SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 1, 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 OCTOBER 1, 2021

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

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KA 14-01879

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE C. FAISON, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered July 24, 2014. The judgment convicted defendant upon a jury verdict of murder in the second degree, manslaughter in the first degree, aggravated criminal contempt, criminal contempt in the second degree, endangering the welfare of a child and criminal obstruction of breathing or blood circulation.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing that part convicting defendant of murder in the second degree and as modified the judgment is affirmed, and a new trial is granted on count one of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [4] [depraved indifference murder of a person less than 11 years old]), manslaughter in the first degree (§ 125.20 [4]), aggravated criminal contempt (§ 215.52 [1]), criminal contempt in the second degree (§ 215.50 [3]), endangering the welfare of a child (§ 260.10 [1]), and criminal obstruction of breathing or blood circulation (§ 121.11 [a]).

Contrary to defendant's contention, viewing the evidence in light of the elements of murder, manslaughter, and endangering the welfare of a child as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that we must reverse the murder conviction because County Court's instructions created the possibility that the jury convicted him based on a theory different from that set forth in the indictment, as limited by the bill of particulars. "A defendant has a right to be tried only for the crimes charged in the

indictment" (*People v Petersen*, 190 AD3d 769, 770 [2d Dept 2021], *lv denied* 36 NY3d 1123 [2021]). " 'Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories' " (*id.*). We agree with defendant that the People's theory of depraved indifference, as outlined in the bill of particulars, was limited to defendant's assaultive conduct, i.e., his infliction of head injuries by shaking or hitting the child, and that the court's instruction allowed the jury to consider, in addition to the specifically delineated assaultive conduct, defendant's "inaction" after the assault ended. Although defendant did not object to any trial testimony on the ground that it was outside the scope of the bill of particulars and, in fact, he gave testimony in his own defense regarding his post-assaultive conduct, defendant objected during the charge conference to a modification of the depraved indifference charge. The charge, as modified, allowed the jury to, inter alia, consider "the defendant's later inaction as a factor when considering the brutal, prolonged and ultimately fatal course of conduct," and defendant objected on the ground that such proof was outside the scope of the bill of particulars. We therefore modify the judgment by reversing that part convicting defendant of murder in the second degree, and we grant him a new trial on count one of the indictment (*see People v Grega*, 72 NY2d 489, 493, 498-500 [1988]; *People v Barber*, 155 AD3d 1543, 1544-1545 [4th Dept 2017]). Defendant did not preserve his related contention that the evidence is legally insufficient to support the murder conviction under the limited theory of depraved indifference alleged in the bill of particulars, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]).

Defendant failed to preserve for our review his further contention that the criminal obstruction of breathing or blood circulation count of the indictment was rendered duplicitous by evidence adduced at trial (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *Hursh*, 191 AD3d at 1454), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's related contention that he was denied effective assistance of counsel based on defense counsel's failure to object or move to dismiss the subject count of the indictment as duplicitous. "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to [make such a motion]" (*People v Rivera*, 71 NY2d 705, 709 [1988]). Here, we conclude that " 'defendant failed to meet that burden, and thus defense counsel's purported failure, without more, is insufficient to demonstrate ineffective assistance' " (*People v Graves*, 136 AD3d 1347, 1350 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]).

We further reject defendant's contention that the court abused its discretion in its *Molineux* ruling. It is well established that

"[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19 [2009]). Here, we conclude that such evidence was properly admitted inasmuch as it was relevant to defendant's intent, as well as to provide necessary background information, and the court did not abuse its discretion in determining that the probative value thereof outweighed the potential for prejudice (*see People v Hall*, 182 AD3d 1023, 1024 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020]).

