contention, he has not established that defense counsel was ineffective for failing to object to that testimony. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]), and that is not the case here (*see generally People v Graham*, 174 AD3d 1486, 1488-1489 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]).

Defendant further contends that reversal is required because the court committed a mode of proceedings error in handling a jury note. We reject that contention. "Where, as here, counsel has meaningful notice of a substantive jury note because the court has read the precise content of the note into the record in the presence of counsel, defendant, and the jury, the court's failure to discuss the note with counsel before recalling the jury is not a mode of proceedings error. Counsel is required to object to the court's procedure to preserve any such error for appellate review" (*People v Nealon*, 26 NY3d 152, 161-162 [2015]). Defense counsel failed to object to the court's procedure in responding to the jury note, and we decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Wilson*, 158 AD3d 1204, 1205 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]; *People v Dame*, 144 AD3d 1625, 1625 [4th Dept 2016], *lv denied* 29 NY3d 948 [2017]).

Defendant also contends that the evidence is legally insufficient to support the conviction with respect to all counts. At the close of proof, defendant moved for a trial order of dismissal, and the court reserved decision. There is no indication in the record that the court ruled on defendant's motion (*cf.* CPL 290.10 [1]). Thus, we may not address defendant's contention because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92

NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020] [internal quotation marks omitted]; *see People v Moore*, 147 AD3d 1548, 1548-1549 [4th Dept 2017]; *People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion (*see Bennett*, 180 AD3d at 1358; *Moore*, 147 AD3d at 1549; *White*, 134 AD3d at 1415). In light of our determination, we do not address defendant's remaining contention.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1156

KA 20-00601

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAITLYN A. CONLEY, DEFENDANT-APPELLANT.

SIMONE M. SHAHEEN, COOPERSTOWN, AND CHRISTOPHER J. PELLI, UTICA, FOR DEFENDANT-APPELLANT.

KAITLYN A. CONLEY, DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 11, 2018. The judgment convicted defendant upon a jury verdict of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]). The conviction stems from the death of Mary Yoder, a 60-year-old chiropractor who owned Chiropractic Family Care (CFC) in Whitesboro, New York, with her husband, William (Bill) Yoder. Mary experienced gastrointestinal distress and died two days later. The Onondaga County Medical Examiner's Office (ME's Office) determined that Mary died of colchicine toxicity. In the course of its investigation into Mary's death, the Oneida County Sheriff's Office (OCSO) received a call from the ME's Office indicating that it had received an anonymous letter that implicated the Yoders' youngest child, Adam, in Mary's death and stated that a bottle of colchicine could be located under the front passenger seat of Adam's Jeep. After being questioned at the OCSO, Adam granted investigators limited consent to search the area in question. The search uncovered a bottle of colchicine and a crumpled receipt from Art Chemicals for the purchase of the colchicine; the receipt bore an email address that included the letters "mradamyoder." The OCSO then interviewed defendant, who was CFC's office manager and Adam's former girlfriend. The day after that interview, defendant returned to the OCSO and provided a DNA sample. During her third interview, on December 21, 2015, defendant admitted that she wrote the anonymous letter. On February 5, 2016, the final time defendant was interviewed, defendant

acknowledged that she purchased a prepaid credit card in Adam's name. The serial number on that credit card matched the serial number on the Art Chemicals receipt. DNA testing excluded Adam's DNA from the mixture of three contributors on the colchicine vial, and determined that defendant was a major contributor of DNA that was found on the colchicine vial and the cardboard wrapper in which the vial was encased. Defendant was indicted for, inter alia, murder in the second degree (§ 125.25 [1]) for intentionally causing Mary's death. Defendant's first jury trial ended in a hung jury. Following the second trial, the jury found defendant not guilty of murder in the second degree and guilty of manslaughter in the first degree, which was submitted to the jury as a lesser included offense of murder in the second degree. County Court sentenced defendant to a determinate term of 23 years of imprisonment and five years of postrelease supervision.

We reject the contention raised in defendant's pro se supplemental brief that the search warrant for defendant's cell phone was issued without probable cause because it was based on stale information. "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but[, rather, it] merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that the evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). "[P]robable cause is not to be determined by counting the number of days between the occurrence of the events relied upon and the issuance of the search warrant. Information may be acted upon as long as the practicalities dictate that a state of facts existing in the past, which is sufficient to give rise to probable cause, continues to exist at the time the application for a search warrant is made" (*People v Clarke*, 173 AD2d 550, 550 [2d Dept 1991]; *see People v Bryan*, 191 AD2d 1029, 1030 [4th Dept 1993], *lv denied* 82 NY2d 714 [1993]). According "great deference to the issuing Judge" (*People v Harper*, 236 AD2d 822, 823 [4th Dept 1997], *lv denied* 89 NY2d 1094 [1997]), we conclude that the court properly determined that there was sufficient information in the warrant application to support a reasonable belief that evidence of a crime was on defendant's cell phone (*see People v Griswold*, 155 AD3d 1658, 1658-1659 [4th Dept 2017], *lv denied* 31 NY3d 984 [2018]). Defendant's related contention that the search warrant failed to meet the particularity requirement is unpreserved (*see* CPL 470.05 [2]; *see generally People v Williams*, 127 AD3d 612, 612 [1st Dept 2015], *lv denied* 27 NY3d 1009 [2016]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice.

We reject the contentions of defendant, presented in her pro se supplemental brief, that the court erred in failing to suppress certain statements she made to police investigators on December 21, 2015, and February 5, 2016. "[B]oth the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]). "[T]he fact that a defendant is being interviewed in

the police station does not necessarily mean that he [or she] is to be considered 'in custody' " (*People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). On December 21, 2015, defendant arrived at the police station on her own; she was not handcuffed, and she was not under arrest (*see People v MacGilfrey*, 288 AD2d 554, 556 [3d Dept 2001], *lv denied* 97 NY2d 757 [2002]). Defendant was only a witness at that point, and investigators wanted to find out the nature of defendant's relationship with Adam and to learn additional information about Bill, with whom defendant worked and whom investigators considered a person of interest. Although defendant's statement that she wrote the anonymous letter caused investigators to look at her as a person of interest, defendant went home at the conclusion of the interview. Consequently, the court, which reviewed the recording of the interview, properly determined that defendant was not in custody during the interview on December 21 (*see People v Morris*, 173 AD3d 1797, 1799 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]).

With respect to the interview on February 5, 2016, in which defendant arrived with and left with her parents, we similarly conclude, contrary to defendant's further contention in her pro se supplemental brief, that she was not in custody (*see id.*). Defendant's contention that the police used "psychological coercion" to secure her statements is not preserved (*see People v Ramirez*, 172 AD3d 619, 619-620 [1st Dept 2019], *lv denied* 34 NY3d 936 [2019]; *People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]) and is, in any event, without merit (*see People v Warrington*, 146 AD3d 1233, 1234-1235 [3d Dept 2017], *lv denied* 29 NY3d 1038 [2017]).

Contrary to defendant's contention in her main brief, the court did not err in charging the jury on the lesser included offense of manslaughter in the first degree inasmuch as there is a reasonable view of the evidence to support a finding that defendant committed the lesser offense but not the greater (*see People v Hull*, 27 NY3d 1056, 1058 [2016]), i.e., that she intended to cause serious physical injury to the victim rather than to kill her (*see People v Cotton*, 153 AD3d 1580, 1580-1581 [4th Dept 2017], *lv denied* 30 NY3d 1059 [2017]; *People v Nesmith*, 36 AD3d 463, 464 [1st Dept 2007], *lv denied* 8 NY3d 948 [2007]; *People v Faison*, 265 AD2d 422, 422-423 [2d Dept 1999], *lv denied* 95 NY2d 934 [2000]).

Defendant failed to preserve her contention in her main brief regarding the manner in which the court instructed the jury on manslaughter in the first degree (*see People v Maltese*, 148 AD3d 1780, 1782-1783 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]; *People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *People v Porter*, 119 AD3d 438, 439 [1st Dept 2014], *lv denied* 24 NY3d 1046 [2014]). In any event, the instruction given by the court was consistent with the pattern Criminal Jury Instructions (*see* CJI2d [NY] Penal Law § 125.20 [1]). Defendant's contention regarding the submission to the jury of an annotated verdict sheet is waived inasmuch as counsel for defendant consented to its use (*see People v*

Howard, 167 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]; *see generally People v Johnson*, 96 AD3d 1586, 1587 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]). Defendant failed to preserve for our review her related contention with respect to the court's compliance with CPL 310.20 (2) (*see People v Allen*, 122 AD3d 1423, 1424 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015], *reconsideration denied* 25 NY3d 1197 [2015]; *People v Dombrowski-Bove*, 300 AD2d 1122, 1124 [4th Dept 2002]).

Defendant correctly concedes that she failed to preserve for our review her contention in her main brief that the evidence is legally insufficient to support the conviction inasmuch as she presented evidence after the court denied her motion for a trial order of dismissal at the close of the People's case but failed to renew her motion at the close of the proof (*see People v Hines*, 97 NY2d 56, 61-62 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, that contention lacks merit (*see People v Ferguson*, 177 AD3d 1247, 1248 [4th Dept 2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude, contrary to defendant's contention in her pro se supplemental brief, that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's related contention in her main brief, " 'the second trial did not violate the prohibition against double jeopardy inasmuch as the evidence at the first trial was legally sufficient to support a conviction' " (*People v Duda*, 45 AD3d 1464, 1465 [4th Dept 2007], *lv denied* 10 NY3d 764 [2008]; *People v Casey*, 37 AD3d 1113, 1114 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]).

Defendant did not object to the admission of the alleged *Molineux* evidence at issue on appeal and thus failed to preserve for our review her contention in her main brief that the court erred in admitting that evidence (*see* CPL 470.05 [2]). In any event, defense counsel's opening statement opened the door to the alleged propensity evidence by discussing the manner in which Adam got sick, shortly before Mary's death, after defendant provided him with a supplement called "Alpha Brain" (*see People v Wright*, 5 AD3d 873, 876 [3d Dept 2004], *lv denied* 3 NY3d 651 [2004]; *People v Davis*, 196 AD2d 880, 881 [2d Dept 1993], *lv denied* 82 NY2d 848 [1993]). We reject defendant's related contention in her main brief that she was thus denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]), and defendant failed to meet that burden.

Inasmuch as we have concluded that defendant's contentions regarding the legal sufficiency of the evidence lack merit, we reject defendant's further contention in her main brief that defense counsel's failure to preserve those issues for review constitutes ineffective assistance (*see Ferguson*, 177 AD3d at 1249; *see generally*

Baldi, 54 NY2d at 147). Furthermore, to the extent that defendant contends that defense counsel was ineffective in failing to object to the annotated verdict sheet and, indeed, in consenting to its submission, we conclude under the circumstances of this case that any such error "was not so prejudicial as to deprive defendant of a fair trial and thus does not constitute ineffective assistance" (*People v James*, 114 AD3d 1202, 1207 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014]; *see Porter*, 119 AD3d at 439; *see also Dombrowski-Bove*, 300 AD2d at 1124). To the extent that defendant's remaining claims of ineffective assistance of counsel are based on evidence outside the record, a CPL 440.10 motion is required to review those claims (*see People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]; *People v Gomez*, 52 AD3d 395, 395 [1st Dept 2008], *lv denied* 11 NY3d 736 [2008]).

Defendant's claims in her main brief of prosecutorial misconduct are, for the most part, unpreserved (*see* CPL 470.05 [2]; *People v Maull*, 167 AD3d 1465, 1467-1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). In any event, none of the alleged improprieties were so egregious as to deprive defendant of a fair trial (*see People v Everson*, 158 AD3d 1119, 1122 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018], *reconsideration denied* 31 NY3d 1147 [2018], *cert denied* — US —, 139 S Ct 1269 [2019]; *People v Swan*, 126 AD3d 1527, 1527 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]). Defendant's contention that the prosecutor arranged to have a former colleague act as Adam's counsel when Adam was a suspect or key witness and then had that attorney improperly bolster Adam's credibility and testify against defendant at trial is not only unpreserved but also concerns matters outside the record that should be raised by way of a motion pursuant to CPL 440.10 (*see People v Carlisle*, 50 AD3d 1451, 1451 [4th Dept 2008], *lv denied* 10 NY3d 957 [2008]).

Contrary to defendant's contention in her main brief, the court acted properly with respect to both trials and, in reviewing the records of both trials, we conclude that "there [is no] basis on which to reasonably question the court's ability to preside over the matter[s]" (*People v Gringer*, 160 AD3d 660, 661 [2d Dept 2018]).

Defendant's sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions in her main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1169

TP 20-00792

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF MARK NEELMAN, PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

CIMASI LAW OFFICE, AMHERST (MICHAEL CHARLES CIMASI OF COUNSEL), AND LIPPES & LIPPES, BUFFALO, 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, Erie County [Mark A. Montour, J.], entered June 22, 2020) to review a determination of respondent. The determination found petitioner responsible for violations of respondent's student code of conduct and imposed a three year suspension.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner, a student at respondent, seeks to annul a determination finding him responsible for violations of respondent's student code of conduct arising from incidents of hazing. Following an administrative hearing and administrative appeal, respondent suspended petitioner for three years and placed a notation on petitioner's transcript.

Contrary to petitioner's contention, we conclude that respondent substantially adhered to its procedural rules during the disciplinary proceeding, and that the purported violations of those rules did not deny petitioner "the full panoply of due process guarantees to which he was entitled or render[ ] the finding of responsibility or the sanction imposed arbitrary or capricious" (*Matter of Sharma v State Univ. of N.Y. at Buffalo*, 170 AD3d 1565, 1566 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Budd v State Univ. of N.Y. at Geneseo*, 133 AD3d 1341, 1342-1343 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo School of Dental Medicine*, 295 AD2d 944, 944 [4th Dept 2002]).

Specifically, contrary to petitioner's contention, respondent complied with petitioner's right to due process and respondent's own procedures by disclosing the evidence against petitioner before the disciplinary hearing, and respondent was not required to disclose that evidence at an earlier date (*see Matter of Agudio v State Univ. of N.Y.*, 164 AD3d 986, 990 [3d Dept 2018]; *Matter of Maye v Dwyer*, 295 AD2d 890, 890-891 [4th Dept 2002], *lv dismissed* 98 NY2d 764 [2002]). We likewise reject petitioner's contention that respondent failed to provide an unbiased finder of fact (*see Matter of Mavrogian v State Univ. of N.Y. at Buffalo*, 186 AD3d 975, 976 [4th Dept 2020]; *Agudio*, 164 AD3d at 991-992). Contrary to petitioner's further contention, respondent's written determinations regarding the basis for its findings did not violate petitioner's right to due process inasmuch as they contained sufficient detail "to permit [petitioner] to effectively challenge the determination in administrative appeals and in the courts and to ensure that the decision was based on evidence in the record" (*Budd*, 133 AD3d at 1343 [internal quotation marks omitted]; *see Matter of Brucato v State Univ. of N.Y. at Buffalo*, 175 AD3d 977, 978 [4th Dept 2019]). Although petitioner also contends that respondent failed to explain its rationale for the sanction imposed, he failed to challenge the sanction on that ground on his administrative appeal, and thus failed to exhaust his administrative remedies with respect to that contention (*see generally Matter of Inesti v Rizzo*, 155 AD3d 1581, 1582 [4th Dept 2017]). To the extent that petitioner challenges the severity of the sanction, we conclude that the sanction "was not 'so disproportionate to the offense[s], in light of all the circumstances, as to be shocking to one's sense of fairness' " (*Matter of Ponichtera v State Univ. of N.Y. at Buffalo*, 149 AD3d 1565, 1566 [4th Dept 2017], quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

We further conclude that, contrary to petitioner's contention, respondent's determination is supported by substantial evidence. The evidence considered by respondent constituted " 'such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion' " that petitioner violated respondent's student code as charged by respondent (*Sharma*, 170 AD3d at 1567, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Further, the alleged inconsistencies or conflict in the evidence "presented credibility issues that were within the sole province of respondent to determine" (*Matter of Lampert v State Univ. of N.Y. at Albany*, 116 AD3d 1292, 1294 [3d Dept 2014], *lv denied* 23 NY3d 908 [2014]), and we perceive no basis to disturb respondent's findings. Lastly, we reject petitioner's contention that the lack of an opportunity to confront live witnesses at his disciplinary hearing amounted to a denial of due process (*see Budd*, 133 AD3d at 1343-1344).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1170

TP 18-02336

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH HACKETT, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT.

