SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 12, 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

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED NOVEMBER 12, 2021

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

32/20
CAF 18-00929
PRESENT: PERADOTTO, J.P., CARNI, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF BRIANNA M.H., DOMINIK J.H.,
AND TYLER J.H.
-- ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

DOUGLAS J.H., RESPONDENT, AND
CRYSTAL H., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

EMIL J. CAPPELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered March 12, 2018 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent Crystal H. to vacate the temporary order of protection issued November 13, 2017 and to vacate a certain provision of the order on review entered on November 29, 2017.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 30, 2021,

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

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

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

146

CA 20-00518

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

MCNIDER MARINE, LLC, AND JOHN BRUCE MCNIDER,
PLAINTIFFS-RESPONDENTS,

V   ORDER

YELLOWSTONE CAPITAL, LLC, YITZHAK STERN,
AND TSVI DAVIS, DEFENDANTS-APPELLANTS.

PROSKAUER ROSE LLP, NEW YORK CITY (MATTHEW J. MORRIS OF COUNSEL), FOR DEFENDANT-APPELLANT YELLOWSTONE CAPITAL, LLC.

WELLS & MENDELBERG, PLLC, NEW YORK CITY (GABRIEL MENDELBERG OF COUNSEL), FOR DEFENDANT-APPELLANT YITZHAK STERN.

SHER TREMONTE LLP, NEW YORK CITY (ALLEGRA NOONAN OF COUNSEL), FOR DEFENDANT-APPELLANT TSVI DAVIS.

WHITE AND WILLIAMS LLP, NEW YORK CITY (SHANE R. HESKIN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered December 23, 2019. The order denied the motion of defendants to dismiss the amended complaint.

Now, upon reading and filing the stipulations of discontinuance signed by the attorneys for the parties on October 27, 2020 and October 21, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

180
CA 20-00960
PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

PATRICIA VANDERHOFF, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT VANDERHOFF, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

FORD MOTOR COMPANY, ET AL., DEFENDANTS, AND LIQUIDATING REICHHOLD, INC., DEFENDANT-APPELLANT.

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

KARST & VON OISTE LLP, NEW YORK CITY (DAVID CHANDLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered February 10, 2020. The order denied the motion of defendant Liquidating Reichhold, Inc. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 19 and 20, 2021,

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

Entered: November 12, 2021 Ann Dillon Flynn

Clerk of the Court

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

206
TP 20-01290
PRESENT: SMITH, J.P., NEMOYER, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF BRYAN SOMERVILLE, PETITIONER,

V — ORDER

STATE UNIVERSITY OF NEW YORK AT BUFFALO,
RESPONDENT.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG 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 29, 2020) to review a determination of respondent. The determination adjudged that petitioner was responsible for a violation of respondent’s Student Code of Conduct and issued sanctions.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 22, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

398
CA 20-00497
PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

BRIAN C. PRUSIK, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

LIBERTY MUTUAL INSURANCE GROUP INC.,
DEFENDANT-APPELLANT,
AND GEDDES FEDERAL SAVINGS AND LOAN
ASSOCIATION, DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY SCHOONMAKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

THE MATHEWS LAW FIRM LLP, SYRACUSE (DANIEL F. MATHEWS, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 24, 2020. The order, inter alia, granted in part plaintiff's motion for summary judgment.

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

Memorandum: This action arises from an insurance coverage dispute with respect to a theft provision contained in plaintiff's homeowner's insurance policy with defendant Liberty Mutual Insurance Group Inc. (Liberty Mutual). Plaintiff owned a home that he refinanced through a lender who later assigned the mortgage to defendant Geddes Federal Savings and Loan Association (Geddes). The property was insured by Liberty Mutual. Between 2014 and 2015, plaintiff defaulted on his mortgage with Geddes and vacated the residence. He then filed for bankruptcy.

After commencing a mortgage foreclosure proceeding in March 2017, Geddes secured the property and changed the locks. Due to the stay arising from plaintiff's bankruptcy filing, Geddes discontinued the foreclosure action in May 2017. A month later, Geddes instructed a property maintenance company acting as its agent (maintenance company) to inspect, secure and maintain the property, which allegedly had been vandalized several times. The maintenance company cleared out the house by removing debris and rubbish, and placed the items into

dumpsters. According to an employee of the maintenance company, there were no items of value in the house when they cleaned it out. Plaintiff alleges, however, that many valuable items of property were removed from his house by the maintenance company, including computers, furniture, clothes, beds and dishes. He commenced this action seeking to recover damages in connection with the loss of such property.

Plaintiff thereafter moved for summary judgment on the complaint, contending, inter alia, that Liberty Mutual breached the insurance contract by disclaiming coverage for the loss on the ground that the property removed and thrown out was not a theft for purposes of the policy, and thus not a covered peril. Liberty Mutual cross-moved for summary judgment seeking, inter alia, dismissal of the complaint against it on the ground that no theft occurred within the meaning of the policy. Supreme Court, inter alia, granted that part of plaintiff's motion with respect to Liberty Mutual, and denied Liberty Mutual's cross motion, determining that a theft occurred as a matter of law. Liberty Mutual appeals.

The central issue on this appeal is whether the removal of items from plaintiff's property constitutes a theft under the homeowner's policy issued by Liberty Mutual. The policy provides coverage for "[t]heft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen." However, "[t]heft" is not defined in the policy. Because that term is undefined in the policy, it should be construed "so as to give the term its ordinary and accepted meaning" (*Sloman v First Fortis Life Ins. Co.*, 266 AD2d 370, 371 [2d Dept 1999]; *see Wirth v Liberty Mut. Ins. Co.*, 122 AD3d 1364, 1365 [4th Dept 2014]). Policy provisions " 'must be interpreted according to common speech and consistent with the reasonable expectation of the average insured' " (*Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]).

Contrary to Liberty Mutual's contention, the court properly denied its cross motion with respect to the issue whether a theft occurred under the policy. Initially, Liberty Mutual contends, and we agree, that "the average policyholder of ordinary intelligence" (*Abrams v Great Am. Ins. Co.*, 269 NY 90, 92 [1935]; *see Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642, 648 [2012]) would not think that the maintenance company's employees committed theft by removing items from plaintiff's house and placing them in garbage dumpsters on the front lawn. Indeed, they did not *steal* or *take* anything. They simply moved items from one part of plaintiff's property to another. We conclude, however, that a triable issue of fact exists whether some unknown person or persons entered the residence *before* it was cleaned out by the maintenance company and stole the items that plaintiff claims were missing. By submitting only the policy in support of its cross motion, Liberty Mutual failed to meet its initial burden of eliminating all triable issues of fact with regard to whether a theft occurred (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). As plaintiff correctly asserts in his brief on appeal, "if Geddes did not remove the personal property from the [r]esidence, and it was instead removed

by other unknown thieves, Liberty Mutual is still obligated [under the policy] to cover the theft loss.”

We nevertheless agree with Liberty Mutual that, in light of the foregoing, the court erred in granting that part of plaintiff’s motion with respect to Liberty Mutual. As discussed above, the actions of the maintenance company’s employees do not constitute theft under the policy and, furthermore, plaintiff’s submissions on his motion fail to establish as a matter of law that any other person or persons committed theft under the policy. Plaintiff thus failed to meet his initial burden on his motion with respect to Liberty Mutual (*see generally id.*), and we therefore modify the order accordingly.

Finally, we reject Liberty Mutual’s further contention that the court should have granted its cross motion insofar as it sought a conditional order of judgment for subrogation. Liberty Mutual’s subrogation rights do not accrue until payment of a loss (*see Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581-582 [1995]; *cf. generally McCabe v Queensboro Farm Prods.*, 22 NY2d 204, 208 [1968]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

548
CA 20-01058
PRESENT: CENTRA, J.P., PERADOTTO, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

KURT E. MEHLENBACHER,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHANIE MEHLENBACHER,
DEFENDANT-RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Steuben County (John B. Gallagher, Jr., J.), entered August 4, 2020 in a divorce action. The judgment, inter alia, distributed the marital property.

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

Memorandum: In this matrimonial action, plaintiff husband appeals and defendant wife cross-appeals from a judgment of divorce that, inter alia, distributed the marital property. We reject plaintiff's contention on his appeal that Supreme Court erred in determining that his 25% interest in Mehlenbacher Farms, LLC (LLC), was marital property. Plaintiff obtained his interest in the LLC during the marriage, and it was therefore his burden to rebut the statutory presumption that the interest was marital property (*see Fields v Fields*, 15 NY3d 158, 163 [2010], *rearg denied* 15 NY3d 819 [2010]; *Iwasykiw v Starks*, 179 AD3d 1485, 1486 [4th Dept 2020]; *Gately v Gately*, 113 AD3d 1093, 1093 [4th Dept 2014], *lv dismissed* 23 NY3d 1048 [2014]; *see also* Domestic Relations Law § 236 [B] [1] [c], [d]). In light of the fact that separate property "should be construed 'narrowly' " (*Fields*, 15 NY3d at 163, quoting *Price v Price*, 69 NY2d 8, 15 [1986]), we conclude that plaintiff's interest in the LLC does not constitute separate property within the meaning of section 236 (B) (1) (d) (1). Despite the stated intention of plaintiff's parents to give him his interest as a gift, it is clear from the record that the LLC was formed by plaintiff, his brother, and his parents together and that nothing was actually delivered or transferred to plaintiff (*cf. Hymowitz v Hymowitz*, 119 AD3d 736, 738-739 [2d Dept 2014]; *Spielfogel v Spielfogel*, 96 AD3d 443, 444 [1st Dept 2012], *lv denied* 21 NY3d 978 [2013]; *see generally Matter of Jordan*, 144 AD3d 1630, 1631 [4th Dept

2016], *lv denied* 29 NY3d 908 [2017]).

Contrary to plaintiff's further contention, we conclude that defendant met her burden of establishing the value of plaintiff's interest in the LLC (*see Alper v Alper*, 77 AD3d 694, 696 [2d Dept 2010]; *Murtari v Murtari*, 249 AD2d 960, 961 [4th Dept 1998], *appeal dismissed* 92 NY2d 919 [1998], *cert denied* 525 US 1072 [1999]). " '[T]here is no uniform rule for fixing the value of a going business for equitable distribution purposes' " (*Lazar v Lazar*, 124 AD3d 1242, 1245 [4th Dept 2015], quoting *Burns v Burns*, 84 NY2d 369, 375 [1994]). Rather, "valuation is an exercise properly within the fact-finding power of the trial courts, guided by expert testimony" (*Burns*, 84 NY2d at 375), and the court has "broad discretion in accepting or rejecting all or part of any expert testimony" regarding the value of marital property (*Madonna v Madonna*, 265 AD2d 455, 455 [2d Dept 1999]; *see Scully v Scully*, 104 AD3d 1137, 1139 [4th Dept 2013]). Here, defendant presented expert testimony establishing the value of the assets owned by the LLC, and the court's valuation of the LLC and plaintiff's 25% interest therein was based on that expert testimony (*see Madonna*, 265 AD2d at 455). Plaintiff presented "no expert testimony that would support a different valuation," and "[t]he determination of a fact-finder as to the value of a business, if it is within the range of the testimony presented, will not be disturbed on appeal where the valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques" (*Scala v Scala*, 59 AD3d 1042, 1043 [4th Dept 2009] [internal quotation marks omitted]).

We reject plaintiff's contention that the court abused its discretion in awarding $50,000 to defendant for attorney and expert witness fees (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Haggerty v Haggerty*, 169 AD3d 1388, 1391 [4th Dept 2019]). A court in a divorce action may award counsel fees and expert witness expenses to a spouse to enable that spouse "to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties" (Domestic Relations Law § 237 [a]). Here, the bulk of defendant's counsel fees and expert witness expenses were incurred defending against plaintiff's separate property claim concerning his interest in the LLC.

With respect to the cross appeal, we reject defendant's contention that the court abused its discretion in setting the monthly payment for the distributive award owed to her. Defendant correctly observes that, although the court determined that the $272,831 distributive award would be paid to her over 15 years in monthly installments at five percent interest, the figure for monthly payments awarded by the court, $1,590, is inaccurate if the interest is compounded monthly. Rather than compounding the interest monthly, however, it appears that the court divided the amount of the distributive award by the total number of months to arrive at an interest-free monthly payment of $1,515. Then, in determining the monthly payment owed to defendant, the court simply added five percent of $1,515 to each monthly payment to calculate the amount awarded. A

trial court has the discretion to fashion an appropriate distributive award " 'based on what it view[s] to be fair and equitable under the circumstances' " (*Betts v Betts*, 156 AD3d 1355, 1356 [4th Dept 2017], quoting *Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420 [2009]; *see Simmons v Simmons*, 159 AD2d 775, 777 [3d Dept 1990]). Based on the size of the distributive award, the nonliquid nature of plaintiff's assets, and plaintiff's ability to pay, we see no basis to disturb the monthly payment set by the court despite the unusual manner in which it calculated the interest thereon.

Contrary to defendant's further contention on her cross appeal, the court did not err in declining to award maintenance to her. "[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Keshav v Singh*, 175 AD3d 1055, 1056 [4th Dept 2019] [internal quotation marks omitted]), and we conclude that the court did not abuse its discretion in light of the size of the distributive award (*see Chalif v Chalif*, 298 AD2d 348, 348-349 [2d Dept 2002]). For the same reason, we further conclude that the court did not err in reducing plaintiff's child support obligation from his pro rata share of the presumptively correct amount of child support (*see Holterman v Holterman*, 3 NY3d 1, 13-14 [2004]; *see also* Domestic Relations Law § 240 [1-b] [f]).

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

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

570
CA 20-01126
PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

G.M. CRISALLI & ASSOCIATES, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PRESTIGE CONTRACTING, INC., AND PRESTIGE
CONTRACTING, INC., DOING BUSINESS AS SPACE
AGE CONSTRUCTION, ALSO KNOWN AS SPACE AGE
CONSTRUCTION OF ILLINOIS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

SHEATS & BAILEY, PLLC, LIVERPOOL (PATIENCE E. SCHERMER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered July 7, 2020. The order denied the motion of defendants for summary judgment and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the cross motion and dismissing the counterclaim, and as modified the order is affirmed without costs.

Memorandum: In late 2015, Wal-Mart Stores, Inc. (Walmart) contracted with plaintiff to serve as general contractor on a construction project in Pennsylvania. Thereafter, plaintiff subcontracted with defendants to perform painting and sealing work on the project. As relevant on appeal, the subcontract contained a provision obligating defendants to pay attorneys' fees incurred by plaintiff, in some circumstances, stemming from litigation or arbitration relating to the subcontract. Eventually, plaintiff determined that defendants breached the subcontract, and backcharged them in the amount needed to complete the work on the project under the subcontract. Defendants filed a mechanic's lien for the work performed and materials they provided on the project. Eventually, they commenced an action in Pennsylvania against Walmart to foreclose on the lien (Pennsylvania action). Pursuant to an indemnification clause contained in its contract with Walmart, plaintiff was obligated to defend and indemnify Walmart in the Pennsylvania action. Walmart ultimately prevailed at arbitration in the Pennsylvania action.

Thereafter, plaintiff commenced this action for contractual indemnification, alleging, inter alia, that defendants were obligated under the subcontract to reimburse plaintiff for the attorneys' fees and costs plaintiff incurred in defending Walmart in the Pennsylvania action. In their answer, defendants asserted a counterclaim for attorneys' fees. Plaintiff appeals, and defendants cross-appeal, from an order that denied plaintiff's cross motion for summary judgment on liability on the complaint and to dismiss the counterclaim, and denied defendants' motion for summary judgment dismissing the complaint.

"[A] contract assuming th[e] obligation [to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed . . . In other words, we may not extend the language of an indemnification clause to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (*Autocrafting Fleet Solutions, Inc. v Alliance Fleet Co.*, 148 AD3d 1564, 1565-1566 [4th Dept 2017] [internal quotation marks omitted]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . The best evidence of what parties to a written agreement intend is what they say in their writing . . . Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms . . . A contract 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 . . . Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002] [internal quotation marks omitted]; *see Potter v Grage*, 133 AD3d 1248, 1249 [4th Dept 2015]).

Here, we agree with plaintiff on its appeal that Supreme Court erred in denying that part of the cross motion seeking summary judgment on liability because the subcontract is susceptible of only one meaning, i.e., that, under the circumstances of this case, defendants were obligated to pay the attorneys' fees plaintiff incurred in the Pennsylvania action. The court failed to properly consider those parts of the subcontract's indemnification clause stating that defendants would indemnify plaintiff for attorneys' fees incurred as a result of litigation or arbitration. "After giving effect and meaning to every term . . . and strictly construing the [sub]contract to avoid reading into it a duty which the parties did not intend to be assumed" (*Dietz v Compass Prop. Mgt. Corp.*, 17 AD3d 1119, 1120 [4th Dept 2005], *lv denied* 5 NY3d 711 [2005] [internal quotation marks omitted]), we conclude that it "is unmistakably clear from the language of the [subcontract]" that defendants must indemnify plaintiff for attorneys' fees incurred in the Pennsylvania action (*Hooper Assoc.*, 74 NY2d at 492; *see Colonial Sur. Co. v Genesee Val. Nurseries, Inc.*, 94 AD3d 1422, 1424 [4th Dept 2012]). We therefore modify the order accordingly.

We reject defendants' contention on their cross appeal that their motion should have been granted on the ground that the court lacked subject matter jurisdiction over the complaint. Specifically, defendants asserted on their motion that the subcontract's forum and venue selection clause was unenforceable because it violated Pennsylvania's Contractor and Subcontractor Payment Act (CSPA) (*see* 73 Pa Stat Ann § 514). Contrary to defendants' contention, the CSPA has no application here, inasmuch as plaintiff's claim is based not on the nonpayment for construction work, but rather on the indemnification of attorneys' fees (*see Stivason v Timberland Post and Beam Structures Co.*, 2008 Pa Super 88, ¶ 14, 947 A2d 1279, 1283 [2008]). We also reject defendants' contention on their cross appeal that they are entitled to summary judgment dismissing the complaint based on the voluntary payment doctrine. That doctrine does not apply here because plaintiff did not voluntarily pay Walmart's attorneys' fees for the Pennsylvania action; rather, plaintiff was obligated to do so by the terms of the contract between those entities (*see generally Nesterczuk v Goldin Mgt., Inc.*, 77 AD3d 800, 804 [2d Dept 2010]).

Finally, we agree with plaintiff on its appeal that the court erred in failing to grant that part of the cross motion seeking dismissal of defendants' counterclaim for attorneys' fees. Plaintiff met its initial burden on the cross motion in that respect by establishing that there is no provision in the subcontract that allows defendants to recover attorneys' fees, nor is any such recovery otherwise permitted by statute (*see generally Colonial Sur. Co.*, 94 AD3d at 1423; *Palermo v Taccone*, 79 AD3d 1616, 1619 [4th Dept 2010]). In opposition, defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore further modify the order accordingly.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

681
OP 20-01405
PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF COALITION OF CONCERNED CITIZENS AND DENNIS GAFFIN, AS ITS PRESIDENT, PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT AND ALLE-CATT WIND ENERGY, LLC, RESPONDENTS.
(PROCEEDING NO. 1.)

LAW OFFICE OF GARY A. ABRAHAM, GREAT VALLEY (GARY A. ABRAHAM OF COUNSEL), FOR PETITIONERS.

ROBERT A. ROSENTHAL, GENERAL COUNSEL, ALBANY (JOHN C. GRAHAM OF COUNSEL), FOR RESPONDENT NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT.

THE DAX LAW FIRM, P.C., ALBANY (JOHN W. DAX OF COUNSEL), FOR RESPONDENT ALLE-CATT WIND ENERGY, LLC.

Proceeding pursuant to Public Service Law § 170 (1) (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination granting a Certificate of Environmental Compatibility and Public Need, and for other relief.

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

Memorandum: Alle-Catt Wind Energy, LLC (Alle-Catt), a respondent in both of these proceedings, submitted a proposal to the New York State Board on Electric Generation Siting and the Environment (Board), also a respondent in both proceedings, seeking approval of a project involving the construction of a wind-powered electric generating facility consisting of numerous wind turbines in several Western New York counties. In response to the proposal, the Board issued a "Certificate of Environmental Compatibility and Public Need" (Certificate) that permitted the project to go forward. The Coalition of Concerned Citizens (Coalition) and Dennis Gaffin, as its president (collectively, Coalition petitioners), commenced the first of these two CPLR article 78 proceedings (proceeding No. 1), initiated in this Court pursuant to Public Service Law § 170 (1), seeking to annul the Board's determination to grant the Certificate. The Town of Farmersville (Farmersville) commenced the second CPLR article 78

proceeding (proceeding No. 2), also initiated in this Court pursuant to Public Service Law § 170 (1), seeking to annul the same determination. We confirm the determination, and therefore we dismiss both petitions.

In proceeding No. 1, the Coalition petitioners contend that the Board exceeded its authority by applying Town of Freedom (Freedom) Local Law No. 1 of 2019 (Freedom's 2019 Law), because Supreme Court had determined in a separate proceeding and action that Freedom Local Law No. 3 of 2007 (Freedom's 2007 Law) was in effect at the time of the proceedings before the Board. We reject that contention.

As the Board correctly noted concerning that issue, "[t]he situation is complicated" (*Application of Alle-Catt Wind Energy LLC*, 2020 WL 3036287, *45, 2020 NY PUC LEXIS 653, *100 [NY St Bd on Elec Generation Siting & Envt, Case 17-F-0282, June 3, 2020]). Before this project began, Freedom's 2007 Law governed applications for wind energy projects such as this one within that town. While the project was in its infancy, the Freedom Town Board enacted Local Law No. 1 of 2018 (Freedom's 2018 Law), which changed several provisions related to wind energy projects, including the maximum height permitted for wind turbines and the required setbacks from residences, churches and other facilities. Freedom's 2018 Law was challenged in a hybrid CPLR article 78 proceeding and declaratory judgment action (separate action) in which Supreme Court eventually annulled that local law and declared that Freedom's 2007 Law remained in effect (*Matter of Freedom United v Town of Freedom Town Bd.*, Sup Ct, Cattaraugus County, Oct. 25, 2019, Parker, A.J., index No. 87572/2019, *appeal dismissed* 2020 NY Slip Op 61184[U] [4th Dept 2020]). While that litigation was pending, however, the Freedom Town Board enacted Freedom's 2019 Law, which the parties agree concerns the same subjects as Freedom's 2018 Law. Consequently, inasmuch as Freedom's 2018 Law had been superseded by Freedom's 2019 Law, the litigation in the separate action was rendered moot (*see generally Lasky v Town Bd. of Town of Amherst*, 57 AD3d 1392, 1392-1393 [4th Dept 2008]; *Matter of Group for S. Fork v Town Bd. of Town of Southampton*, 285 AD2d 506, 508 [2d Dept 2001]). Because the Freedom Town Board enacted Freedom's 2019 Law and it was not at issue in the separate action, that was the operative local law for purposes of the proceedings before the Board, and the Board was required to apply it (*see* Public Service Law § 168 [3] [e]), regardless of Supreme Court's declaration in the separate action.

Also in proceeding No. 1, the Coalition petitioners contend that the Board gave insufficient weight to the character of the community, that the Board failed to balance the severe adverse impact on that character against the project's modest and theoretical benefits, and that the Board's determination that the project would have beneficial effects on the climate was impermissibly based on speculation. We reject those contentions.

Pursuant to its enabling statute, the Board must determine, inter alia, whether a proposed electric generating facility "is a beneficial addition to or substitution for the electric generation capacity of the state" and whether "the adverse environmental effects of the

construction and operation of the facility will be minimized or avoided to the maximum extent practicable" (Public Service Law § 168 [3] [a], [c]), and the Board must consider, inter alia, "the impact on community character" and any additional "social, economic, visual or other aesthetic, environmental and other conditions" deemed pertinent by the Board (§ 168 [4] [f], [g]). "[T]he Board was created to provide for an expeditious review process and 'to balance, in a single proceeding, the people's need for electricity and their environmental concerns' " (*Matter of TransGas Energy Sys., LLC v New York State Bd. on Elec. Generation Siting & Envt.*, 65 AD3d 1247, 1252 [2d Dept 2009], *lv denied* 13 NY3d 715 [2010]; *see generally Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Envt.*, 281 AD2d 89, 92 [3d Dept 2001]). Furthermore, it is settled that "[t]his [C]ourt's scope of review is limited to whether the decision and opinion of the [B]oard, *inter alia*, are . . . supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion . . . , are made in accordance with proper procedure . . . and are not arbitrary, capricious or an abuse of discretion" (*Koch v Dyson*, 85 AD2d 346, 364 [2d Dept 1982] [internal quotation marks omitted]). "The task of weighing conflicting evidence . . . is properly left to the . . . Board" (*id.* at 373).