Defendant failed to preserve his contention that he was denied a fair trial by certain evidentiary errors (*see* CPL 470.05 [2]), 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]). With one exception, defendant failed to preserve for our review his further contention that the prosecutor's conduct during cross-examination and opening and closing statements deprived him of a fair trial (*see* CPL 470.05 [2]). In any event, "[r]eversal on grounds of prosecutorial misconduct is mandated only when the conduct has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law" and, here, we conclude that any improprieties were "not so egregious as to deprive defendant of a fair trial" (*People v Lewis*, 177 AD3d 1351, 1354 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020], *reconsideration denied* 35 NY3d 971 [2020] [internal quotation marks omitted]).

We reject the contention of defendant that he was denied effective assistance of counsel by defense counsel's failure to object to the alleged evidentiary errors and prosecutorial misconduct. Inasmuch as defendant was not denied a fair trial by any alleged instances of prosecutorial misconduct, defense counsel's failure to object to those comments does not constitute ineffective assistance of counsel (*see People v Gaston*, 100 AD3d 1463, 1465 [4th Dept 2012]). 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]).

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

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

All concur except LINDLEY, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent in part. The majority concludes that the conviction of murder in the second degree (Penal Law § 125.25 [4]) must be reversed based on County Court's instructions that allowed the jury to consider a theory of prosecution different from that set forth in the indictment, as limited by the bill of particulars. I agree. As a remedy, the majority grants defendant a new trial on count one of the indictment, charging murder in the second degree. This is where the majority and I part ways. Instead of granting a new trial, I would dismiss that count of the indictment with prejudice on the ground that the evidence

at trial was legally insufficient to establish defendant's guilt under the theory set forth in the bill of particulars. I agree with the majority that defendant's remaining contentions do not warrant further modification or reversal of the judgment.

Where, as here, there is a "variance between the People's trial evidence and the indictment as amplified by the bill of particulars," we must determine whether the evidence was legally sufficient to support the charged theory (*see People v Bradley*, 154 AD3d 1279, 1281 [4th Dept 2017]). If the evidence is legally insufficient, of course, a retrial would be prohibited by the Double Jeopardy Clauses of the State and Federal Constitutions (*see Burks v United States*, 437 US 1, 18 [1978]; *Matter of Suarez v Byrne*, 10 NY3d 523, 532-533 [2008], *rearg denied* 11 NY3d 753 [2008]; *People v King*, 181 AD3d 1233, 1233 [4th Dept 2020], *lv denied* 35 NY3d 1027 [2020]).

Count one of the indictment charged defendant with depraved indifference murder of a person less than 11 years old under Penal Law § 125.25 (4). In his demand for a bill of particulars, defendant requested that the People specify "the substance of defendant's conduct encompassed by the charge" under count one, including the circumstances that "evinced the defendant's depraved indifference to human life." In response, the People stated in their bill of particulars that defendant, "while evincing a depraved indifference to human life, recklessly engaged in conduct including shaking the child, or slamming or throwing the child, who was less than 11 years old so as to impact the child's head on a surface or object causing subarachnoid hemorrhage, subdural hemorrhage and the ultimate death of the child." Notably, the bill of particulars did not allege any post-assault inaction by defendant.

At trial, however, evidence was introduced showing that the victim may not have immediately died as a result of the assault and that defendant left the victim alone in the apartment following the assault instead of seeking medical attention for him. During the charge conference, the prosecutor asked the court to instruct the jury that it could consider defendant's post-assault inaction as evidence of depraved indifference. Over defense counsel's objection, the court granted the prosecutor's request. For the reasons set forth by the majority, the court erred in allowing the People to broaden their theory of depraved indifference at trial.

The question becomes whether the evidence is legally sufficient to establish defendant's guilt under the narrow theory set forth in the bill of particulars, i.e., that the assault alone demonstrated the requisite mens rea. The majority does not address this question because defendant failed to preserve his sufficiency contention for our review. We have held, however, that "preservation is not required" for a sufficiency of the evidence contention in a change of theory context (*People v Duell*, 124 AD3d 1225, 1226 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015]; *see Bradley*, 154 AD3d at 1280).