JOSEPH HACKETT, PETITIONER PRO SE.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MARILYN BALCACER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Anthony J. Paris, J.], dated December 11, 2018) to review a determination of respondent. The determination found no probable cause for claimed discrimination.

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

Memorandum: Petitioner filed a complaint with respondent, New York State Division of Human Rights (DHR), alleging this his former employer unlawfully discriminated and retaliated against him. Following an investigation, DHR dismissed the administrative complaint, finding no probable cause to believe that the employer engaged in discriminatory or retaliatory conduct. Petitioner later commenced this proceeding pursuant to Executive Law § 298, contending, inter alia, that DHR's determination was not supported by a rational basis.

We agree with DHR that Supreme Court improperly transferred the proceeding to this Court pursuant to Executive Law § 298 (*see Bentkowsky v Tokio Re Corp.*, 139 AD2d 436, 436 [1st Dept 1988]; *see also Matter of Sidoti v New York State Div. of Human Rights*, 212 AD2d 537, 537-538 [2d Dept 1995]). We nevertheless address the issues in the interest of judicial economy (*see Matter of Bradway v Annucci*, 145 AD3d 1590, 1591 [4th Dept 2016]) and conclude that the petition must be dismissed based on petitioner's failure to name the employer as a necessary party. Pursuant to 22 NYCRR 202.57 (a), a petitioner challenging a determination of DHR must "nam[e] as respondents the State Division of Human Rights and *all other parties appearing in the proceeding before the State Division of Human Rights*" (emphasis

added). Petitioner's failure to join the employer, i.e., a party appearing in the proceeding before the DHR, requires dismissal of the proceeding (*see* CPLR 1001; *Matter of Rumman v Duane Reade*, 64 AD3d 715, 715 [2d Dept 2009]; *Matter of Jeanty v New York State Dept. of Correctional Servs.*, 36 AD3d 811, 812 [2d Dept 2007]; *see also Matter of Massapequa Auto Salvage, Inc. v Donaldson*, 40 AD3d 647, 649 [2d Dept 2007]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1171

TP 20-00640

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF SCOTLAND RODRIGUEZ,
PETITIONER,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

CIMASI LAW OFFICE, AMHERST (MICHAEL CHARLES CIMASI OF COUNSEL), AND LIPPES & LIPPES, BUFFALO, 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, Erie County [Frank A. Sedita, III, J.], entered May 26, 2020) to review a determination of respondent. The determination found that petitioner had violated respondent's student code of conduct.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, and the preliminary injunction entered February 13, 2020 is vacated.

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner, a student at respondent State University of New York at Buffalo, seeks to annul a determination finding him responsible for violations of respondent's student code of conduct arising from incidents of stalking and failure to comply with a reasonable request. Following an administrative hearing and administrative appeal, respondent suspended petitioner for a period of a year and placed a notation on petitioner's transcript.

Initially, contrary to petitioner's contention, we conclude that respondent substantially adhered to its procedural rules during the disciplinary proceedings, and that the purported violations of those rules did not deny petitioner "the full panoply of due process guarantees to which he was entitled or render[ ] the finding of responsibility or the sanction imposed arbitrary or capricious" (*Matter of Sharma v State Univ. of N.Y. at Buffalo*, 170 AD3d 1565, 1566 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Mavrogian v State Univ. of N.Y. at Buffalo*, 186 AD3d 975, 975 [4th Dept 2020]; *Matter of Budd v State Univ. of N.Y. at Geneseo*, 133 AD3d

1341, 1342-1343 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]).

We reject petitioner's contention that respondent denied him due process by allegedly failing to provide him with certain documentary evidence prior to the administrative hearing. Although " 'there is no general constitutional right to discovery in . . . administrative proceedings' " (*Matter of Weber v State Univ. of N.Y., Coll. at Cortland*, 150 AD3d 1429, 1431 [3d Dept 2017]), "due process entitles a student accused of misconduct to a statement detailing the factual findings and the evidence relied upon by the decision-maker in reaching the determination of guilt" (*Budd*, 133 AD3d at 1343 [internal quotation marks omitted]). Here, we conclude that the record reflects that petitioner was provided with the documents relied upon by respondent in reaching its determination (*see Mavrogian*, 186 AD3d at 975-976; *Matter of Brucato v State Univ. of N.Y. at Buffalo*, 175 AD3d 977, 979 [4th Dept 2019]). To the extent that petitioner conclusorily contends that he was denied due process on the ground that he is unaware of what other evidence was provided to respondent but was not entered into evidence at the administrative hearing, we reject that contention because the existence of such other evidence is unsubstantiated by the record. Moreover, we note that at the administrative hearing, the hearing officers stated that they would rely only on those documents and testimony adduced at the hearing (*see Budd*, 133 AD3d at 1343). We also reject petitioner's contention that he was denied due process when respondent allegedly refused to permit him to call a live witness during the administrative hearing (*see Brucato*, 175 AD3d at 979; *see also Matter of Jacobson v Blaise*, 157 AD3d 1072, 1076 [3d Dept 2018]).

Petitioner failed to raise during the administrative proceedings his remaining contentions regarding the procedures followed by respondent, and we have no discretionary authority to review those contentions in this CPLR article 78 proceeding (*see Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Sharma*, 170 AD3d at 1567; *Krupa v Stanford*, 145 AD3d 1656, 1656 [4th Dept 2016]).

We further conclude that, contrary to petitioner's contention, respondent's determination is supported by substantial evidence. The evidence considered by respondent at the administrative hearing constituted " 'such relevant proof as a reasonable mind may accept as adequate to support [the] conclusion' " that petitioner violated respondent's student code as charged by respondent (*Sharma*, 170 AD3d at 1567, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see Mavrogian*, 186 AD3d at 977). To the extent that there are inconsistencies or conflicts between the accounts provided by the complainant and petitioner, those divergences "presented credibility issues that were within the sole province of respondent to determine," and we perceive no basis to disturb respondent's findings (*Matter of Lampert v State Univ. of N.Y. at Albany*, 116 AD3d 1292, 1294 [3d Dept 2014], *lv denied* 23 NY3d 908

[2014]; *see Brucato*, 175 AD3d at 980; *Sharma*, 170 AD3d at 1567).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1177

KA 19-02121

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN J. DUPUIS, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER 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 (Chauncey J. Watches, J.), rendered April 24, 2019. The judgment convicted defendant after a nonjury trial of sexual abuse in the first degree (two counts), attempted sexual abuse in the first degree, and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts each of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]), and one count of attempted sexual abuse in the first degree (§§ 110.00, 130.65 [3]). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different finding would not have been unreasonable (*see Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495), we conclude that, "[b]ased on the weight of the credible evidence, [County C]ourt . . . was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348; *see generally People v Romero*, 7 NY3d 633, 642-643 [2006]). " 'Great deference is to be accorded to the [factfinder]'s resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d 805, 805-806 [4th Dept 2002], *lv denied* 98 NY2d 697 [2002]; *see People v Martin*, 122 AD3d 1424, 1425 [4th Dept 2014], *lv denied* 25 NY3d 951 [2015]), and we perceive no reason to disturb the court's credibility determinations.

Defendant failed to preserve for our review his contention that

the court erred in allowing the People to introduce *Molineux* evidence (*see* CPL 470.05 [2]; *see generally People v Taylor*, 2 AD3d 1306, 1307 [4th Dept 2003], *lv denied* 2 NY3d 746 [2004]) inasmuch as defense counsel advised the court that the defense did not oppose the People's *Molineux* application and defendant raised no objection to the police officer testimony that he now challenges on appeal.

Defendant failed to preserve for our review his contention that the court, "in determining the sentence to be imposed, penalized [him] for exercising [his] right to a . . . trial" (*People v Garner*, 136 AD3d 1374, 1374 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016]; *see People v Coapman*, 90 AD3d 1681, 1683-1684 [4th Dept 2011], *lv denied* 18 NY3d 956 [2012]). In any event, that contention is without merit. "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [his] right to trial," and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial (*Garner*, 136 AD3d at 1374 [internal quotation marks omitted]). Moreover, "[g]iven that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea" (*People v Martinez*, 26 NY3d 196, 200 [2015] [internal quotation marks omitted]; *see People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]). Finally, the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1220

CA 20-00505

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

SOURCE ONE LOGISTICS, LTD., AND GLENN LISTA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BBX, INC., DOING BUSINESS AS BOSTON BUFFALO
EXPRESS, DEFENDANT-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE HOLZMAN PHOTIADIS & GRESENS LLP, BUFFALO (CHRISTOPHER M. BERLOTH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered January 7, 2020. The order, among other things, denied defendant's motion for partial summary judgment and to disqualify the law firm representing plaintiffs.

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

Memorandum: Plaintiffs commenced this action against defendant seeking damages for, inter alia, breach of contract. Defendant appeals from an order that, among other things, denied its motion seeking to disqualify the law firm representing plaintiffs and partial summary judgment limiting the third, fourth, and fifth causes of action to the time period of November and December 2012.

Contrary to defendant's contention, Supreme Court did not abuse its discretion in denying that part of the motion for disqualification of plaintiffs' law firm on the ground that defendant lacked standing to seek that relief inasmuch as defendant did not show the existence of a prior attorney-client relationship between it and the opposing law firm (*see Ellison v Chartis Claims, Inc.*, 142 AD3d 487, 487-488 [2d Dept 2016]; *Scafuri v DeMaso*, 71 AD3d 755, 756 [2d Dept 2010]; *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 736, 736 [2d Dept 2006]; *see also Bison Plumbing City v Benderson*, 281 AD2d 955, 955 [4th Dept 2001]).

We also reject defendant's contention that the court erred in denying that part of the motion seeking partial summary judgment. Even assuming, arguendo, that defendant met its initial burden on that part of the motion, we conclude that plaintiffs raised triable issues

of fact whether their claims under the third, fourth, and fifth causes of action should be limited to the months of November and December 2012 (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1225.1

TP 19-00870

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JAMES M. KERNAN, ORISKA INSURANCE COMPANY AND ORISKA CORPORATION, PETITIONERS,

V MEMORANDUM AND ORDER

SHIRIN EMAMI, AS ACTING SUPERINTENDENT OF NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, CHARLES (“BUZZ”) SAWYER, CHRISTINE GRALTON, ET AL., RESPONDENTS.

FRANK POLICELLI, UTICA, FOR PETITIONERS.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Patrick F. MacRae, J.], entered April 2, 2018) to review a determination that, inter alia, denied the application of petitioner James M. Kernan for consent to engage in the business of insurance.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking review of a determination that denied the application of James M. Kernan (petitioner) for written consent to engage in the business of insurance pursuant to 18 USC § 1033 (e) (2) and that found petitioner in violation of Insurance Law § 1506 (c) (1) (A). Supreme Court transferred the proceeding to this Court pursuant to CPLR 7804 (g).

Contrary to petitioners’ contention, we conclude that there is substantial evidence supporting the determination that petitioner violated Insurance Law § 1506 (c) (1) (A) and was not entitled to consent to engage in the business of insurance pursuant to 18 USC § 1033 (e) (2) inasmuch as petitioner has demonstrated untrustworthiness as a controlling person of petitioner Oriska Insurance Company (Oriska) (*see generally Matter of B.P. Global Funds, Inc. v New York State Liq. Auth.*, 169 AD3d 1506, 1506-1507 [4th Dept 2019]; *Matter of Nichols v New York State Dept. of Fin. Servs.*, 148 AD3d 1400, 1403-1405 [3d Dept 2017]; *Matter of Greenberg v Wrynn*, 86

AD3d 437, 437-438 [1st Dept 2011]). Most notably, the record supports the determination of the then-Superintendent of the New York State Department of Financial Services (DFS) that petitioner never actually divested his ownership interest in Oriska at any point during the period relevant to this case via voting trust or any other means despite being directed to do so by the New York State Insurance Department and representing that he would do so to the United States District Court for the Northern District of New York pursuant to his guilty plea of violating 18 USC § 1033 (e) (1) (B) (*see generally Matter of Kernan*, 73 AD3d 219, 220 [4th Dept 2010]).

We reject petitioners' further contention that DFS had no authority to prohibit petitioner from providing legal and engineering services to Oriska (*see* Insurance Law § 1506 [c] [2]). Here, DFS directed petitioner that he "shall not serve in any capacity at Oriska . . . , including but not limited to providing legal or engineering services, or insurance agency services, personally or by any member of his family, directly or indirectly, to Oriska." We conclude that the penalty here is appropriate and consistent with DFS's authority given the facts and circumstances of this case, including DFS's authority "to take appropriate action to cure [the] violation" (*id*.); petitioner's persistent refusal to divest his ownership interest in Oriska; the legitimate concern that, even if petitioner finally divested, he still might attempt to exert control over Oriska through other means; and DFS's duty to prevent a recurrence (*see generally Matter of McKie v Corcoran*, 162 AD2d 535, 537 [2d Dept 1990], *lv denied* 76 NY2d 714 [1990]).

We have reviewed petitioners' remaining contentions and conclude that none warrants a different result.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1225

CA 20-00744

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

DONALD F. SCHULTZ, III, AS ADMINISTRATOR OF THE ESTATE OF DONALD F. SCHULTZ, II, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALAMO GROUP INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CLEAN EARTH ENVIRONMENTAL GROUP, LLC, CLEAN EARTH KENTUCKY, LLC, AND/OR VACALL INDUSTRIES, INC., ALAMO GROUP (TX), INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CLEAN EARTH ENVIRONMENTAL GROUP, LLC, CLEAN EARTH KENTUCKY, LLC, AND/OR VACALL INDUSTRIES, INC., GRADALL INDUSTRIES, INC., INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO VACALL INDUSTRIES, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

HURWITZ & FINE, P.C., BUFFALO (BRENNA C. GUBALA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered May 21, 2020. The order denied the motion of defendants-appellants for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action after plaintiff's decedent sustained severe injuries, ultimately leading to his death, as a result of decedent's operation of a sewer-cleaning truck in the course of his employment. The truck was manufactured by a company (predecessor company) from which assets were purchased by nonparty Alamo Group (AL) Inc., as guaranteed by defendant Alamo Group Inc. (collectively, Alamo Group). In the complaint, plaintiff asserted causes of action for, inter alia, strict products liability and wrongful death. Defendants-appellants (defendants) moved for summary judgment dismissing the complaint against them on the ground that they could not be held liable for the alleged tortious acts of the predecessor company. Defendants asserted that their asset purchase

agreement (APA), as approved by the order of the Bankruptcy Court overseeing the Chapter 11 reorganization of the predecessor company, precluded the assertion against them of liability claims related to the subject assets. Defendants highlighted that the Bankruptcy Court order permitted the predecessor company to sell the subject assets to the Alamo Group free and clear of all liens and liabilities, including successor liability, and that the Alamo Group required such as a condition of the purchase. Supreme Court denied the motion, and we affirm.