Here, assuming, arguendo, that the Coalition petitioners have standing to challenge the climate effects of the project (*see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774-776 [1991]), we conclude that the Board's determination is supported by substantial evidence and is not arbitrary or capricious. In support of its application, Alle-Catt introduced evidence regarding the amount of energy to be generated by the project; the proposed transmission facilities and the ability to connect energy generated by the project with New York City, where it is most needed; noise; setbacks; turbine heights and other configurations; and the purported benefits of the project. The Board also considered the project's impacts with respect to, among other things, carbon emissions; the collision risks to bats and birds, including bald eagles and upland sandpipers; streams, forests, and wetlands; agricultural lands; seismic risks; and planetary climate change. The Coalition petitioners, and others who opposed the project, submitted evidence regarding, among other things, the local opposition to the project; the project's non-conformity with local land use plans; the purported inability of the New York State electrical grid to ensure the proposed use of the energy generated by the project; and the environmental impact of the project. The Board reviewed all of those factors in making its determination (*see Application of Alle-Catt Wind Energy LLC*, 2020 WL 3036287, *6-52, 2020 NY PUC LEXIS 653, *11-116). Here, although the record contains some conflicting evidence "and room for choice exists[,] there is a rational basis for the [Board's] determination" (*Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1565 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of New York State Div. of Human Rights v Hawk*, 195 AD3d 1395, 1397 [4th Dept 2021]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]).

The Coalition petitioners next contend in proceeding No. 1 that the Board violated the First Amendment rights of a group of Amish residents that would be impacted by the project. Initially, we note that "[t]he standing of an organization such as [the Coalition] to maintain an action on behalf of its members requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs. Additionally, the interests which the organization seeks to protect must be germane to its purposes, the court should be satisfied that the organization is an appropriate one to act as the representative of the group whose rights it is asserting, and neither the relief requested nor the claims asserted must require participation of the individual members" (*Matter of Dental Socy. of State of N.Y. v Carey*, 61 NY2d 330, 333-334 [1984]; *see Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1509-1510 [4th Dept 2014], *lv denied* 25 NY3d 902 [2015]). Here, we conclude that the Coalition petitioners seek via that contention to protect rights or interests that are not germane to the Coalition's purpose, and thus they lack standing to raise that contention. In any event, the Coalition petitioners failed to raise that contention in their "brief on exceptions" to the hearing (16 NYCRR 4.10 [a]), which precluded them from raising that contention in their application for rehearing (*see* 16 NYCRR 4.10 [d] [2]). Therefore, even assuming, arguendo, that the Coalition petitioners had standing to raise that contention, their failure to raise it in their brief on exceptions "deprive[d] the administrative agency of the opportunity to prepare a record reflective of its expertise and judgment with regard to that issue and, as a result, [the Coalition petitioners have] failed to exhaust [their] administrative remedies with respect to that issue" (*Matter of Hill v Zucker*, 172 AD3d 1895, 1897 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). This Court has "no discretionary authority to review [the Coalition petitioners'] contention" (*Hill*, 172 AD3d at 1897).

For the same reasons, Farmersville's contentions in proceeding No. 2 concerning the Board's alleged violation of the First Amendment rights of Amish citizens are not properly before us.

Contrary to the further contention of Farmersville in proceeding No. 2, the Board did not err in failing to either apply or waive Farmersville Local Law Nos. 1 and 4 of 2020 (Farmersville's 2020 Laws), which were enacted in February 2020. Article 10 of the Public Service Law mandates, among other things, that the Board consider whether the proposed project "is designed to operate in compliance with applicable state and local laws and regulations," unless the Board determines that compliance with a law is "unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers" (§ 168 [3] [e]). Thus, the enabling statute "requires certain specific findings to be made by the Board upon completing its review" of the proposed project, including its "ability to comply with State and local laws" (*TransGas Energy Sys., LLC*, 65 AD3d at 1252). The applicable local laws must be identified early in the process because they "will be used by parties to determine their positions in

the issues conference and the remainder of the hearing phase of the proceeding" (16 NYCRR 1001.31). Here, Farmersville's 2020 Laws did not exist during the evidentiary phase of the process, and thus they were not raised at that time; therefore, the Board did not violate Public Service Law § 168 (3) (e) in refusing to consider them (*see generally Matter of Broome County Concerned Residents v New York State Bd. on Elec. Generation Siting & Envt.*, — AD3d —, —, 2021 NY Slip Op 05903, *3-4 [3d Dept 2021]). Furthermore, the Board did not abuse its discretion in declining to reopen the evidentiary phase of the proceedings based on local laws enacted after that part of the process was complete (*see generally Matter of Incorporated Vil. of E. Williston v Public Serv. Commn. of State of N.Y.*, 153 AD2d 943, 946 [2d Dept 1989]; *Matter of Long Is. Light Co. v Public Serv. Commn. of State of N.Y.*, 134 AD2d 135, 146-147 [3d Dept 1987]).

Finally, the Board did not abuse its discretion in rejecting Farmersville's interpretation of its Local Law No. 3 of 2019 (Farmersville's 2019 Law). During the proceedings before the Board, Farmersville contended that it interpreted that local law as including all Amish residences within the definition of churches for the purposes of setbacks for wind generation and electrical transmission facilities. "Where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 [2001]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 94), and the term residence is defined in Farmersville's 2019 Law as "any dwelling suitable for habitation." Inasmuch as there is no evidence that Farmersville classified the dwellings at issue as churches in any other context, and their primary uses were agricultural and residential, the Board did not err in declining to classify those dwellings as churches (*see generally Matter of Yeshivath Shearith Hapletah v Assessor of Town of Fallsburg*, 79 NY2d 244, 250 [1992]; *Matter of Yeshiva & Mesivta Toras Chaim v Rose*, 136 AD2d 710, 711 [2d Dept 1988]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

686
OP 20-01406
PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF TOWN OF FARMERSVILLE,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT, ALLE-CATT WIND
ENERGY, LLC, STATE OF NEW YORK, JOHN DOE
CORPORATIONS AND JOHN DOES, RESPONDENTS.
(PROCEEDING NO. 2.)

THE ZOGHLIN GROUP, PLLC, ROCHESTER (BENJAMIN E. WISNIEWSKI OF
COUNSEL), FOR PETITIONER.

ROBERT A. ROSENTHAL, GENERAL COUNSEL, ALBANY (JOHN C. GRAHAM OF
COUNSEL), FOR RESPONDENT NEW YORK STATE BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT.

THE DAX LAW FIRM, P.C., ALBANY (JOHN W. DAX OF COUNSEL), FOR
RESPONDENT ALLE-CATT WIND ENERGY, LLC.

Proceeding pursuant to Public Service Law § 170 (1) (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to annul a determination granting a Certificate of Environmental Compatibility and Public Need, and for other relief.

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

Same memorandum as in *Matter of Coalition of Concerned Citizens v New York State Bd. on Elec. Generation Siting & Envt.* ([proceeding No. 1] — AD3d — [Nov. 12, 2021] [4th Dept 2021]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

689

CA 17-00255

PRESENT: SMITH, J.P., LINDLEY, TROUTMAN, AND WINSLOW, JJ.

MARK SMUKALL AND DIANE SMUKALL,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DOLLAR TREE STORES, INC., DEFENDANT-APPELLANT,
DENTCO, INC., DENT ENTERPRISES, INC.,
JENNIFER G. FLANNERY, AS ADMINISTRATOR OF THE
ESTATE OF STEVEN M. SAILING, DECEASED, DOING
BUSINESS AS B. SAILING SITE & LANDSCAPE
CONTRACTOR AND B. SAILING SITE & LANDSCAPE
CONTRACTOR, INC., DEFENDANTS-RESPONDENTS.

CONNORS LLP, BUFFALO (KELLY RILEY OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

SCHNADER, HARRISON, SEGAL & LEWIS LLP, NEW YORK CITY (BARRY S.
ALEXANDER OF COUNSEL), FOR DEFENDANT-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS DENTCO, INC. AND DENT ENTERPRISES, INC.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS JENNIFER G. FLANNERY, AS ADMINISTRATOR OF THE
ESTATE OF STEVEN M. SAILING, DECEASED, DOING BUSINESS AS B. SAILING
SITE & LANDSCAPE CONTRACTOR AND B. SAILING SITE & LANDSCAPE
CONTRACTOR, INC.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 30, 2016. The order granted the motions of defendants-respondents for summary judgment dismissing the complaint and cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants DentCo Inc. and Dent Enterprises, Inc. in part, reinstating the second and third cross claims of defendant Dollar Tree Stores, Inc., and converting those cross claims into a third-party complaint, and as modified the order is affirmed without costs.

Memorandum: Mark Smukall (plaintiff) allegedly tripped and fell over a broken sign post in the parking lot of premises owned by defendant Dollar Tree Stores, Inc. (Dollar Tree). Dollar Tree had an agreement with defendant Dent Enterprises, Inc. pursuant to which Dent

Enterprises, Inc. was responsible for maintenance of the premises, including snowplowing and landscaping. Dent Enterprises, Inc. subcontracted some of the work, including the removal of broken sign post bases in the parking lot, to decedent Steven M. Sailing, doing business as B. Sailing Site & Landscape Contractor. After the accident, plaintiffs commenced this action to recover damages for injuries sustained by plaintiff.

Dollar Tree, in its answer, asserted cross claims against DentCo Inc. and Dent Enterprises, Inc. (collectively, Dent defendants) seeking contribution, contractual indemnification, and damages arising from a breach of the service agreement between Dollar Tree and Dent Enterprises, Inc. In addition, Dollar Tree asserted a cross claim seeking contribution from Sailing, whose estate has since been substituted as a defendant in this action, and defendant B. Sailing Site & Landscape Contractor Inc. (collectively, Sailing defendants).

The Dent defendants and the Sailing defendants moved separately for summary judgment dismissing the complaint and cross claims against them. Plaintiffs and Dollar Tree now appeal from an order granting those motions.

Contrary to plaintiffs' contention on their appeal, Supreme Court properly granted those parts of the motions seeking dismissal of the complaint against the Dent defendants and Sailing defendants. Here, any duty that those defendants had with respect to maintenance of the premises arose from the service agreement between Dollar Tree and Dent Enterprises, Inc. or the subcontract between Dent Enterprises, Inc. and Sailing. Although "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), there are three well settled exceptions (*see id.* at 140), only the third of which plaintiffs assert as a basis for liability. More particularly, plaintiffs assert that the Dent defendants and Sailing defendants "entirely displaced" Dollar Tree's duty to maintain the premises safely (*id.*).

Even assuming, arguendo, that the allegations in the pleadings are sufficient to require the Dent defendants and Sailing defendants to negate the potential application of the third *Espinal* exception in establishing their prima facie entitlement to summary judgment, we conclude that they met their respective initial burdens (*see Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1523 [4th Dept 2017]; *cf. Govenettio v Dolgencorp of N.Y., Inc.*, 175 AD3d 1805, 1805 [4th Dept 2019]). Here, the service agreement, which was submitted in support of the motions, "gave the property owner the right to request additional services, and employees of the property owner monitored the performance of the . . . contract" (*Torella v Benderson Dev. Co.*, 307 AD2d 727, 728 [4th Dept 2003]; *see Lingenfelter*, 149 AD3d at 1524). In opposition, plaintiffs failed to raise a triable issue of fact whether either contract "was 'so comprehensive and exclusive a maintenance agreement as to entirely displace' [Dollar Tree's] duty to maintain the property safely" (*Baker v Buckpitt*, 99 AD3d 1097, 1099 [3d Dept 2012]; *see generally Zuckerman v City of New York*, 49 NY2d

557, 562 [1980]).

We agree with Dollar Tree on its appeal that the court erred in granting the motion of the Dent defendants insofar as it sought dismissal of Dollar Tree's contractual indemnification and breach of contract cross claims, i.e., the second and third cross claim, and we therefore modify the order accordingly. With respect to those cross claims, the Dent defendants failed to meet their initial burden on the motion (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We note that Dollar Tree has abandoned any contention that the court erred in granting the motion with respect to its contribution cross claim against the Dent defendants (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Finally, we reject Dollar Tree's contention that the court erred in granting that part of the Sailing defendants' motion with respect to the cross claim against them.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

695
KA 19-00832
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK GETMAN, 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 April 4, 2019. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and count one of indictment No. 2018-102 is dismissed, without prejudice to the People to re-present any appropriate charge with respect to such dismissed count to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal sexual act in the first degree (Penal Law § 130.50 [3]) as a lesser included offense of predatory sexual assault against a child (§ 130.96). We reject defendant's contention that the evidence is legally insufficient to support the conviction. Contrary to defendant's contention, there is a " 'valid line of reasoning and permissible inferences' that could lead a rational person to conclude beyond a reasonable doubt" (*People v Robinson*, 193 AD3d 1393, 1394 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021], quoting *People v Delamota*, 18 NY3d 107, 113 [2011]) that defendant engaged in oral sexual conduct with the child victim (*see* Penal Law §§ 130.00 [2] [a]; 130.50). The victim, who was eight years old at the time of trial, testified that defendant touched her "pee pee" with his tongue, and that she knew that touching a "pee pee" was a "bad touch." Moreover, the victim's mother used the same euphemism to describe the victim's vaginal area. We conclude that the testimony of the victim and her mother is legally sufficient to establish that oral sexual conduct occurred (*see People v Monroe*, 134 AD3d 1138, 1139-1140 [3d Dept 2015]; *see also People v Pereau*, 45 AD3d 978, 981 [3d Dept 2007], *lv denied* 9 NY3d 1037 [2008]). Furthermore, viewing the evidence in light of the elements of criminal sexual act in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]),

we 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 agree with defendant, however, that County Court erred in granting the People's request to charge criminal sexual act in the first degree as a lesser included offense of predatory sexual assault against a child. It is well established that "[a] party who seeks to have a lesser included crime charged to the jury must satisfy a two-pronged inquiry" (*People v Rivera*, 23 NY3d 112, 120 [2014]). "First, the crime must be a lesser included offense within the meaning of Criminal Procedure Law § 1.20 (37)" (*id.*). "Second, the party making the request for a charge-down 'must then show that there is a reasonable view of the evidence in the particular case that would support a finding that [the defendant] committed the lesser included offense but not the greater' " (*id.*, quoting *People v Glover*, 57 NY2d 61, 63 [1982]). With respect to the first prong, CPL 1.20 (37) defines a lesser included offense as follows: "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.' " That "determination requires the court to compare the statutes in the abstract, without reference to any factual particularities of the underlying prosecution" (*People v Repanti*, 24 NY3d 706, 710 [2015]; *see People v Davis*, 14 NY3d 20, 23 [2009]). Thus, the party seeking the charge-down is required to show that " 'in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the same conduct, committing the lesser offense' " (*Repanti*, 24 NY3d at 710, quoting *Glover*, 57 NY2d at 63). Nevertheless, the determination whether a particular offense is a lesser included offense "concerns only 'the subdivision which the particular act or omission referred to in the indictment brings into play' " (*People v Scott*, 61 AD3d 1348, 1350 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009], quoting *People v Green*, 56 NY2d 427, 431 [1982], *rearg denied* 57 NY2d 775 [1982]).

In this case, defendant was charged in count one of indictment No. 2018-102 (indictment) with the class A-II felony of predatory sexual assault against a child. Pursuant to Penal Law § 130.96, "[a] person is guilty of [that offense] when, being [18] years old or more, he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in [Penal Law article 130], and the victim is less than [13] years old." Essentially, the crime of predatory sexual assault against a child elevates the four class B felonies enumerated in the statute to class A-II felonies if they are committed by someone who is at least 18 years old against someone who is less than 13 years old (*see People v Fleming*, 48 Misc 3d 451, 453-457 [Livingston County Ct 2015], *affd* 153 AD3d 1648 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

As alleged in count one of the indictment, defendant committed

predatory sexual assault against a child because, during a certain period of time, and while "being [18] years old or more, [he] engaged in two or more acts of sexual conduct, which included at least one act of sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact, with a female . . . , who was less than [13] years old." Thus, by its explicit language, the count of predatory sexual assault against a child was predicated on defendant's alleged commission of the class B felony of course of sexual conduct against a child in the first degree (*see* Penal Law § 130.75 [1] [b]) and, as a result, the People could not establish that the offense of criminal sexual act in the first degree, a different class B felony, was a lesser included offense of predatory sexual assault against a child within the meaning of CPL 1.20 (37). Stated another way, it is *not* impossible to commit predatory sexual assault against a child, as the offense was charged in the indictment in this case, without concomitantly, by the same conduct, committing criminal sexual act in the first degree. Indeed, as the offense was charged in the indictment here, a defendant could commit predatory sexual assault against a child by engaging in sexual intercourse or aggravated sexual contact with the victim (*see* Penal Law §§ 130.96, 130.75 [1] [b]), without concomitantly, by the same conduct, committing criminal sexual act in the first degree (*see* § 130.50 [3]). The People therefore failed to satisfy the impossibility test, and the court thus erred in granting the People's request to charge criminal sexual act in the first degree as a lesser included offense of predatory sexual assault against a child. Consequently, the judgment must be reversed, and count one of the indictment must be dismissed (*see People v Nieves*, 136 AD2d 250, 259, 262 [1st Dept 1988]). The dismissal of that count is without prejudice to the People to re-present any appropriate charge with respect thereto to another grand jury (*see People v Gonzalez*, 61 NY2d 633, 634-635 [1983]; *People v Tillmon*, 197 AD3d 956, 958 [4th Dept 2021]; *People v Gardner*, 144 AD3d 1546, 1547 [4th Dept 2016]).

In light of our determination, we need not address defendant's remaining contentions. We note, however, that it was unacceptable for the prosecutor to state, during his summation, that he was at a "significant advantage over" the jury because he had been working on the case for more than a year, possessed "an entire cart of evidence of questions [and] paperwork," and had "the opportunity to talk to the witnesses" and "review reports." By making those comments, the prosecutor improperly "injected the integrity of the District Attorney's office into the case" (*People v Clark*, 195 AD2d 988, 990 [4th Dept 1993]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

697
KA 17-01485
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREL W. ADDISON, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Charles A. Schiano, Jr., J.), rendered June 15, 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 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]). The conviction arises from an incident in which the police, during a traffic stop of a two-door vehicle driven by defendant, observed an assault rifle sticking out of a sweatshirt between the front and back seats, and eventually recovered the assault rifle and ammunition from the vehicle upon apprehending defendant and his codefendant passenger after they attempted to flee in the vehicle and then on foot. We affirm.

Defendant contends that the traffic stop was unlawful and, therefore, Supreme Court erred in refusing to suppress evidence obtained as a result thereof. We reject that contention. It is well settled that, "where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*People v Robinson*, 97 NY2d 341, 349 [2001]; *see Whren v United States*, 517 US 806, 812-813 [1996]; *People v Hinshaw*, 35 NY3d 427, 430-431 [2020]; *People v Howard*, 129 AD3d 1469, 1470 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015], *reconsideration denied* 26 NY3d 1089 [2015]). Moreover, "the credibility determinations of the suppression court are entitled to

great deference on appeal and will not be disturbed unless clearly unsupported by the record” (*Howard*, 129 AD3d at 1470 [internal quotation marks omitted]).

Here, affording great deference to the court’s resolution of credibility issues at the suppression hearing (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]), we conclude that “the record supports the court’s finding that the police officer[s] lawfully stopped defendant’s [vehicle] for crossing the [double yellow center] line in violation of Vehicle and Traffic Law §[§ 1120 (a) and] 1128 (a)” (*People v Eron*, 119 AD3d 1358, 1359 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]; *see People v Lewis*, 147 AD3d 1481, 1481 [4th Dept 2017]; *People v Wohlers*, 138 AD2d 957, 957 [4th Dept 1988]). The officers’ testimony at the suppression hearing established that they had probable cause to believe that defendant violated those statutes when, just after 1:00 a.m. on an unobstructed roadway with no bicyclists or other impediments to travel present, they observed the vehicle defendant was driving briefly cross over the double yellow center line into the oncoming lane by as much as six inches before returning to its lane (*see Lewis*, 147 AD3d at 1481; *People v Twoguns*, 108 AD3d 1091, 1093 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]; *People v Ogden*, 250 AD2d 1001, 1001 [3d Dept 1998]; *Wohlers*, 138 AD2d at 957).

Contrary to defendant’s contention and the dissent’s assertion, we also conclude that “[t]he police officer[s’] testimony at the suppression hearing does not have all appearances of having been patently tailored to nullify constitutional objections . . . , and was not so inherently incredible or improbable as to warrant disturbing the . . . court’s determination of credibility” (*People v Walters*, 52 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008] [internal quotation marks omitted]; *see People v Jemison*, 158 AD3d 1310, 1310-1311 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]; *Howard*, 129 AD3d at 1470). First, despite being confronted upon the reopening of the suppression hearing with an audio recording of police communications in which one of the officers used slightly different terminology when describing the position of the vehicle in relation to the center line, the officers maintained that they had, in fact, initiated the traffic stop after observing the vehicle cross over the center line. We conclude that the court was entitled to determine, on this record, that the description on the audio recording could reasonably be interpreted as being consistent with the officers’ testimony, and thus “[t]here is no basis for disturbing the court’s credibility determination[with respect to] its resolution of any [purported] inconsistencies between [the officers’] testimony and [the] recording” (*People v Brown*, 14 AD3d 356, 356 [1st Dept 2005], *lv denied* 4 NY3d 852 [2005]).

Second, we reject defendant’s related contention and the dissent’s assertion that the officers’ suppression hearing testimony should be discredited, and thus that the traffic stop should be deemed unlawful, because the officers failed to disclose that they also had a pretextual reason for stopping the vehicle based on information from a confidential informant conveyed to them by another officer in an

earlier phone call. The officers acknowledged when the suppression hearing was reopened that they had failed to disclose in their reports or during their prior testimony that they had a pretextual reason for stopping the vehicle based on information from a confidential informant that a firearm may have been in the vehicle. Nonetheless, one of the officers offered a credible explanation for that initial nondisclosure and the other explained that, consistent with their prior testimony, the officers had not received a "call for service," i.e., a citizen complaint via 911, prior to the traffic stop but, rather, had received a phone call from another officer. We conclude on this record that the officers' testimony "was not so inherently incredible or improbable as to warrant disturbing the . . . court's determination of credibility" after it was presented with the initial omissions and subsequent explanations (*Walters*, 52 AD3d at 1274 [internal quotation marks omitted]; *see generally People v Rivera*, 68 NY2d 786, 787-788 [1986]; *People v Mayes*, 90 AD2d 879, 880 [3d Dept 1982]).

Defendant's challenge to the legal sufficiency of the evidence lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Diaz*, 15 NY3d 764, 765 [2010]), we conclude that the evidence is legally sufficient to establish that defendant constructively possessed the assault rifle, i.e., that he "exercised 'dominion or control' over the [firearm] by a sufficient level of control over the area in which the [firearm was] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see People v Thomas*, 165 AD3d 1636, 1636 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert denied* — US —, 140 S Ct 257 [2019]; *see generally Diaz*, 15 NY3d at 765). Contrary to defendant's assertion, there was sufficient evidence that the assault rifle was loaded inasmuch as the firearm was possessed by defendant "who, at the same time, possesse[d] a quantity of ammunition [that could] be used to discharge such firearm" (Penal Law § 265.00 [15]; *see People v Tillery*, 60 AD3d 1203, 1205-1206 [3d Dept 2009], *lv denied* 12 NY3d 860 [2009]). In addition, we conclude that there was sufficient evidence that defendant's possession of the firearm was knowing (*see People v Muhammad*, 16 NY3d 184, 188 [2011]; *Thomas*, 165 AD3d at 1636; *see generally People v Diaz*, 24 NY3d 1187, 1190 [2015]).

We reject defendant's contention that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *Thomas*, 165 AD3d at 1636-1637; *Tillery*, 60 AD3d at 1205-1206).