That is so because, "[w]here the charge against a defendant is limited either by a bill of particulars or the indictment itself, the

defendant has a 'fundamental and *nonwaivable*' right to be tried only on the crimes charged" (*People v Hong Wu*, 81 AD3d 849, 849 [2d Dept 2011], *lv denied* 17 NY3d 796 [2011] [emphasis added]; *see generally People v Grega*, 72 NY2d 489, 495-496 [1988]), and the trial court is therefore " 'obliged to hold the prosecution to this narrower theory alone' " (*Duell*, 124 AD3d at 1227, quoting *People v Barnes*, 50 NY2d 375, 379 n 3 [1980]).

In any event, I note that no useful purpose would be served by applying the preservation requirement in this case inasmuch as, for the reasons set forth below, there was nothing the court or the People could have done to cure the deficiency in the proof identified by defendant on appeal.

With respect to the merits, defendant, relying on *People v Barboni* (21 NY3d 393 [2013]), contends that evidence of his assault upon the victim alone is insufficient to establish the existence of circumstances evincing a depraved indifference to human life, one of the mentes reae required for the commission of depraved indifference murder of a child. I agree. As the Court of Appeals explained in *Barboni*, to establish that element of the crime, "the People must show that, at the time the crime occurred, defendant had a mens rea of 'utter disregard for the value of human life' " (*id.* at 400, quoting *People v Suarez*, 6 NY3d 202, 214 [2005]; *see People v Feingold*, 7 NY3d 288, 296 [2006]). "Put simply, the People must prove that defendant did not care whether his victim lived or died" (*Barboni*, 21 NY3d at 400).

The defendant in *Barboni* "inflicted injuries on a 15-month-old child by striking or shaking the child so brutally as to cause four distinct skull fractures" (*id.* at 401). At trial, the People called an ocular pathologist who testified that, based on his postmortem examination of the child, there was a two-hour gap between the assault and the child's death. Another expert called by the People opined that the extensive bruising would have been recognizable within a half hour of the assault, and that the child "would have been in a substantial amount of pain and probably crying, screaming, or else 'lethargic' " (*id.* at 399). The defendant nevertheless did not seek medical assistance for the child during that two-hour period when the child was struggling to survive.

On appeal, the defendant argued that evidence that he assaulted the child was legally insufficient to establish that he acted with the requisite wanton indifference. The Court of Appeals did not disagree. The Court stated, however, that "the charge of depraved indifference murder here is comprised of more than the physical assault on the child; it also encompasses defendant's inaction for the two hours that elapsed between the injuries and death" (*id.* at 402). The Court added that, "[i]n light of the child's vulnerability and utter dependence on a caregiver, defendant's post-assault failure to treat the child or report his obvious injuries must be considered in assessing whether depraved indifference was shown" (*id.*).

Here, in contrast, due to the narrow theory relied upon by the People in their bill of particulars, we cannot consider evidence of defendant's alleged post-assault inaction in reviewing the sufficiency of the evidence. The People are therefore left with evidence of the assault itself, which cannot alone establish the requisite mens rea for depraved indifference murder of a child unless it occurred "over a prolonged or extended period of time," showing that defendant "had the opportunity to regret his actions and display caring, but failed to take the opportunity" (*id.* at 403).

Although the medical testimony and records establish that the victim suffered multiple injuries at the hands of defendant, there is no evidence establishing whether those injuries were inflicted rapidly in succession or, instead, whether they were inflicted over an extended period of time. It therefore follows that the evidence is legally insufficient to establish that defendant committed depraved indifference murder of a child under the theory set forth in the People's bill of particulars. I would thus modify the judgment by reversing that part convicting defendant of murder in the second degree and dismissing count one of the indictment, and otherwise affirm.

Ann Dillon Flynn

Entered: October 1, 2021

Clerk of the Court

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

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CA 20-00624

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

DUNN AUTO PARTS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM E. WELLS, DOING BUSINESS AS BILL'S AUTO WRECKING, DEFENDANT-APPELLANT.