Defendants contend that they cannot be held liable under the de facto merger doctrine inasmuch as there was no continuity of ownership (*see Sweatland v Park Corp.*, 181 AD2d 243, 245-246 [4th Dept 1992]; *see also Simpson v Ithaca Gun Co. LLC*, 50 AD3d 1475, 1476 [4th Dept 2008], *lv denied* 11 NY3d 709 [2008]). Defendants, however, failed to address the factor of continuity of ownership in their motion papers, and thus their contention is not properly before us on this appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Defendants further contend that the language in the APA and the order of the Bankruptcy Court purporting to limit their successor liability establish their prima facie entitlement to judgment as a matter of law. We likewise reject that contention. The parties to the APA could regulate how successor liability would be allocated among themselves, but such provisions in the APA "cannot affect the rights of a stranger to their contract" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 297 [1984]; *see Sweatland*, 181 AD2d at 247; *Wensing v Paris Indus.-N.Y.*, 158 AD2d 164, 166-167 [3d Dept 1990]). Furthermore, the Bankruptcy Court may permit the free and clear sale of assets only if nonbankruptcy law, such as our State law, permits it (*see* 11 USC § 363 [f] [1]).

Inasmuch as the APA and the order of the Bankruptcy Court were the only two bases on which defendants moved for summary relief, we conclude that they failed to meet their initial burden of establishing their entitlement to judgment as a matter of law (*see Nationwide Mut. Fire Ins. Co. v Long Is. A.C., Inc.*, 78 AD3d 801, 802 [2d Dept 2010]; *see also Meadows v Amsted Indus.*, 305 AD2d 1053, 1054-1055 [4th Dept 2003]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, we need not consider the adequacy of plaintiff's opposing submissions (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gagnon v St. Joseph's Hosp.*, 90 AD3d 1605, 1606 [4th Dept 2011]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

1256

CA 20-00861

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

TODD POWERS AND LINDSAY POWERS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF GENEVA, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (CHRISTINA M. VERONE JULIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRADY J. O'MALLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Charles A. Schiano, Jr., J.), entered March 2, 2020. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking dismissal of the negligence cause of action and the negligent concealment cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for personal injuries allegedly sustained by Todd Powers (plaintiff) from exposure to contaminants on a parcel of real property that plaintiffs purchased from the City of Geneva (defendant). Defendant appeals from an order that denied in part its motion for summary judgment dismissing the amended complaint against it.

For reasons stated in the decision and order at Supreme Court, we reject defendant's contention that the court erred in denying the motion with respect to the negligent misrepresentation cause of action. We note only that, contrary to defendant's repeated contention, plaintiffs' attorney did not concede that defendant owed no duty of care. Plaintiffs' attorney conceded at oral argument that there is "no statutory duty" under "the Real Property Law," but that concession applied to the duty to provide a "property condition disclosure statement" (§ 462), from which defendant is exempt (*see* § 463 [11]). Thus, the concession does not impact the common-law tort causes of action at issue on appeal, which do not arise from the Real Property Law.

We agree with defendant, however, that the court erred in denying the motion with respect to the negligent concealment cause of action, and we therefore modify the order accordingly. The " 'negligent concealment' cause of action is included in and duplicative of the[ ] negligent misrepresentation cause of action" (*Basso v New York Univ.*, 2018 WL 2694430, *3 [SD NY, June 5, 2018, No. 16-CV-7295 (VN) (KNF)]; *see generally Krobath v South Nassau Communities Hosp.*, 178 AD3d 807, 808 [2d Dept 2019]), and arose from the same facts, thus the court should have dismissed the negligent concealment cause of action on that ground (*see generally Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2d Dept 2005], *lv denied* 6 NY3d 701 [2005]).

We also agree with defendant that the court erred in denying the motion with respect to the negligence cause of action, and we therefore further modify the order accordingly. That cause of action is based on allegations that plaintiff was injured due to a dangerous condition on the parcel of property that defendant sold to plaintiffs, i.e., chemical contamination, to which plaintiff was exposed after the sale. It is well settled that "[o]ne's liability in negligence for the condition of land ceases when the premises pass out of one's control before injury results. Such is the general rule" (*Kilmer v White*, 254 NY 64, 69 [1930]). Thus, under that general rule, defendant's liability for negligence based on a dangerous condition on the property ended when it sold the parcel to plaintiffs (*see id.*; *Morris v Freudenheim*, 273 AD2d 885, 885 [4th Dept 2000]), and "liability may be imposed upon defendant only if the allegedly dangerous condition . . . existed at the time [it] relinquished possession and control of the premises 'and the new owner has not had a reasonable time to discover the condition, if it was unknown, and to remedy the condition once it is known' " (*Morris*, 273 AD2d at 885-886; *see Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896, 898 [1991]).

Here, defendant met its burden on the motion of establishing that any injury allegedly sustained by plaintiff was caused by exposure after defendant sold the property. In response, "plaintiff[s have] offered nothing to show that [they, as] the new owner[s,] did not have adequate time to discover and remedy such defects" (*Bittrolff*, 77 NY2d at 898; *see generally Farragher v City of New York*, 26 AD2d 494, 496 [1st Dept 1966], *affd* 21 NY2d 756 [1968]; *Copp v Corning Glass Works*, 114 AD2d 144, 147 [4th Dept 1986]).

In light of our determination, defendant's remaining contentions are academic.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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CAF 18-01669

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

IN THE MATTER OF DAGAN B.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CALLA B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered August 8, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the subject child's placement with petitioner until the completion of the next permanency hearing.

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

Same memorandum as in *Matter of Dagan B. (Calla B.)* ([appeal No. 3] — AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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CAF 19-00188

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

IN THE MATTER OF DAGAN B.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CALLA B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered December 6, 2018 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the subject child's placement with petitioner until the completion of the next permanency hearing.

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

Same memorandum as in *Matter of Dagan B. (Calla B.)* ([appeal No. 3] — AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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CAF 19-02064

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

IN THE MATTER OF DAGAN B.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CALLA B., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered September 11, 2019 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 affirmed without costs.

Memorandum: In appeal Nos. 1 and 2, respondent mother appeals from orders entered in a proceeding pursuant to Family Court Act article 10 that continued placement of the subject child with petitioner until the completion of the next permanency hearing. The mother has not raised any contentions with respect to those orders, and we therefore dismiss those appeals as abandoned (*see generally Golf Glen Plaza Niles, Il. L.P. v Amcoid USA, LLC*, 160 AD3d 1375, 1376 [4th Dept 2018]). In any event, those appeals have also been rendered moot by subsequently entered permanency orders (*see Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]), and by the order in appeal No. 3, which, inter alia, terminated the mother's parental rights with respect to the subject child (*see Matter of Jaxsin L. [Heather L.]*, 124 AD3d 1398, 1399 [4th Dept 2015]).

In appeal No. 3, the mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect. The mother contends that petitioner failed to establish that it had exercised diligent efforts

to encourage and strengthen her parental relationship with the child, as required by Social Services Law § 384-b (7) (a). We reject that contention. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome problems that prevent the discharge of the child into [his or her] care, and informing the parent[] of the[ ] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). The record establishes by clear and convincing evidence that petitioner made "affirmative, repeated, and meaningful efforts" to assist the mother (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]), including making referrals for evaluation and therapy, providing transportation services, and coordinating supervised visitation. Nonetheless, petitioner's efforts were fruitless because the mother was utterly uncooperative in that she, among other things, refused to provide her residential address for the purpose of a home inspection or sign a release so that petitioner could talk to the mother's purported psychologist, despite Family Court confirming that the mother understood that her failure to do either was preventing petitioner from returning the child to her care (*see id.*; *Matter of Markus R.*, 273 AD2d 919, 920 [4th Dept 2000]). Further, the mother's disruptive behaviors during supervised visitation inhibited petitioner's ability to find willing visitation supervisors despite petitioner's continued attempts to do so. Thus, the court did not err in granting petitioner's request to suspend visitation because, contrary to the mother's contention, it was not a lack of diligent efforts by petitioner that prevented visitation from being able to safely occur (*see generally Matter of June D.S.*, 288 AD2d 904, 905 [4th Dept 2001]). "[G]iven the circumstances, [petitioner] provided what services it could" (*Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1776 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017] [internal quotation marks omitted]).

Contrary to the mother's further contention, the court did not err in determining that she permanently neglected the child because she failed to plan for the child's future, i.e., she failed "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]; *see Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Finally, we conclude that there is a sound and substantial basis in the record for the court's determination to terminate the mother's parental rights (*see Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1541 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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TP 20-01153

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF RUTHIE MCELROY, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Monroe County [Debra A. Martin, A.J.], dated June 17, 2020) to review a determination of respondent. The determination denied petitioner's application for a license to operate a family day care program in her residence.

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 the determination denying her application for a license to operate a family day care facility. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Helping Hands of WNY, Inc. v Carrion*, 70 AD3d 1483, 1483 [4th Dept 2010]; *see also Matter of Persaud v New York State Off. of Children & Family Servs.*, 114 AD3d 492, 493 [1st Dept 2014]; *see generally Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1046 [2018]). In March 2017, respondent revoked petitioner's prior license to operate a group family day care in her home because of numerous dangerous violations of day care regulations, which petitioner failed to correct over a nine-month period and which she frequently attempted to conceal by, inter alia, denying inspectors access to the facility. That revocation was upheld on administrative appeal. In June 2019, more than two years following the revocation of petitioner's license (*see* 18 NYCRR 413.3 [j] [1]), petitioner applied to respondent for another family day care license at a new location, and respondent denied the application. The denial was upheld on administrative appeal.

Given the nature, severity, and duration of the past violations,

respondent investigated whether petitioner had undergone any additional professional training through the Child Care Council in order to improve her "character and habits" (18 NYCRR 417.15 [b] [4]), such that she would, in accordance with applicable regulations, grant respondent's inspectors free access to the premises (*see* 18 NYCRR 416.15 [b] [10] [i]), and provide "safe and suitable care to children which is supportive of [their] physical, intellectual, emotional and social well-being" (18 NYCRR 417.13 [a] [3]). Based on the severity of the prior violations and petitioner's failure to complete any additional professional training, it was rational for respondent to deny petitioner's application (*see generally Haug*, 32 NY3d at 1046).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 19-01741

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

NICK J. WILLIAMS, DEFENDANT-RESPONDENT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (DANIEL R. MAGILL OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), dated March 26, 2019. The order, insofar as appealed from, granted that part of the omnibus motion of defendant seeking to suppress the results of a chemical breath test and dismissed counts one and two of the indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, counts one and two of the indictment are reinstated, and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: The People appeal from an order that, inter alia, granted that part of defendant's omnibus motion seeking to suppress the results of a chemical breath test (*see* Vehicle and Traffic Law § 1194 [2] [a]) and dismissed counts one and two of the indictment. We now reverse the order insofar as appealed from.

Defendant was charged by an indictment with, inter alia, felony aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [i] [A]) and two counts of felony driving while intoxicated (§§ 1192 [2], [3]; 1193 [1] [c] [i] [A]), stemming from an incident that occurred when defendant, while allegedly under the influence of alcohol, drove and crashed a vehicle belonging to his girlfriend. In his omnibus motion, defendant sought, inter alia, suppression of his statements and evidence seized or discovered by the police. County Court granted a *Huntley* hearing (*see People v Huntley*, 15 NY2d 72 [1965]), but denied without a hearing that part of the motion seeking to suppress evidence. The *Huntley* hearing ensued, at the conclusion of which the court denied that part of defendant's motion to suppress his statements but, as stated above, the court granted that part of the omnibus motion seeking to suppress the chemical breath test results. In suppressing the test results, the court held that a police officer failed to comply with the requirements of Vehicle and Traffic Law § 1194 and also violated

defendant's limited right to counsel under *People v Gursey* (22 NY2d 224, 227 [1968]).

We conclude that the court erred in granting that part of defendant's omnibus motion seeking to suppress evidence because the court failed to notify the People of its intention to consider that issue and failed to give the People an opportunity to present evidence at the hearing on that issue (*see generally People v Watson*, 154 AD3d 627, 627-628 [1st Dept 2017]; *People v Russ*, 19 AD3d 746, 747 [3d Dept 2005]). At the *Huntley* hearing, the issues of the officer's compliance with Vehicle and Traffic Law § 1194 and defendant's limited right to counsel were merely ancillary. Moreover, we reject defendant's contention that the limited evidence that was admitted at the hearing supports the court's determination to suppress the chemical breath test results. The evidence at the hearing established that the police administered a field breath test and then a chemical breath test at the jail, only the latter of which is the subject of section 1194 (2) (a) and would be admissible at trial (*see People v Kulk*, 103 AD3d 1038, 1040 [3d Dept 2013], *lv denied* 22 NY3d 956 [2013]), but the court conflated the administration of both tests in determining that suppression was warranted. On this record, it is unclear whether the officer complied with section 1194 (2) (f) by warning defendant of the consequences of refusal in " 'clear and unequivocal language' " before administering the chemical test (*People v Smith*, 18 NY3d 544, 549 [2012]), or whether defendant voluntarily consented to the test (*see generally People v Odum*, 31 NY3d 344, 346 [2018]). The record is also unclear whether defendant, who made a request to speak with his attorney, was afforded the opportunity to do so prior to deciding whether to submit to the chemical breath test (*see generally Smith*, 18 NY3d at 549; *Gursey*, 22 NY2d at 227; *People v Dell*, 175 AD3d 1037, 1039 [4th Dept 2019], *lv denied* 34 NY3d 980 [2019]). We therefore remit the matter to County Court for a new hearing and determination on that part of the omnibus motion seeking the suppression of the chemical breath test results.

Mark W. Bennett

Entered: March 19, 2021

Clerk of the Court

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

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KA 16-00875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUBEN GARCIA, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Francis A. Affronti, J.), rendered October 6, 2015. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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 rape in the first degree (Penal Law § 130.35 [1]). The alleged crime occurred in April 2005, but defendant was not charged until February 2014. We now reverse.

Viewing the evidence independently and in light of the elements of the crime as charged to the jury (*see generally People v Delamota*, 18 NY3d 107, 116-117 [2011]; *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a contrary verdict would not have been unreasonable, we cannot say that the jury failed to give the evidence its proper weight (*see People v Boyd*, 175 AD3d 1030, 1031 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]).