Defendant next contends that the court erred by submitting to the jury, as a lesser included offense of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), the crime of criminal possession of a firearm (§ 265.01-b [1]) as advocated by the prosecutor instead of criminal possession of a weapon in the fourth degree (§ 265.01 [1]) as requested by defendant. Contrary to defendant's contention, we conclude that any error by the court in

that regard is harmless (*see People v McIntosh*, 33 NY3d 1064, 1065 [2019]; *People v Boettcher*, 69 NY2d 174, 180 [1987]). Under the circumstances here, the jury's verdict on the highest count of criminal possession of a weapon in the second degree, despite the availability of the next lesser included offense of criminal possession of a firearm for its consideration, forecloses defendant's challenge to the court's refusal to charge the remote lesser included offense of criminal possession of a weapon in the fourth degree, because it dispels any speculation whether the jury might have reached a guilty verdict on still lower degrees of weapon possession (*see McIntosh*, 33 NY3d at 1065; *Boettcher*, 69 NY2d at 180).

Finally, defendant contends that he was denied effective assistance of counsel because defense counsel failed to sufficiently investigate and call as witnesses the codefendant passenger and three other inmates who purportedly would have provided exculpatory testimony. We reject that contention. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]), and we conclude that defendant has not met that burden here. Instead, the record establishes that defense counsel sufficiently investigated the facts and had strategic and legitimate reasons for declining to call the prospective witnesses, including reasonable concerns about the admissibility of portions of the proposed testimony, the inconsistent accounts of the subject events offered by the codefendant passenger and the possibility that his testimony would be inculpatory, and the weakness of the proposed testimony arising from credibility problems with each of the prospective witnesses (*see People v Smith*, 82 NY2d 731, 733 [1993]; *People v Wheeler*, 124 AD3d 1136, 1139 [3d Dept 2015], *lv denied* 25 NY3d 993 [2015]; *People v Kurkowski*, 117 AD3d 1442, 1443-1444 [4th Dept 2014]; *People v Wainwright*, 11 AD3d 242, 243 [1st Dept 2004], *lv denied* 4 NY3d 749 [2004]). 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]).

All concur except NEMOYER and DEJOSEPH, JJ., who dissent and vote to reverse in accordance with the following memorandum: The majority upholds Supreme Court's finding that the police had probable cause to stop defendant's vehicle for a Vehicle and Traffic Law (VTL) violation. We respectfully dissent and vote to reverse the judgment, suppress the physical evidence, dismiss the indictment, and remit for proceedings under CPL 470.45.

While on patrol on the night in question, two on-duty police officers received a cell phone call from an off-duty officer. The off-duty officer advised the on-duty officers that an older-model white BMW was likely transporting an automatic weapon. The off-duty officer was following the vehicle, and he directed the on-duty officers to the relevant location. Within approximately one minute of pulling up behind the subject vehicle, the on-duty officers claim to have witnessed it cross the double yellow line. The on-duty officers

then stopped defendant's vehicle, purportedly based on that VTL violation. The officers then discovered the subject gun during the course of the stop. Neither on-duty officer, however, mentioned the call from the off-duty officer or the information that he provided when they wrote out their contemporaneous and lengthy narrative reports later that night.

At the initial suppression hearing, both on-duty officers claimed that they stopped defendant's vehicle solely for the alleged VTL violation. Importantly, both officers affirmatively denied having received a service call that night alerting them to be on the lookout for defendant's vehicle. Based on that testimony, the court refused to suppress the subject gun. On the eve of trial, however, the defense finally received the radio runs from the patrol vehicle. On that recording, one of the on-duty officers is revealed to have said, "He's driving on the center line. Let's go. *There's supposed to be a gun in the car*" (emphasis added). The court then re-opened the suppression hearing in light of the new information that directly contradicted the on-duty officers' prior testimony.

At the reopened hearing, both on-duty officers had no choice but to admit receiving the off-duty officer's cell phone call and the information thereby conveyed. One of the on-duty officers acknowledged that, despite his prior sworn testimony to having stopped defendant's car solely for a routine traffic infraction, he and his partner had, in fact, received incriminating information from the off-duty officer prior to the traffic stop. The other on-duty officer likewise admitted that—in contradiction to his prior testimony—the stop was triggered, at least in part, by the information from the off-duty officer. At the close of the reopened suppression hearing, the prosecutor "readily acknowledge[d] that there was deception here, because I myself was kept in the dark about this." Nevertheless, the court again refused to suppress the gun.

That was error. Although due deference must be afforded to the credibility findings of the suppression court, we still have an unyielding responsibility to independently review the court's ultimate determination, and that includes assessing witness credibility when necessary (*see People v Harris*, 192 AD3d 151, 158 [2d Dept 2020]; *see generally People v Romero*, 7 NY3d 633, 643-644 [2006]). For these purposes, "allegations of police misconduct do not lose their relevance to a police witness's credibility simply because the alleged bad acts are not regarded in all cases as criminal or immoral" (*People v Smith*, 27 NY3d 652, 661 [2016]).

This is not a *Whren/Robinson* case about the officers' primary motivation for the subject stop (*Whren v United States*, 517 US 806 [1996]; *People v Robinson*, 97 NY2d 341 [2001]). Of course, pretext stops are legally permissible, but only so long as there is bona fide probable cause of an actual VTL or other technical violation. The fact that a VTL violation can serve as a lawful pretext for a stop motivated primarily by a hunch that might not satisfy the applicable *De Bour* category does not give the police license to invent a non-existent VTL violation in order to execute that pretext stop. Thus,

while an officer's primary motivation in executing a stop will never be dispositive of its legality, an officer's decision to affirmatively testify falsely on the stand about his or her primary motivation for that stop should certainly weigh heavily on his or her credibility when it comes time to decide whether he or she did, in fact, have the bona fide probable cause of a VTL or other technical violation necessary to uphold the stop.

Here, the on-duty officers' admitted decision to affirmatively testify falsely on the stand and conceal the true basis of their stop compels us to discredit their claim to having observed a bona fide VTL violation. *Whren* and *Robinson* are not exactly secrets around police precincts, and it makes no sense for those officers to conceal and testify falsely about their primary purpose for the stop had they actually observed a true VTL violation that could have permissibly and justly validated their pretext stop. That is one of the great benefits of the *Whren*/*Robinson* doctrine: by allowing officers the latitude to use their intuition to investigate suspected miscreants and thereby protect the public so long as they have some lawful basis for a stop, the doctrine encourages officers to be forthright about the events preceding a stop and thus maximizes a reviewing court's ability to collect all the information necessary to determine the stop's ultimate legality. But that ultimate determination must rest with the courts, and the system breaks down if officers deprive judges of the facts needed to make an objective assessment of a stop's legality (*see People v Lopez*, 95 AD2d 241, 250 [2d Dept 1983], *lv denied* 60 NY2d 968 [1983]).

Upon our review of the evidence at these suppression hearings, we would hold that the People failed to carry their burden of demonstrating the legality of the police conduct in initiating the traffic stop (*see Harris*, 192 AD3d at 165-166). Defendant's motion to suppress should therefore have been granted, and the indictment should have been dismissed. That is, admittedly, strong medicine. Thankfully, such medicine is rarely necessary. But it is necessary here.

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

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

706
CA 20-01230
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

AH WINES, INC., GREAT COLISEUM, L.L.C., THE GREAT COLISEUM, L.L.C., GREAT COLISEUM, L.L.C., DOING BUSINESS AS AH WINES, LODI CITY WINERY, LODI WINE COMPANY, WINERY DIRECT DISTRIBUTORS AND JEFFREY WAYNE HANSEN, PLAINTIFFS-RESPONDENTS,

V — MEMORANDUM AND ORDER

C6 CAPITAL FUNDING LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CARTER, LEDYARD & MILBURN LLP, NEW YORK CITY (JEFFREY S. BOXER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BASILE LAW FIRM, P.C., JERICHO (CATHERINE MCGOVERN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a decision of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered August 20, 2020. The decision granted the motion of plaintiffs for a preliminary injunction.

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

Same memorandum as in *AH Wines, Inc. v C6 Capital Funding LLC* ([appeal No. 2] — AD3d — [Nov. 12, 2021] [4th Dept 2021]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

707
CA 20-01231
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

AH WINES, INC., GREAT COLISEUM, L.L.C., THE GREAT COLISEUM, L.L.C., GREAT COLISEUM, L.L.C., DOING BUSINESS AS AH WINES, LODI CITY WINERY, LODI WINE COMPANY, WINERY DIRECT DISTRIBUTORS AND JEFFREY WAYNE HANSEN, PLAINTIFFS-RESPONDENTS,

V   MEMORANDUM AND ORDER

C6 CAPITAL FUNDING LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CARTER LEDYARD & MILBURN LLP, NEW YORK CITY (JEFFREY S. BOXER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BASILE LAW FIRM, P.C., JERICHO (CATHERINE MCGOVERN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (J. Scott Odorisi, J.), entered September 11, 2020. The order granted the motion of plaintiffs for a preliminary injunction and enjoined defendant from enforcing certain judgments against plaintiffs.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, to vacate a judgment by confession and thereafter moved by order to show cause to enjoin defendant from enforcing that judgment. In appeal No. 1, defendant purports to appeal from a decision granting the motion. In appeal No. 2, defendant appeals from the order entered pursuant to that decision.

At the outset, we note that the appeal from the decision in appeal No. 1 must be dismissed because it was taken from a "mere decision, from which no appeal lies" (*Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1266 [4th Dept 2007]; *see Garcia v Town of Tonawanda*, 194 AD3d 1479, 1479-1480 [4th Dept 2021]).

With respect to the order in appeal No. 2, we agree with defendant that Supreme Court abused its discretion in granting plaintiffs' motion inasmuch as plaintiffs failed to demonstrate by clear and convincing evidence a danger of irreparable injury in the

absence of the injunction (*see Cangemi v Yeager*, 185 AD3d 1397, 1398 [4th Dept 2020]; *Eastview Mall, LLC v Grace Holmes, Inc.*, 182 AD3d 1057, 1058 [4th Dept 2020]). We conclude that there was no showing of harm to plaintiffs aside from economic loss, and "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*Mangovski v DiMarco*, 175 AD3d 947, 949 [4th Dept 2019] [internal quotation marks omitted]). In light of our determination, defendant's remaining contentions are academic.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

714
CA 20-00803

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

ERIC J. HOLLENBECK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN R. BARRY, AND THE ESTATE OF LINDA L. OLEJNICZAK, DECEASED, DEFENDANTS-APPELLANTS.

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF MICHAEL D. HOLLENBECK, BUFFALO (MICHAEL D. HOLLENBECK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered May 13, 2020. The order, among other things, denied in part the motion of defendants for summary judgment and granted that part of the cross motion of plaintiff seeking summary judgment on the issue of negligence.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he allegedly sustained after the vehicle he was driving was struck by a vehicle driven by defendant Brian R. Barry. Defendants appeal from an order that, inter alia, denied their motion insofar as it sought summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use and significant limitation of use categories and granted that part of plaintiff's cross motion seeking summary judgment on the issue of Barry's negligence.

Contrary to defendants' contention, we conclude that Supreme Court properly denied their motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. Even assuming, arguendo, that defendants met their initial burden on the motion by submitting a report from a physician who conducted an independent medical examination of plaintiff, we conclude that plaintiff raised a triable issue of fact with respect to both of those categories by submitting, among other things, the conflicting expert affidavit of his treating physician (*see Cline v Code*, 175 AD3d 905, 908 [4th Dept 2019]; *DaCosta v Gibbs*, 139 AD3d 487, 487-488 [1st Dept 2016]; *Cook v*

Peterson, 137 AD3d 1594, 1596, 1598 [4th Dept 2016]). We reject defendants' further contention that they were entitled to summary judgment based on an alleged one-year gap in plaintiff's treatment. Summary judgment may be appropriate " '[e]ven where there is objective medical proof [of a serious injury], when additional contributory factors interrupt the chain of causation between the accident and the claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition' " (*McCarthy v Bellamy*, 39 AD3d 1166, 1166 [4th Dept 2007], quoting *Pommells v Perez*, 4 NY3d 566, 572 [2005]). In this case, however, "the record fails to establish that plaintiff in fact ceased all therapeutic treatment" during the purported gap (*Cook*, 137 AD3d at 1597).

Defendants also contend that, inasmuch as there is a triable issue of fact whether plaintiff contributed to the accident, the court erred in granting that part of plaintiff's cross motion with respect to Barry's negligence. We reject that contention. "[A] plaintiff's comparative negligence is no longer a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages" (*Rodriguez v City of New York*, 31 NY3d 312, 321 [2018]). Thus, "to obtain partial summary judgment on [a] defendant's liability[, a plaintiff] does not have to demonstrate the absence of his [or her] own comparative fault" (*id.* at 323; *see Lowes v Anas*, 195 AD3d 1579, 1582 [4th Dept 2021]).

Finally, we note that, inasmuch as plaintiff did not cross-appeal from the court's order, his contention that the court erred in granting defendants' motion with respect to the 90/180-day category of serious injury is not properly before us (*see Depczynski v Schuster*, 196 AD3d 1105, 1107 [4th Dept 2021]; *Salovin v Orange Regional Med. Ctr.*, 174 AD3d 1191, 1194 [3d Dept 2019]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

722

KA 20-01484

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT DOUGLAS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), dated August 27, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant appeals from an order classifying him as a level three sex offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reverse.

Where a "defendant's prior felony conviction of a sex crime raised his [or her] presumptive risk level from level two to level three . . . , the [SORA] court is not mandated to apply the override but may, in appropriate circumstances, impose a lower risk level" (*People v Reynolds*, 68 AD3d 955, 956 [2d Dept 2009]; *see People v Howard*, 27 NY3d 337, 341 [2016]; *People v Edmonds*, 133 AD3d 1332, 1333 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). "[T]reating the presumptive override as mandatory is a ground for reversal" (*People v Jones*, 172 AD3d 1786, 1787 [3d Dept 2019] [internal quotation marks omitted]).

Here, Supreme Court, in its oral decision, incorrectly treated defendant's presumptive level three classification as mandatory, and the court therefore never ruled on his downward departure application. We reject the People's assertion that the court corrected that error in its subsequent written decision. To the contrary, the written decision explicitly "incorporates . . . [the] oral decision" and again failed to rule on defendant's downward departure application. Moreover, the "compelling evidence" line in the written decision

merely summarized the findings of the Board of Examiners of Sex Offenders and was not—as the People characterize it—an independent holding or ruling by the court. Thus, as defendant correctly contends, remittal to Supreme Court "is required so that a proper evaluation of his risk level may occur" (*People v Denny*, 87 AD3d 1230, 1231 [3d Dept 2011]; *see Jones*, 172 AD3d at 1787-1788; *Reynolds*, 68 AD3d at 956).

We note that, on remittal, the court must set forth in writing "its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168-n [3]). Additionally, given defendant's temporally-proximate conviction in Madison County, we remind the court and the parties to ensure that all further proceedings comply with *People v Cook* (29 NY3d 114, 119-120 [2017]; *see e.g. People v Miller*, 179 AD3d 1517, 1517-1518 [4th Dept 2020]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

724
KA 18-02278
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIVON DAVIS, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered October 25, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that County Court erred in refusing to suppress physical evidence obtained as a result of an illegal pursuit of defendant by the police. We reject that contention. The undisputed evidence at the suppression hearing demonstrated that a police officer observed a man crouching down on the porch of a boarded-up house that the officer knew to be vacant. As the officer pulled into the driveway, the man stood up and jumped over the porch railing onto the ground. At the same time, another man emerged from the side of the house, and the two men then fled together on foot. One of the two men was defendant. The officer pursued them, and another officer joined the chase and eventually apprehended both men. Thereafter, the police found, inter alia, two loaded handguns along the route the men had taken while fleeing.

Based on the officer's observations of defendant and the other man before they fled, the police had probable cause to believe that defendant had knowingly entered the premises unlawfully and was committing a trespass in the officer's presence (*see generally* Penal Law § 140.05; CPL 140.05). Thus, the police were "entitled to pursue and arrest" defendant (*People v Lewis*, 137 AD3d 1057, 1057 [2d Dept 2016], *lv denied* 27 NY3d 1153 [2016]; *see People v Caba*, 78 AD3d 857, 858 [2d Dept 2010], *lv denied* 20 NY3d 1096 [2013]; *People v Delgado*, 4

AD3d 310, 310-311 [1st Dept 2004], *lv denied* 2 NY3d 798 [2004]). Because the pursuit was justified, defendant's abandonment of his weapon and other physical evidence during the pursuit "was not precipitated by any illegal police conduct," and the court properly refused to suppress the physical evidence (*People v Martinez*, 80 NY2d 444, 448 [1992]).

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

725

KA 17-01344

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMANTHA L. HUGHES, ALSO KNOWN AS SAM,
DEFENDANT-APPELLANT.

ANDREW G. MORABITO, EAST ROCHESTER, 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 November 23, 2016. The judgment convicted defendant upon her plea of guilty of kidnapping in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of defendant's omnibus motion seeking to suppress her statements is granted to the extent of suppressing any statements made after 5:00 p.m. on December 6, 2015, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of kidnapping in the second degree (Penal Law § 135.20). We agree with defendant, and the People correctly concede, that the waiver of the right to appeal is invalid. Defendant orally waived her right to appeal and executed a written waiver of the right to appeal. The language in the written waiver is inaccurate and misleading insofar as it purports to impose "an absolute bar to the taking of a direct appeal" and purports to deprive defendant of her "attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Supreme Court's colloquy regarding the waiver of the right to appeal somewhat remedied the mischaracterization of the waiver as an absolute bar to the right to appeal inasmuch as the court referred to issues that would still be preserved for appeal, including ineffective assistance of counsel and "some other constitutional issues." The court's verbal statements, however, did nothing to counter the other inaccuracies set forth in the written appeal waiver. A "waiver[] cannot be upheld . . . on the theory that the offending language can be ignored and that [it is] enforceable based on the court's few correctly spoken terms" (*id.* at 566).

Although defendant's contention that she received ineffective assistance of counsel survives her guilty plea to the extent that she contends that her plea was infected by the allegedly ineffective assistance (*see People v Ollman*, 147 AD3d 1452, 1453 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017]), we reject that contention. Defendant contends that defense counsel was ineffective by failing to argue at the *Huntley* hearing that the police violated defendant's rights by questioning her without *Miranda* warnings and failing to seek suppression of her confession. The record shows, however, that defense counsel indeed sought suppression of defendant's statements and argued, inter alia, that defendant was in police custody and was not given *Miranda* warnings.

Defendant next contends that the court erred in refusing to suppress statements that she made to Rochester Police Department investigators. We agree with defendant in part. It is well settled that *Miranda* warnings must be given when a defendant is subject to custodial interrogation (*see People v Paulman*, 5 NY3d 122, 129 [2005]; *People v Berg*, 92 NY2d 701, 704 [1999]; *People v Torres*, 172 AD3d 758, 760 [2d Dept 2019]). "In determining whether suppression is required, the court 'should consider: (1) the amount of time the defendant spent with the police, (2) whether his [or her] freedom of action was restricted in any significant manner, (3) the location and atmosphere in which the defendant was questioned, (4) the degree of cooperation exhibited by the defendant, (5) whether he [or she] was apprised of his [or her] constitutional rights, and (6) whether the questioning was investigatory or accusatory in nature' " (*People v Lunderman*, 19 AD3d 1067, 1068-1069 [4th Dept 2005], *lv denied* 5 NY3d 830 [2005]). In determining whether a defendant is in custody, the subjective belief of the defendant and the subject intent of the officers is not determinative (*see Torres*, 172 AD3d at 760). Rather, the question is whether a reasonable person, innocent of any crime, would have believed that he or she was not free to leave at the time he or she was being questioned (*see Paulman*, 5 NY3d at 129; *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *People v McCabe*, 182 AD3d 772, 774-775 [3d Dept 2020]).

Here, the police were investigating the disappearance of two students from the University of Rochester. They were aware that defendant was one of the last people to have seen the two students at approximately 2:30 a.m. on December 5, 2015. Sometime after 2:00 p.m. on December 6, 2015, the police arrived at the house of defendant's friend, where defendant agreed to speak with an investigator privately inside the investigator's unmarked vehicle. Defendant was seated in the front passenger seat, and the questioning lasted 10 to 15 minutes. Defendant then agreed to accompany the police to the Public Safety Building (PSB) to speak with other investigators. Contrary to defendant's contention, she was not in custody when she was in the police vehicle at her friend's house or during the ride to the PSB. Defendant had agreed to speak with the investigator, and the brief questioning was investigatory, not accusatory (*see People v Box*, 181 AD3d 1238, 1239 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *People v Spoor*, 148 AD3d 1795,

1796 [4th Dept 2017], *lv denied* 29 NY3d 1134 [2017]; *Lunderman*, 19 AD3d at 1068). Under the circumstances, a reasonable person, innocent of any crime, would not have believed that he or she was in custody (*see generally Yukl*, 25 NY2d at 589).

At the PSB, defendant was placed in a conference room and was questioned by an investigator from approximately 3:15 p.m. until 5:00 p.m. At 5:00 p.m., another investigator accompanied defendant to the bathroom, and the investigator continued questioning defendant. During that conversation, defendant made admissions demonstrating that she was more involved in the case than she had initially revealed, that she knew who was holding the students, and that one of the students had been shot. Defendant indicated that if the police let her go, she could contact the people who were holding the missing students, but the investigators refused her offer and continued questioning defendant in an interview room. At approximately 8:00 p.m., defendant divulged the location of the missing students, who were then rescued by the police. The police continued questioning defendant until the following afternoon, not including a break when defendant slept on a cot in the interview room. At no time was she ever given *Miranda* warnings.

We note that the People do not contend that the emergency doctrine exception applies here to justify the police questioning of defendant without administering *Miranda* warnings (*see generally People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). We conclude that defendant's statements that were made after 5:00 p.m. on December 6 were the product of custodial interrogation and should have been suppressed inasmuch as defendant never received *Miranda* warnings (*see People v Glanton*, 72 AD3d 1536, 1537 [4th Dept 2010]; *People v Baggett*, 57 AD3d 1093, 1095 [3d Dept 2008]). At that time, the questioning changed from investigatory to accusatory, and a reasonable person, innocent of any crime, would not have believed that they were free to leave (*see generally Yukl*, 25 NY2d at 589). We therefore grant that part of defendant's omnibus motion seeking to suppress her statements to the extent of suppressing any statements made after 5:00 p.m. on December 6, 2015.

In the absence of any proof that defendant would have pleaded guilty even if her statements were suppressed, we conclude that the plea must be vacated " '[i]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty' " (*Glanton*, 72 AD3d at 1538; *see People v Henry*, 133 AD3d 1085, 1087 [3d Dept 2015]; *see generally People v Grant*, 45 NY2d 366, 379-380 [1978]).

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

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

728
KA 17-01517
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE GIBSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 24, 2017. The judgment convicted defendant upon a jury verdict of 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 a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). We affirm.

Defendant contends that County Court (Randall, J.) erred in denying his request for new counsel before his first trial, which ended in a mistrial. We conclude, however, that defendant abandoned that request when he proceeded to the second trial, before a different judge (Castro, A.J.), while still being represented by the same attorney (*see People v Hampton*, 113 AD3d 1131, 1132 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014], *reconsideration denied* 23 NY3d 1062 [2014]; *People v Bennett*, 94 AD3d 1570, 1571 [4th Dept 2012], *lv denied* 19 NY3d 994 [2012], *reconsideration denied* 19 NY3d 1101 [2012]; *see also People v Crosby*, 195 AD3d 1602, 1604 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

Defendant contends that the evidence is legally insufficient to support the conviction because the People failed to establish the element of identity. We reject that contention. The presence of defendant’s fingerprint on an item that was moved in the course of the burglary, together with the victim’s testimony that she did not know defendant, provided a “valid line of reasoning and permissible inferences which could lead a rational person to the conclusion” that defendant was the burglar (*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 reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that the People failed to establish that his statements to the police were voluntary because the police failed to video record his interrogation and thus that the court erred in refusing to suppress those statements. We reject that contention. There was no statutory requirement that the police record the interrogation, and it is well settled that due process does not require that the police record interrogations (*see People v Durant*, 26 NY3d 341, 348-349 [2015]). We conclude that the People proved beyond a reasonable doubt that defendant's statements were not products of coercion but rather were the "result of a free and unconstrained choice by defendant" (*People v Buchanan*, 136 AD3d 1293, 1294 [4th Dept 2016], *lv denied* 27 NY3d 1129 [2016] [internal quotation marks omitted]).