TREVETT CRISTO, ROCHESTER (DAVID H. EALY OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (SARAH A. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (Henry J. Nowak, J.), entered September 3, 2019. The order, insofar as appealed from, granted that part of plaintiff's cross motion seeking summary judgment dismissing defendant's third counterclaim.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of plaintiff's cross motion seeking summary judgment dismissing the third counterclaim is denied, and that counterclaim is reinstated.

Memorandum: The parties entered into a contract for plaintiff to purchase defendant's property and automobile scrapping business for a set amount of money. Pursuant to the terms of the contract, defendant would continue to reside in a residence on the property and, for a period of "up to 6 months," would "maintain property taxes in lieu of rent." If defendant remained in the residence "for longer than the 6[-]month period, then [defendant] [would] be required to pay a monthly rent of $800.00 to [plaintiff]." The contract was silent with respect to who was required to pay the property taxes following the initial, six-month period. Inasmuch as no one paid the taxes for several years after the initial six-month period and defendant remained the titled owner of the property, defendant received a notice of foreclosure in December 2015. In an effort to avoid a tax auction, defendant paid the taxes and interest.

Aside from the property tax issue, there were other disputes between the parties, who never closed on the real estate transaction. Ultimately, plaintiff commenced this action seeking, inter alia, specific performance of the contract and damages. Defendant answered and asserted various counterclaims, including the third counterclaim, which sought reimbursement for the property taxes and interest paid by

defendant.

After defendant moved to compel certain discovery, plaintiff cross-moved for summary judgment in its favor on its five causes of action and dismissing certain counterclaims. Supreme Court granted plaintiff's cross motion to the extent that it sought dismissal of the first and third counterclaims. Defendant appeals from only that part of the order dismissing the third counterclaim. We agree with defendant that the court erred in dismissing the third counterclaim.

It is well settled that " '[i]nterpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument' " (*Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 [1986]; *see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The determination whether a contract is ambiguous "is an issue of law for the courts to decide" (*Greenfield*, 98 NY2d at 569; *see Ames v County of Monroe*, 162 AD3d 1724, 1725-1726 [4th Dept 2018]). "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' " (*Greenfield*, 98 NY2d at 569; *see Ames*, 162 AD3d at 1726). "A contract is ambiguous, however, when on its face it 'is reasonably susceptible of more than one interpretation' " (*Matter of Wilson*, 138 AD3d 1441, 1442 [4th Dept 2016], quoting *Chimart Assoc.*, 66 NY2d at 573).

We agree with defendant that the contractual provisions regarding who was obligated to maintain property taxes after the initial six-month period are ambiguous and cannot be resolved by the courts inasmuch as the " 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' " (*id.* at 1443).

Inasmuch as "a contract generally incorporates the state of the law in existence at the time of its formation" (*Travelers Indem. Co. v Orange & Rockland Utils., Inc.*, 73 AD3d 576, 577 [1st Dept 2010], *lv dismissed* 15 NY3d 834 [2010]), defendant, as the titled owner, would have been responsible for the property taxes, absent a contractual provision to the contrary. Here, however, the contract was not truly silent on the issue of property taxes. It specifically provided that defendant would pay property taxes in one situation but then failed to address who would pay the property taxes in another situation (*see generally Reiss v Financial Performance Corp.*, 279 AD2d 13, 21 [1st Dept 2000], *mod on other grounds* 97 NY2d 195 [2001]). Based on the maxim expressio unius est exclusio alterius, which applies to contracts as well as statutes (*see Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014]), "[w]here a [document] describes the particular situations in which it is to apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded" (*Village of Webster v Town of Webster*, 270 AD2d 910, 912 [4th Dept 2000], *lv dismissed in*

part and denied in part 95 NY2d 901 [2000] [internal quotation marks omitted]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 240; *Town of Aurora v Village of E. Aurora*, 32 NY3d 366, 372-373 [2018]). Inasmuch as the determination of the intent of the parties depends on a choice among reasonable inferences, we conclude that resolution of the third counterclaim should be left to a trier of fact. We therefore reverse the order insofar as appealed from and reinstate the third counterclaim.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

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CA 20-01168

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

LESLIE E. ALLIGOOD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN DOE, ET AL., DEFENDANTS,
AND LORETTA JOHNSON, DEFENDANT-RESPONDENT.