Contrary to defendant's further contention, Supreme Court properly denied his motion to dismiss the indictment on constitutional prompt-prosecution grounds (*see generally People v Singer*, 44 NY2d 241, 253-254 [1978]). Although the 8-year, 10-month interval between the alleged crime and the commencement of this action (*see generally* CPL 1.20 [1] [a]; [8]; [17]) was extraordinary and weighs in defendant's favor for purposes of the *Singer* analysis, less than two years of that period is attributable to governmental inaction, namely, the time between April 2011, when defendant's DNA sample was submitted to the CODIS database following an unrelated conviction, and March

2013, when the crime lab finally tested the complainant's rape kit and matched the sample to defendant's DNA. The People cannot be faulted for the first six years of delay because the complainant could not identify her alleged attacker and defendant's DNA was not in the database to compare against the rape kit. Nor, given the further investigation necessitated by the DNA hit in March 2013, can the People be faulted for the delay between that event and the filing of charges in February 2014 (*see Singer*, 44 NY2d at 254; *see also People v Wiggins*, 31 NY3d 1, 13 [2018]). Moreover, while defendant undoubtedly suffered some degree of prejudice from the delay—the true extent of which can never be fully ascertained—we are particularly persuaded by the fact that none of the prejudice is traceable to the period of governmental inaction between April 2011 and March 2013 (*see People v Johnson*, 100 AD3d 492, 492 [1st Dept 2012], *lv denied* 20 NY3d 1012 [2013]). Put differently, any prejudice that defendant suffered in this case would have attached well before April 2011, and he would have suffered no less prejudice had the crime lab expeditiously processed the complainant's rape kit and matched it to his DNA shortly after it became available. Thus, upon balancing all the factors identified in *Singer*, we cannot conclude that defendant's due process right to prompt prosecution was violated by the delay here (*see People v Davis*, 234 AD2d 88, 88 [1st Dept 1996], *affd* 90 NY2d 947 [1997]; *People v Wentworth*, 77 AD3d 519, 520 [1st Dept 2010], *lv denied* 16 NY3d 864 [2011]; *People v Peralta*, 267 AD2d 172, 173 [1st Dept 1999], *lv denied* 95 NY2d 869 [2000]).

We nevertheless reverse the judgment and grant a new trial because the court erred in denying defendant's request for a missing witness charge. At trial, the complainant testified that she promptly reported the alleged rape, first to her boyfriend and then, several hours later at a separate location, to her mother. The mother testified that her daughter reported the alleged rape to her. The People, however, declined to call the boyfriend to the stand. Defendant therefore sought a missing witness charge for the boyfriend; in opposition, the People argued that the boyfriend's testimony would be cumulative of the mother's and that the boyfriend was not within the People's control. Although the court explicitly rejected the People's control argument, it nevertheless denied defendant's request for a missing witness instruction on cumulativeness grounds. The latter determination was error.

In *People v Smith* (33 NY3d 454 [2019]), the Court of Appeals held that the proponent of a missing witness charge has no initial burden to show that the missing testimony would not be cumulative of the remaining testimony, and that the concept of cumulativeness in this context functions only as a tool for defeating an otherwise-meritorious request for a missing witness instruction (*id.* at 458-460). Thus, the Court of Appeals explained, the opponent of the missing witness instruction has the burden of showing that the missing testimony would be cumulative in order to defeat the requested instruction on that ground (*id.*).

Applying the standard set forth in *Smith*, we conclude that the People failed to show that the boyfriend's testimony would have been

cumulative of the mother's testimony. The respective accounts would concern *different* outcries, separated by several hours and many blocks. The boyfriend could not have duplicated the mother's account of the complainant's outcry, because the boyfriend was not present during *that* particular event. Conversely, the mother could not have duplicated the boyfriend's account of the complainant's outcry, because the mother was not present during *that* particular event.

Moreover, treating the accounts as cumulative would be inconsistent with the prevailing definition of "cumulative" in this context. As *Smith* reiterated, testimony is cumulative when it would not have " 'contradicted *or* added to' " the existing testimony (*id.* at 461 [emphasis added], quoting *People v Almodovar*, 62 NY2d 126, 133 [1984]; *see People v Gonzalez*, 68 NY2d 424, 430 n 2 [1986]), and the People failed to establish that the boyfriend's testimony would not, at a minimum, have "added to" the mother's testimony. According to the complainant's testimony, she went directly from the site of the alleged rape to the boyfriend's house, where she immediately told him about the alleged rape. As such, under the complainant's version of events, she reported the alleged rape to her boyfriend *before* she reported it to her mother. The boyfriend's testimony thus would have been highly relevant to whether the complainant reported the alleged rape "at the *first* suitable opportunity" (*People v McDaniel*, 81 NY2d 10, 17 [1993] [emphasis added and internal quotation marks omitted]), which is the underlying purpose of prompt-outcry evidence (*see id.*). Put simply, the boyfriend's testimony would have "added to" the mother's testimony by shedding light on exactly when the complainant first reported the alleged rape, when she actually arrived at the boyfriend's house, whether she testified accurately about her actions at the boyfriend's home and the entire time period between leaving a particular party and returning to her mother's house many hours later, and whether—as the defense posited at trial—the complainant fabricated the attack upon arriving home late and intoxicated after having left her young child in the care of relatives.

Although *Smith* was an attempted murder case, the Court of Appeals' application of the cumulativeness standard to the facts in that case is markedly instructive here. In *Smith*, "due to inconsistencies in the victim's descriptions of the incident and what the shooter was wearing, the issue of identification was 'in sharp dispute . . . and the testimony of the [missing witness] might have made the difference,' " i.e., the missing witness "may have 'contradicted or added to' the victim's disputed identification testimony" (33 NY3d at 460-461). Similarly, due to the multiple inconsistencies and discrepancies in this case between the mother's testimony, the complainant's trial testimony about the alleged rape, and the complainant's account of the alleged rape to the investigating officer and a nurse back in 2005, the issue of forcible compulsion was in "sharp dispute" at trial (*id.* at 460 [internal quotation marks omitted]). Had he testified, the boyfriend—the first friendly person to encounter the complainant after the alleged rape—could have clarified the various inconsistencies and discrepancies concerning the timeline and precise events described by the complainant. Those

inconsistencies and discrepancies were critically important in this case, since the element of forcible compulsion hinged exclusively on the jury's assessment of the complainant's credibility. Thus, the boyfriend's testimony—just like the testimony of the missing witness in *Smith*—" 'might have made the difference' " because he "may have 'contradicted or added to' the victim's disputed . . . testimony" about the details of the crime alleged (*id.* at 461). Under these circumstances, a missing witness instruction was required (*see id.*; *People v Paulin*, 70 NY2d 685, 686-687 [1987]).

The error is not harmless. Although the DNA evidence conclusively established the occurrence of sexual intercourse between defendant and the complainant, the element of forcible compulsion turned exclusively on the complainant's testimony and the jury's corresponding assessment of her credibility. Such evidence is not overwhelming (*see e.g. People v Leonard*, 29 NY3d 1, 8 [2017]; *People v Holtslander*, 189 AD3d 1701, 1704 [3d Dept 2020]; *People v Stone*, 133 AD3d 982, 984 [3d Dept 2015]; *People v Wildrick*, 83 AD3d 1455, 1457-1458 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]), and "[a]s a matter of first principle, 'unless the proof of the defendant's guilt . . . is overwhelming, there is no occasion for consideration of any doctrine of harmless error' " (*People v J.L.*, 36 NY3d 112, 124 [2020], quoting *People v Crimmins*, 36 NY2d 230, 241 [1975]; *see People v Mairena*, 34 NY3d 473, 484 [2019]).

Contrary to the People's assertion, the improper denial of the requested missing witness charge "was not cured by permitting defense counsel to comment on the failure to call the witness in summation" (*Nuccio v Chou*, 183 AD2d 511, 514 [1st Dept 1992], *lv dismissed* 81 NY2d 783 [1993]; *see DeVito v Feliciano*, 22 NY3d 159, 165, 167 [2013]). The People's reliance on *People v Barber* (133 AD3d 868 [2d Dept 2015], *lv denied* 28 NY3d 926 [2016]) for the contrary proposition is unavailing because, unlike here, the defendant in *Barber* was not entitled to a missing witness charge at all (*see id.* at 870).

Finally, given the trial court's explicit rejection of the People's control argument, we are precluded from affirming on that ground (*see People v Concepcion*, 17 NY3d 192, 194-196 [2011]; *People v LaFontaine*, 92 NY2d 470, 473-475 [1998], *rearg denied* 93 NY2d 849 [1999]). Defendant's remaining contentions are academic in light of our determination.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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CAF 19-01009

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

IN THE MATTER OF MATTHEW A. DIXON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TAYLOR R. CROW, RESPONDENT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-APPELLANT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered May 8, 2019 in a proceeding pursuant to Family Court Act article 6. The order granted respondent supervised visitation with the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, after a hearing, granted the petition of petitioner father to modify a prior order of custody and visitation by requiring that the mother's visitation with the subject children be supervised and occur in New York. We affirm.

The mother contends that Family Court erred in denying her request for an adjournment of the hearing until she could travel from out of state to appear in person. We reject that contention. "The grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court,' " and we conclude under the circumstances here that the court did not abuse its discretion (*Matter of Steven B.*, 6 NY3d 888, 889 [2006], quoting *Matter of Anthony M.*, 63 NY2d 270, 283 [1984]; *cf. Matter of Sullivan v Sullivan*, 173 AD3d 1844, 1845 [4th Dept 2019]). We note that the mother has failed to demonstrate that she suffered any prejudice as a result of not attending the hearing in person inasmuch as she appeared by telephone, she declined the opportunity to testify, and her attorney fully represented her interests at the hearing (*cf. Sullivan*, 173 AD3d at 1845; *see generally Matter of Anastasia E.M. [Niasia F.]*, 146 AD3d 887, 889 [2d Dept 2017]; *Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315-1316 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]). We also reject the mother's related contention that the

court's refusal to grant the adjournment deprived her of effective assistance of counsel. Contrary to the mother's assertion, the record establishes that her attorney was fully familiar with the case and " 'was both competent and zealous' . . . , as evidenced by the fact that [she] . . . vigorously cross-examined [the father], . . . made appropriate objections" and put forth a reasoned, albeit unsuccessful, motion to dismiss the petition (*Matter of Ballard v Piston*, 178 AD3d 1397, 1398-1399 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]).

The mother further contends that the court erred in determining that there was reliable corroboration of the children's out-of-court statements describing certain mistreatment by the mother. We conclude that the mother's contention lacks merit. "It is well settled that there is 'an exception to the hearsay rule in custody [and visitation] cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct Act § 1046 (a) (vi)' . . . , where . . . the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732 [4th Dept 2006]; *see Matter of Ordona v Campbell*, 132 AD3d 1246, 1247 [4th Dept 2015]). "Although the degree of corroboration [required] is low, a threshold of reliability must be met" (*Matter of East v Giles*, 134 AD3d 1409, 1411 [4th Dept 2015] [internal quotation marks omitted]). "Courts have considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse" (*Matter of Poromon v Evans*, 176 AD3d 1642, 1642 [4th Dept 2019] [internal quotation marks omitted]).

Here, each child's out-of-court statements were sufficiently corroborated, and cross-corroborated, by the testimony at their separate *Lincoln* hearings that, during an out-of-state summer visitation period, the mother subjected them to excessive and inappropriate corporal punishment by repeatedly striking them with a belt thereby leaving bruises, deprived them of indoor bathroom facilities and necessities, and engaged in other mistreatment and inappropriate conduct while ostensibly caring for them (*see Matter of Gabriel R. [Jose R.]*, 188 AD3d 501, 502 [1st Dept 2020]; *Matter of George A. v Josephine D.*, 165 AD3d 425, 425 [1st Dept 2018]; *Matter of Lowe v O'Brien*, 81 AD3d 1093, 1094 [3d Dept 2011], *lv denied* 16 NY3d 713 [2011]). In addition, the children's reports of mistreatment and inappropriate conduct by the mother, and its detrimental effect on them, were partially corroborated by the testimony of the father (*see Matter of Antonio S. [Antonio S., Sr.]*, 154 AD3d 420, 420 [1st Dept 2017]). Although the mother challenges the court's determination with respect to the father's credibility and the reliability of the corroborative evidence, we note that " 'Family Court has considerable discretion in deciding whether a child's out-of-court statements alleging incidents of abuse have been reliably corroborated . . . , and its findings must be accorded deference on appeal where . . . the . . . [c]ourt is primarily confronted with issues of credibility' " (*East*, 134 AD3d at 1411). Here, "in view of its unique opportunity to observe the witnesses in the course of the fact-finding and *Lincoln* hearings, [the court's] credibility determinations are entitled to great deference" (*Matter of Eunice G. v Michael G.*, 85 AD3d 1339, 1340

[3d Dept 2011]), and we conclude that there is no basis on this record to disturb those determinations.

Contrary to the mother's further contention, the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a modification of the visitation arrangement is in the best interests of the children (*see Matter of Morales v Vaillant*, 187 AD3d 1591, 1591 [4th Dept 2020]). Here, the mother's mistreatment of the children during the summer visitation period, which included the infliction of excessive and inappropriate corporal punishment with a belt and the deprivation of adequate bathroom facilities and necessities, constituted the requisite change in circumstances (*see Matter of DeJesus v Gonzalez*, 136 AD3d 1358, 1360 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]; *Matter of Samuel v Samuel*, 64 AD3d 920, 921 [3d Dept 2009]; *Matter of Hagans v Harden*, 12 AD3d 972, 973 [3d Dept 2004], *lv denied* 4 NY3d 705 [2005]).

The mother also contends that the court erred in requiring that her visitation be supervised because the father failed to establish that such visitation is in the children's best interests. We conclude that the mother's contention lacks merit in light of the evidence of her mistreatment of the children. The determination whether visitation should be supervised "is a matter left to the sound discretion of the court and will not be disturbed where, as here, there is a sound and substantial basis in the record to support such visitation" (*Matter of Vieira v Huff*, 83 AD3d 1520, 1521 [4th Dept 2011]; *see Matter of Joseph G. v Winifred G.*, 104 AD3d 1067, 1068-1069 [3d Dept 2013], *lv denied* 21 NY3d 858 [2013]; *Matter of Boulerice v Heaney*, 45 AD3d 1217, 1218 [3d Dept 2007]). Contrary to the mother's related contention, we discern no basis to disturb the court's determination that the supervised visitation must occur in New York (*see Matter of LaRussa v Williams*, 114 AD3d 1052, 1055 [3d Dept 2014]). Finally, we note that if, as the mother now suggests in her brief on appeal, visitation is being withheld because the parties are unable to agree on a "mutually acceptable supervisor" to facilitate the mother's supervised visitation with the children in New York pursuant to the order, she "may file a petition seeking to enforce or modify the order" (*Matter of Moore v Kazacos*, 89 AD3d 1546, 1547 [4th Dept 2011], *lv denied* 18 NY3d 806 [2012]; *see Matter of Pierce v Pierce*, 151 AD3d 1610, 1611 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *Matter of Thomas v Small*, 142 AD3d 1345, 1346 [4th Dept 2016]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

168

CAF 19-00690

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL J.M., SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LISA M.H., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered September 5, 2018 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for a modification of an order of custody and visitation.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition of petitioner Michael J.M., Sr. is reinstated, and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: In these consolidated appeals arising from proceedings pursuant to Family Court Act articles 6 and 10, petitioner father appeals in appeal No. 1 from an order that dismissed as moot his article 6 petition for modification of custody and visitation. In appeal Nos. 2 through 4, the father appeals from modified orders of fact-finding and disposition that made a finding of neglect or derivative neglect against respondent mother with respect to each of the three subject children and placed the subject children with their maternal aunt. The father initially filed a petition for modification of custody and visitation against the mother, seeking primary residential custody of their three children. Petitioner Genesee County Department of Social Services then commenced a neglect proceeding against the mother, and the mother consented to the entry of orders finding the subject children to be neglected children. Family Court held a joint hearing regarding the neglect petition and the father's custody petition (*see* § 1055-b [a-1]), after which the court placed the children with their maternal aunt with the mother's consent but over the father's objection, and dismissed the father's custody petition as moot.