We reject defendant's contention that the court erred in adjudicating him a persistent violent felony offender. Defendant failed to preserve for our review his contention that the court erred in failing to reopen the persistent violent felony offender hearing after it admitted in evidence a certificate of incarceration from the Department of Corrections and Community Supervision (DOCCS) (*see generally People v Angona*, 119 AD3d 1406, 1407 [4th Dept 2014], *lv denied* 25 NY3d 987 [2015]), 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]). Contrary to defendant's assertion, we conclude that the court did not err in admitting in evidence the certificate of incarceration pursuant to the common-law public documents exception to the hearsay rule. " 'When a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports so made by or under the supervision of the public officer are admissible in evidence' " (*People v Smith*, 258 AD2d 245, 248 [4th Dept 1999], *lv denied* 94 NY2d 829 [1999]). The Commissioner of Corrections and Community Supervision is a public officer who is required to collect the names of inmates, the nature and duration of their sentences, and the duration of their punishments (*see* Correction Law §§ 29, 119). Thus, the certificate of incarceration with the seal of DOCCS qualified for admission under the common-law public documents exception to the hearsay rule (*see Smith*, 258 AD2d at 249; *People v Hudson*, 237 AD2d 943, 944 [4th Dept 1997], *lv denied* 89 NY2d 1094 [1997]). Finally, inasmuch as there was a prior finding that defendant's 2002 conviction is a predicate violent felony conviction, he could not challenge that finding in the subsequent proceeding to adjudicate him a persistent violent felony offender (*see* CPL 400.15

[8]; *People v Wilson*, 231 AD2d 912, 913 [4th Dept 1996], *lv denied* 89 NY2d 868 [1996]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

739
CA 20-01366
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF KAREN J. MURRAY AND CHS
MOBILE INTEGRATED HEALTH CARE, INC.,
PETITIONERS-PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

NORTH GREECE FIRE DISTRICT,
RESPONDENT-DEFENDANT-RESPONDENT-APPELLANT,
AND MONROE MEDI-TRANS, INC., DOING BUSINESS
AS MONROE AMBULANCE (AS A NECESSARY PARTY),
RESPONDENT-DEFENDANT-RESPONDENT.

PINSKY LAW GROUP, PLLC, SYRACUSE (BRADLEY M. PINSKY OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS-RESPONDENTS.

HANNIGAN LAW FIRM PLLC, DELMAR (TIMOTHY C. HANNIGAN OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT-APPELLANT.

GIRVIN & FERLAZZO, P.C., ALBANY (PATRICK J. FITZGERALD OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered October 14, 2020. The order and judgment, among other things, dismissed the first, third and fourth causes of action in the amended petition-complaint.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that the court did not address that part of the motion of respondent-defendant North Greece Fire District (District) seeking an award of attorney’s fees and costs, and thus it was deemed denied (*see Abasciano v Dandrea*, 83 AD3d 1542, 1543 [4th Dept 2011]; *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]). Contrary to the District’s contention on its cross appeal, we conclude that the motion was properly denied to that extent inasmuch as the District provided no evidence that petitioners-plaintiffs engaged in frivolous conduct (*see* 22 NYCRR 130-1.1 [c]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

741
TP 21-00357
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JAMES R. BLANDFORD, AS LIMITED ADMINISTRATOR OF THE ESTATE OF MARGARET BLANDFORD, DECEASED, PETITIONER,

V   MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE AND ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

BALDWIN, SUTPHEN & FRATESCHI, PLLC, SYRACUSE (ROBERT F. BALDWIN, JR., OF COUNSEL), FOR PETITIONER.

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, Onondaga County [Gerard J. Neri, J.], entered February 11, 2021) to review a determination of respondents. The determination denied the application of decedent for Medicaid benefits.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed against respondent New York State Office of Temporary and Disability Assistance, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Margaret Blandford (decedent) commenced this CPLR article 78 proceeding challenging the determination denying her application for Medicaid benefits on the ground that she failed to provide documentation necessary to determine her eligibility for such benefits. Decedent applied for benefits in November 2016, which respondent Onondaga County Department of Social Services (OCDSS) denied by notice sent on May 27, 2017, based on decedent’s failure to adequately respond to OCDSS’ demands for supporting documents. At the fair hearing conducted on the administrative appeal filed by decedent, an OCDSS representative submitted evidence tending to establish that the agency requested documentation regarding varying aspects of decedent’s financial situation by letters dated December 6, 2016, January 30, 2017, March 22, 2017 and May 10, 2017. OCDSS also submitted evidence tending to establish that, in response to the first three letters, decedent, acting through counsel, provided some but not all of the documents requested by OCDSS, and that neither decedent nor her attorney responded to the May 10th letter. Decedent’s attorney indicated that a series of unfortunate incidents occurred during the time period, including that his office was flooded causing him to

relocate the office, that the flooding caused decedent's records to become infested with mold, that counsel had several outpatient procedures to remove skin cancers during the relevant time period, and that he traveled out of the country during that time. He further established that the May 10th letter arrived in his office while he was overseas, but he did not see the letter until after he received OCDSS' May 27th notice that it had denied decedent's application. The agency representative submitted evidence that the assistant to decedent's attorney was working when the May 10th letter was received, and that the assistant had previously sought an extension of time in this matter but took no action after the receipt of the May 10th letter. Although decedent's attorney has repeatedly stated that he has the information sought by OCDSS and wished to submit it, he has not done so at any time, including at the fair hearing when he indicated that he had the information with him, and in his submissions in conjunction with this proceeding.

The designee of the Commissioner of Health upheld the denial of Medicaid benefits, concluding that decedent and her attorney failed to provide OCDSS with the eligibility documentation as required, and that they also failed to contact OCDSS to request assistance or an extension to submit the documentation. The designee concluded that the attorney's explanations were vague, self-serving, and uncorroborated, especially in light of the evidence that the attorney was back from his travels by May 16th but failed to take any action, including failing to read his mail, before the deadline of May 25th.

Decedent appealed from that determination, and respondent New York State Office of Temporary and Disability Assistance (OTDA) affirmed the denial of Medicaid benefits, concluding that decedent failed to establish good cause for the failure to provide the eligibility documentation in response to OCDSS' repeated requests for information. Decedent subsequently commenced this CPLR article 78 proceeding challenging the denial of benefits, and petitioner was substituted as the estate representative after decedent passed away. Supreme Court, inter alia, granted petitioner's request for a default judgment against OCDSS, stayed entry of that judgment pending final determination of this proceeding, and transferred the proceeding to this Court to review a question of substantial evidence pursuant to CPLR 7804 (g). We confirm the determination.

It is well settled that, " '[j]udicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether the determination is supported by substantial evidence based upon the entire record' " (*Matter of Tip-A-Few, Inc. v Caliva*, 196 AD3d 1040, 1040-1041 [4th Dept 2021]; *see* CPLR 7803 [4]; *Matter of Jason B. v Novello*, 12 NY3d 107, 114 [2009]; *Matter of B.P. Global Funds, Inc. v New York State Liq. Auth.*, 169 AD3d 1506, 1506 [4th Dept 2019]). Therefore, "[a]lthough the [amended] petition challenges the determination as arbitrary and capricious[and affected by an error of law,] it is apparent that a challenge is being made to the factual findings of the [Commissioner's designee following a fair hearing]. Thus, regardless of the terms used by [petitioner], a substantial evidence issue has been raised"

(*Matter of Stoughtenger v Carrion*, 72 AD3d 1484, 1485 [4th Dept 2010] [internal quotation marks omitted]). Here, based on the evidence discussed above, we conclude that substantial evidence supports the determination.

Petitioner's remaining contentions are academic in light of our determination. We therefore confirm the determination and dismiss the amended petition against OTDA, and remit the matter to Supreme Court for further proceedings with respect to the default judgment against OCDSS.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

746
KA 17-00904
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN A. BEMBRY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (John L. DeMarco, J.), rendered March 7, 2017. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, as a class E felony, aggravated unlicensed operation of a motor vehicle in the first degree, consumption or possession of alcohol in a motor vehicle and refusal to take a breath test.

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 count four of the indictment, vacating the plea with respect to that count and dismissing that count, and vacating the fine imposed on count one of the indictment and imposing a fine in the sum of $500 on count two of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), and "Refusal to Take Breath Test" (§ 1194 [1] [b]). County Court sentenced defendant to, among other things, a fine in the sum of $1,000 on count one, driving while intoxicated, but did not impose a fine on count two, aggravated unlicensed operation of a motor vehicle, and the court imposed concurrent indeterminate terms of incarceration on those two counts of the indictment. On appeal, defendant contends that the imposition of the fine on count one is unduly harsh and severe.

Initially, we note that the sentence imposed on count two of the indictment is illegal because a fine of between $500 and $5,000 is mandatory upon a conviction of aggravated unlicensed operation of a motor vehicle in the first degree, even where, as here, the court also

imposes a sentence of incarceration (*see* Vehicle and Traffic Law § 511 [3] [b]; *People v Eron*, 79 AD3d 1774, 1775 [4th Dept 2010]; *People v Barber*, 31 AD3d 1145, 1145-1146 [4th Dept 2006]). Furthermore, "[n]either County Court nor this Court possesses interest of justice jurisdiction to impose a sentence less than the mandatory statutory minimum" (*People v Clark*, 176 AD2d 1206, 1206-1207 [4th Dept 1991], *lv denied* 79 NY2d 854 [1992]; *see People v Dexter*, 104 AD3d 1184, 1185 [4th Dept 2013]). " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]; *see People v Campagna*, 172 AD3d 1904, 1905 [4th Dept 2019]). "In the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence" (*People v Perrin*, 94 AD3d 1551, 1551 [4th Dept 2012]), and we therefore modify the judgment by imposing the statutory minimum fine in the sum of $500 on count two of the indictment, in addition to the previously imposed parts of the sentence on that count.

We agree with defendant that the sentence, as modified, is unduly harsh and severe insofar as it imposes a fine of $1,000 on count one of the indictment. Consequently, we further modify the judgment as a matter of discretion in the interest of justice by vacating the fine imposed on that count.

Finally, we note that the Appellate Term, Second Department, has repeatedly stated that a defendant's "refusal to submit to a breath test did not establish a 'cognizable offense' " (*People v Malfetano*, 64 Misc 3d 135[A], 2019 Slip Op 51147[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2019]; *see People v Villalta*, 56 Misc 3d 59, 60-61 [App Term, 2d Dept, 9th & 10th Jud Dists 2017], *lv denied* 29 NY3d 1135 [2017]; *People v Wrenn*, 52 Misc 3d 141[A], 2016 NY Slip Op 51193[U], *2-3 [App Term, 2d Dept, 9th & 10th Jud Dists 2016], *lv denied* 28 NY3d 1032 [2016]; *see generally People v Thomas*, 46 NY2d 100, 108 [1978], *appeal dismissed* 444 US 891 [1979]). We agree, and we therefore further modify the judgment by reversing that part convicting defendant of count four of the indictment, vacating the plea with respect to that count of the indictment and dismissing that count.

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

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

747
KA 16-01978
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTIS L. MILLER, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered August 2, 2016. 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: In this prosecution arising from a domestic violence homicide, defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm.

We reject defendant's contention that the search warrant for his cell phones was issued without probable cause. According "great deference to the issuing [Justice]" (*People v Harper*, 236 AD2d 822, 823 [4th Dept 1997], *lv denied* 89 NY2d 1094 [1997]), we conclude that Supreme 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 phones (*see People v Conley*, 192 AD3d 1616, 1617-1618 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). Contrary to defendant's related contention, we conclude that the " '[m]inor discrepancies or misstatements [in the application] do not amount to egregious inaccuracies affecting [the] probable cause determination' " (*People v Anderson*, 149 AD3d 1407, 1408 [3d Dept 2017], *lv denied* 30 NY3d 947 [2017]) and that the "typographical error in the search warrant . . . does not invalidate the search" (*People v Shetler*, 256 AD2d 1234, 1234 [4th Dept 1998]; *see generally Groh v Ramirez*, 540 US 551, 558 [2004]).

Defendant further contends that the court erred in refusing to suppress his statements made during questioning by the police because

the officer failed to adequately convey the *Miranda* warnings by downplaying defendant's rights. Defendant's contention is not preserved for our review, however, inasmuch as he failed to raise that specific contention in his motion papers or at the hearing (*see People v Caballero*, 23 AD3d 1031, 1032 [4th Dept 2005], *lv denied* 6 NY3d 846 [2006]). In any event, we conclude that defendant's contention lacks merit (*see People v Mateo*, 194 AD3d 1342, 1343-1344 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]; *People v Bakerx*, 114 AD3d 1244, 1247 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]).

We reject defendant's contention that the court abused its discretion in allowing testimony about prior acts of domestic violence that defendant committed against the victim. We conclude that the testimony of the People's witnesses was "probative of intent, motive, and identity in this domestic violence homicide, and its probative value was not outweighed by its prejudicial impact" (*People v Dixon*, 171 AD3d 1470, 1471 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]; *see People v Dorm*, 12 NY3d 16, 18-19 [2009]). We note that the court's limiting instructions minimized any prejudice to defendant (*see Dorm*, 12 NY3d at 19; *People v Washington*, 122 AD3d 1406, 1408 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]).

Defendant contends that the court erred in failing to conduct an inquiry into whether a juror was asleep during the final portion of the videotaped questioning of defendant by the police that was played for the jury and in failing to discharge that juror. Defendant failed to preserve that contention for our review inasmuch as he did not request that the court conduct such an inquiry and did not move to discharge the juror (*see People v Crumpler*, 163 AD3d 1457, 1460 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018], *reconsideration denied* 32 NY3d 1125 [2018]). Indeed, we conclude on this record that defendant " 'demonstrated a willingness to continue to accept the juror as a trier of fact' and now 'cannot be heard to complain' " (*id.*). 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]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that a different verdict would have been unreasonable and thus that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that the court erred in ordering him to pay restitution without a hearing is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" (*People v Horne*, 97 NY2d 404, 414 n 3 [2002]; *see People v Jones*, 108 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to

defendant's further contention, we conclude that the sentence is not unduly harsh or severe.

We have reviewed defendant's remaining contentions and conclude that they are unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, are without merit.

Finally, we note that the certificate of conviction incorrectly states that defendant was sentenced on August 3, 2016, and it must be amended to reflect the correct sentencing date of August 2, 2016 (*see People v Gray*, 181 AD3d 1326, 1326 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

750
KA 19-00529
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PANDE TRIFUNOVSKI, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRADLEY E. KEEM 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 (Stephen J. Dougherty, J.), rendered February 15, 2019. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) for killing his wife. Contrary to defendant's contention, County Court did not err in refusing to suppress his statements to the police. We conclude that the record of the suppression hearing, including the video of defendant's police interview, "supports the court's determination that defendant knowingly, voluntarily and intelligently waived his *Miranda* rights before making [his] statement[s]" to the police (*People v Case*, 150 AD3d 1634, 1638 [4th Dept 2017] [internal quotation marks omitted]). The video of the police interview also belies defendant's contention that he did not understand his *Miranda* rights because of a language barrier. To the extent that defendant further contends that he invoked his right to remain silent, we reject that contention. Defendant did not "clearly communicate a desire to cease all questioning indefinitely" (*People v Flowers*, 122 AD3d 1396, 1397 [4th Dept 2014], *lv denied* 24 NY3d 1219 [2015] [internal quotation marks omitted]; *see People v Ware*, 159 AD3d 1401, 1402 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]; *People v Lowin*, 36 AD3d 1153, 1155 [3d Dept 2007], *lv denied* 9 NY3d 847 [2007], *reconsideration denied* 9 NY3d 878 [2007]). Rather, the record establishes that, after defendant asked if it was possible to continue the interview the next day, he continued to participate in the conversation with the police (*see generally Flowers*, 122 AD3d at 1397). Under these circumstances, we conclude that defendant did not unequivocally exercise his right to

remain silent, and that his statements were not rendered involuntary when the police continued to question him. "[T]he totality of the circumstances here does not 'bespeak such a serious disregard of defendant's rights, and [was not] 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], quoting *People v Holland*, 48 NY2d 861, 863 [1979]).

Defendant next contends that the evidence is not legally sufficient to support the conviction because the People failed to establish that he killed his wife intentionally. We reject that contention. "Intent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v McDonald*, 172 AD3d 1900, 1901-1902 [4th Dept 2019] [internal quotation marks omitted]). In this case, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found" that defendant intended to kill his wife (*People v Steinberg*, 79 NY2d 673, 682 [1992]). Defendant repeatedly struck his wife in the head with a piece of wood and strangled her (*see People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]), and he also took measures to conceal the evidence of his conduct (*see People v Morgan*, 38 AD3d 1329, 1329 [4th Dept 2007], *lv denied* 8 NY3d 988 [2007]). To the extent that defendant further contends that the evidence is legally insufficient to support the conviction because he established the defense of extreme emotional disturbance by a preponderance of the evidence, defendant failed to preserve that contention for our review (*see People v Martin-Brown*, 156 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018], *reconsideration denied* 31 NY3d 1084 [2018]; *People v Ashline*, 124 AD3d 1258, 1260 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]). In any event, we conclude that the contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Additionally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct during the opening statement (*see People v Bagley*, 194 AD3d 1475, 1477 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; *People v Vick*, 173 AD3d 1776, 1777 [4th Dept 2019], *lv denied* 34 NY3d 955 [2019]). In any event, we conclude that "[t]he prosecutor's comments during his opening statement were, while perhaps theatrical, properly framed in terms of what the [witnesses] would testify to and did not distort the evidence or otherwise prejudice defendant" (*Vick*, 173 AD3d at 1777 [internal quotation marks omitted]). We reject defendant's further contention that he was deprived of effective assistance of counsel. The prosecutor's comments during his opening statement were "not sufficiently egregious to deprive defendant of a fair trial; as such, it cannot be said that defense counsel was ineffective for failing to object to [them]" (*People v Linder*, 170 AD3d 1555, 1560 [4th Dept

2019], *lv denied* 33 NY3d 1071 [2019]). We further conclude that defendant otherwise received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe. Finally, to the extent that defendant further contends that he was penalized for exercising his right to a jury trial and that the court should have exercised its discretion to sentence him pursuant to Penal Law § 60.12, those contentions are unpreserved for our review (*see People v Jacobs*, 195 AD3d 1434, 1435 [4th Dept 2021]; *People v Elmore*, 195 AD3d 1575, 1576-1577 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *People v Smalls*, 128 AD3d 1229, 1230 [3d Dept 2015], *lv denied* 27 NY3d 1006 [2016], *reconsideration denied* 27 NY3d 1155 [2016], *cert denied* — US —, 137 S Ct 498 [2016]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

752
CAF 20-00300
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF TONY S.H., JR.

NEW HOPE FAMILY SERVICES, PETITIONER-RESPONDENT;
MEMORANDUM AND ORDER
KATRINA F., RESPONDENT-APPELLANT,
STACIE P. AND BEN P., RESPONDENTS.

THEODORE W. STENUF, MINOA, FOR RESPONDENT-APPELLANT.

HARRIGAN & DOLAN, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (JOHN A. CIRANDO OF COUNSEL), FOR PETITIONER-RESPONDENT.

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered January 13, 2020 in a proceeding pursuant to Social Services Law § 383-c. The order, insofar as appealed from, granted the petition for approval of respondent Katrina F.'s extra-judicial surrender of the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is denied, and the motion is granted.

Memorandum: In this guardianship and custody proceeding pursuant to Social Services Law § 383-c, respondent Katrina F. (birth mother) appeals from an order that, inter alia, granted the petition of petitioner, New Hope Family Services (New Hope), for approval of the birth mother's extra-judicial surrender of the subject child and adjudged that it was in the child's best interests to be adopted by Stacie P. and Ben P. (respondents). The appeal from that final order brings up for review an earlier intermediate order that denied the birth mother's motion to vacate her surrender (*see Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1518 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *see generally* CPLR 5501 [a] [1]; Family Ct Act § 1118; *Matter of Alyssa L. [Deborah K.]*, 93 AD3d 1083, 1084 [3d Dept 2012]). We agree with the birth mother that reversal of the final order insofar as appealed from is required.

The birth mother contacted New Hope just prior to the child's birth explaining her desire to place the child for adoption, and she was adamant that the adoption plan be made through that authorized agency because she was unhappy with the Onondaga County Department of Children and Family Services, which had been involved in parental

termination proceedings with respect to the birth mother's five other children. At the hospital a couple days after the child's birth, the birth mother executed a voluntary placement agreement in which she agreed to place the child in New Hope's foster care program. The child was discharged from the hospital the next day and placed in that program. A week later, after having selected respondents as the prospective adoptive parents, the birth mother signed the subject extra-judicial surrender in the presence of witnesses. The child was placed with respondents the following day.

Within 15 days of its execution, New Hope filed a petition seeking approval of the extra-judicial surrender. However, in an affidavit received by the appropriate Family Court part less than 45 days after executing the surrender, the birth mother sought to revoke it. The birth mother thereafter moved for an order pursuant to Social Services Law § 383-c (6) (a) deeming the surrender a nullity and returning the child to the care and custody of the authorized agency. The court refused to deem the surrender a nullity, denied the birth mother's motion, and instead determined that a best interests hearing was required. Following the best interests hearing, the court, among other things, granted New Hope's petition approving the birth mother's surrender.

"In the context of agency adoptions, Social Services Law § 383-c . . . provides that biological parents willing to give their child up for adoption must execute a written instrument, known as a 'surrender' " (*Matter of Jacob*, 86 NY2d 651, 664 [1995]; *see* § 383-c [1]). In that regard, "[s]ection 383-c provides that a birth parent may relinquish parental rights to an infant by signing either a judicial surrender or an extra-judicial surrender" (Joseph R. Carrieri, Practice Commentaries, McKinney's Cons Laws of NY, Book 52A, Social Services Law § 383-c). A judicial surrender is executed and acknowledged before a judge and becomes final and irrevocable immediately upon its execution and acknowledgment (*see* § 383-c [3] [a], [b]; [5] [c]).

An extra-judicial surrender, by contrast, is executed and acknowledged by the birth parent not before a judge, but rather in the presence of witnesses with certain qualifications and a notary public (*see* Social Services Law § 383-c [4] [a]). Within 15 days of such execution, the authorized agency to which the child was surrendered must file an application with the court for approval of the extra-judicial surrender (*see* § 383-c [4] [b]). The court thereafter must enter an order either approving or disapproving the extra-judicial surrender and, if the court disapproves it, the extra-judicial surrender is deemed a nullity and without force or effect (*see* § 383-c [4] [f]). As relevant here, the statute also allows the birth parent to revoke an extra-judicial surrender within a specified period: "[I]f a revocation of an extra-judicial surrender is mailed and postmarked or otherwise delivered to the court named in the surrender within [45] days of the execution of the surrender, such surrender shall be deemed a nullity, and the child shall be returned to the care and custody of the authorized agency" (§ 383-c [6] [a]).

Here, it is undisputed that the birth mother timely revoked her extra-judicial surrender within the required 45-day period. Nonetheless, despite the arguments to the contrary raised by the birth mother in her moving papers and during a subsequent appearance, the court initially determined that a best interests hearing was required by Social Services Law § 383-c and later reasoned that the situation was "no different than a private placement adoption" and, thus, Domestic Relations Law § 115-b applied, which required a best interests hearing following the revocation. Those determinations constitute error.

First, as the birth mother correctly contended, the plain language of Social Services Law § 383-c (6) (a) *mandates* that a timely revocation shall render the extra-judicial surrender a nullity and that the child shall be returned to the care and custody of the authorized agency, and the statute contains no language providing for a best interests hearing in the event of such a timely revocation (*see generally Matter of Janus Petroleum v New York State Tax Appeals Trib.*, 180 AD2d 53, 54 [3d Dept 1992]; McKinney's Cons Laws of NY, Book 1, Statutes § 177).