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

TREVETT CRISTO, ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered May 11, 2020. The order denied the motion of plaintiff to set aside a jury verdict.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when a vehicle in which she was a passenger flipped onto its roof after being struck by another vehicle. According to plaintiff, the other vehicle did not stop, and the driver of the other vehicle, defendant John Doe, was never identified. The police, however, found a license plate at the scene of the accident that was registered to a Saturn owned by Loretta Johnson (defendant). Plaintiff alleged in the complaint, inter alia, that John Doe was operating defendant's Saturn with her express or implied consent when he collided with the vehicle in which plaintiff was a passenger, causing plaintiff to sustain serious injuries and that defendant was vicariously liable pursuant to Vehicle and Traffic Law § 388. Following a bifurcated trial on liability, the jury concluded that, although defendant and John Doe (collectively, defendants) were negligent, such negligence was not a substantial factor in causing the accident. Plaintiff appeals from an order denying her posttrial motion to set aside the verdict as inconsistent, against the weight of the evidence, and not supported by legally sufficient evidence. We affirm.

Plaintiff contends that Supreme Court erred in denying her motion insofar as it sought to set aside the verdict as inconsistent because it was logically impossible for the jury to find that defendants were negligent without also finding that such negligence was a proximate cause of the accident. Plaintiff, however, failed to preserve that

contention for our review because she "did not object to the verdict on that ground before the jury was discharged" (*Delong v County of Chautauqua* [appeal No. 2], 71 AD3d 1580, 1581 [4th Dept 2010]; *see Schley v Steffans*, 79 AD3d 1753, 1753 [4th Dept 2010]).

We reject plaintiff's further contention that the court erred in denying the motion insofar as it sought to set aside the verdict on the ground that it is not supported by legally sufficient evidence. In order to find that a jury verdict is not supported by legally sufficient evidence, there must be "no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]), and that cannot be said here.

Plaintiff further contends that the verdict is against the weight of the evidence. "A verdict is not against the weight of the evidence merely because the jury finds a defendant negligent but determines that his or her negligence is not a proximate cause of the accident" (*Santillo v Thompson*, 71 AD3d 1587, 1588 [4th Dept 2010]; *see Furch v Klingler*, 173 AD3d 1672, 1672 [4th Dept 2019]). "A verdict finding that a defendant was negligent but that such negligence was not a proximate cause of the accident is against the weight of the evidence only when those issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Santillo*, 71 AD3d at 1588-1589 [internal quotation marks omitted]; *see Reid v Levy* [appeal No. 2], 148 AD3d 1800, 1801 [4th Dept 2017]), which is not the case here.

In conducting our weight of the evidence review, we are cognizant of the fact that the jury was asked to determine only whether defendants were negligent and whether their negligence was a substantial factor in causing the accident, and the jury was not asked to determine whether the negligence in question involved the use or operation of defendant's Saturn (*see Brown v Ng*, 163 AD3d 1464, 1465 [4th Dept 2018]; *cf. Monzon v Porter*, 173 AD3d 1779, 1780 [4th Dept 2019]). We conclude that, under these circumstances, there is a fair interpretation of the evidence supporting the jury's determination that defendant was negligent but that such negligence was not a proximate cause of the accident.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

401

CA 20-01249

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

RONALD BRADLEY, ALSO KNOWN AS RON BRADLEY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW PENN FINANCIAL, LLC, DOING BUSINESS AS
SHELLPOINT MORTGAGE SERVICING,
DEFENDANT-APPELLANT.