In appeal No. 1, we agree with the father that the court erred in dismissing his petition for modification of custody and visitation as moot without making a determination on the merits of his petition

pursuant to Family Court Act article 6 (*see* § 1055-b [a-1]). We further agree with the father that, " '[a]s 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' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]). Nevertheless, on the facts of this case, we conclude that the maternal aunt did not have the burden of making a showing of extraordinary circumstances inasmuch as she did not file a petition in this matter and was not awarded custody of the children, but rather the children were placed with her for the pendency of the article 10 proceeding pursuant to Family Court Act § 1017 (*cf. Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]; *Matter of Susan T. v Crystal T.*, 175 AD3d 1829, 1830-1831 [4th Dept 2019]). We therefore reverse the order in appeal No. 1 and reinstate the father's petition, and modify the modified orders in appeal Nos. 2 through 4 by vacating the disposition, and we remit the matter to Family Court for a determination of the father's petition under Family Court Act article 6 and reconsideration of the disposition in the article 10 proceeding in light of its determination on the father's petition.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

169

CAF 18-02360

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF KYLIE M.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA H., RESPONDENT.

MICHAEL J.M., SR., APPELLANT.
(APPEAL NO. 2.)

DAVID J. PAJAK, ALDEN, FOR APPELLANT.

ANDREA R. CLATTENBURG, BATAVIA, FOR PETITIONER-RESPONDENT.

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

Appeal from a modified order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 7, 2018 in a proceeding pursuant to Family Court Act article 10. The modified order, inter alia, determined that respondent had neglected the subject child and placed the child in the custody of a relative.

It is hereby ORDERED that the modified order so appealed from is unanimously modified on the law by vacating the disposition and as modified the modified order is affirmed without costs and the matter is remitted to Family Court, Genesee County, for further proceedings.

Same memorandum as in *Matter of Michael J.M., Sr. v Lisa M.H.* (— AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

170

CAF 18-02361

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL M., JR.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA H., RESPONDENT.

MICHAEL J.M., SR., APPELLANT.
(APPEAL NO. 3.)

DAVID J. PAJAK, ALDEN, FOR APPELLANT.

ANDREA R. CLATTENBURG, BATAVIA, FOR PETITIONER-RESPONDENT.

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

Appeal from a modified order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 7, 2018 in a proceeding pursuant to Family Court Act article 10. The modified order, inter alia, determined that respondent had neglected the subject child and placed the child in the custody of a relative.

It is hereby ORDERED that the modified order so appealed from is unanimously modified on the law by vacating the disposition and as modified the modified order is affirmed without costs and the matter is remitted to Family Court, Genesee County, for further proceedings.

Same memorandum as in *Matter of Michael J.M., Sr. v Lisa M.H.* (— AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

171

CAF 18-02362

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF NAOMIE H.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LISA H., RESPONDENT.

MICHAEL J.M., SR., APPELLANT.
(APPEAL NO. 4.)

DAVID J. PAJAK, ALDEN, FOR APPELLANT.

ANDREA R. CLATTENBURG, BATAVIA, FOR PETITIONER-RESPONDENT.

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

Appeal from a modified order of the Family Court, Genesee County (Eric R. Adams, J.), entered December 7, 2018 in a proceeding pursuant to Family Court Act article 10. The modified order, inter alia, determined that respondent had neglected the subject child and placed the child in the custody of a relative.

It is hereby ORDERED that the modified order so appealed from is unanimously modified on the law by vacating the disposition and as modified the modified order is affirmed without costs and the matter is remitted to Family Court, Genesee County, for further proceedings.

Same memorandum as in *Matter of Michael J.M., Sr. v Lisa M.H.* (— AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

186

KA 19-00658

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDRIA HEATH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered February 21, 2019. The judgment convicted defendant upon her plea of guilty of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that her waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. The record establishes that the oral colloquy, together with the written waiver of the right to appeal, was adequate to ensure that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jenkins*, 184 AD3d 1150, 1150 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]), and that valid waiver forecloses her challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

188

KA 16-00848

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

FELIPE LEBRON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 10, 2016. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

192

CAF 19-01753

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

IN THE MATTER OF LAHNI ELIZABETH THOMAS,
PETITIONER-APPELLANT,

V ORDER

GEOFFREY DAVID THOMAS, RESPONDENT-RESPONDENT.

IN THE MATTER OF GEOFFREY DAVID THOMAS,
PETITIONER-RESPONDENT,

V

LAHNI ELIZABETH THOMAS, RESPONDENT-APPELLANT.

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

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

JOAN MERRY, HORNELL, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), dated September 9, 2019 in proceedings pursuant to Family Court Act article 6. The order, inter alia, continued joint custody of the subject children.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

193

CAF 19-02012

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

IN THE MATTER OF WILLIAM A., III

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

MEMORANDUM AND ORDER

JESSICA F., RESPONDENT-APPELLANT, AND WILLIAM A., JR., RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 27, 2019 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, adjudged that respondent Jessica F. had neglected the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, and the petition is dismissed against respondent Jessica F.

Memorandum: On appeal from an order of fact-finding and disposition that, inter alia, determined that she neglected the subject child, respondent mother contends that she was not properly served with the petition and that, as a result, Family Court erred in denying her motion to dismiss the petition against her for lack of personal jurisdiction. We agree with the mother and conclude that she was not properly served. We therefore reverse the order insofar as appealed from, grant the motion, and dismiss the petition against the mother.

After being unable to locate the mother to deliver the summons and petition to her personally (*see generally* Family Ct Act § 1036 [b]), petitioner applied for an order permitting substituted service (*see generally* § 1036 [d]). In support of that application, petitioner submitted a number of documents listing various addresses for the mother. Although the court initially denied the application, the court later issued an order permitting service pursuant to CPLR 308 (4) at a particular residence after petitioner submitted a

"diligence of effort affidavit." That residence was not one of the residences listed in the documents submitted by petitioner.

Despite the order permitting service pursuant to CPLR 308 (4), petitioner thereafter attempted to serve the mother pursuant to CPLR 308 (2) by serving a person over the age of 18 at the address listed in that order, i.e., the alleged "dwelling house or usual place of abode" of the mother, and thereafter mailing the documents "by prepaid, first class mail." The affidavit of service does not identify the address used for the mailing.

The mother's attorney moved to dismiss the petition against the mother for lack of personal jurisdiction, contending, inter alia, that the mother never lived at the residence where service was attempted and that the affidavit of service failed to identify the address to which the documents were mailed. We conclude that the court erred in denying the mother's motion.

Regardless of whether service was made pursuant to CPLR 308 (2) or (4), both subdivisions require that the initial act, i.e., the delivery or affixing of the summons, respectively, be made at the party's "actual . . . dwelling place or usual place of abode" (CPLR 308 [2], [4]). A " 'dwelling place' is one at which the [party to be served] is actually residing at the time of delivery. . . [, and] [t]he 'usual place of abode' is a place at which the [party] lives with a degree of permanence and stability and to which he [or she] intends to return" (*Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776, 777 [2d Dept 2017]). Both subdivisions thereafter require the requisite documents to be mailed to the party's "last known residence or . . . actual place of business" (CPLR 308 [2], [4]). Jurisdiction is not acquired pursuant to CPLR 308 (2) or (4) unless there has been strict compliance with "both the delivery and mailing requirements" (*CitiMortgage, Inc. v Twersky*, 153 AD3d 1230, 1232 [2d Dept 2017] [internal quotation marks omitted]; *see Wells Fargo Bank, N.A. v Heaven*, 176 AD3d 761, 762 [2d Dept 2019]).

"While the ultimate burden of proof rests with the party asserting jurisdiction, . . . [a] plaintiff[] in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the [court]" (*Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 986 [2d Dept 2007]; *see Constantine v Stella Maris Ins. Co., Ltd.*, 97 AD3d 1129, 1130 [4th Dept 2012]). Although " '[o]rdinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit' " (*Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept 2017]). In addition, it is well settled that a defect in service cannot be cured by a party's actual notice of the commencement of an action or proceeding (*see Feinstein v Bergner*, 48 NY2d 234, 241 [1979]).

In our view, petitioner failed in the first instance to establish

that the documents were mailed to the mother's " 'last known address' " inasmuch as "[t]he affidavit of service says that the [papers] were mailed [by prepaid, first class mail] . . . , without identifying th[e] address" to which they were mailed (*Deutsche Bank Natl. Trust Co. v Ferguson*, 156 AD3d 460, 461 [1st Dept 2017]; *see Wells Fargo Bank, N.A.*, 176 AD3d at 763). In any event, even assuming, arguendo, that the process server's affidavit was sufficient to create the presumption of valid service, we conclude that the mother's submissions were sufficient to rebut that presumption.

The mother's attorney submitted an affidavit from his legal assistant establishing that the person who accepted service mistakenly thought the papers were for his daughter, who shared the same first name as the mother. That person also informed the legal assistant that the mother had never resided at that address and that the mother's father, with whom petitioner believed the mother was residing, "had moved out of the home months earlier." We thus conclude that the mother rebutted any presumption that she was properly served at her "actual place of business, dwelling place or usual place of abode so as to satisfy the requirements of CPLR 308 (2) [or (4)]" (*Prochillo v Acker*, 108 AD2d 800, 802 [2d Dept 1985], *lv denied* 66 NY2d 603 [1985]; *see generally Ben-Amram v Hershowitz*, 14 AD3d 638, 638 [2d Dept 2005]). Additionally, we note that petitioner's own submissions in the application for an order of substituted service raise a question whether the mother ever resided at the address listed in the affidavit of service inasmuch as that address was not among the numerous identified addresses for her.

In view of our determination, we do not address the mother's remaining contentions.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

194

CAF 20-00831

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

IN THE MATTER OF JEROME G.,
RESPONDENT-APPELLANT.

ERIE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., ATTORNEY FOR THE CHILD, BUFFALO (JOHN MORRISSEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (AMY MCCABE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered December 13, 2019 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

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

Memorandum: In this juvenile delinquency proceeding pursuant to Family Court Act article 3, respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crimes of assault in the third degree (Penal Law § 120.00 [2]) and reckless endangerment in the second degree (§ 120.20). Preliminarily, we reject petitioner's contention that the appeal is rendered moot by the expiration of respondent's one-year conditional discharge. "An appeal from a delinquency proceeding is not necessarily rendered moot by the expiration of the term of the conditional discharge, as the delinquency determination 'nevertheless implicates possible collateral legal consequences' " (*Matter of Ryan LL.*, 119 AD3d 994, 994 [3d Dept 2014], *lv denied* 25 NY3d 904 [2015]).

Although respondent contends that Family Court abused its discretion in allowing certain rebuttal evidence, respondent correctly concedes that he failed to preserve that contention for our review because he failed to object to the allegedly improper evidence (*see Matter of Kimaya Mc.*, 51 AD3d 671, 672 [2d Dept 2008]), and we decline to exercise our power to review that contention in the interest of justice (*see generally Matter of Shannon F.*, 121 AD3d 1595, 1596 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]).

We reject respondent's further contention that he received ineffective assistance of counsel. Defense counsel made a successful motion for a trial order of dismissal, resulting in the dismissal of the only felony count of which respondent was charged, and secured a conditional discharge on the misdemeanor charges which respondent was ultimately found to have committed. Viewing the evidence, law, and circumstances of the case in totality and as of the time of the representation, we conclude that respondent received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

195

CAF 20-00828

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

IN THE MATTER OF PETER M. ALEXANDER,
PETITIONER-APPELLANT,

V ORDER

LORRAINE C. ALEXANDER, RESPONDENT-RESPONDENT.

PETER M. ALEXANDER, PETITIONER-APPELLANT PRO SE.

MACKENZIE HUGHES LLP, SYRACUSE (JILLIAM L.D. MCGUIRE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 19, 2019 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's written objection to an order of a support magistrate.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

196

CAF 18-01862

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

IN THE MATTER OF KEVIN J. BLAIR,
PETITIONER-RESPONDENT,

V ORDER

CRYSTAL L. BASSETTE-DIGREGORIO,
RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

KEVIN J. BLAIR, PETITIONER-RESPONDENT PRO SE.

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore A. Pavone, R.), entered September 17, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole legal and primary physical custody of the subject child.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

201

CA 20-00669

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, AND TROUTMAN, JJ.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE FINAL ACCOUNT OF JPMORGAN CHASE BANK N.A. (SUCCESSOR BY CONVERSION TO JPMORGAN CHASE BANK, SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK, SUCCESSOR BY MERGER TO THE CHASE MANHATTAN BANK, N.A., SUCCESSOR BY MERGER TO CHASE LINCOLN FIRST BANK, N.A., SUCCESSOR IN INTEREST TO LINCOLN FIRST BANK, N.A.), AS TRUSTEE OF THE TRUST UNDER THE LAST WILL AND TESTAMENT OF LUCY GAIR GILL, DECEASED, FOR THE BENEFIT OF MARY GILL ROBY, ET AL., PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

WILLIAM S. ROBY, III, OBJECTANT-APPELLANT.

WILLIAM S. ROBY, III, OBJECTANT-APPELLANT PRO SE.

NIXON PEABODY LLP, ROCHESTER (ERIC M. FERRANTE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended decree of the Surrogate's Court, Monroe County (John M. Owens, S.), entered October 4, 2018. The amended decree, among other things, awarded the attorney for petitioner $88,461 in attorneys' fees.

It is hereby ORDERED that the amended decree is unanimously affirmed without costs.

Memorandum: On a prior appeal, we modified a decree by vacating the award of attorneys' fees, costs and disbursements and remitting the matter to Surrogate's Court for a determination whether those fees, costs and disbursements were reasonable (*Matter of JPMorgan Chase Bank, N.A. [Roby]*, 158 AD3d 1224 [4th Dept 2018]). Objectant now appeals from an amended final decree of the Surrogate that, inter alia, awarded $88,461 in attorneys' fees for the attorney for petitioner. We affirm. In determining the amount of attorneys' fees, the Surrogate properly considered " 'the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' " (*Matter of HSBC Bank USA, N.A. [Campbell]*, 150 AD3d 1661, 1663 [4th Dept 2017], quoting *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925]). Contrary to objectant's contention, the Surrogate did not abuse his discretion in determining that an award of approximately 10% of the

gross value of the trust was reasonable under the facts of this case (*cf. Matter of Mahnk*, 138 AD2d 939, 940 [4th Dept 1988]; *see generally Matter of Birnbaum*, 159 AD2d 997, 997 [4th Dept 1990], *appeal dismissed* 76 NY2d 783 [1990], *lv denied* 76 NY2d 709 [1990]). We have considered objectant's remaining contentions and conclude that they are without merit.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

204

CA 20-01074

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND TROUTMAN, JJ.