Second, as the birth mother also correctly argued, the court erroneously determined that the agency adoption here as governed by Social Services Law § 383-c was indistinguishable from a private placement adoption as governed by Domestic Relations Law § 115-b. A private placement adoption is a separate category of adoption that requires birth parents willing to place their child for adoption to execute a written document known as a "consent," which may be judicial or extra-judicial (*see* Domestic Relations Law § 115-b; *Jacob*, 86 NY2d at 664). Like an extra-judicial surrender (*see* Social Services Law § 383-c [6] [a]), an extra-judicial consent may be revoked by the birth parent via written notice received by the court within 45 days (*see* Domestic Relations Law § 115-b [3] [a]). There is, however, a critical difference between the statutes regarding the consequences that flow from a timely revocation. With respect to the revocation of an extra-judicial consent by written notice, Domestic Relations Law § 115-b (3) (b) provides that, "[n]otwithstanding that such written notice is received within said [45] days, the notice of revocation shall be given effect only if the adoptive parents fail to oppose such revocation . . . or, if they oppose such revocation and the court . . . has determined that the best interests of the child will be served by giving force and effect to such revocation." Where the adoptive parents in a private placement adoption oppose the birth parents' timely and proper revocation of consent, the court must hold a best interests hearing to determine what disposition should be made with respect to the custody of the child (*see* Domestic Relations Law § 115-b [6] [d]; *see e.g. Matter of Collin*, 92 AD3d 1283, 1284 [4th Dept 2012]; *Matter of Gabriela*, 273 AD2d 940, 940 [4th Dept 2000]). The statute governing revocations of extra-judicial surrenders in agency adoptions, by contrast, does not provide for a best interests hearing (*see* Social Services Law § 383-c [6]). In sum, "while an attempted revocation of an extra-judicial adoption *consent* may lead to [a] hearing on whether revocation is in the child's best interest,

revocation of an extra-judicial *surrender* is automatic and requires that the child be returned to the care and custody of the authorized agency" (Alan D. Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C111:5 [emphasis added]). Thus, the court here had no statutory basis for refusing to deem the surrender a nullity, denying the birth mother's motion, and instead conducting a best interests hearing.

New Hope and the Attorney for the Child nonetheless contend that the court had a contractual basis for conducting a best interests hearing because the language of the surrender indicated that such a hearing might be required upon the birth mother's timely revocation. That contention lacks merit. Social Services Law § 383-c (5)—which sets forth the required form of surrenders—provides, in pertinent part, that an extra-judicial surrender instrument must state in plain language in conspicuous bold print at the beginning thereof that "a revocation of the surrender will be effective if it is in writing and postmarked or received by the court named in the surrender within [45] days of the signing of the surrender" (§ 383-c [5] [d] [ii]). Consistent with that part of the statute governing the effect of a timely revocation of an extra-judicial surrender (*see* § 383-c [6] [a]), the mandated language in a proper extra-judicial surrender form does not provide that a revocation is effective only upon a determination after a best interests hearing (*see* § 383-c [5] [d] [ii]). As the birth mother correctly contended in her motion papers, New Hope nonetheless deviated from the statute by inserting language in the surrender indicating that, even if the birth mother attempted to revoke the surrender within 45 days, a best interests hearing may be required. Inasmuch as that language contravenes the governing statute, we conclude that it does not provide a valid basis for the court's refusal to give effect to the birth mother's timely revocation.

Based on the foregoing, because it is undisputed that the birth mother timely revoked the extra-judicial surrender (*see* Social Services Law § 383-c [6] [a]), we conclude that the court erred in refusing to deem the surrender a nullity, denying the birth mother's motion seeking that relief, and granting New Hope's petition seeking approval of the surrender.

With respect to the appropriate remedy, inasmuch as the timely revocation renders the extra-judicial surrender a nullity (*see* Social Services Law § 383-c [6] [a]), such revocation "restores the parties to their original positions" prior to the surrender (*Matter of L.S. [Diana A.]*, 195 AD3d 1, 10 [1st Dept 2021]; *see Matter of Bentley XX. [Eric XX.]*, 121 AD3d 209, 214-215 [3d Dept 2014]; *Matter of Christopher F.*, 260 AD2d 97, 100 [3d Dept 1999]). Here, prior to executing the surrender, the birth mother voluntarily agreed to place the child in New Hope's foster care program. Thus, consistent with that agreement and the statutory effect of the revocation (*see* § 383-c [6] [a]), the child should remain in the care and custody of New Hope, with physical placement of the child remaining with respondents pending further proceedings. We note that the right of any appropriate party to pursue a proceeding seeking termination of the

birth mother’s parental rights “is unimpaired by the revocation of the surrender” (*Christopher F.*, 260 AD2d at 101; *see Bentley XX.*, 121 AD3d at 214-215).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

755
CA 20-00820
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH GASPARINO AND
SUSAN DRESSNER GASPARINO,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF BRIGHTON ZONING BOARD OF APPEALS,
RESPONDENT-APPELLANT,
EDWARD HALL AND PATRICIA HALL, RESPONDENTS.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (JACOB H. ZOGHLIN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered June 9, 2020 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and annulled the determination of respondent Town of Brighton Zoning Board of Appeals to grant an area variance to respondents Edward Hall and Patricia Hall.

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

Memorandum: Respondent Town of Brighton Zoning Board of Appeals (ZBA) appeals from a judgment in a proceeding pursuant to CPLR article 78. The judgment granted the petition and annulled the ZBA's determination granting the application of respondents Edward Hall and Patricia Hall (applicants) for an area variance, which they sought for the construction of an addition to their home. We agree with the ZBA that Supreme Court erred in granting the petition, and we therefore reverse.

In determining whether to grant an area variance, a zoning board of appeals is "required to weigh the benefit to the applicants of granting the variance against any detriment to the health, safety and welfare of the neighborhood or community affected thereby, taking into account the five factors set forth in Town Law § 267-b (3) (b)" (*Matter of Freck v Town of Porter*, 158 AD3d 1163, 1165 [4th Dept 2018], *lv denied* 32 NY3d 903 [2018]; *see Matter of Mimassi v Town of Whitestone Zoning Bd. of Appeals*, 124 AD3d 1329, 1330 [4th Dept

2015]). The five factors set forth in the statute are: "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created" (§ 267-b [3] [b]; *see Matter of Qing Dong v Mammina*, 84 AD3d 820, 821 [2d Dept 2011]). Although the fifth factor "shall be relevant to the decision of the [zoning] board of appeals, [it] shall not necessarily preclude the granting of the area variance" (§ 267-b [3] [b]). A zoning board of appeals is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational" (*Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 [2d Dept 2007]; *see Matter of Feinberg-Smith Assoc., Inc. v Town of Vestal Zoning Bd. of Appeals*, 167 AD3d 1350, 1352 [3d Dept 2018]). In this case, we agree with the ZBA that the court erred in concluding that the ZBA failed to undertake the required analysis and that the ZBA's determination lacked a rational basis.

The administrative record and the ZBA's formal return in the CPLR article 78 proceeding establish that the ZBA considered the five statutory factors, including whether the alleged difficulty was self-created (*see Matter of Fund for Lake George, Inc. v Town of Queensbury Zoning Bd. of Appeals*, 126 AD3d 1152, 1154 [3d Dept 2015], *lv denied* 25 NY3d 1039 [2015]; *Matter of Ohrenstein v Zoning Bd. of Appeals of Town of Canaan*, 39 AD3d 1041, 1043 [3d Dept 2007]). Thus, we conclude that the ZBA "rendered its determination after considering the appropriate factors and properly weighing the benefit to the [applicants] against the detriment to the health, safety and welfare of the neighborhood or community" if the variance was granted (*Matter of DeGroote v Town of Greece Bd. of Zoning Appeals*, 35 AD3d 1177, 1178 [4th Dept 2006]). We further conclude that the record establishes that the ZBA's determination had the requisite rational basis (*see generally Matter of Kaye v Zoning Bd. of Appeals of the Vil. of N. Haven*, 185 AD3d 820, 821 [2d Dept 2020]). It was therefore error for the court to substitute its judgment for that of the ZBA, "even if such a contrary determination is itself supported by the record" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 [2002]; *see Kaye*, 185 AD3d at 821).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

783
CA 20-01294
PRESENT: CARNI, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF DANIEL W. GERBER, FRANK J. CIANO, WILLIAM G. KELLY, PAUL S. DEVINE, JOHN J. JABLONSKI AND DENNIS J. BRADY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

GOLDBERG SEGALLA LLP, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

VAHEY LAW OFFICES, PLLC, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 18, 2020. The order denied petitioners’ motion seeking, among other things, to vacate an arbitration award.

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

Same memorandum as in *Matter of Gerber v Goldberg Segalla LLP* ([appeal No. 2] — AD3d — [Nov. 12, 2021] [4th Dept 2021]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

784
CA 20-01590
PRESENT: CARNI, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF DANIEL W. GERBER, FRANK J. CIANO, WILLIAM G. KELLY, PAUL S. DEVINE, JOHN J. JABLONSKI AND DENNIS J. BRADY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

GOLDBERG SEGALLA LLP, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

VAHEY LAW OFFICES, PLLC, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered November 2, 2020. The judgment, among other things, confirmed the arbitration award.

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

Memorandum: Petitioners are former equity partners of respondent law firm. In 2015, they executed a Partnership Agreement (PA), which contained a withdrawal provision providing that the withdrawal of an equity partner extinguished that partner's interest in the partnership and his or her rights to receive a return of capital. The withdrawal provision further provided that, if a client wished to remain with the withdrawing partner, the withdrawing partner was required to reimburse respondent for all unpaid costs advanced and all unpaid services expended with respect to the matter.

Upon their departure from respondent to begin a new practice, petitioners demanded arbitration, seeking rescission of the PA on the grounds that it was the product of the firm's wrongful acts and that the withdrawal provision violated public policy. Following a hearing, the panel of arbitrators concluded that the PA was valid and enforceable and was consistent with controlling New York law and policy.

Petitioners thereafter commenced this CPLR article 75 proceeding, seeking, inter alia, to vacate the arbitration award on the grounds that it violated public policy and disregarded the law. In appeal No.

1, petitioners appeal from an order that denied their motion seeking, inter alia, to vacate the arbitration award. In appeal No. 2, petitioners appeal from a judgment that, among other things, confirmed the arbitration award. In appeal Nos. 3 and 4, petitioners appeal from statements of judgment directing petitioners to pay respondent amounts granted in the arbitration award on respondent's counterclaim, plus costs. As an initial matter, we dismiss the appeal from the order in appeal in No. 1 inasmuch as that order was subsumed in the judgment in appeal No. 2 (*see Matter of O'Connell [State Farm Mut. Auto. Ins. Co.]*, 187 AD3d 1630, 1631 [4th Dept 2020]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *see also* CPLR 5501 [a] [1]). We affirm in appeal Nos. 2, 3, and 4.

"Arbitration is a creature of contract, and arbitrators draw their powers from the consent of the arbitrants, not from the sovereignty of the State. It is thus 'well settled that judicial review of arbitration awards is extremely limited' " (*Schiferle v Capital Fence Co., Inc.,* 155 AD3d 122, 125 [4th Dept 2017]; *see Matter of Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO [City of Lackawanna]*, 156 AD3d 1406, 1407 [4th Dept 2017]). CPLR 7511 (b) (1) (iii) permits vacatur of an award where, among other things, the arbitrator exceeds his or her power. As relevant here, an arbitrator "exceed[s] his [or her] power under the meaning of the statute where his [or her] award violates a strong public policy" (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010] [internal quotation marks omitted]) or where the arbitrator " 'manifestly disregard[s]' the substantive law applicable to the parties' dispute" (*Barone v Haskins*, 193 AD3d 1388, 1391 [4th Dept 2021], *appeal dismissed* 37 NY3d 1032 [2021]). Petitioners have the burden to establish that the arbitration award should be vacated (*see Caso v Coffey*, 41 NY2d 153, 159 [1976]).

Petitioners argue that, because the withdrawal provision of the PA violates "the twin public policies" of attorney mobility and client choice as found in case law (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 380-381 [1993]; *Cohen v Lord, Day & Lord*, 75 NY2d 95, 98 [1989]) and rule 5.6 (a) (1) of the Rules of Professional Conduct (22 NYCRR 1200.00), the award upholding that provision violates public policy and should be vacated. We reject that contention and conclude that the arbitration award on its face does not violate public policy (*see Transparent Value, L.L.C. v Johnson*, 93 AD3d 599, 600 [1st Dept 2012]; *see generally Schiferle*, 155 AD3d at 126; *cf. Matter of Bukowski [State of N.Y. Dept. of Corr. & Community Supervision]*, 148 AD3d 1386, 1389-1392 [3d Dept 2017]), i.e., it does not "create[] an explicit conflict with other laws and their attendant policy concerns" *(Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999] [emphasis omitted]). We further conclude that, contrary to petitioners' contention, the arbitration award is not subject to vacatur on the ground that it was based on a "manifest disregard of the law" (*Matter of City of Buffalo [Buffalo Police Benevolent Assn.]*, 13 AD3d 1202, 1202 [4th Dept 2004] [internal quotation marks omitted]).

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

785
CA 21-00498
PRESENT: CARNI, J.P., LINDLEY, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF DANIEL W. GERBER, FRANK J.
CIANO, WILLIAM G. KELLY, PAUL S. DEVINE, JOHN J.
JABLONSKI AND DENNIS J. BRADY,
PETITIONERS-APPELLANTS,

V   MEMORANDUM AND ORDER

GOLDBERG SEGALLA LLP, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

VAHEY LAW OFFICES, PLLC, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered November 19, 2020. The judgment awarded respondent the sum of $5,919.14 as against petitioner Daniel W. Gerber.

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

Same memorandum as in *Matter of Gerber v Goldberg Segalla LLP* ([appeal No. 2] — AD3d — [Nov. 12, 2021] [4th Dept 2021]).

Entered: November 12, 2021   Ann Dillon Flynn
                                                              Clerk of the Court

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

786

CA 21-00499

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

IN THE MATTER OF DANIEL W. GERBER, FRANK J. CIANO, WILLIAM G. KELLY, PAUL S. DEVINE, JOHN J. JABLONSKI AND DENNIS J. BRADY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

GOLDBERG SEGALLA LLP, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

VAHEY LAW OFFICES, PLLC, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered November 19, 2020. The judgment awarded respondent the sum of $200.00 as against petitioners Frank J. Ciano, William G. Kelly, Paul S. Devine, John J. Jablonski and Dennis J. Brady.

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

Same memorandum as in *Matter of Gerber v Goldberg Segalla LLP* ([appeal No. 2] — AD3d — [Nov. 12, 2021] [4th Dept 2021]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

790
KA 20-00373
PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANCHAUNN RANGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered April 3, 2019. The judgment convicted defendant after a nonjury trial of burglary in the first degree, robbery in the first degree and robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of burglary in the first degree (Penal Law § 140.30 [4]), robbery in the first degree (§ 160.15 [4]), and robbery in the second degree (§ 160.10 [1]), defendant contends that County Court erred in determining following a pretrial hearing that the responding police officer had an independent basis for his in-court identification of defendant. We reject that contention. "[I]t is well-settled that even when an identification is the product of a suggestive pretrial identification procedure, a witness will nonetheless be permitted to identify a defendant in court if that identification is based upon an independent source" (*People v Campbell*, 200 AD2d 624, 625 [2d Dept 1994], *lv denied* 83 NY2d 869 [1994]; *see People v Woody*, 160 AD3d 1362, 1363 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). Factors to consider in determining whether a witness has a sufficiently reliable independent basis for an identification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation" (*Neil v Biggers*, 409 US 188, 199-200 [1972]; *see People v Lopez*, 85 AD3d 1641, 1641 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]). Here, the officer's testimony established that he had an opportunity to view defendant during the course of the crime, i.e., when the officer was

face to face with defendant while they were engaged in a physical altercation in a well-lit stairwell (*see People v Gray*, 135 AD3d 874, 874 [2d Dept 2016], *lv denied* 27 NY3d 998 [2016]), and that the officer's attention was on defendant during the entire altercation (*see People v Mallory*, 126 AD2d 750, 751 [2d Dept 1987]; *People v Magee*, 122 AD2d 227, 228 [2d Dept 1986]). The officer accurately described defendant's gender, race, and clothing, and accurately noted that defendant was wearing an ankle monitor (*see Gray*, 135 AD3d at 874; *People v Small*, 110 AD3d 1106, 1106-1107 [2d Dept 2013], *lv denied* 22 NY3d 1043 [2013]). Although the officer viewed defendant for a matter of only several seconds, we conclude that, under these circumstances, the court's determination is "supported by 'sufficient evidence' in the record" (*Lopez*, 85 AD3d at 1642, quoting *People v Yukl*, 25 NY2d 585, 588 [1969], *cert denied* 400 US 851 [1970]; *see People v Tindale*, 295 AD2d 987, 988 [4th Dept 2002], *lv denied* 98 NY2d 714 [2002]). In any event, even assuming, arguendo, that the court erred in determining that there was an independent basis for the officer's identification of defendant, we conclude that any error was harmless in light of the overwhelming evidence of defendant's guilt and the lack of any reasonable possibility that the error might have contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

Contrary to defendant's further contention, 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]). We have reviewed defendant's remaining contention and conclude that it is without merit.

Finally, we note that the uniform sentence and commitment form erroneously reflects that defendant was sentenced on the count of robbery in the second degree to one year in jail with no postrelease supervision, which would be an illegal sentence (*see* Penal Law §§ 70.04 [3] [b]; 160.10), whereas the sentencing minutes reflect that defendant was in fact sentenced on that count to seven years in prison with five years of postrelease supervision. The uniform sentence and commitment form must therefore be amended to correct that error (*see generally People v McCoy*, 174 AD3d 1379, 1382 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020]; *People v Correa*, 145 AD3d 1640, 1641 [4th Dept 2016]; *People v Owens*, 51 AD3d 1369, 1372-1373 [4th Dept 2008], *lv denied* 11 NY3d 740 [2008]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

791

KA 19-01433

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER SHAFFER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JESSICA N. CARBONE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 29, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree and attempted 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 a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and attempted criminal sale of a controlled substance in the third degree (§§ 110.00, 220.39 [1]), for possessing and attempting to sell morphine. Defendant contends that the verdict is against the weight of the evidence. We reject that contention. In performing a weight of the evidence review, this Court essentially sits as a thirteenth juror, and we must "weigh the evidence in light of the elements of the crime[s] as charged to the other jurors" (*People v Danielson*, 9 NY3d 342, 349 [2007]). Here, viewing the evidence in light of the elements of the abovementioned crimes as charged to the jury (*see id.*), 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 result would not have been unreasonable, 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 Dame*, 144 AD3d 1625, 1626 [4th Dept 2016], *lv denied* 29 NY3d 948 [2017] [internal quotation marks omitted]; *see People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]). Finally, contrary to defendant's further contention, the

sentence is not unduly harsh or severe.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

796
KA 16-00195
PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS J. CONKLIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 9, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree, vehicular manslaughter in the second degree, driving while intoxicated (two counts), reckless driving, and four traffic infractions.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of driving while intoxicated and dismissing counts five and six 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, manslaughter in the second degree (Penal Law § 125.15 [1]), vehicular manslaughter in the second degree (§ 125.12 [1]), and two counts of driving while intoxicated (DWI) (Vehicle and Traffic Law § 1192 [2], [3]). The case arose from a fatal motorcycle accident resulting in the death of defendant's passenger.

Contrary to defendant's contention concerning the admission in evidence of certain expert testimony regarding chemical test results measuring defendant's blood alcohol content (BAC), we conclude that "[t]he People presented a proper foundational basis 'from which the trier of fact could reasonably conclude that the [blood] test results were derived from a properly functioning machine' " (*People v Kirkey*, 17 AD3d 1149, 1149-1150 [4th Dept 2005], *lv denied* 5 NY3d 764 [2005], quoting *People v Freeland*, 68 NY2d 699, 701 [1986]). It is well established that "the scientific reliability and accuracy of a machine measuring [BAC] for forensic purposes must be established before such test results may be admitted in evidence" (*People v Campbell*, 73 NY2d 481, 485 [1989]). The People must establish that the testing

equipment was in " 'proper working order' " (*People v Dargento*, 302 AD2d 924, 924 [4th Dept 2003], quoting *People v Todd*, 38 NY2d 755, 756 [1975]). If the People fail to "elicit testimony from the witness who conducted the test as to whether the testing equipment was properly calibrated and whether the test was properly performed on the particular blood sample taken from defendant . . . , the BAC test results should not [be] admitted" (*People v Grune*, 12 AD3d 944, 945 [3d Dept 2004], *lv denied* 4 NY3d 831 [2005]). Here, the People's forensic expert testified that, before testing the blood sample in question, he verified the reliability and accuracy of the testing equipment by performing routine quality control tests. Specifically, he used samples containing no ethanol to ensure that the machine was not contaminated, and used "samples of known concentration" to calibrate it.

We reject defendant's further contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of this case in their 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]).

Contrary to defendant's additional contention, County Court did not err in denying his challenge for cause with respect to a certain prospective juror. Even assuming, arguendo, that the prospective juror's statements raised a serious doubt regarding his ability to be impartial, the court elicited from him an unequivocal statement on the record that he would decide the case impartially and based on the evidence (*see People v Harris*, 19 NY3d 679, 685 [2012]; *People v Garcia*, 148 AD3d 1559, 1559 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]).

As defendant further contends and the People correctly concede, the DWI counts of which defendant was convicted are inclusory concurrent counts of vehicular manslaughter in the second degree (*see People v Osborne*, 60 AD3d 1310, 1310-1311 [4th Dept 2009], *lv denied* 12 NY3d 919 [2009], *reconsideration denied* 13 NY3d 798 [2009]; *see generally People v Miller*, 6 NY3d 295, 300-303 [2006]; *People v Scott*, 61 AD3d 1348, 1350 [4th Dept 2009], *lv denied* 12 NY3d 920 [2009], *reconsideration denied* 13 NY3d 799 [2009]). Thus, those DWI counts must be dismissed as a matter of law (*see Osborne*, 60 AD3d at 1311), and we therefore modify the judgment accordingly.

Finally, the sentence is not unduly harsh or severe.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

798
KA 17-01856
PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. SCOTT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 24, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that his guilty plea was not knowingly, intelligently, and voluntarily entered because he did not expressly establish each element of the offense. We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal. Although defendant's contention survives the unchallenged appeal waiver, he nevertheless failed to preserve his contention for our review because he did not "move to withdraw the plea or to vacate the judgment of conviction" (*People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *see People v Lopez*, 71 NY2d 662, 665 [1988]). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement (*see Lopez*, 71 NY2d at 666; *People v Kaye*, 190 AD3d 767, 768 [2d Dept 2021], *lv denied* 36 NY3d 1098 [2021]).

In any event, we conclude that defendant's contention is without merit. It is well established that a "defendant who pleads guilty need not 'acknowledge[] committing every element of the pleaded-to offense . . . or provide[] a factual exposition for each element of the pleaded-to offense' " (*People v Madden*, 148 AD3d 1576, 1578 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017], quoting *People v Seeber*, 4 NY3d 780, 781 [2005]). In this case, "even if defendant's allocution

did not establish the essential elements of the crime to which he pleaded guilty, it would not require vacatur of his plea since there is no suggestion in the record that the plea was improvident or baseless" or that it was otherwise involuntary (*id.* [internal quotation marks omitted]).

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

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

804

CA 20-01263

PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

SHAWNTRELL BRANCH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

1908 WEST RIDGE RD, LLC, DEFENDANT,
ROCHESTER AIRPORT MARRIOTT, EJ DELMONTE
CORPORATION AND DELMONTE HOTEL GROUP,
DEFENDANTS-APPELLANTS.

MANSON & MCCARTHY, BUFFALO, BAXTER SMITH & SHAPIRO, P.C., WHITE PLAINS (SIM R. SHAPIRO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered September 26, 2020. The order, insofar as appealed from, granted the motion of plaintiff for summary judgment pursuant to Labor Law § 240 (1) and denied in part the cross motion of defendants Rochester Airport Marriott, EJ Delmonte Corporation and Delmonte Hotel Group for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, the cross motion is granted in its entirety and the amended complaint against defendants-appellants is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of, among other things, an alleged violation of Labor Law § 240 (1) that occurred while he was working to replace the roof at the Rochester Airport Marriott hotel. We agree with defendants-appellants (defendants) that Supreme Court erred in denying that part of their cross motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them, and in granting plaintiff's motion for summary judgment on the issue of defendants' liability with respect to that claim. It is well established that "[l]iability may . . . be imposed under [Labor Law § 240 (1)] only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], *rearg denied* 25 NY3d 1195 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The statute "was designed to prevent

those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *see Runner*, 13 NY3d at 604). Thus, the protections of Labor Law § 240 (1) " 'do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity' " (*Nicometi*, 25 NY3d at 97, quoting *Ross*, 81 NY2d at 501).