AKERMAN LLP, NEW YORK CITY (ERIC M. LEVINE OF COUNSEL), FOR DEFENDANT-APPELLANT.

WESTERN NEW YORK LAW CENTER, BUFFALO (KEISHA A. WILLIAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered September 23, 2020. The order denied defendant's motion for summary judgment and granted plaintiff's cross motion for summary judgment.

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

Memorandum: In 1999, plaintiff borrowed a sum of money from defendant's predecessor in interest and executed a note secured by a mortgage on property in the Town of Lewiston, Niagara County. In December 2009, defendant's predecessor in interest commenced a foreclosure action. In December 2017, defendant's predecessor in interest moved to voluntarily discontinue the foreclosure action. Plaintiff thereafter commenced this action, seeking cancellation and discharge of the mortgage on the ground that any action to enforce the note and foreclose on the mortgage would be time-barred. Defendant counterclaimed for unjust enrichment, based on taxes and insurance premiums it paid on the property. Defendant moved for summary judgment dismissing the complaint, and plaintiff cross-moved for summary judgment granting an order of quiet title and dismissing the counterclaim. Supreme Court denied defendant's motion and granted plaintiff's cross motion. We affirm.

A mortgage foreclosure action is subject to a six-year statute of limitations (*see* CPLR 213 [4]). Once the debt has been accelerated by a demand, the statute of limitations begins to run on the entire debt (*see Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]). Thus, the statute of limitations expired before defendant's

predecessor in interest voluntarily discontinued the foreclosure action.

Here, contrary to defendant's contention, the statute of limitations was not renewed upon discontinuation. A lender seeking to revoke acceleration "must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" (*U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1484 [4th Dept 2018] [internal quotation marks omitted]; *see U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1040 [4th Dept 2020]; *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068, 1069-1070 [2d Dept 2017]). Although the voluntary discontinuance constituted an affirmative act of revocation as a matter of law (*see Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 32 [2021], *rearg denied* 37 NY3d 926 [2021]), it occurred two years after the expiration of the statute of limitations.

Contrary to defendant's further contention, the statute of limitations was not renewed by payments plaintiff made as part of a conditional offer to modify the mortgage. The statute of limitations is renewed by partial payments made "under circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder" (*Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006] [internal quotation marks omitted]; *see* General Obligations Law § 17-107). Here, defendant failed to establish that the trial payments here satisfied that standard inasmuch as "any promise to pay the remainder of the debt that could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement" (*Nationstar Mtge., LLC v Dorsin*, 180 AD3d 1054, 1057 [2d Dept 2020]; *see Federal Natl. Mtge. Assn. v Jeanty*, 188 AD3d 827, 829-830 [2d Dept 2020]).

To the extent that *Wells Fargo Bank N.A. v Grover* (165 AD3d 1541 [3d Dept 2018]) held to the contrary, we disagree and decline to follow that decision. We note in any event that the borrower in *Grover* entered into a modification agreement with the lender pursuant to which he was to make three payments during a trial period. Here, in contrast, plaintiff never executed the proposed trial modification agreements offered to him by defendant.

Finally, we conclude that the court did not err in dismissing the counterclaim. It is well settled that "[t]he existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract or unjust enrichment for occurrences or transactions arising out of the same matter" (*Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017] [internal quotation marks omitted]; *see Town of Mexico v County of Oswego*, 175 AD3d 876, 877 [4th Dept 2019]). Because the disputed payments of taxes and insurance "fall entirely within the [mortgage] contract, there is no valid claim for unjust enrichment" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). Contrary to defendant's contention, the counterclaim did not state a cause of action for waste in addition to unjust enrichment. Moreover,

defendant never sought to amend the counterclaim to add a cause of action for waste, and instead sought to raise that new cause of action for the first time in opposition to the cross motion (*see generally Omar v Moore*, 171 AD3d 1533, 1534 [4th Dept 2019]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

403.1

KA 19-00733

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN P. MORANA, 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 amended order of the Monroe County Court (Stephen T. Miller, A.J.), entered February 5, 2019. The amended order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the amended order so appealed from is unanimously modified in the exercise of discretion by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the amended order is affirmed without costs.