WILLIAM MARC MATHIAS, AS ADMINISTRATOR OF THE ESTATE OF LINDA NEMCOW, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

STEPHEN HALE, DEFENDANT-APPELLANT.

HITE & BEAUMONT, P.C., ALBANY (JOHN H. BEAUMONT OF COUNSEL), FOR DEFENDANT-APPELLANT.

HASAPIDIS LAW OFFICES, SOUTH SALEM (ANNETTE G. HASAPIDIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 4, 2019. The order granted plaintiff's motion for partial summary judgment on the issue of liability.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

207

TP 20-00782

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

IN THE MATTER OF KEVIN MADISON, PETITIONER,

V ORDER

JULIE WOLCOTT, SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY, RESPONDENT.

KEVIN MADISON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [Sanford A. Church, A.J.], entered June 17, 2020) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated inmate rules.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

208

KA 18-02398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM HEMPHILL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE 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 (Paul Wojtaszek, J.), rendered May 23, 2018. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that he did not validly waive his right to appeal and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

210

KA 19-01374

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TALIEK FLETCHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered June 4, 2019. The judgment convicted defendant upon his plea of guilty of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). By failing to move to withdraw his guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review his contention that his guilty plea was not knowingly or voluntarily entered (*see People v Liepke*, 184 AD3d 1109, 1109 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]). This case does not fall within the rare exception to the preservation requirement because nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea (*see People v Davis*, 134 AD3d 1459, 1460 [4th Dept 2015], *lv denied* 27 NY3d 1150 [2016]).

Defendant contends that the court did not appropriately inquire into his request for a substitution of counsel. Even assuming, arguendo, that the contention survives his guilty plea (*see People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]), we conclude that he "abandoned his request for new counsel when he decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020] [internal quotation marks omitted]).

Defendant's further contention that he was denied effective

assistance of counsel does not survive his guilty plea where, as here, "[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance" (*Davis*, 134 AD3d at 1459-1460 [internal quotation marks omitted]; *see People v Coleman*, 178 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 35 NY3d 1026 [2020]). To the extent that defendant's contention survives the plea, it concerns matters outside the record that must be raised by way of a motion pursuant to CPL article 440 (*see People v Lopez*, 189 AD3d 2152, 2153 [4th Dept 2020]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

211

KA 16-02078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FELIX ESQUILIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 13, 2016. The judgment convicted defendant, upon a plea of guilty, of assault 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 assault in the first degree (Penal Law § 120.10 [1]). As the People correctly concede, defendant's waiver of the right to appeal is invalid. Supreme 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 Bisono*, — NY3d —, —, 2020 NY Slip Op 07484, *2 [2020]; *People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

213

KA 16-02097

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ODYSSTY D. REED, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (Melchor E. Castro, A.J.), rendered August 19, 2016. The judgment convicted defendant upon his plea of guilty of robbery in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that County Court erred in failing to determine whether he should be afforded youthful offender status. We agree. Because defendant was convicted of an armed felony offense (*see* CPL 1.20 [41]), he is ineligible to receive a youthful offender adjudication unless the court determines that one of two mitigating factors is present (*see* CPL 720.10 [2] [a] [ii]; [3]). If the court, in its discretion, determines that neither of the mitigating factors is present and states the reason for its determination on the record, then no further determination on the youthful offender application is required (*see People v Middlebrooks*, 25 NY3d 516, 527 [2015]; *People v Jones*, 155 AD3d 1547, 1552 [4th Dept 2017], *amended on rearg* 156 AD3d 1493 [4th Dept 2017], *lv denied* 32 NY3d 1205 [2019]). If, however, the court determines that one or more of those mitigating factors are present, and that defendant is therefore an eligible youth, it must then determine whether defendant is a youthful offender (*see Middlebrooks*, 25 NY3d at 527; *People v Dukes*, 147 AD3d 1534, 1535 [4th Dept 2017]).

Here, the court did not follow the procedure set forth in *Middlebrooks*, inasmuch as it made no on-the-record determination of defendant's eligibility for a youthful offender adjudication at sentencing (*see People v Gonzalez*, 171 AD3d 1502, 1503 [4th Dept 2019]). Consequently, we hold the case, reserve decision, and remit the matter to County Court "to make and state for the record 'a

determination of whether defendant is a youthful offender' " (*People v Wilson*, 151 AD3d 1836, 1837 [4th Dept 2017], quoting *People v Rudolph*, 21 NY3d 497, 503 [2013]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

214

CAF 20-00827

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

IN THE MATTER OF MICHELLE SIGOURNEY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SANTARO, RESPONDENT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR RESPONDENT-APPELLANT.

ALDERMAN & ALDERMAN, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered December 31, 2019 in a proceeding pursuant to Family Court Act article 4. The order, among other things, dismissed the objections of respondent to the determination of the Support Magistrate and granted in part the objections of petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, respondent's objections are reinstated and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, respondent appeals from an order that, among other things, granted in part petitioner's objections to a determination of the Support Magistrate, and dismissed respondent's objections on the ground that respondent failed to timely file proof of service of his objections upon petitioner. We reverse.

Family Court Act § 439 (e) provides that a party filing objections to the determination of the Support Magistrate must serve those objections upon the opposing party, and that proof of service "shall be filed with the court at the time of filing of objections." Here, the record indicates that respondent timely filed his objections and served a copy of those objections upon petitioner on the same day, but respondent failed to file proof of service with Family Court until two days later.

Under the particular circumstances of this case, we substitute our discretion for that of Family Court and conclude that dismissal of respondent's objections is not warranted (*see generally Hawe v Delmar*, 148 AD3d 1788, 1789 [4th Dept 2017]). Although respondent failed to comply with the statutory deadline for filing proof of service,

" '[s]trict adherence to this deadline is not required,' " and courts have " 'discretion to overlook a minor failure to comply with the statutory requirement' " (*Matter of Hobbs v Wansley*, 143 AD3d 1138, 1139 [3d Dept 2016]). Here, there is no dispute that petitioner was not prejudiced by the late filing inasmuch as she was served with a copy of respondent's objections within the statutory time period (*see* Family Ct Act § 439 [e]). Indeed, the record shows that petitioner filed a rebuttal to respondent's objections. Thus, we reverse the order, reinstate the objections of respondent, and remit the matter to Family Court for further proceedings on the objections.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

215

CAF 19-00554

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

IN THE MATTER OF LAMAIRIK S.

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

MEMORANDUM AND ORDER

ERIKA S., RESPONDENT,
AND JONAS S., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (DAVID L. CHAPLIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered January 29, 2019 in a proceeding pursuant to Family Court Act article 10. The order adjudicated the subject child to be a neglected child and placed respondent Jonas S. under the supervision of petitioner for a period of 12 months.

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

Memorandum: Respondent father appeals from an order that adjudicated the subject child to be a neglected child based on a finding of derivative neglect. Contrary to the father's contention, Family Court's finding of derivative neglect is supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Dante S. [Kathryne T.]* [appeal No. 2], 181 AD3d 1311, 1312 [4th Dept 2020]). "It is well settled that a derivative finding of neglect is warranted where, as here, the [father's] neglect of the subject child is so closely connected with the care of another child as to indicate that the [subject] child is equally at risk" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011] [internal quotation marks omitted]). Here, petitioner established that " 'the neglect . . . of [three older children] was so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still existed' " (*Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568 [4th Dept 2014]; *see Matter of Sasha M.*, 43 AD3d 1401, 1402 [4th Dept 2007]). Thus, contrary to the father's contentions, there was sufficient evidence to establish that he derivatively neglected the subject child inasmuch as

" 'the evidence of . . . neglect of [the older] child[ren] indicates a fundamental defect in [the father's] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care' " (*Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1514 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]).

Although the father has shown progress in completing the directed programs, he failed to meet his burden of demonstrating that the circumstances leading to the prior neglect "cannot reasonably be expected to exist currently or in the foreseeable future" (*Matter of Amber C.*, 38 AD3d 538, 541 [2d Dept 2007], *lv denied* 8 NY3d 816 [2007], *lv dismissed* 11 NY3d 728 [2008] [internal quotation marks omitted]; *see Matter of William N. [Kimberly H.]*, 118 AD3d 703, 706 [2d Dept 2014]). "[I]nasmuch as the paramount purpose of Family [Court] Act article 10 is the protection of the physical, mental, and emotional well-being of children . . . , and mindful of the particular vulnerability attendant to newborn infants such as the child herein," we conclude that the court did not err in making a finding of derivative neglect (*Matter of Tristyn R. [Jacqueline Z.]*, 118 AD3d 1468, 1469 [4th Dept 2014] [internal quotation marks omitted]).

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

219

CA 20-00902

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

DARREN ZIMMERMAN AND JENNIFER ZIMMERMAN,
PLAINTIFFS-RESPONDENTS,

V ORDER

JUREK BUILDERS, INC. AND HDJ BUILDERS, INC.,
DEFENDANTS.

SOUTHWEST MARINE AND GENERAL INSURANCE COMPANY,
APPELLANT.

CULLEN AND DYKMAN LLP, NEW YORK CITY (OLIVIA M. GROSS OF COUNSEL), FOR APPELLANT.

BROWN CHIARI LLP, BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered July 7, 2020. The order granted the motion of plaintiffs to compel Southwest Marine and General Insurance Company to disclose certain documents.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

223

CA 20-00517

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

IN THE MATTER OF R.W. BURROWS GRANTOR FAMILY TRUST.

JI TING WANG-BURROWS AND EVAN DREYFUSS, PETITIONERS-RESPONDENTS;

ORDER

MICHAEL LENGVARSKY AND MARCIA BURROWS, RESPONDENTS-APPELLANTS.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (GERARD G. BREW OF COUNSEL), AND KERNAN AND KERNAN, P.C., UTICA, FOR RESPONDENTS-APPELLANTS.

MCCARTHY FINGAR LLP, WHITE PLAINS (ROBERT H. ROSH OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Herkimer County (John H. Crandall, S.), entered February 26, 2020. The order, among other things, denied respondents' motion for summary judgment dismissing the petition and granted petitioners' cross motion for summary judgment.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

228

TP 20-01291

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF ANNMARIE SAM, PETITIONER,

V MEMORANDUM AND ORDER

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

ANNMARIE SAM, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frank A. Sedita, III, J.], entered September 10, 2020) to review a determination of respondent. The determination suspended indefinitely the prison visitation privileges of petitioner.

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 a determination suspending indefinitely her prison facility visitation privileges. The suspension of petitioner's privileges was based on the allegation that, while petitioner and her eight-year-old grandchild were visiting petitioner's husband, who is an inmate, petitioner inappropriately touched her husband's leg and groin area and that her husband assaulted and injured several staff members who terminated the visit and removed him from the visitation area.

As an initial matter, petitioner did not request a hearing to appeal the determination suspending her visitation privileges and instead proceeded on written submissions only (*see* 7 NYCRR 201.4 [c] [1] [ii]-[iv]). Absent a hearing, our standard of review is not whether the determination is supported by "substantial evidence" (CPLR 7803 [4]) but rather whether it was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR 7803 [3]; *cf. Matter of Suttles v Annucci*, 177 AD3d 1062, 1062 [3d Dept 2019]). Thus, this proceeding does not raise a substantial evidence

issue, and Supreme Court therefore should not have transferred the proceeding to this Court (*see Matter of Occupational Safety & Envtl. Assoc., Inc. v New York State Dept. of Economic Dev.*, 161 AD3d 1582, 1582 [4th Dept 2018], *lv denied* 32 NY3d 904 [2018]). Nevertheless, we address the merits of petitioner's contentions in the interest of judicial economy (*see id.*).

Contrary to petitioner's contention, the determination indefinitely suspending her visitation privileges should be confirmed. The misbehavior reports in the record state that a correction officer observed petitioner's husband inappropriately touching petitioner, warned him to stop, and later observed petitioner inappropriately touching her husband; it is undisputed that petitioner's eight-year-old grandchild was present during the visit. The misbehavior reports also reflect that petitioner's husband began assaulting correction officers once they terminated the visit due to the inappropriate touching. Based on those reports, the determination to indefinitely suspend petitioner's visitation privileges was not arbitrary and capricious (*see* CPLR 7803 [3]; *see generally Matter of Guesno v Village of E. Rochester*, 118 AD3d 1460, 1460-1461 [4th Dept 2014]). We note that 7 NYCRR 201.4 (e) (3) provides that a visitor's privileges may be indefinitely suspended if the "visitor and/or inmate" assaults facility staff, and thus it is immaterial that petitioner herself did not participate in the assault. Further, although petitioner contends that her husband's conduct toward the correction officers did not occur until after the visit had ended, the record reflects that the conduct was directly related to the inappropriate contact the correction officers observed between petitioner and her husband during the visit, and "there is no express requirement that the actions which lead to the revocation take place during an actual visit" (*Matter of Mary X. v Goord*, 37 AD3d 888, 889 [3d Dept 2007], *lv denied* 8 NY3d 812 [2007]).

We reject petitioner's contention that the indefinite suspension of her visitation privileges was not permitted under applicable regulation. A visitor's privileges may be suspended "for a term of six months or more, up to and including an indefinite suspension pending reinstatement . . . for misconduct that represents a serious threat to the safety, security, and good order of the facility as specified in subdivision (e) of [7 NYCRR 201.4]" (7 NYCRR 201.4 [c]). As relevant here, 7 NYCRR 201.4 (e) (3) authorizes an indefinite suspension if the "visitor and/or inmate engage in unacceptable physical conduct," depending on the egregiousness of the offense, the surrounding circumstances, and past instances of misconduct. That provision also permits an indefinite suspension of a visitor's privileges if the "visitor and/or inmate" assaults facility staff. Based on the evidence and circumstances of this case, we conclude that the indefinite suspension was authorized.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

230

KA 16-01479

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. DRAGONE, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIELLE E. PHILLIPS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 21, 2016. The judgment convicted defendant, upon a plea of guilty, of attempted murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [2]), defendant contends that he did not validly waive his right to appeal. As the People correctly concede, Supreme Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing it as an absolute bar to the taking of an appeal, and we thus conclude that the colloquy was insufficient to ensure that defendant's waiver was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that "[t]he better practice is for the court to use the Model Colloquy, which neatly synthesizes . . . the governing principles" (*People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020] [internal quotation marks omitted]; *see Thomas*, 34 NY3d at 567; NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

232

KA 17-00058

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RUTH M. LORA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 21, 2016. The judgment convicted defendant upon a jury verdict of kidnapping in the second degree (two counts), criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree and dismissing counts 28, 30, and 32 of the indictment against her and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of two counts of kidnapping in the second degree (Penal Law § 135.20) and one count each of criminal use of a firearm in the first degree (§ 265.09 [1] [a]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Contrary to defendant's contention, the evidence is legally sufficient to support her conviction of kidnapping in the second degree as an accomplice. 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 conclusion that defendant had "a shared intent, or 'community of purpose' with the principal[s]" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016], quoting *People v Cabey*, 85 NY2d 417, 421 [1995]). Based on the evidence adduced at trial, it is reasonable to infer that defendant was aware that the victims were being held at a house in which she was present and that she intentionally aided the principals by providing them and the

victims with food (*see generally* § 20.00). A defendant's intent " 'may be inferred from [his or her] conduct as well as the surrounding circumstances' " (*People v Metales*, 171 AD3d 1562, 1563 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], quoting *People v Steinberg*, 79 NY2d 673, 682 [1992]) and, in this case, the evidence established that defendant sent text messages to a codefendant, Inalia Rolldan (*see People v Rolldan*, 175 AD3d 1811 [4th Dept 2019], *lv denied* 34 NY3d 1081 [2019]), close in time to defendant's arrival at the house, warning Rolldan to not use real names and suggesting that something nefarious was taking place. It is also a reasonable inference that, later in the evening, defendant left the house to procure more food. In addition, viewing the evidence in light of the elements of kidnapping in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the evidence is legally insufficient to support her conviction of the counts of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, and we therefore modify the judgment accordingly. Those counts were based on defendant's constructive possession of a rifle that was found in the house after the police entered. The People failed to establish that defendant "exercised dominion or control over [the rifle] by a sufficient level of control over the area in which [it was] found" to establish that she had constructive possession of it (*People v Everson*, 169 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019] [internal quotation marks omitted]). Rather, as was the case with codefendant Rolldan, the People established nothing more than "defendant's mere presence in the house where the weapon [was] found" (*Rolldan*, 175 AD3d at 1813).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

233

KA 17-01967

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD GRAHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 8, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant was previously convicted of criminal possession of a weapon in the second degree and endangering the welfare of a child, arising from the same incident, but this Court reversed that judgment and dismissed the indictment on the grounds that neither the grand jury nor the petit jury was instructed on the defense of temporary innocent possession (*People v Graham*, 148 AD3d 1517 [4th Dept 2017]).