In this case, the parties' submissions establish that plaintiff was injured while lifting a large metal structure six to eight inches off the surface of the roof so that his coworkers could apply new roofing material underneath. Although plaintiff's back injury was "tangentially related to the effects of gravity upon the [structure] he was lifting, it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" (*Carr v McHugh Painting Co., Inc.*, 126 AD3d 1440, 1442 [4th Dept 2015] [internal quotation marks omitted]; *see Cardenas v BBM Constr. Corp.*, 133 AD3d 626, 627-628 [2d Dept 2015]). We conclude as a matter of law that plaintiff's injuries "resulted from a 'routine workplace risk[]' of a construction site and not a 'pronounced risk[] arising from construction work site elevation differentials' " (*Horton v Board of Educ. of Campbell-Savona Cent. Sch. Dist.*, 155 AD3d 1541, 1543 [4th Dept 2017], quoting *Runner*, 13 NY3d at 603; *see Cardenas*, 133 AD3d at 627-628; *Carr*, 126 AD3d at 1442-1443).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

805
CA 21-00011
PRESENT: CENTRA, J.P., LINDLEY, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

MICHAEL J. CARLSON, SR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CLAUDIA D'AGOSTINO CARLSON, DECEASED, AND AS ASSIGNEE OF WILLIAM PORTER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

AMERICAN INTERNATIONAL GROUP, INC., ET AL., DEFENDANTS,
AMERICAN ALTERNATIVE INSURANCE CO., AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, DEFENDANTS-APPELLANTS-RESPONDENTS.

RUBIN, FIORELLA & FRIEDMAN LLP, NEW YORK CITY (PAUL F. KOVNER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT AMERICAN ALTERNATIVE INSURANCE CO.

CHAFFETZ LINDSEY LLP, NEW YORK CITY (CHARLES J. SCIBETTA OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

BROWN CHIARI LLP, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 17, 2020. The order granted in part and denied in part the motion of plaintiff for summary judgment, denied the motion of defendant National Union Fire Insurance Company of Pittsburgh, PA, for summary judgment and granted in part and denied in part the cross motion of defendant American Alternative Insurance Co. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's motion seeking summary judgment dismissing the defense of late notice by defendant American Alternative Insurance Co. and reinstating that defense, granting in its entirety the cross motion of that defendant seeking summary judgment dismissing the first cause of action against it and dismissing the complaint in its entirety against that defendant, and as modified the order is affirmed without costs.

Memorandum: This is an action brought pursuant to Insurance Law § 3420 (a) (2) to collect on certain insurance policies upon a judgment against MVP Delivery and Logistics, Inc. (MVP) and William

Porter. The facts of the case were fully set out in the prior appeal upon a motion and cross motion to dismiss the complaint (*Carlson v American Intl. Group, Inc.*, 130 AD3d 1479 [4th Dept 2015], *mod* 30 NY3d 288 [2017]). The only remaining cause of action in the complaint is the first cause of action, which alleged that, pursuant to Insurance Law § 3420 (a) (2) and (b), American Alternative Insurance Co. (AAIC) and National Union Fire Insurance Company of Pittsburgh, PA (National Union) (collectively, defendants), among others, were responsible to plaintiff for payment of the judgment because MVP and Porter were insureds under the policies in question. Now, AAIC and National Union appeal and plaintiff cross-appeals from an order granting in part and denying in part AAIC's cross motion seeking summary judgment dismissing the first cause of action against it, denying National Union's motion seeking summary judgment dismissing that cause of action against it, and granting in part and denying in part plaintiff's motion for, inter alia, summary judgment on that cause of action.

We reject National Union's contention that Supreme Court erred in denying that part of its motion seeking summary judgment dismissing the first cause of action against it based on its defense of late notice and granting that part of plaintiff's motion for summary judgment dismissing that defense. National Union issued policies to DHL Worldwide Express, Inc., doing business as DHL Express (USA), Inc. (DHL), and DHL gave notice of the occurrence or accident to National Union, which it does not contend was untimely. Rather, National Union contends that MVP and Porter, purported additional insureds under the policies, failed to give National Union timely notice under the policies. While we agree with National Union that the additional insureds had a duty to give timely notice of the occurrence to it (*see City of New York v Investors Ins. Co. of Am.*, 89 AD3d 489, 489 [1st Dept 2011]; *23-08-18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 AD3d 541, 542-543 [2d Dept 2008]; *City of New York v St. Paul Fire & Mar. Ins. Co.*, 21 AD3d 978, 981-982 [2d Dept 2005]), their failure to do so does not preclude recovery by plaintiff against National Union under the circumstances of this case. As the injured party, plaintiff has the right to bring an action against defendants to collect on the judgment (*see* Insurance Law § 3420 [a] [2]) and an independent right to provide notice to the insurer (*see* § 3420 [a] [3]; *American Tr. Ins. Co. v Sartor*, 3 NY3d 71, 76 [2004]; *Lauritano v American Fid. Fire Ins. Co.*, 3 AD2d 564, 568 [1st Dept 1957], *affd* 4 NY2d 1028 [1958]; *Mt. Hawley Ins. Co. v Seville Elecs. Trading Corp.*, 139 AD3d 921, 923 [2d Dept 2016], *lv denied* 29 NY3d 902 [2017]; *Wraight v Exchange Ins. Co.* [appeal No. 2], 234 AD2d 916, 917 [4th Dept 1996], *lv denied* 89 NY2d 813 [1997]). Although plaintiff also failed to give timely notice of the occurrence to National Union, "[i]t is only in the event of noncompliance by both the insured *and* the injured claimant that the insurer may validly disclaim against the injured party" (*American Tr. Ins. Co.*, 3 NY3d at 77 n 2; *see Matter of AutoOne Ins. Co. v Sarvis*, 111 AD3d 824, 825 [2d Dept 2013]). Here, inasmuch as DHL gave notice of the accident to National Union, which it does not contend was untimely, plaintiff was not required to give notice of the accident to National Union before seeking to collect on

the judgment pursuant to section 3420 (a) (2).

We agree with AAIC, however, that the court erred in denying that part of its cross motion seeking summary judgment dismissing the first cause of action against it based on its defense of late notice and granting that part of plaintiff's motion for summary judgment dismissing that defense, and we therefore modify the order accordingly. AAIC established as a matter of law that it did not receive timely notice of the occurrence from the insured, i.e., DHL, the purported additional insureds, i.e., MVP and Porter, or plaintiff, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562-564 [1980]). In light of our determination, plaintiff's remaining contentions regarding AAIC are moot.

We reject the contention of National Union and plaintiff that the court erred in denying their motions seeking summary judgment on the issue whether the MVP vehicle was a "hired" auto such that MVP is considered an insured under the policies. The court properly concluded that, as explained by the Court of Appeals on the prior appeal, the issue "presents a question of fact to be resolved by the trier of fact" (*Carlson*, 30 NY3d at 295-296).

We reject National Union's contention that the court erred in granting that part of plaintiff's motion seeking summary judgment on his entitlement to postjudgment interest from National Union and denying that part of National Union's motion seeking summary judgment dismissing that claim. The policies provided that National Union would pay postjudgment interest on any suits against the insured which it defended. Contrary to plaintiff's contention, the language in the policies does not conflict with 11 NYCRR 60-1.1 (b), which states that the requirement to pay interest is "subject to the policy terms" (*see Alejandro v Liberty Mut. Ins. Co.*, 84 AD3d 1132, 1133-1134 [2d Dept 2011]; *see generally Dingle v Prudential Prop. & Cas. Ins. Co.*, 85 NY2d 657, 660 [1995]). But inasmuch as National Union had notice of the underlying action and the opportunity to defend MVP and Porter, we conclude that the court properly determined that National Union was required to pay postjudgment interest (*see Friedman v Progressive Direct Ins. Co.*, 100 AD3d 591, 592 [2d Dept 2012]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

814
KA 20-00156
PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAYNE M. HILDRETH, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (AMBER R. POULOS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered October 24, 2019. The judgment convicted defendant upon a jury verdict of use of a child in a sexual performance, unlawful surveillance in the second degree, endangering the welfare of a child and criminal sexual act 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, use of a child in a sexual performance as a sexually motivated felony (Penal Law §§ 130.91, 263.05), unlawful surveillance in the second degree (§ 250.45 [2]), and criminal sexual act in the second degree (§ 130.45 [1]). The first two charges arose from defendant having installed a surveillance camera in the bedroom of the child victim and then using that camera to capture footage of the victim masturbating. The third charge arose from defendant forcing the victim to perform oral sex on him during the summer of 2016.

Defendant contends that there is legally insufficient evidence to support the conviction on the counts of use of a child in a sexual performance as a sexually motivated felony and unlawful surveillance in the second degree because the People failed to present evidence establishing that he captured the footage for the purpose of his own sexual gratification (*see* Penal Law §§ 130.91 [1]; 250.45 [2]). We reject that contention. The sexual gratification elements could be inferred from defendant's act of installing a camera in the victim's bedroom (*see People v Newman*, 87 AD3d 1348, 1349 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]), as well as from other evidence presented at trial. The victim testified that defendant first touched his penis to her vagina when she was four years old, touched her vagina with his

mouth or hands “almost every day” after that, and at times put his penis in her mouth. In addition, pornographic images depicting children other than the victim were found stored on defendant’s cell phone. Viewing that evidence in the light most favorable to the People, we conclude that “ ‘there is a valid line of reasoning and permissible inferences from which a rational jury could have found’ ” beyond a reasonable doubt that defendant captured the surveillance images of the masturbating victim for his own sexual gratification (*People v Acosta*, 80 NY2d 665, 672 [1993]; *see* §§ 130.91 [1]; 250.45 [2]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Although defendant’s remaining challenges to the legal sufficiency of the evidence are unpreserved for our review inasmuch as his motion for a trial order of dismissal was not “ ‘specifically directed’ ” at those alleged errors (*People v Gray*, 86 NY2d 10, 19 [1995]), we nevertheless review the evidence with respect to each of the elements of the crimes in the context of our review of defendant’s contention that the verdict is contrary to the weight of the evidence (*see People v Simmons*, 184 AD3d 326, 327 [4th Dept 2020]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that County Court abused its discretion when it allowed the victim to testify about prior uncharged crimes committed by defendant and when it allowed in evidence some of the child pornography found on his cell phone. More particularly, defendant contends that the probative value of that evidence was outweighed by its potential for prejudice (*see generally People v Leonard*, 29 NY3d 1, 6-7 [2017]). We reject that contention. Defendant’s past sexual abuse of the victim and his interest in child pornography were highly probative of whether defendant, whose home had previously been broken into, installed the surveillance camera in the victim’s bedroom in order to capture images of her for the purpose of his own sexual gratification (*see People v MacLeod*, 162 AD3d 1751, 1751-1752 [4th Dept 2018], *lv denied* 32 NY3d 1005 [2018]; *see also People v Ramsaran*, 154 AD3d 1051, 1054 [3d Dept 2017], *lv denied* 30 NY3d 1063 [2017]). With respect to the criminal sexual act charge, defendant’s past abuse of the victim “provided necessary background information on the nature of the relationship and placed the charged conduct in context” (*People v Dorm*, 12 NY3d 16, 19 [2009]; *see Ramsaran*, 154 AD3d at 1054). Thus, the probative value of that evidence “ ‘outweighed its tendency to demonstrate defendant’s criminal propensity’ ” (*MacLeod*, 162 AD3d at 1752).

Defendant failed to preserve for our review his contention that the court erred in failing to provide an immediate limiting instruction with respect to the foregoing *Molineux* evidence (*see* CPL 470.05 [2]; *People v Hall*, 182 AD3d 1023, 1024 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]). Defense counsel had ample opportunity to object to the content and timing of the court’s intended instruction, but made no such objection. 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]).

Defendant's contention that the court abused its discretion in refusing to suppress certain evidence and statements that he made to the police is also unpreserved for our review because the specific challenges raised on appeal were not raised in defendant's motion (*see People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]). Likewise, defendant did not object, and thus failed to preserve his present challenges, to allegedly improper remarks made during jury voir dire (*see People v Green*, 179 AD3d 1516, 1516 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020], *reconsideration denied* 35 NY3d 1045 [2020], *cert denied* — US —, 141 S Ct 2525 [2021]) and the People's summation (*see People v Lane*, 106 AD3d 1478, 1480 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]). We decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve his challenge to allegedly inaccurate statements contained in the presentence report (*see People v Richardson*, 142 AD3d 1318, 1319 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Williams*, 89 AD3d 1222, 1224 [3d Dept 2011], *lv denied* 18 NY3d 887 [2012]), 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]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

822
CAF 20-00274
PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF DORIS I. MURRAY, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HULBERT F. KATES, III, RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

JAMES M. WUJCIK, COUNTY ATTORNEY, ATTICA (JANET L. BENSMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wyoming County (Michael M. Mohun, J.), entered December 2, 2019 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found that respondent had willfully violated a court order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order that, inter alia, effectively confirmed the determination of the Support Magistrate that the father willfully violated a prior order of child support.

Because the father failed to submit written objections to the order of the Support Magistrate, his challenges to the determinations of the Support Magistrate are not properly preserved (*see* Family Ct Act § 439 [e]; *see also Matter of Farruggia v Farruggia*, 125 AD3d 1490, 1490 [4th Dept 2015]; *Matter of White v Knapp*, 66 AD3d 1358, 1359 [4th Dept 2009]). In any event, we reject the contention of the father that the Support Magistrate erred in imputing income to him for the purpose of calculating his child support obligation. It is well settled that a support magistrate has " 'considerable discretion to . . . impute an annual income to a parent' " (*Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]; *see Matter of Bashir v Brunner*, 169 AD3d 1382, 1383 [4th Dept 2019]). Furthermore, "[c]hild support is determined by the parents' ability to provide for their child rather than their current economic situation" (*Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180 [4th Dept 2007] [internal quotation marks omitted]; *see Bashir*, 169 AD3d at 1383), and a support magistrate's imputation of income will not be disturbed where, as here, there is record support for that determination (*see Matter of Rapp v Horbett*, 174 AD3d

1315, 1317-1318 [4th Dept 2019]; *see also Matter of Drake v Drake*, 185 AD3d 1382, 1383 [4th Dept 2020], *lv denied* 36 NY3d 909 [2021]). Contrary to the father's further contention, the Support Magistrate did not demonstrate any bias by imputing income to the father, and the Support Magistrate did not interfere with the presentation of the father's case or indicate any partiality or bias that would warrant reversal or modification of the order on appeal (*see Matter of Deshotel v Mandile*, 151 AD3d 1811, 1812-1813 [4th Dept 2018]; *Matter of Cadle v Hill*, 23 AD3d 652, 653 [2d Dept 2005]).

We reject the father's contention that petitioner failed to establish that he willfully violated the order of support. "A failure to pay support as ordered itself constitutes prima facie evidence of a willful violation . . . [and] establishes [the] petitioner's direct case of willful violation, shifting to [the] respondent the burden of going forward . . . To meet that burden, the respondent must offer some competent, credible evidence of his [or her] inability to make the required payments" (*Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012] [internal quotation marks omitted]; *see Matter of Wayne County Dept. of Social Servs. v Loren*, 159 AD3d 1504, 1505 [4th Dept 2018]). Here, contrary to the father's contention, he failed to submit competent medical evidence to substantiate his claim that he was unable to work because of a disability (*see Loren*, 159 AD3d at 1505; *Matter of Hwang v Tam*, 158 AD3d 1216, 1217 [4th Dept 2018]).

Finally, we conclude that the father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Reinhardt v Hardison*, 122 AD3d 1448, 1449 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Kelley v Holmes*, 151 AD3d 1704, 1705 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]). We therefore reject his contention that he was deprived of effective assistance of counsel.

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

823
CAF 21-00311
PRESENT: SMITH, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MARK A. STREIFF,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ELISABETH J. STREIFF, RESPONDENT-RESPONDENT.

ANGEL A. CASTRO, III, CICERO, FOR PETITIONER-APPELLANT.

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

ARLENE BRADSHAW, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered July 28, 2020 in proceedings pursuant to Family Court Act article 6. The order, among other things, dismissed the amended petition for modification of the custody and visitation provisions of the parties' judgment of divorce and the petition for enforcement of those provisions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the "adjudged" and first ordering paragraphs and reinstating the amended petition for modification of the custody and visitation provisions of the parties' judgment of divorce and the petition for enforcement of those provisions, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings on the amended petition and petition.

Memorandum: Petitioner father appeals from an order that, inter alia, dismissed his amended petition for modification of the custody and visitation provisions of the parties' judgment of divorce and his petition for enforcement of those provisions (collectively, petitions). On January 29, 2020, which was eight days before the scheduled hearing on the petitions, respondent mother filed a motion seeking, inter alia, to preclude the father from offering into evidence certain materials that had been requested in the mother's notice to produce to which the father had not responded and to strike the allegations in the petitions related to those materials. The record reflects that a return date was not initially provided on January 29, 2020, but that Family Court later advised the mother's counsel that the motion would be returnable on February 6, 2020, which was also the previously scheduled date for the hearing on the father's

petitions. The father did not respond to the motion.

Prior to beginning the hearing on February 6, 2020, the court stated that the father had not responded to the motion. The father's counsel replied that the motion was untimely. The mother's counsel explained that she had mailed the motion to the father's counsel on January 29, 2020, and the court suggested that the eight-day period between mailing and the return date was sufficient. The father responded that he had not received the motion papers until that Monday, i.e., February 3, 2020. The court rejected the father's contention that the motion was untimely, however, stating that it was "going to entertain the motion."

At that point the father's counsel addressed the merits of the motion, stating that he had no intention of introducing into evidence the material that was the subject of the notice to produce and thus would consent to an order precluding him from introducing that material. The court then stated, however, that the motion also sought to strike allegations in the petitions related to those materials, repeated that the father had not responded to the motion, and granted those parts of the motion seeking to preclude the materials and to strike the allegations in the petitions related thereto. Based on the court's decision regarding the motion, the father's counsel requested that he be allowed to withdraw the petitions without prejudice or, in the alternative, that the hearing be postponed so that he could respond to the merits of the motion. During those discussions, the father's counsel continued to argue that the motion was untimely, that the motion papers he had received did not bear a return date, and that he had not received the papers until that Monday. Based on the request to withdraw the petitions by the father's counsel following the court's decision to grant the mother's motion in part, the court dismissed the petitions, but did so with prejudice.

We agree with the father that the court erred in considering the mother's motion because it was untimely. Pursuant to CPLR 2214 (b), "[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." Although service is complete upon mailing, five days must be added to any relevant time period measured from the date of service when service is effected by mail (*see* CPLR 2103 [b] [2]). At the hearing, the mother's counsel stated that she served the motion papers by mailing them on January 29, 2020, i.e., eight days before the return date on February 6, 2020. Adding five days to the typical eight-day period (*see id.*), we conclude that the father's counsel lacked adequate notice of the motion and that the court erred in considering it (*see generally State Bank of Texas v Kaanam, LLC*, 120 AD3d 900, 901 [4th Dept 2014]). Because the court's decision to grant in part the motion formed the basis for the request of the father's counsel to withdraw the petitions without prejudice and the court's decision to dismiss the petitions with prejudice, we modify the order by vacating the "adjudged" and first ordering paragraphs, reinstating the petitions, and remitting the matter to Family Court for further proceedings on the petitions.

Based on the above, the father’s further contentions regarding the order on appeal are academic.

Although the father also contends that the court abused its discretion in awarding the mother attorneys’ fees, the order on appeal did not grant the mother’s request for attorneys’ fees. That issue was resolved in a separate order from which the father has not appealed, and thus his contention on the issue of attorneys’ fees is not properly before us (*see generally Caudill v Rochester Inst. of Tech.*, 125 AD3d 1392, 1393 [4th Dept 2015]; *Weichert v Delia*, 1 AD3d 1058, 1058-1059 [4th Dept 2003], *lv denied* 1 NY3d 509 [2004]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

831
CA 20-00748
PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND WINSLOW, JJ.

JODI GBUREK, INDIVIDUALLY, AND AS ADMINISTRATRIX
OF THE ESTATE OF CHRISTOPHER GBUREK, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOANNE COBLER, M.D., BUFFALO CARDIOLOGY &
PULMONARY ASSOCIATES, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HOGANWILLIG PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (SETH A. HISER OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 11, 2020. The order granted the motion of defendants Joanne Cobler, M.D. and Buffalo Cardiology & Pulmonary Associates for, inter alia, summary judgment dismissing 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 denied, and the complaint against defendants-respondents is reinstated.

Memorandum: In this medical malpractice action, plaintiff appeals from an order that granted the motion of defendants-respondents for, inter alia, summary judgment dismissing the complaint against them. As plaintiff correctly contends, Supreme Court erred in granting the motion because "the competing expert affidavits submitted by the parties create[d] triable issues of fact" (*Pick v Midrox Ins. Co.*, 186 AD3d 1079, 1079 [4th Dept 2020]; *see Thompson v Hall*, 191 AD3d 1265, 1267-1268 [4th Dept 2021]). We reiterate that "the conflicting opinions of . . . experts with respect to [a doctor's] alleged deviations from the accepted standard of medical care and proximate causation . . . cannot be resolved on a motion for summary judgment" (*Thompson*, 191 AD3d at 1267 [internal quotation marks omitted]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

834
KA 16-02156
PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL BELTON, JR., DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (JESSICA J. BURGASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered September 16, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that he was denied effective assistance of counsel based on counsel's alleged failures to, among other things, adequately challenge the suggestiveness of the photo array during the *Wade* hearing and submit a timely argument after that hearing, cross-examine witnesses, move for a trial order of dismissal, or call a witness who would disprove a jail deputy's testimony concerning defendant's statements. We reject that contention. With respect to the *Wade* hearing, we conclude that "even assuming, arguendo, that defense counsel could have established suggestiveness of the identification procedure, . . . defense counsel could have concluded that there was an independent source for the identification of defendant" at trial by the witness who viewed the photo array (*People v Dark*, 122 AD3d 1321, 1322 [4th Dept 2014], *lv denied* 26 NY3d 1039 [2015], *reconsideration denied* 27 NY3d 1068 [2016]). Specifically, the witness who viewed the photo array testified at trial that she had seen defendant once or twice per week for more than a year, knew what type of car defendant drove, and knew defendant's street name, which she provided to the 911 operator prior to viewing the photo array. In light of the witness's familiarity with defendant (*see generally People v Rodriguez*, 79 NY2d 445, 450 [1992]; *People v Gambale*, 158 AD3d 1051, 1052-1053 [4th Dept

2018], *lv denied* 31 NY3d 1081 [2018]), we conclude that any further attempt by defense counsel to suppress the identification of defendant by that witness through a *Wade* hearing would have been futile, and that defense counsel thus was not ineffective (*see People v Petty*, 208 AD2d 774, 774 [2d Dept 1994], *lv denied* 84 NY2d 1036 [1995]; *see also People v Smith*, 118 AD3d 1492, 1493 [4th Dept 2014], *lv denied* 25 NY3d 953 [2015]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

We reject defendant's further contention that defense counsel's failure to timely make written arguments after the *Wade* hearing constituted ineffective assistance of counsel. Counsel submitted written arguments that, although untimely, were considered by Supreme Court, and those arguments "set forth a cogent theory for suppression of the evidence, and defense counsel vigorously pursued that theory through cross-examination of the police witness" (*People v Harris*, 147 AD3d 1354, 1356 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *cf. People v Clermont*, 22 NY3d 931, 933-934 [2013]). Similarly, counsel's failure to preserve all of defendant's legal sufficiency challenges does not constitute ineffective assistance because those challenges would not have been meritorious (*see People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]).

Defendant's contention that defense counsel was ineffective in failing to call a particular witness is based on matters outside the record and thus must be raised in a motion pursuant to CPL article 440 (*see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]). Defendant's contentions concerning the purported inadequacies in the cross-examination of the witnesses are merely "hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Morrison*, 48 AD3d 1044, 1045 [4th Dept 2008], *lv denied* 10 NY3d 867 [2008]; *see People v Smith*, 192 AD3d 1648, 1649 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]). Viewing the evidence, the law, and the circumstances of the case as a whole 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]).