Memorandum: On appeal from an amended order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that he is entitled to a downward departure because, inter alia, the assessment of points under risk factors three and seven (number of victims and relationship with victims, respectively) resulted in an overassessment of his risk. Although we do not believe that County Court abused its discretion in denying defendant's request for a downward departure, we exercise our own discretion to grant that request (*see generally People v Weatherley*, 41 AD3d 1238, 1238 [4th Dept 2007]; *People v Smith*, 30 AD3d 1070, 1071 [4th Dept 2006]), and we modify the amended order by determining that defendant is a level one risk.

Defendant was convicted upon a plea of guilty of possessing a sexual performance by a child under the age of 16 (Penal Law § 263.16), relating to his possession of "approximately 192 images of child pornography and erotica, as well as at least one video." In anticipation of a sentence of 10 years' probation, the Board of Examiners of Sex Offenders completed a risk assessment instrument that assessed defendant a risk factor score of 100 points, which made him a presumptive level two risk. That assessment included 30 points for

risk factor three, i.e., greater than three victims, and 20 points for risk factor seven, i.e., a stranger relationship with the victims.

As defendant recognizes, the court was authorized to impose points for those two factors (*see People v Gillotti*, 23 NY3d 841, 852-853 [2014]; *see also People v Johnson*, 11 NY3d 416, 418-420 [2008]; *People v Poole*, 90 AD3d 1550, 1550-1551 [4th Dept 2011]). He nevertheless contends that, under the authority of *Gillotti*, the court should have granted a downward departure because the assessment of points under those risk factors resulted in an overassessment of risk under the circumstances of this case (*see Gillotti*, 23 NY3d at 863; *see also People v Gonzalez*, 189 AD3d 509, 510-511 [1st Dept 2020]). We reject that contention inasmuch as defendant failed to establish by a preponderance of the evidence that the court's assessment of points for risk factors three and seven resulted in an overassessment of his risk (*cf. Gonzalez*, 189 AD3d at 510-511; *see generally Gillotti*, 23 NY3d at 861).

We agree with defendant, however, that he established by a preponderance of the evidence that there are other mitigating factors that were "not otherwise adequately taken into account by the guidelines" (*People v Santiago*, 20 AD3d 885, 886 [4th Dept 2005] [internal quotation marks omitted]; *see People v Kearns*, 68 AD3d 1713, 1714 [4th Dept 2009]). Defendant established that he suffered from a rare, congenital disease that resulted in significant disfigurement and medical issues, requiring numerous surgeries throughout his life. Defendant was bullied as a child, primarily due to his disfigurement and, as a result, was socially isolated, having no significant peer relationships. Defendant has only one prior crime on his record, a misdemeanor for which he was referred to Mental Health Court, and, in the case at hand, the court sentenced him to probation pursuant to the People's recommendation, thus indicating that defendant does not pose a significant threat to the community. We also note that defendant will be under supervision by the Probation Department for 10 years.

As a result of the depression and related mental health issues that flowed from such a difficult childhood, defendant turned to alcohol and drugs, some of which had been properly prescribed to him following many of his surgeries. Defendant's use of child pornography generally occurred while he was under the influence of drugs. Inasmuch as defendant was sentenced to a 10-year term of probation, which would ensure that he continued to participate in all of his treatment programs, we conclude that, in light of the totality of the circumstances, a downward departure to risk level one is warranted in the exercise of our discretion (*see generally Gillotti*, 23 NY3d at 861).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

403

CA 20-01069

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

KATHARINE NOGA, AS PRELIMINARY EXECUTRIX OF THE ESTATE OF GEORGE NOGA, ALSO KNOWN AS GEORGE S. NOGA, SR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BROTHERS OF MERCY NURSING & REHABILITATION CENTER AND BROTHERS OF MERCY NURSING HOME COMPANY, INC., DEFENDANTS-APPELLANTS.