We reject defendant's contention that the grand jury proceedings resulting in the new indictment were defective. Although defendant was restrained when he testified before the grand jury, the prosecutor twice instructed the grand jury not to draw any negative inference from the restraints, and we conclude that those instructions were "sufficient to dispel any potential prejudice to defendant" (*People v Barnes*, 139 AD3d 1371, 1373 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016] [internal quotation marks omitted]; *see People v Griggs*, 117 AD3d 1523, 1523 [4th Dept 2014], *affd* 27 NY3d 602 [2016], *rearg denied* 28 NY3d 957 [2016]; *People v Cotton*, 120 AD3d 1564, 1565 [4th Dept 2014], *lv denied* 27 NY3d 963 [2016]). We further conclude that "defendant has not established a possibility of prejudice justifying the exceptional remedy of dismissal of the indictment" based on the prosecutor's instruction to the grand jury on constructive possession

(*People v Wisdom*, 23 NY3d 970, 973 [2014]). Additionally, although we agree with defendant that the prosecutor erred in presenting to the grand jury testimony from the victim contradicting evidentiary facts that were resolved in defendant's favor at the first trial (*see People v O'Toole*, 22 NY3d 335, 338 [2013]; *see also People v Williams*, 163 AD3d 1418, 1420 [4th Dept 2018]), we conclude that the submission of that testimony involved "the erroneous handling of evidentiary matters, [which does] not merit invalidation of the indictment" where, as here, the remaining evidence is sufficient to establish the charge for which defendant was indicted (*People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* 23 NY3d 948 [2014]; *see Wisdom*, 23 NY3d at 972; *People v Huston*, 88 NY2d 400, 409 [1996]).

Defendant further contends that the evidence is legally insufficient to establish that the firearm recovered was "loaded with live ammunition" (*People v Redmond*, 182 AD3d 1020, 1022 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *see* Penal Law § 265.03 [3]). We reject that contention. The firearms examiner testified that she successfully test fired one of the three rounds submitted to her, and the officer who discovered the firearm testified that those three rounds were recovered from the firearm. Thus, 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 from which a rational jury could have found that element of the crime proved beyond a reasonable doubt (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we likewise reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley,* 69 NY2d at 495). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), the jury did not "fail[ ] to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, Supreme Court did not abuse its discretion in responding to the jury's request for information by declining to reread the definition of temporary innocent possession inasmuch as the jury did not request a rereading of that definition (*see People v Almodovar*, 62 NY2d 126, 131-132 [1984]; *People v Sanchez*, 160 AD3d 903, 903 [2d Dept 2018], *lv denied* 31 NY3d 1121 [2018]; *People v Martinez*, 8 AD3d 8, 9 [1st Dept 2004], *lv denied* 3 NY3d 677 [2004]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

235

CAF 19-00651

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHLOE R.

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

ORDER

KATHLEEN H., RESPONDENT,
AND GIANNA C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered January 22, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Gianna C. had neglected the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 11 and 12, 2021,

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

236

CAF 19-02068

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHLOE R.

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

ORDER

GIANNA C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered October 11, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the placement of the subject child with petitioner.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 11 and 12, 2021,

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

239

CAF 19-01700

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CHRISTOPHER BECKI,
PETITIONER-RESPONDENT,

V ORDER

STACY HAMILTON, RESPONDENT-APPELLANT.

IN THE MATTER OF STACY HAMILTON,
PETITIONER-APPELLANT,

V

CHRISTOPHER BECKI, RESPONDENT-RESPONDENT.

AMBER R. POULOS, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

CONNIE M. LOZINSKY, NIAGARA FALLS, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered June 28, 2019 in proceedings pursuant to Family Court Act article 6. The order, among other things, granted the petition of petitioner-respondent seeking to modify a prior court order.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

240

CAF 20-01265

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF KIRK M.B.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RACHEL S., RESPONDENT-APPELLANT,
AND STEVEN T.S., RESPONDENT.

WEISBERG & ZUKHER, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR RESPONDENT-APPELLANT.

JEFFREY DEROBERTS, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR PETITIONER-RESPONDENT.

KAREN J. DOCTER, FAYETTEVILLE, ATTORNEY FOR THE CHILD.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered August 18, 2020 in a proceeding pursuant to Family Court Act article 5. The order, among other things, determined that genetic marker testing was in the best interests of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding to establish paternity, respondent mother appeals from an order in which Family Court, without conducting a hearing, determined that genetic marker testing was in the best interests of the child and ordered such testing.

We agree with the mother that the court erred in ordering genetic marker testing without first holding a hearing to determine whether testing was in the best interests of the child. It is undisputed that, at the time of the child's birth, respondents were married to one another, and respondents alleged that they had access to each other during the relevant time frame such that the presumption of legitimacy would apply. Although the court has the authority to order genetic marker and DNA testing in order to establish paternity, "[n]o such test shall be ordered . . . upon a written finding by the court that it is not in the best interests of the child on the basis of . . . the presumption of legitimacy of a child born to a married woman" (Family Ct Act § 532 [a]; *see Matter of Tracy C.O. v Douglas A.F.*, 66

AD3d 1390, 1391-1392 [4th Dept 2009]; *see also Matter of Jennifer L. v Gerald S.*, 145 AD3d 1581, 1582-1583 [4th Dept 2016], *lv dismissed* 29 NY3d 942 [2017]). On this record, "[t]here was insufficient evidence before the court to determine the child's best interests," and we thus conclude that, before ordering the genetic marker test, the court should have conducted a hearing to determine whether it was in the best interests of the child to do so, based on the presumption of legitimacy (*Tracy C.O.*, 66 AD3d at 1392 [internal quotation marks omitted]; *see Matter of Schenectady County Dept. of Social Servs. v Joshua BB.*, 168 AD3d 1244, 1245 [3d Dept 2019]). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition consistent with this decision.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

242

CA 20-01031

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

MICHAEL BONK, PLAINTIFF-RESPONDENT,

V ORDER

TURNER CONSTRUCTION COMPANY, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE FIRM, BUFFALO (SEAN COONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 13, 2020. The order, among other things, granted plaintiff's motion for partial summary judgment and denied in part defendant's cross motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 23, 2021,

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

243

CA 20-00384

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

WILLIAM CLEMENTS, PLAINTIFF-RESPONDENT,

V ORDER

THOMAS A. MILLER, DOUGLAS O. THOMPSON,
G&T FARM LLC, AND G&T FARM SERVICES LLC,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SOBO & SOBO, LLP, MIDDLETOWN (MARK P. CAMBARERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered December 16, 2019. The order, among other things, granted plaintiff's motion for partial summary judgment on the issue of negligence and denied in part defendants' cross motion for summary judgment dismissing plaintiff's amended complaint.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

244

CA 20-01171

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

CHRISTOPHER C. AND KATHERINE C., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF A.L.C., AN INFANT, PLAINTIFFS-RESPONDENTS,

V ORDER

SOUTH SLOPE DEVELOPMENT CORPORATION, DEFENDANT-APPELLANT.

ROEMER WALLENS GOLD & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (EDWARD J. SMITH, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered August 21, 2020. The order denied the motion of defendant for summary judgment.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

246

CA 20-00863

PRESENT: CENTRA, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

WILLIAM W. OCHOCINSKI, PLAINTIFF-RESPONDENT,
AND MICHELLE DIXON-OCHOCINSKI, PLAINTIFF,

V ORDER

VINCENT P. HURLEY, WHITELAW TRUCKING, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PETER D. CANTONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 1, 2020. The order, among other things, denied in part the motion of defendants Vincent P. Hurley and Whitelaw Trucking, Inc. seeking summary judgment dismissing the complaint of plaintiff William W. Ochocinski in its entirety as against them.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

250

KA 17-02148

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RIZA J. JOHNSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 7, 2016. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree (two counts), criminal possession of a controlled substance in the third degree (two counts), resisting arrest, and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Supreme Court's oral waiver colloquy and the written waiver signed by defendant together "mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues" (*People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]; *see People v Thomas*, 34 NY3d 545, 564-565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]). We thus conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559). Although we are thus not precluded from reviewing

defendant's challenge to the severity of his sentence, we nevertheless conclude that the sentence is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was sentenced to five years of postrelease supervision on each count of criminal possession of a controlled substance in the third degree, and it must therefore be amended to reflect that he was sentenced to three years of postrelease supervision on those counts (*see People v Tumolo*, 149 AD3d 1544, 1544 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

253

KA 17-00688

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJMIER M. MACK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered November 7, 2016. The judgment convicted defendant upon a plea of guilty of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid because Supreme Court provided defendant with erroneous information about the scope of the waiver, including characterizing the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 560-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The better practice is for the court to use the Model Colloquy, "which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

254

KA 18-01260

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RA JONATHAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered February 26, 2018. The judgment convicted defendant, upon a plea of guilty, of strangulation in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Jonathan* ([appeal No. 2] — AD3d — [Mar. 19, 2021] [4th Dept 2021]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

255

KA 20-00589

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RA JONATHAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered December 14, 2018. 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.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of strangulation in the second degree (Penal Law § 121.12). In appeal No. 2, defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of strangulation in the second degree (§ 121.12) and imposing a determinate term of imprisonment, followed by a period of postrelease supervision. We note at the outset that we dismiss the appeal from the judgment in appeal No. 1 because defendant raises no contentions with respect thereto (*see People v White*, 173 AD3d 1852, 1852 [4th Dept 2019]; *People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]).

Contrary to defendant's initial contention, the Court of Appeals has rejected the assertion that waivers of the right to appeal should be invalid per se (*see People v Thomas*, 34 NY3d 545, 557-558, 558 n 1 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Seaberg*, 74 NY2d 1, 8-9 [1989]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not

unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

258

KA 19-00112

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN JAYCOX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered December 18, 2018. The judgment convicted defendant upon a jury verdict of attempted murder in the first degree, attempted assault in the first degree, attempted robbery in the first degree, assault in the second degree and attempted sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [vii]; [b]) arising out of his unprovoked attack on a complete stranger. At the time of the crime, the victim was 60 years old and defendant was 49 years old. We now affirm.

Contrary to defendant's contentions, the conviction is based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and the verdict is not against the weight of the evidence when viewed independently and in light of the elements of the crimes as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]; *People v Gonzalez*, 174 AD3d 1542, 1544-1545 [4th Dept 2019]). Contrary to defendant's further contention, defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). The sentence is not unduly harsh or severe. We note that, just 53 days before committing the crime in this case, defendant was released from state prison after serving approximately 20 years for a similar attack on an 81-year-old woman in 1998. Defendant's remaining contentions are unpreserved for appellate review, and we decline to exercise our power to review them

as a matter of discretion in the interest of justice.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

259

KA 19-02329

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY STEWART, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 31, 2019. The judgment convicted defendant upon a jury verdict of, inter alia, aggravated unlicensed operation of a motor vehicle in the first degree (two counts) and driving while intoxicated as a misdemeanor.

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, two counts of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i], [ii]) and one count of driving while intoxicated as a misdemeanor (§§ 1192 [3]; 1193 [1] [b] [i]). Contrary to defendant's contention, County Court properly denied his motion to suppress the statement that he made at the police station following his arrest. The record supports the court's determination that the statement was "genuinely spontaneous and was not the product of interrogation or its functional equivalent" (*People v Tomion*, 174 AD3d 1495, 1496 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *see People v Bumpars*, 178 AD3d 1379, 1380 [4th Dept 2019]). The statement was not made in response to a question or statement by the officer. Instead, it was "a blurted out admission, . . . which [wa]s in effect forced upon the officer" (*People v Grimaldi*, 52 NY2d 611, 617 [1981]; *see Tomion*, 174 AD3d at 1496).

We reject defendant's further contentions that the court erred in denying his for-cause challenges to certain prospective jurors and in failing sua sponte to exclude an additional prospective juror for cause. Even assuming, arguendo, that the court erred, we conclude that the errors do not require reversal because defendant did not exhaust his peremptory challenges (*see People v Carpenter*, 187 AD3d

1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]; *People v Arguinzoni*, 48 AD3d 1239, 1241 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]). Contrary to defendant's related contention, defendant has " 'failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge' " the additional prospective jurors or others (*Carpenter*, 187 AD3d at 1557). Indeed, we conclude that counsel provided defendant with meaningful representation throughout the proceedings (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant next contends that the conviction is based on insufficient evidence that he was operating the vehicle. We reject that contention. The arresting officer testified that, before he pulled the vehicle over, he observed defendant operating the vehicle erratically and that, after he pulled the vehicle over, he observed defendant switching seats with his girlfriend, who was sitting in the passenger seat. We thus conclude that there is a valid line of reasoning and permissible inferences that could lead a rational jury to find the elements of the crimes proved beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]). Although defendant's girlfriend testified at trial that she, not defendant, had been operating the vehicle, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

262

CAF 19-00738

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MATTHEW R. PIOTROWSKI,
PETITIONER-RESPONDENT,

V ORDER

SARA L. VOGEL, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered April 12, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall share joint custody of the subject child.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

263

CAF 19-00739

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF SARA L. VOGEL,
PETITIONER-APPELLANT,

V ORDER

MATTHEW R. PIOTROWSKI, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR PETITIONER-APPELLANT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered April 12, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

264

CAF 19-01697

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ELLIOTT ALLEN BAZZANO,
PETITIONER-RESPONDENT,

V ORDER

EMILY POLLOKOFF, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

DYER LAW OFFICES, P.C., SYRACUSE (ANDREA M. FERRO OF COUNSEL), FOR PETITIONER-RESPONDENT.