Contrary to defendant's further contention, the court did not err in imposing consecutive sentences. "So long as a defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751 [2013]; *see People v Malloy*, 33 NY3d 1078, 1080 [2019]). Here, eyewitness testimony establishes that defendant was asked to come to the victim's house to provide marihuana, that he did so, and that he was there speaking to the victim for some time about a possible sale of that drug before defendant took the weapon out of a pocket in his sweatshirt and shot the victim several times, "supporting the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to kill" (*Malloy*, 33 NY3d at 1080; *see People v Redmond*, 182 AD3d 1020, 1022-1023 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]; *People v Walton*,

168 AD3d 1103, 1107 [2d Dept 2019], *lv denied* 33 NY3d 1036 [2019], *reconsideration denied* 34 NY3d 955 [2019]).

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

842

CAF 20-00183

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

IN THE MATTER OF JAMES D., PENELOPE D. AND
NALA D.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LESLIE S., RESPONDENT-APPELLANT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered January 3, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: Respondent mother appeals from an order revoking a suspended judgment pursuant to Family Court Act § 633 and terminating her parental rights with respect to the subject children. Family Court had previously granted a suspended judgment for a period of 12 months upon the consent of the parties and the mother's admission of permanent neglect. Near the conclusion of the 12-month period, petitioner filed a petition to revoke the suspended judgment because the mother allegedly violated several of its terms. Following a fact-finding hearing, the court granted the petition, determining that the mother failed to comply with several terms of the suspended judgment and that the termination of her parental rights was in the best interests of the children.

The mother contends that the court erred in failing to conduct a separate dispositional hearing. We reject that contention. "It is well established that a hearing on a petition alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and that the disposition shall be based on the best interests of the child[ren]"

(*Matter of Alisa E. [Wendy F.]*, 114 AD3d 1175, 1176 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]; *see Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]). We conclude that there was no need for an additional hearing here inasmuch as the court "conducted a lengthy hearing that addressed both the alleged violations of the suspended judgment and the child[ren's] best interests" (*Jenna D.*, 165 AD3d at 1619). We note that "a parent's noncompliance with the terms of [a] suspended judgment constitutes strong evidence that termination of parental rights is in a child's best interests" (*Matter of Dominic T.M. [Cassie M.]*, 169 AD3d 1469, 1470 [4th Dept 2019], *lv denied* 33 NY3d 902 [2019]).

We also reject the mother's further contention that the court erred in refusing to grant her attorney's request for an adjournment when the mother failed to appear for the third day of the fact-finding hearing. "The granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Anthony M.*, 63 NY2d 270, 283 [1984]; *see Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]), and we conclude that the court did not abuse its discretion in denying the request for an adjournment here (*see Matter of Anastasia R. [Jessica R.]*, 133 AD3d 605, 605 [2d Dept 2015]; *Matter of Tripp*, 101 AD3d 1137, 1138-1139 [2d Dept 2012]). The mother failed to preserve for our review her further contention that the court improperly took on the role of an advocate when it examined a witness at the fact-finding hearing about the circumstances of her absence at the hearing (*see Matter of Hershberger v Brown*, 185 AD3d 1462, 1462-1463 [4th Dept 2020]; *Matter of Wright v Perry*, 169 AD3d 910, 912 [2d Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Robinson v Robinson*, 158 AD3d 1077, 1077-1078 [4th Dept 2018]). In any event, we conclude that the contention is without merit inasmuch as the court's questions properly " 'advance[d] the goals of truth and clarity' " (*Matter of Veronica P. v Radcliff A.*, 126 AD3d 492, 492 [1st Dept 2015], *lv denied* 25 NY3d 911 [2015], quoting *People v Arnold*, 98 NY2d 63, 68 [2002]).

We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

860
KA 17-00339
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK WOODARD, ALSO KNOWN AS “WOOD,”
DEFENDANT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JAMES F. GIBBONS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 25, 2017. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree, criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third 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: In this prosecution arising from an investigation into a multi-level drug sales operation, defendant appeals from a judgment convicting him, following a joint jury trial with three codefendants, of conspiracy in the second degree (Penal Law § 105.15), criminal sale of a controlled substance in the third degree (§ 220.39 [1]), and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We reject defendant’s challenges to the legal sufficiency of the evidence. “It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People” (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001] [internal quotation marks omitted]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant’s contention, we conclude that the evidence is legally sufficient to support the conviction on the counts of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree (*see People v Samuels*, 99 NY2d 20, 24 [2002]; *People v White*, 103 AD3d 1213, 1213 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]). Contrary to defendant’s further contention, the conviction on the count of

conspiracy in the second degree is supported by legally sufficient evidence, notwithstanding the fact that the People's case was based largely on circumstantial proof (*see People v Portis*, 129 AD3d 1300, 1301-1302 [3d Dept 2015], *lv denied* 26 NY3d 1091 [2015]; *People v Rivera*, 128 AD3d 473, 473 [1st Dept 2015], *lv denied* 27 NY3d 1005 [2016]).

We also reject defendant's contention that the verdict is against the weight of the evidence. Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see Portis*, 129 AD3d at 1302; *see generally Bleakley*, 69 NY2d at 495).

Defendant next contends that Supreme Court erred in denying his request to provide the jury with a multiple conspiracies charge. We reject that contention. A multiple conspiracies charge "recogniz[es] the possibility of multiple conspiracies and direct[s] an acquittal in the event that the jury concludes that something other than a single integrated conspiracy was proven" (*People v Leisner*, 73 NY2d 140, 150 [1989]). "Although a multiple conspiracies charge must be given 'when the facts are such that a jury might reasonably find either a single conspiracy or multiple conspiracies' . . . , it is well established that '[p]roof of a defendant's knowledge of the identities and specific acts of all his coconspirators is not necessary where[, as here,] the circumstantial evidence establishes the defendant's knowledge that he is part of a criminal venture which extends beyond his individual participation' " (*People v King*, 166 AD3d 1562, 1564 [4th Dept 2018], *lv denied* 34 NY3d 1017 [2019]). We conclude that the court did not err in denying defendant's request to provide the jury with a multiple conspiracies charge inasmuch as "[t]here was no reasonable view of the evidence that there was any conspiracy [other] than the single conspiracy charged in the indictment" (*id.* at 1564-1565 [internal quotation marks omitted]; *see People v Williams*, 150 AD3d 1315, 1320 [3d Dept 2017], *lv denied* 30 NY3d 984 [2017]).

Defendant also contends that the court abused its discretion in admitting the expert testimony of a police investigator regarding the meaning of certain coded or cryptic phrases used in recorded phone calls and intercepted text messages. Defendant did not properly object to any of the police investigator's testimony that he now challenges on appeal, and defendant therefore "failed to preserve for our review his contention that 'the testimony of [that investigator] interpreting recorded telephone conversations [and intercepted text messages] between defendant and other individuals invaded the province of the jury' " (*People v McMillian*, 158 AD3d 1059, 1060 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *see* CPL 470.05 [2]; *People v Bailey*, 32 NY3d 70, 79-82 [2018]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *McMillian*, 158 AD3d at 1060; *see also People v Fulmer-Salvador*, 193 AD3d 598, 599 [1st Dept 2021], *lv denied* 37 NY3d 965 [2021]; *People v Adrian*, 173 AD3d 431,

432-433 [1st Dept 2019], *lv denied* 34 NY3d 1125 [2020]).

We agree with defendant, however, that the court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2). As relevant here, a court may, upon a motion of defendant, set aside the verdict on the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, . . . which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2]). "Generally, 'a jury verdict should not be impeached, absent special circumstances, by affidavit or testimony of jurors after their verdict is publicly returned,' [which is] a rule designed 'to protect jurors from being harassed after verdict and to ensure the secure foundation of the verdict' " (*People v Estella*, 68 AD3d 1155, 1157 [3d Dept 2009]; *see People v Rukaj*, 123 AD2d 277, 280 [1st Dept 1986]). Nonetheless, setting aside the verdict "is warranted where a juror had an undisclosed preexisting prejudice that would have resulted in his or her disqualification if it had been revealed during voir dire, such as an undisclosed, pretrial opinion of guilt against the defendant" (*People v Rivera*, 304 AD2d 841, 842 [2d Dept 2003]; *see People v Leonti*, 262 NY 256, 258 [1933]; *Estella*, 68 AD3d at 1157; *Rukaj*, 123 AD2d at 280-281).

Here, we conclude that the court erred in denying defendant's motion without a hearing because the sworn allegations in support of the motion, including the affidavits of two jurors, indicated that certain other jurors may have had undisclosed preexisting prejudices against people of defendant's race that may have affected defendant's substantial right to an impartial jury and fair trial (*see Estella*, 68 AD3d at 1157; *Rivera*, 304 AD2d at 841-842; *Rukaj*, 123 AD2d at 280-281; *see generally Leonti*, 262 NY at 258). Indeed, as early as the evening following the verdict, the two jurors alleged in emails sent directly to the court that, during deliberations, certain other jurors directed racist comments at the defendants and that racial bias had played a role in the verdict. In addition, contrary to the court's suggestion, the detailed affidavits of the two jurors recounting specific instances of racist comments by certain other jurors did, in fact, allege that the verdict was influenced by racial bias against the defendants (*cf. People v Johnson*, 54 AD3d 636, 637 [1st Dept 2008], *lv denied* 12 NY3d 759 [2009]). We therefore hold the case, reserve decision and remit the matter to Supreme Court to conduct a hearing on defendant's CPL 330.30 motion.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

861
KA 16-02065
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY L. ROTH, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON 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 November 9, 2016. The judgment convicted defendant upon a jury verdict of custodial interference in the first degree (two counts) and criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of custodial interference in the first degree (Penal Law § 135.50 [1]) under counts one and two of the indictment and dismissing those counts of the indictment, and by amending the order of protection and as modified the judgment is affirmed and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him following a jury trial of two counts of custodial interference in the first degree (Penal Law § 135.50 [1]) and one count of criminal contempt in the second degree (§ 215.50 [3]), defendant contends, inter alia, that Ontario County Court lacked geographical jurisdiction over the two custodial interference counts inasmuch as none of the elements of those offenses occurred in Ontario County. We agree.

In 2013, Family Court, Ontario County issued custody and visitation orders related to defendant's two minor children. At the time, the children's mother resided in Ontario County. Shortly after those orders were issued, the mother relocated to Yates County. At all relevant times, defendant resided with the children in Oswego County.

Although it is undisputed that all elements of the crime of custodial interference in the first degree were committed outside of Ontario County, the People contend that Ontario County Court could exercise jurisdiction under the " 'injured forum' " provisions of CPL

20.40 (2) (c) (*Matter of Steingut v Gold*, 42 NY2d 311, 313 [1977]). That statute provides, in pertinent part, that "[a] person may be convicted in an appropriate criminal court of a particular county, of an offense of which the criminal courts of this state have jurisdiction pursuant to section 20.20, . . . when: . . . [e]ven though none of the conduct constituting such offense may have occurred within such county: . . . [s]uch conduct had, or was likely to have, a particular effect upon such county or a political subdivision or part thereof, and was performed with intent that it would, or with knowledge that it was likely to, have such particular effect therein" (CPL 20.40 [2] [c]).

" 'Particular effect of an offense' " is "[w]hen conduct constituting an offense produces consequences which, though not necessarily amounting to a result or element of such offense, have a materially harmful impact upon the governmental processes or community welfare of a particular jurisdiction, or result in the defrauding of persons in such jurisdiction" (CPL 20.10 [4]; *see Steingut*, 42 NY2d at 314-315; *see generally Matter of Taub v Altman*, 3 NY3d 30, 33-34 [2004]). "Extraterritorial jurisdiction is to be applied only in those limited circumstances where the out-of-jurisdiction conduct is violative of a statute intended to protect the integrity of the governmental processes or is harmful to the community as a whole" (*People v Fea*, 47 NY2d 70, 76-77 [1979]; *see People v Seifert*, 113 AD2d 80, 82 [4th Dept 1985], *lv denied* 67 NY2d 889 [1986]).

Here, the conduct alleged in the counts of the indictment charging defendant with custodial interference in the first degree occurred outside Ontario County and did not have a materially harmful impact on the governmental processes or community welfare of Ontario County. That conduct impacted three people: the children and their mother, none of whom resided in Ontario County, and did not impact the community as a whole (*see Fea*, 47 NY2d at 77-78; *Seifert*, 113 AD2d at 82; *cf. People v Shouder*, 237 AD2d 545, 545 [2d Dept 1997], *lv denied* 90 NY2d 898 [1997]; *People v Sandy*, 236 AD2d 104, 114-115 [1st Dept 1997], *lv denied* 91 NY2d 977 [1998]). We therefore modify the judgment by reversing those parts convicting defendant of custodial interference in the first degree under counts one and two of the indictment and dismissing those counts of the indictment.

Based on our determination, the duration of the order of protection must be modified (*see* CPL 530.12 former [5]; 530.13 former [4]), and we therefore further modify the judgment by amending the order of protection, and we remit the matter to County Court for a calculation of the new term of the order of protection.

Defendant further contends that the court erred in permitting the prosecutor to cross-examine a defense witness on an ultimate issue to be determined by the jury (*see generally People v Ingram*, 2 AD3d 211, 212-213 [1st Dept 2003], *lv denied* 2 NY3d 741 [2004]). Even assuming, arguendo, that the court erred, we conclude that the error is harmless given the overwhelming evidence of guilt and because there is no significant probability that the error contributed to the conviction (*see People v Morman*, 145 AD3d 1435, 1438 [4th Dept 2016], *lv denied*

29 NY3d 999 [2017]; *People v Ruffins*, 31 AD3d 1180, 1181 [4th Dept 2006]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

877
TP 21-00792
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF WILLIAM ROBINSON, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 27, 2021) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 101.22 (7 NYCRR 270.2 [B] [2] [v]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination finding him guilty following a tier III hearing of, inter alia, violating inmate rule 101.22 (7 NYCRR 270.2 [B] [2] [v] [stalking]). We agree with petitioner that the determination that petitioner violated that rule is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated rule 101.22, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Lago v Annucci*, 177 AD3d 1309, 1310 [4th Dept 2019]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Hinspeter v Annucci*, 187 AD3d 1578, 1579 [4th

Dept 2020]).

Petitioner’s further contention that the Hearing Officer denied his request to call a certain witness at the hearing in violation of procedural regulations was not raised in petitioner’s administrative appeal. Petitioner thus failed to exhaust his administrative remedies with respect to that contention (*see Matter of Ballard v Kickbush*, 165 AD3d 1587, 1589 [4th Dept 2018], *appeal dismissed* 32 NY3d 1182 [2019]), and this Court “ ‘has no discretionary power to reach [it]’ ” (*Matter of Jones v Annucci*, 141 AD3d 1108, 1109 [4th Dept 2016]; *see Matter of Ross-Simmons v Fischer*, 115 AD3d 1234, 1234 [4th Dept 2014]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

878

KA 19-01455

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL AUSTIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES 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 December 5, 2016. The judgment convicted defendant upon his plea of guilty of rape in the second 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 and on the law by amending the order of protection to expire on June 29, 2037, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of four counts of rape in the second degree (Penal Law § 130.30 [1]). Preliminarily, we note that defendant's notice of appeal recites an incorrect date on which the judgment was rendered, but inasmuch as the notice of appeal is otherwise accurate and recites the correct indictment number, we exercise our discretion, in the interest of justice, and treat the notice of appeal as valid (*see People v Delgado*, 183 AD3d 1236, 1236 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]; *People v Mitchell*, 93 AD3d 1173, 1173 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]).

Defendant contends that the waiver of the right to appeal is invalid and that the 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 the sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Defendant's further contention that County Court erred in calculating the expiration date of the order of protection would survive even a valid waiver of the right to appeal (*see People v Davis*, 153 AD3d 1617, 1618 [4th Dept 2017], *lv denied* 30 NY3d 1059

[2017]), but defendant failed to preserve that contention for our review (*see People v Nieves*, 2 NY3d 310, 315-316 [2004]; *Davis*, 153 AD3d at 1618). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), and we agree with defendant that the expiration date of the order of protection exceeds that allowed by the law. Where, as here, a defendant is convicted of a felony and his or her sentence does not include a term of probation for an enumerated felony sexual assault, CPL 530.13 (4) (A) provides that the expiration date of the order of protection "shall not exceed the greater of: (i) eight years from the date of such sentencing, . . . or (ii) eight years from the date of the expiration of the . . . term of a determinate sentence of imprisonment actually imposed." Here, the expiration date of defendant's determinate sentence of imprisonment, which includes the six-year period of postrelease supervision, is June 29, 2029 (*see People v Williams*, 19 NY3d 100, 104-105 [2012]; *People v Gonyeau*, 144 AD3d 1574, 1574 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]). Thus, eight years from that date results in a maximum expiration date of June 29, 2037 for the order of protection. We therefore modify the judgment by amending the order of protection to expire on that date (*see People v Griswold*, 186 AD3d 1104, 1105 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

879

KA 19-00810

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TOBIAS S., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 26, 2019. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see* CPL 720.10 [2] [c]; *People v Carter*, 191 AD3d 1168, 1170 [3d Dept 2021]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

880

KA 19-00811

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TOBIAS S., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an adjudication of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 26, 2019. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the adjudication so appealed from is unanimously affirmed (*see People v Shaland S.*, 187 AD3d 1683, 1684 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]; *People v Carlisle*, 120 AD3d 1607, 1608 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]; *People v Prokopienko* [appeal No. 2], 72 AD3d 1528, 1529 [4th Dept 2010]; *see also People v Hoti*, 12 NY3d 742, 743 [2009]; *People v Nieves*, 2 NY3d 310, 316-317 [2004]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

882
KA 17-00931
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AZYA M. GILBERT, ALSO KNOWN AS AZYA JACKSON/AZYA GILBERT-JACKSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 7, 2017. 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]). Defendant contends that the verdict is against the weight of the evidence with respect to her intent to cause serious physical injury. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Given the number, depth, and severity of the stab wounds here, it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see People v Angel*, 185 AD2d 356, 358 [2d Dept 1992], *lv denied* 80 NY2d 1025 [1992]).

Defendant failed to preserve for our review her further contention that she was denied a fair trial by alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Hall*, 169 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 33 NY3d 976 [2019]; *People v Keels*, 128 AD3d 1444, 1445 [4th Dept 2015], *lv denied* 26 NY3d 969 [2015]), 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]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

886
CAF 21-00088
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF CHARLENE CHILDERS,
PETITIONER-APPELLANT,

V ORDER

NICOLE M. GUNKEL, RESPONDENT-RESPONDENT.

RYAN JAMES MULDOON, AUBURN, FOR PETITIONER-APPELLANT.

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

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered November 5, 2020 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Attorney for the Children to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Piwowar v Glosek*, 53 AD3d 1121, 1122 [4th Dept 2008]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

887

CAF 20-00635

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

IN THE MATTER OF TYRONE O.

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

MEMORANDUM AND ORDER

LILLIAN G., RESPONDENT-APPELLANT, AND MAPLE O., RESPONDENT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSHUA E. LAROCK OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHARLES E. LUPIA, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 5, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order, entered upon her default that, inter alia, adjudicated the subject child to be permanently neglected, terminated the mother's parental rights, and transferred custody of the child to petitioner. The order was entered following fact-finding and dispositional hearings at which the mother failed to appear and in which her attorney, although present, elected not to participate (*see Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]; *Matter of Makia S. [Catherine S.]*, 134 AD3d 1445, 1445-1446 [4th Dept 2015]). Where, as here, the order appealed from is made upon a respondent's default, "review is limited to matters which were the subject of contest below" (*Ramere D.*, 177 AD3d at 1386 [internal quotation marks omitted]). Thus, review is limited to the denial of the request of the mother's attorney for an adjournment (*see Matter of Hayden A. [Karen A.]*, 188 AD3d 1759, 1759 [4th Dept 2020]; *Ramere D.*, 177 AD3d at 1386-1387). Contrary to the mother's contention, Family Court did

not abuse its discretion in denying that request inasmuch as the mother's attorney offered nothing beyond a "vague and unsubstantiated claim that the [mother] could not appear" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011] [internal quotation marks omitted]) and the mother had a history of failing to appear (*see Matter of Wilson v McCray*, 125 AD3d 1512, 1513 [4th Dept 2015], *lv denied* 25 NY3d 908 [2015]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

893
CA 20-01582
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

LEGAL SERVICES FOR THE ELDERLY, DISABLED OR DISADVANTAGED OF WESTERN NEW YORK, INC., KAREN NICHOLSON, CHIEF EXECUTIVE OFFICER, AS PERMANENT GUARDIAN OF DAVID GLENN, PLAINTIFF-RESPONDENT,

V   ORDER

ERIE COUNTY, DEFENDANT-APPELLANT,
AND ERIE COUNTY SHERIFF'S DEPARTMENT, DEFENDANT.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 16, 2020. The order, among other things, denied the motion of defendant Erie County for summary judgment.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

896
CA 20-01079
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

MICHAEL PREASTER, PLAINTIFF-APPELLANT,

V ORDER

RUNYEMURA MUGINGI AND JOSEPHINE BIRINGANINE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

THE RUSSELL FRIEDMAN LAW GROUP, LLP, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered August 4, 2020. The order, among other things, granted defendants' motion to dismiss the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

897
CA 20-01663
PRESENT: WHALEN, P.J., CENTRA, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

MICHAEL PREASTER, PLAINTIFF-APPELLANT,

V ORDER

JOSEPHINE BIRINGANINE AND RUNYEMURA MUGINGI,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

THE RUSSELL FRIEDMAN LAW GROUP, LLP, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered October 7, 2020. The order denied plaintiff’s motion insofar as it sought leave to renew plaintiff’s opposition to defendants’ motion to dismiss the complaint, granted plaintiff’s motion insofar as it sought leave to reargue and, upon reargument, adhered to the prior order granting defendants’ motion and dismissing the complaint.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

900

TP 20-01572

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

IN THE MATTER OF BERNABE ENCARNACION, PETITIONER,

V — ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered November 30, 2020 to review a determination of respondent. The determination found after a tier II hearing that petitioner violated various inmate rules.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

901
KA 19-02116
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. CATO, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TODD G. MONAHAN, LITTLE FALLS, 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 (Frederick G. Reed, A.J.), rendered September 12, 2019. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree (three counts).

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty during a single plea proceeding of, respectively, three counts and one count of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We affirm in both appeals.

Initially, to the extent that the purported waiver of the right to appeal is relevant to any of defendant's contentions, we conclude that he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Parker*, 189 AD3d 2065, 2065-2066 [4th Dept 2020], *lv denied* 36 NY3d 1122 [2021]).

Defendant contends that his pleas were not voluntarily, knowingly, and intelligently entered because County Court did not ensure that defendant, who reportedly suffers from mental health conditions, was competent to enter the pleas. Defendant failed to preserve his contention for our review inasmuch as he did not move to withdraw the pleas or to vacate the judgments of conviction on that ground (*see People v Russell*, 133 AD3d 1199, 1199 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]). This case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *see Russell*, 133 AD3d at

1199; *Williams*, 124 AD3d at 1285-1286). In any event, defendant's contention lacks merit. " 'A history of prior mental illness or treatment does not itself call into question [a] defendant's competence' " and, here, "[t]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea[s]" (*People v Williams*, 35 AD3d 1273, 1275 [4th Dept 2006], *lv denied* 8 NY3d 928 [2007] [internal quotation marks omitted]; *see Williams*, 124 AD3d at 1286). Indeed, the court "sufficiently inquired about defendant's mental health issues and medications and ensured that he was lucid and understood the proceedings" (*Russell*, 133 AD3d at 1199-1200), and "[t]here was not the slightest indication that defendant was uninformed, confused or incompetent" at the time he entered the pleas (*People v Alexander*, 97 NY2d 482, 486 [2002]; *see People v Wilson*, 117 AD3d 1476, 1477 [4th Dept 2014]).

To the extent that defendant's further contention that he was denied effective assistance of counsel survives his pleas of guilty (*see People v Corron*, 180 AD3d 1330, 1331 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]; *People v Robinson*, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007]), we conclude that it is without merit inasmuch as the record establishes that defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]). Defendant also contends that his attorney took positions adverse to him during the sentencing proceeding, and that the court thus erred in failing to sua sponte appoint new counsel. That contention lacks merit inasmuch as defendant's attorney did not take a position adverse to defendant (*see People v Tracy*, 125 AD3d 1517, 1518 [4th Dept 2015], *lv denied* 27 NY3d 1008 [2016]; *see also People v Washington*, 25 NY3d 1091, 1095 [2015]; *People v Mishoe*, 162 AD3d 529, 530 [1st Dept 2018], *lv denied* 32 NY3d 1113 [2018]).

We have considered defendant's remaining contentions raised in these appeals and conclude that none warrants reversal or modification of the judgments.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

902
KA 15-01935
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CARUTHERS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered September 16, 2015. The judgment convicted defendant upon a jury verdict of rape in the first degree (two counts), rape in the second degree (two counts), criminal sexual act in the first degree, criminal sexual act in the second degree and criminal obstruction of breathing or blood circulation.