BETH A. LOCKHART, NORTH SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Salvatore A. Pavone, R.), entered July 29, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that petitioner's residence be considered the subject childrens' address for school enrollment purposes and that the subject children are to be immediately enrolled in and continue to attend public school in the Fayetteville - Manlius School District.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

270

CA 20-00711

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JAMES KAUFMANN,
PETITIONER-RESPONDENT,

V ORDER

CITY OF BUFFALO AND CITY OF BUFFALO CIVIL
SERVICE COMMISSION, RESPONDENTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (J. CHRISTINE CHIRIBOGA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

THE LAW OFFICE OF CHRISTEN ARCHER PIERROT, ORCHARD PARK (CHRISTEN A. PIERROT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 6, 2019 in a proceeding pursuant to CPLR article 78. The order granted the motion of petitioner for partial summary judgment and directed that a hearing be held on the issue of damages.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5701 [b] [1]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

274

KA 17-00060

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BURNIE E. DANIELS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 20, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the third degree and petit larceny.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

282

CAF 19-02312

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

IN THE MATTER OF ALEXANDER G.R. AND
CHRISTIAN A.R.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTIN G.P., RESPONDENT-APPELLANT.

CHARU NARANG, BROCKPORT, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered November 18, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to vacate an order terminating her parental rights.

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 denying her motion to vacate a prior order entered on her default that terminated her parental rights with respect to the subject children on the ground of permanent neglect. We affirm.

Initially, the mother contends that her motion should have been granted because she was deprived of her right to due process for a number of reasons, including that Family Court proceeded to conduct a trial in her absence and that the record is unclear whether she received notice of the trial. The mother's contentions relating to due process, however, are unpreserved inasmuch as they are raised for the first time on appeal (*see Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1342 [4th Dept 2012], *lv denied* 19 NY3d 801 [2012]; *see generally Matter of Anastashia S. [Tonya R.]*, 96 AD3d 1442, 1442-1443 [4th Dept 2012]).

The mother further contends that her motion should have been granted because she had multiple reasonable excuses for her failure to appear and a meritorious defense to the petition. We reject that contention. We conclude that the court properly determined that the

mother's purported reasonable excuses were unsubstantiated and based only on conclusory allegations that, inter alia, she was too ill to attend the trial and lacked transportation (*see Matter of Elysia R.M. [Shamaya M.]*, 161 AD3d 870, 871 [2d Dept 2018]; *Matter of Zabrina M.*, 17 AD3d 1132, 1132 [4th Dept 2005]). Furthermore, the mother did not establish a meritorious defense to the petition based on her decision to enroll in an inpatient drug treatment program because she did not submit any factual support for her claim that she was making progress in that drug treatment program (*see Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559, 560 [1st Dept 2011], *lv denied in part and dismissed in part* 18 NY3d 975 [2012]; *Matter of Devon Dupree F.*, 298 AD2d 103, 104 [1st Dept 2002]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

283

CAF 19-01625

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

IN THE MATTER OF TAHJ B.-L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

TAHJMA L., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, 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 July 31, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to vacate a prior default order which terminated her parental rights with respect to the subject child.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

289

CA 20-00975

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

JAMES STRIFE, PLAINTIFF-APPELLANT,

V ORDER

ALEC J. WIECZOREK, II, AS EXECUTOR OF THE
ESTATE OF SALLY C. JEWELL, DECEASED,
DEFENDANT-RESPONDENT,
AND CHRISTINE M. BERNARD, DEFENDANT.

CAMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered January 6, 2020. The order, among other things, dismissed the amended complaint.

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

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

295

KA 16-02344

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY J. NATHAN, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 7, 2016. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree, and criminal possession of a controlled substance in the fifth 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, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the sentence is unduly harsh and severe. Initially, we note that "defendant's release to parole supervision does not render his challenge to the severity of the sentence moot because he remains under the control of the Parole Board until his sentence has terminated" (*People v Williams*, 160 AD3d 1470, 1471 [4th Dept 2018] [internal quotation marks omitted]; *see People v Shaland S.*, 187 AD3d 1683, 1684 [4th Dept 2020], *lv denied* — NY3d — [2021]; *People v Fox*, 173 AD3d 1680, 1681 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). In addition, as the People correctly concede, Supreme Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, and failed to identify that certain rights would survive the waiver. Therefore, we conclude that the colloquy was insufficient to ensure that defendant's waiver was voluntary, knowing, and intelligent (*see People v Bisono*, — NY3d —, —, 2020 NY Slip Op 07484, *2 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The better practice is for the court "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at

567; *see* NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we further conclude that the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

298

KA 19-02246

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLY T. DAVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered October 15, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, we conclude that his mental impairments do not warrant a downward departure (*see People v Krembel*, 150 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

300

KA 18-02327

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN C. BISHOP, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KAITLYNN E. SCHMIT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered September 24, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of six months in jail and a period of probation.

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

Memorandum: Defendant was convicted upon his plea of guilty of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]) and was sentenced to a period of probation. Defendant now appeals from a judgment resentencing him, upon his admission to a violation of probation, to six months in jail and a continuation of the same period of probation with additional terms and conditions.

Contrary to defendant's contention, "the Court of Appeals has rejected the assertion that waivers of the right to appeal should be invalid per se" (*People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]; *see People v Thomas*, 34 NY3d 545, 557-558, 558 n 1 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Bisono*, — NY3d —, —, 2020 NY Slip Op 07484, *2 [2020]; *Thomas*, 34 NY3d at 565-566) and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

307

KA 18-02404

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RODERICK G. HENRY, II, DEFENDANT-APPELLANT.

M. BENJAMIN SUSMAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 25, 2018. The judgment convicted defendant upon a plea of guilty of failure to report a change of address as a sex offender.

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 failure to report a change of address as a sex offender (Correction Law § 168–f [4]), defendant contends that County Court erred in imposing an enhanced sentence without affording him the opportunity to withdraw his plea. Defendant failed to preserve his contention for our review inasmuch as he "did not object to the enhanced sentence, and he did not move to withdraw the plea or to vacate the judgment of conviction on that ground" (*People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *see People v Sprague*, 82 AD3d 1649, 1649 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]).

In any event, defendant's contention lacks merit. During the plea proceeding, the court advised defendant that it would not be bound by the plea agreement to impose the promised sentence if, among other things, he failed to appear for sentencing. The court further advised defendant that it could impose the maximum sentence if he failed to appear for sentencing and that he would not be allowed to withdraw his plea. Defendant failed to appear for sentencing and was arrested several weeks later in North Carolina. "By failing to appear at the scheduled sentencing, defendant violated the terms of the plea agreement and [the] [c]ourt was no longer bound by the agreed-upon sentence" (*People v Goodman*, 79 AD3d 1285, 1286 [3d Dept 2010]; *see*

People v Figgins, 87 NY2d 840, 841 [1995]).

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

317

KA 18-00617

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDISON N. HERNANDEZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME 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 (Francis A. Affronti, J.), rendered November 15, 2011. The judgment convicted defendant upon a jury verdict of robbery in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]). The charges arose from defendant and an unidentified codefendant robbing a victim at gunpoint as the victim sought to purchase marihuana from defendant.

Defendant contends that Supreme Court erred in admitting in evidence certain custodial statements that he made to a police investigator on the ground that those statements were not included in the pretrial CPL 710.30 notice. That contention is not preserved for our review (*see* CPL 470.05 [2]; *People v King*, 166 AD3d 1562, 1563 [4th Dept 2018], *lv denied* 34 NY3d 1017 [2019]; *People v Marvin*, 162 AD3d 1744, 1744 [4th Dept 2018], *lv denied* 32 NY3d 1066 [2018]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant likewise failed to preserve for our review his contention that the court's statement to a panel of prospective jurors regarding his status in custody deprived him of a fair trial (*see* CPL 470.05 [2]). In any event, that contention is without merit (*see People v Pressley*, 156 AD3d 1384, 1384 [4th Dept 2017], *amended on rearg* 159 AD3d 1619 [4th Dept 2018], *lv dismissed* 31 NY3d 1085 [2018]; *see also People v Wilkins*, 175 AD3d 867, 869 [4th Dept 2019]). Contrary to defendant's related contention, defense counsel was not ineffective for failing to move for a mistrial on that meritless ground (*see*

generally People v Stultz, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *People v Jenkins*, 79 AD3d 1767, 1767 [4th Dept 2010], *lv denied* 16 NY3d 860 [2011]). We further conclude that defendant has not demonstrated the absence of strategic or other legitimate explanations for defense counsel's other alleged shortcomings (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *see also People v Baker*, 14 NY3d 266, 270-271 [2010]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe, particularly given that defendant was on probation for the commission of a nearly identical crime at the time he committed the crimes herein.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

323

KA 20-00139

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH C. SHELTON, SR., DEFENDANT-APPELLANT.

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

KENNETH C. SHELTON, SR., DEFENDANT-APPELLANT PRO SE.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 9, 2019. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree and criminal sale 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 guilty plea, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant contends in his main and pro se supplemental briefs that County Court erred in imposing an enhanced sentence based upon his failure to appear at sentencing because the court did not sufficiently warn him about the consequences of his failure to appear. Defendant, however, failed to preserve his contention for our review inasmuch as he did not object to the enhanced sentence or move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Couturier*, 177 AD3d 1320, 1320-1321 [4th Dept 2019], *lv denied* 34 NY3d 1127 [2020]; *People v Hernandez*, 161 AD3d 1548, 1549 [4th Dept 2018]), and contrary to defendant's further contention in his main brief, the court's alleged failure does not constitute a mode of proceedings error for which preservation is not required. We decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's contention in his main brief, the enhanced sentence is not unduly harsh or severe. We have reviewed the remaining contentions of defendant raised in his pro se supplemental

brief and conclude that they are without merit.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

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

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KA 19-00671

PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LEACH, DEFENDANT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Wyoming County Court (Michael M. Mohun, J.), dated November 27, 2018. The order denied the petition of defendant to reduce his risk level 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 denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (§ 168 *et seq.*). We conclude that County Court properly denied the petition inasmuch as defendant failed to meet his "burden of proving the facts supporting the requested modification by clear and convincing evidence" (§ 168-o [2]; *see People v Hegazy*, 170 AD3d 899, 900 [2d Dept 2019]). Defendant failed to preserve for our review his further contention that he was deprived of his right to due process by the alleged inadequacy of the updated recommendation prepared by Board of Examiners of Sex Offenders (§ 168-o [4]; *see generally People v Willis*, 130 AD3d 1470, 1471-1472 [4th Dept 2015]; *People v Akinpelu*, 126 AD3d 1451, 1452 [4th Dept 2015], *lv denied* 25 NY3d 912 [2015]) and, in any event, we conclude that defendant's contention lacks merit.

Entered: March 19, 2021

Mark W. Bennett
Clerk of the Court

MOTION NO. (511/89) KA 09-01741. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL PITTMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 19, 2021.)

MOTION NOS. (153-154/96) KA 05-01122. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 05-01123. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER YOUNG, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, LINDLEY, AND BANNISTER, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (574/01) KA 99-05272. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V JOSHUA KEPPEN, DEFENDANT-APPELLANT. -- Motion for reargument dismissed as untimely. PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, WINSLOW, AND BANNISTER, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (6/16) KA 15-00472. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANCIS FINSTER, DEFENDANT-APPELLANT. -- Motion for writ of

error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (443/16) KA 13-02199. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXANDER S. VANVLEET, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND BANNISTER, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (9/17) KA 16-00242. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEREMY B. NEWTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (78/19) KA 01-01982. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHONDELL J. PAUL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (105/20) CA 19-00761. -- ALEXANDRA R., ALEXIS R., SR., AS PARENT AND NATURAL GUARDIAN OF ALEXIS R., JR. AND YAMARIS R., AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTIEANN G., AND DEMARIS M., AS GUARDIAN OF JAICOB G. AND JAIDEN G., AND AS ADMINISTRATOR OF THE ESTATE OF LUIS A., JR., DECEASED, PLAINTIFFS-RESPONDENTS, V ERIC J. KRONE, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for leave to appeal to the

Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (106/20) CA 19-00477. -- JESSICA G., PLAINTIFF-RESPONDENT, V ERIC J. KRONE, DEFENDANT-APPELLANT, ET AL., DEFENDANT. (APPEAL NO. 2.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (107/20) CA 19-00478. -- VANESSA G., AS PARENT AND NATURAL GUARDIAN OF ADRIANNA A., AN INFANT, PLAINTIFF-RESPONDENT, V NELSON A., AS ADMINISTRATOR OF THE ESTATE OF LUIS A. A.-S., DECEASED, ET AL., DEFENDANTS, AND ERIC J. KRONE, DEFENDANT-APPELLANT. (APPEAL NO. 3.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (108/20) CA 19-00755. -- NELSON A., AS ADMINISTRATOR OF THE ESTATE OF LUIS A. A.-S., ALSO KNOWN AS LUIS A., SR., PLAINTIFF-RESPONDENT, V ERIC J. KRONE, DEFENDANT-APPELLANT. (APPEAL NO. 4.) -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (984/20) CA 19-02156. -- ROBIN HART, AS ADMINISTRATOR OF THE ESTATE OF EIAN CLAYTON BROOKS, DECEASED, PLAINTIFF-RESPONDENT, V COUNTY OF

ERIE, DEFENDANT-APPELLANT, ET AL., DEFENDANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (1016/20) KA 18-02268. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL J. HILL, DEFENDANT-APPELLANT. -- Motion for reargument denied and motion for leave to appeal to the Court of Appeals held for determination by a Justice of this Court. PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Mar. 19, 2021.)

MOTION NO. (1181/20) KA 13-01552. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V REGGIE CASWELL, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

KA 19-00080. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL BROADUS, JR., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Supreme Court, Erie County, Russell P. Buscaglia, A.J. - Criminal Contempt, 2nd Degree). PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

KA 19-00081. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL BROADUS, JR., DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Supreme Court, Erie County, Russell P. Buscaglia, A.J. - Criminal Possession Weapon, 2nd Degree). PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

KA 19-01768. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDGARDO DEVICTOR-LOPEZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Assault, 2nd Degree). PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

KA 19-00370. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVON GWIN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH JJ. (Filed Mar. 19, 2021.)

KA 17-00398. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY M. MARTIN, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of aggravated unlicensed operation of a motor vehicle in the second degree (AUO) (Vehicle and Traffic Law § 511 [2] [a] [ii]) and driving while intoxicated (DWI) (§ 1192 [3]). Defendant's sentence on the DWI conviction included a term of imprisonment of 90 days followed by three years of probation with an ignition interlock device requirement for a period of three years. Defendant was sentenced to a one-year conditional discharge on the AUO conviction. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38 [4th Dept 1979]). We conclude that there are nonfrivolous issues as to whether defendant's plea was knowing, voluntary, and intelligent, concerning whether defendant was advised of the direct consequences of his plea (*see People v Nguyen*, __ AD3d __, 2021 NY Slip Op 00724, *1 [4th Dept 2021]), and as to whether defendant was sentenced on the AUO conviction in violation of CPL 380.40. We therefore relieve counsel of his assignment and assign new counsel to brief these issues, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Monroe County Court, Stephen T. Miller, A.J. - Aggravated Unlicensed Operation Vehicle, 2nd Degree). PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ. (Filed Mar. 19, 2021.)

KA 17-01358. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES A. QUITALDI, DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the superior court information (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Mar. 19, 2021.)