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 rape in the first degree (Penal Law § 130.35 [1]) and one count of criminal obstruction of breathing or blood circulation (§ 121.11 [a]). Contrary to defendant's contention, the criminal obstruction of breathing or blood circulation conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, County Court properly refused to suppress the victim's identification testimony (*see People v Owens*, 161 AD3d 1567, 1568 [4th Dept 2018], *lv denied* 34 NY3d 1161 [2020]; *People v Bolden*, 109 AD3d 1170, 1172 [4th Dept 2013], *lv denied* 22 NY3d 1039 [2013]). Contrary to defendant's further contention, the video evidence was adequately authenticated (*see People v Oquendo*, 152 AD3d 1220, 1220-1221 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). Moreover, any error in the admission of the statements made by the victim immediately after the crime is harmless (*see People v Ridgeway*, 295 AD2d 879, 880 [4th Dept 2002], *lv denied* 98 NY2d 713 [2002]). We reject defendant's contention that defense counsel was ineffective in connection with

plea bargaining inasmuch as “the People refused to extend any offers due to defendant’s criminal history” (*People v Spencer*, 183 AD3d 1258, 1259 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). Contrary to defendant’s further contention, counts three and four of the indictment were not rendered duplicitous by the victim’s trial testimony (*see People v McFadden*, 148 AD3d 1769, 1772 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]). Defendant’s specific sentencing arguments are without merit. Defendant’s remaining contentions do not warrant reversal or modification of the judgment.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

906

KA 19-02117

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. CATO, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TODD G. MONAHAN, LITTLE FALLS, 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 (Frederick G. Reed, A.J.), rendered September 12, 2019. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree.

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

Same memorandum as in *People v Cato* ([appeal No. 1] — AD3d — [Nov. 12, 2021] [4th Dept 2021]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

908
CAF 19-00743
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF DANIEL R. PRUCHNICKI, JR.,
PETITIONER-APPELLANT,

V   ORDER

JENNIFER TAYLOR, RESPONDENT-RESPONDENT.

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

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered March 15, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the violation petition.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

911
CAF 20-01097
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF SHANNON BETTERS,
PETITIONER-APPELLANT,

V ORDER

RAYMOND CASTERLINE, RESPONDENT-RESPONDENT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered July 16, 2020 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition to modify a prior custody order.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

913
CA 20-01248
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

KEVIN CONLEY AND DENISE CONLEY,
PLAINTIFFS-APPELLANTS,

V ORDER

PINELLI LANDSCAPING, INC., ANTHONY PINELLI
AND TAMMY PINELLI, DEFENDANTS-RESPONDENTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered August 26, 2020. The order, among other things, granted the motion of defendants for bifurcation.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

915
CA 21-00171
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, BANNISTER, AND DEJOSEPH, JJ.

STEPHEN D. VICKI AND NICOLE VICKI,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
NIAGARA FALLS WATER BOARD, NIAGARA FALLS
PUBLIC WATER AUTHORITY AND NIAGARA MOHAWK
POWER CORPORATION, DOING BUSINESS AS NATIONAL
GRID, DEFENDANTS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 7, 2020. The order, among other things, adjudged that no further deposition of plaintiff Stephen D. Vicki is warranted and directed the parties to continue with discovery.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Presti v Schalck*, 26 AD2d 793, 793 [4th Dept 1966]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

922
KA 18-01376
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMMY ABDELLATIF, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. TRESMOND 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 January 10, 2018. 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 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

923

KA 20-00416

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SALEEM T. SPENCER, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ERICH D. GROME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 2, 2020. The judgment convicted defendant, upon a plea of guilty, of course of sexual conduct against a child in the second degree and sexual abuse in the first degree.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

927
KA 19-01993
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY S. LOBES, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Philip J. Roche, J.), rendered August 23, 2019. The judgment convicted defendant upon a jury verdict of assault in the second degree, attempted assault in the second degree, assault in the third degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [2]), attempted assault in the second degree (§§ 110.00, 120.05 [1]), and assault in the third degree (§ 120.00 [1]) stemming from his conduct in assaulting his girlfriend on two different dates. 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 sidebar conferences with prospective jurors. 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]). "Without more, failure to record a defendant's presence is insufficient to meet defendant's burden of rebutting the presumption of regularity" (*Velasquez*, 1 NY3d at 48). Inasmuch as the record does not indicate that defendant was absent from the sidebar conferences, 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).

Defendant failed to preserve for our review his contention that certain counts of the indictment were rendered duplicitous by the victim's testimony at trial (*see People v Allen*, 24 NY3d 441, 449-450

[2014]; *People v Rath*, 192 AD3d 1600, 1602 [4th Dept 2021], *lv denied* 37 NY3d 959 [2021]; *People v Zeman*, 156 AD3d 1460, 1461 [4th Dept 2017], *lv denied* 31 NY3d 988 [2018]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Rath*, 192 AD3d at 1602; *Zeman*, 156 AD3d at 1461).

We reject defendant's contention that he received ineffective assistance of counsel. Although defense counsel's representation was not perfect, 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.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

931
CA 21-00556
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

MANISH MADAN, PLAINTIFF-RESPONDENT-APPELLANT,

V   ORDER

SUNITA D. MALIK, ALSO KNOWN AS DOLLY MALIK,
DEFENDANT-APPELLANT-RESPONDENT.

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-APPELLANT-RESPONDENT.

BARNEY & BARNEY, ROCHESTER (BRIAN J. BARNEY OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered November 13, 2020. The order, among other things, adjudged that plaintiff shall replace defendant's vehicle whenever the mileage exceeds 75,000 miles.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

932
TP 21-00785
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF BERNICE CURRY-MALCOLM,
PETITIONER,

V ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
ROCHESTER CITY SCHOOL DISTRICT, RESPONDENTS.

BERNICE CURRY-MALCOLM, PETITIONER PRO SE.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (AARON M. WOSKOFF OF COUNSEL), FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

STEVEN G. CARLING, ACTING GENERAL COUNSEL, ROCHESTER CITY SCHOOL DISTRICT, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR RESPONDENT ROCHESTER CITY SCHOOL DISTRICT.

Proceeding pursuant to CPLR article 78 and 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 [Ann Marie Taddeo, J.], entered October 27, 2020) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaints of petitioner.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

933
CA 21-00513
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF BUFFALO COLLEGIATE CHARTER SCHOOL AND RUPP BAASE PFALZGRAF CUNNINGHAM, LLC, PETITIONERS-RESPONDENTS-APPELLANTS,

V ORDER

BUFFALO PUBLIC SCHOOLS, BUFFALO CITY SCHOOL DISTRICT AND BUFFALO PUBLIC SCHOOLS BOARD OF EDUCATION, RESPONDENTS-APPELLANTS-RESPONDENTS.

BUFFALO PUBLIC SCHOOLS, OFFICE OF GENERAL COUNSEL, BUFFALO (STEPHANIE JOY CALHOUN OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 4, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the petition in part and denied the petition in part.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

936
CA 21-00494
PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF STATE FARM INSURANCE COMPANY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. CALVELLO, RESPONDENT-APPELLANT.

VIOLA CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (RICHARD J. PORTER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 9, 2020 in a proceeding purusant to CPLR article 75. The order denied respondent's motion to dismiss the petition and granted the petition to stay arbitration.

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

Memorandum: After sustaining injury in an automobile collision, respondent insured served on petitioner insurer a notice of intention to arbitrate the parties' dispute over supplemental uninsured motorist benefits. More than 20 days after receiving that notice, petitioner filed a petition seeking a stay of arbitration. Respondent moved to dismiss the petition on the ground that, inter alia, it was untimely. The parties then agreed to adjourn proceedings on the petition while respondent provided petitioner with discovery. After respondent provided petitioner with certain discovery, petitioner made further discovery demands, to which respondent objected. Thereafter, Supreme Court denied the motion and granted the petition, temporarily staying arbitration while discovery continued. Respondent appeals, and we reverse. As petitioner correctly concedes, the petition was untimely inasmuch as petitioner filed it more than 20 days after receiving respondent's notice of intention to arbitrate (*see* CPLR 7503 [c]; *Matter of GEICO Gen. Ins. Co. v Glazer*, 173 AD3d 499, 499 [1st Dept 2019]), and the court thus erred in denying the motion (*see John W. Cowper Co. v Clintstone Props.*, 120 AD2d 976, 977 [4th Dept 1986], *lv denied* 68 NY2d 610 [1986]). Although petitioner is correct that a party "who utilizes the tools of litigation, or participates in litigation for an unreasonable period without asserting the right to arbitrate, may lose the right to compel arbitration" (*Estate of*

Castellone v JP Morgan Chase Bank, N.A., 60 AD3d 621, 623 [2d Dept 2009]; *see Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67 [2007]), respondent did not, by consenting to prearbitration discovery, waive his objection to a stay of arbitration inasmuch as he "never acted in a manner inconsistent either with [his] intent to arbitrate the claims or with [his] right to do so pursuant to the [policy]" (*Castellone*, 60 AD3d at 623). To the contrary, it is undisputed that the matter will ultimately proceed to arbitration.

Furthermore, to the extent that petitioner's application can be construed as seeking court-ordered discovery "to aid in arbitration" (CPLR 3102 [c]), we conclude that petitioner was not entitled to that relief because it failed to establish the requisite extraordinary circumstances (*see AXA Equit. Life Ins. Co. v Kalina*, 101 AD3d 1655, 1656 [4th Dept 2012]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

938

KA 17-00115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE KING, 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 (Thomas E. Moran, J.), rendered January 9, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts), strangulation in the second degree and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), one count of strangulation in the second degree (§ 121.12), and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence (*see Johnson*, 192 AD3d at 1495), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

939

KA 20-01377

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

WESLEY A. SMITH, 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 (Michael L. Dollinger, J.), entered September 25, 2020. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in failing to grant a downward departure from his presumptive classification as a level two risk. Contrary to defendant's contention, "the remoteness of his prior felony conviction is adequately taken into account by the risk assessment instrument and therefore is not, as a matter of law, a mitigating factor to be considered by the court in departing from the presumptive risk level" (*People v Jewell*, 119 AD3d 1446, 1448-1449 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]; *see People v Sofo*, 168 AD3d 891, 892 [2d Dept 2019], *lv denied* 33 NY3d 905 [2019]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant's further contention regarding the merits of his request for a downward departure is not preserved for our review because defendant did not advance the ground underlying that specific contention during the SORA hearing (*see People v Burgess*, 191 AD3d 1256, 1256-1257 [4th Dept 2021]; *People v Iverson*, 90 AD3d 1561, 1562 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]).

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

Entered: November 12, 2021   Ann Dillon Flynn
                                                          Clerk of the Court

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

956

KA 20-00598

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS COSSETTE, DEFENDANT-APPELLANT.

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

MARCUS COSSETTE, 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 August 12, 2019. The judgment convicted defendant upon a plea of guilty of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]). As an initial matter, we conclude that defendant's waiver of the right to appeal is invalid inasmuch as both the signed written waiver of the right to appeal and the oral waiver colloquy mischaracterized the nature of the right to appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jones*, 186 AD3d 1069, 1070 [4th Dept 2020]).

Defendant contends in his pro se supplemental brief that the evidence is legally insufficient to support the conviction. However, defendant forfeited that contention by pleading guilty (*see People v Weakfall*, 151 AD3d 1966, 1966 [4th Dept 2017]; *People v Feidner*, 109 AD3d 1086, 1086 [4th Dept 2013]). Indeed, "it would be logically inconsistent to permit a defendant to enter a plea of guilty based on particular admitted facts, yet to allow that defendant contemporaneously to reserve the right to challenge on appeal the sufficiency of those facts to support a conviction, had there been a trial" (*People v Plunkett*, 19 NY3d 400, 405-406 [2012]). Further, defendant's challenge in his pro se supplemental brief to the weight of the evidence is " 'inapplicable' inasmuch as he was convicted upon his plea of guilty, rather than upon a verdict following a trial"

(*Feidner*, 109 AD3d at 1086; *cf. People v Danielson*, 9 NY3d 342, 349 [2007]).

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

961
KA 16-00222
PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWAN T. THOMAS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered September 9, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) 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 two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count of assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention, Supreme Court did not err in summarily denying his motion seeking to set aside the verdict pursuant to CPL 330.30 (2) on the ground of juror misconduct (*cf. People v Blunt*, 174 AD3d 1504, 1506 [4th Dept 2019]). No hearing was necessary here inasmuch as the sworn allegations in the moving papers did not " 'raise a question of outside influence but, rather, [sought] to impeach the verdict by delving into the tenor of the jury's deliberative processes' " (*People v Jones*, 85 AD3d 1667, 1667 [4th Dept 2011], *lv denied* 19 NY3d 974 [2012]; *see People v Drake*, 68 AD3d 1778, 1779 [4th Dept 2009], *lv denied* 14 NY3d 840 [2010]; *see generally People v Maragh*, 94 NY2d 569, 573 [2000]).

Defendant contends that the evidence is legally insufficient to support the conviction of burglary in the first degree (Penal Law § 140.30 [2]) and assault in the second degree (§ 120.05 [2]) with respect to the element of physical injury (*see* § 10.00 [9]; *People v Chiddick*, 8 NY3d 445, 447-448 [2007]). We reject that contention. The People presented evidence that defendant and codefendant struck the victim repeatedly with a baseball bat and a three-foot-long piece of wood, resulting in welts on the victim's back and bruising to his forehead. The People also presented the victim's testimony concerning

the degree of pain he felt. Viewing that evidence in the light most favorable to the People, we conclude that there is a valid line of reasoning and permissible inferences to support the jury's conclusion that the victim experienced substantial pain (*see People v Huddleston*, 196 AD3d 1098, 1099 [4th Dept 2021]), i.e., "more than slight or trivial pain" (*Chiddick*, 8 NY3d at 447; *see People v Henderson*, 77 AD3d 1311, 1311 [4th Dept 2010], *lv denied* 17 NY3d 953 [2011]). Furthermore, viewing the evidence in light of the elements of all three 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]).

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

964
CAF 20-00083
PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

IN THE MATTER OF ALBA M. MERCEDES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS M. SANCHEZ, RESPONDENT-APPELLANT.

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

Appeal from an amended order of the Family Court, Erie County (Deanne M. Tripi, J.), entered December 5, 2019 in a proceeding pursuant to Family Court Act article 4. The amended order, among other things, reconfirmed the determination of the Support Magistrate.

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

Memorandum: Petitioner commenced this proceeding pursuant to Family Court Act article 4, alleging that respondent willfully failed to obey a prior order of child support. The Support Magistrate determined that respondent had willfully violated the order of child support and, inter alia, recommended committing him to jail for a period of 60 days. Family Court confirmed the finding of willful violation and committed respondent to jail as recommended. Respondent thereafter moved, inter alia, to vacate the court's order on the ground that it was entered at a time when the court's jurisdiction was suspended based on the pendency of respondent's application to remove the matter to federal court. The court denied the motion to vacate and also entered an amended order that, inter alia, "reconfirmed" the Support Magistrate's determination. Respondent appeals from the amended order, contending only that the court erred in denying his motion to vacate.

Preliminarily, we note that respondent's appeal from the amended order brings up for our review the propriety of the order denying his motion to vacate (*see generally* CPLR 5501 [a] [1]; Family Ct Act § 1118; *Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1518 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]; *Matter of Clark v Ormiston*, 101 AD3d 870, 870 [2d Dept 2012]). Nonetheless, we conclude that the appeal must be dismissed as moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]; *Matter of Cullop v Miller*, 173 AD3d 1652, 1652-1653 [4th Dept 2019]). Even assuming, arguendo, that the motion to vacate should have been granted, the amended order was entered after the denial of respondent's removal application, at a

time when it is undisputed that the court had jurisdiction (*see generally* 28 USC § 1446 [d]; *Railroad Co. v Koontz*, 104 US 5, 16 [1881]; *Matter of State of New York v Fuller*, 31 AD2d 71, 72 [2d Dept 1968]), and therefore "any corrective measures which this Court might have taken with respect to the order [respondent sought to vacate] would have no practical effect" (*Cullop*, 173 AD3d at 1652-1653 [internal quotation marks omitted]). We further conclude that the exception to the mootness doctrine does not apply here (*see generally Hearst Corp.*, 50 NY2d at 714-715).

Entered: November 12, 2021 Ann Dillon Flynn
Clerk of the Court

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

974
CA 21-00087
PRESENT: WHALEN, P.J., SMITH, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

ANDREW L. ANDRUSZKO, AS ADMINISTRATOR OF THE ESTATE OF LYNN M. ANDRUSZKO, PLAINTIFF,

V — ORDER

MICHAEL P. HARRINGTON, ET AL., DEFENDANTS.

MICHAEL P. HARRINGTON, WILLIAM E. WAYMAN AND WILLIAM E. WAYMAN, DOING BUSINESS AS WAYMANS TRUCKING, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

PETER KAY AUTO SALES, INC., THIRD-PARTY DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered January 12, 2021. The order denied the motion of third-party defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 6, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

977
KA 19-01125
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

RAAQUIM MCCRAYER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 28, 2018. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). We affirm.

As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal. Although no "particular litany" is required for a waiver of the right to appeal to be valid (*People v Lopez*, 6 NY3d 248, 256 [2006]), defendant's waiver of the right to appeal was invalid because Supreme Court's oral colloquy mischaracterized it as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Davis*, 188 AD3d 1731, 1731 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]). Although the record establishes that defendant executed a written waiver of the right to appeal, that does not cure the deficient oral colloquy because the court did not inquire of defendant whether he understood the written waiver or whether he had read the waiver before signing it (*see People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]).

Contrary to defendant's contention, however, we conclude that the sentence is not unduly harsh or severe.

Entered: November 12, 2021   Ann Dillon Flynn
                                              Clerk of the Court

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

980
KA 20-00293
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE MARTIN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (TYLER B. BUGDEN 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 (Matthew J. Doran, J.), rendered February 3, 2020. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of defendant's challenge to County Court's refusal to grant him youthful offender status, we nevertheless affirm the judgment. Contrary to defendant's contention, the court did not abuse its discretion in declining to grant him youthful offender status (*see People v McCall*, 177 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020]; *People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019], *lv denied* 34 NY3d 1132 [2020]), particularly in light of the nature of the offense and the manner in which it was committed (*see People v Lester*, 167 AD3d 1559, 1560 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]; *People v Ford*, 144 AD3d 1682, 1683 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Chambers*, 176 AD3d 1600, 1600-1601 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *cf. People v Keith B.J.*, 158 AD3d 1160, 1160-1161 [4th Dept 2018]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

988

CA 21-00683

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

MANLIUS CENTER ROAD ASSOCIATES, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

LIQUOR WORLD, LLC, DEFENDANT,
GURNAKE SINGH, ALSO KNOWN AS SONNY SINGH,
INDIVIDUALLY AND DOING BUSINESS AS LIQUOR
WORLD LLC, AND LIQUOR WORLD OF SYRACUSE, INC.,
DOING BUSINESS AS LIQUOR WORLD LLC,
DEFENDANTS-APPELLANTS.

TULLY RINCKEY PLLC, ROCHESTER (KAREN R. SANDERS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered October 15, 2020. The order denied the motion of defendants-appellants to dismiss plaintiff’s amended complaint.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

989
CA 21-00097
PRESENT: CARNI, J.P., LINDLEY, NEMOYER, WINSLOW, AND BANNISTER, JJ.

PROGRESSIVE WATER TREATMENT INC., DOING BUSINESS AS ORIGINCLEAR, ORIGINCLEAR INC., DOING BUSINESS AS ORIGINCLEAR, AND TENER R. ECKELBERRY, JR., PLAINTIFFS-APPELLANTS,

V ORDER

YELLOWSTONE CAPITAL LLC, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

THE BASILE LAW FIRM P.C., JERICHO (MARK R. BASILE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

STEIN ADLER DABAH & ZELKOWITZ, LLP, NEW YORK CITY (CHRISTOPHER MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 5, 2021. The order, among other things, granted defendant’s motion to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 9 and 10, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

990

CA 21-00256

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

PROGRESSIVE WATER TREATMENT INC., DOING BUSINESS AS ORIGINCLEAR, ORIGINCLEAR INC., DOING BUSINESS AS ORIGINCLEAR AND TENER R. ECKELBERRY, JR., PLAINTIFFS-APPELLANTS,

V — ORDER

YELLOWSTONE CAPITAL LLC, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

THE BASILE LAW FIRM P.C., JERICHO (MARK R. BASILE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

STEIN ADLER DABAH & ZELKOWITZ, LLP, NEW YORK CITY (CHRISTOPHER MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 5, 2021. The judgment, among other things, dismissed the action in its entirety.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 9 and 10, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

992

KA 19-01821

PRESENT: CENTRA, J.P., PERADOTTO, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SIMEON J. MCDANIELS, 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 (Alex R. Renzi, J.), rendered April 26, 2017. The judgment convicted defendant upon a plea of guilty of robbery 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 his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). We decline to grant defendant's request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender. Considering the "broad range of factors pertinent to any youthful offender determination" (*People v Middlebrooks*, 25 NY3d 516, 527 [2015]; *see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]), we conclude that defendant should not be afforded youthful offender status under the circumstances of this case. Defendant participated in an admittedly violent crime, he received a prior youthful offender adjudication, he violated the terms of the plea agreement here, and the presentence report did not recommend youthful offender status (*see People v Abdul-Jaleel*, 142 AD3d 1296, 1298-1299 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]). Contrary to defendant's further contention, the period of postrelease supervision is not unduly harsh or severe.

Entered: November 12, 2021   Ann Dillon Flynn
Clerk of the Court

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

993
KA 19-01446
PRESENT: CENTRA, J.P., PERADOTTO, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

ROBERT WESTER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Christopher S. Ciaccio, J.), entered May 8, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in denying his request for a downward departure from his presumptive risk level because he met his burden of proving the existence of a mitigating factor to warrant the downward departure, i.e., he had an exceptional response to treatment. We reject that contention. While defendant is correct that “[a]n offender’s response to treatment, if exceptional, can be the basis for a downward departure” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]), we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response was exceptional (*see People v Antonetti*, 188 AD3d 1630, 1631 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]; *People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]). Moreover, even assuming, arguendo, that defendant demonstrated that his response to treatment was exceptional, we nevertheless conclude, based upon the totality of the circumstances, that a downward departure is not warranted (*see Antonetti*, 188 AD3d at 1632; *Rivera*, 144 AD3d at 1596; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

1015
KA 20-01616
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN CRANDALL, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (BARRY NELSON COVERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), entered August 10, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

1021
CAF 21-00426

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

IN THE MATTER OF L.M. AND A.M.

ORDER

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

A.M., RESPONDENT-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (MATTHEW J. TURETSKY OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Ontario County (Jacqueline E. Sisson, A.J.), entered March 11, 2021 in a proceeding pursuant to Family Court Act article 10. The order, among other things, directed respondent to stay away from and have no contact with the subject children.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 14, 16 and 20, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

1023
CA 21-00320
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

SUSAN R. CORY, AS EXECUTRIX WITH LETTERS
TESTAMENTARY WITH LIMITATIONS OF THE
ESTATE OF RICHARD J. MENGA, DECEASED,
PLAINTIFF-RESPONDENT,

V   ORDER

PENFIELD CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT,
AND JENNIFER M. FICHERA,
DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANT-APPELLANT.

MORRIS & MORRIS, ATTORNEYS, ROCHESTER (DEBORAH M. FIELD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

ROE & ASSOCIATES, WILLIAMSVILLE (MATTHEW J. ROE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered November 9, 2020. The order, insofar as appealed from, denied the cross motion of defendant Penfield Central School District for summary judgment dismissing the complaint against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 25 and 26, 2021,

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

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

1024
CA 21-00473
PRESENT: SMITH, J.P., LINDLEY, NEMOYER, AND CURRAN, JJ.

KENNARD LAW P.C., DOING BUSINESS AS KENNARD LAW,
AND ALFONSO KENNARD, PLAINTIFFS-APPELLANTS,

V ORDER

HIGH SPEED CAPITAL LLC, DEFENDANT-RESPONDENT.

AMOS WEINBERG, GREAT NECK, FOR PLAINTIFFS-APPELLANTS.

STEIN ADLER DABAH & ZELKOWITZ, LLP, NEW YORK CITY (CHRISTOPHER R.
MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 15, 2020. The judgment dismissed the action.

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

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court