VAHEY GETZ LLP, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI, LLP, BUFFALO (NICOLE T.C. MARQUES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 18, 2020. The order granted the motion of plaintiff for leave to reargue and, upon reargument, denied the motion of defendants for summary judgment and reversed the prior order dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendants' motion for summary judgment in part and dismissing the complaint except to the extent that the complaint, as amplified by the bill of particulars, alleges failure to provide proper supervision and failure to follow and to revise the decedent's care plan, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as executrix of the estate of her father (decedent), commenced this action seeking damages for the decedent's physical injuries and ultimate death, alleging that they were caused by, inter alia, defendants' negligence. The decedent was a double amputee with end-stage renal failure when he resided at a nursing home owned and operated by defendants. While the decedent was unsupervised, he fell out of his wheelchair and sustained a fracture to his left shoulder. Two days later, he died.

Following discovery, defendants moved for summary judgment dismissing the complaint on the ground that they were not negligent as a matter of law. Supreme Court granted the motion in its entirety, and plaintiff made a motion for leave to reargue. Upon granting plaintiff's motion for leave to reargue, the court reversed its prior

order and denied defendants' motion for summary judgment in its entirety, reinstating the complaint. We now modify the order on appeal by granting defendants' motion in part and dismissing the complaint except to the extent that the complaint, as amplified by the bill of particulars, alleges failure to provide proper supervision and failure to follow and to revise the decedent's care plan, and we otherwise affirm.

As an initial matter, we reject defendants' contention that the court improperly reversed its own order sua sponte. It was within the court's power to reverse its prior order upon plaintiff's motion for leave to reargue on the ground that the court misapprehended the facts and the law in determining defendants' motion (*see* CPLR 2221 [d] [2]; *Luppino v Mosey*, 103 AD3d 1117, 1118 [4th Dept 2013]; *cf. Merriwether v Osborne*, 66 AD3d 851, 852 [2d Dept 2009]). We likewise reject defendants' contention that the court abused its discretion in granting plaintiff's motion for leave to reargue. Plaintiff made a sufficient showing that the court overlooked a controlling principle of law by establishing that the parties submitted conflicting testimony from expert witnesses, thereby creating " 'a credibility battle . . . properly left to a jury for its resolution' " (*Federczyk v Garden Gate Health Care Facility*, 162 AD3d 1588, 1589 [4th Dept 2018]).

We agree with defendants, however, that the complaint, as amplified by the bill of particulars, alleges several claims sounding in medical malpractice, and that the summary judgment standard for medical malpractice claims should apply to those claims. Specifically, plaintiff alleges that defendants failed to "provide proper services to the decedent[,] . . . provide . . . adequate . . . staff[ing,] . . . change and/or adjust the decedent's care plan . . . [, and] adequately formulate and/or promulgate a care plan in accordance with a comprehensive assessment[]," all of which sound in medical malpractice because they challenge defendants' assessment of the decedent's need for supervision (*see Carthon v Buffalo Gen. Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 1405 [4th Dept 2011]; *Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967 [4th Dept 1994]). With respect to the medical malpractice claims, we agree with defendants that they met their initial burden on their motion by submitting the affirmation of an expert physician, who opined that defendants did not deviate from the accepted standard of care in the treatment and assessment of the decedent, and that the alleged negligence did not cause the decedent's injuries or death (*see Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]). We nevertheless conclude that plaintiff raised a triable issue of fact in opposition by submitting the affidavit of her own expert, who opined that defendants deviated from the standard of care insofar as they did not amend the decedent's care plan to require greater supervision after he was noted to be experiencing confusion and delirium, and that such deviation proximately caused the decedent's fall (*see Hranek v United Methodist Homes of Wyo. Conference*, 27 AD3d 879, 881 [3d Dept 2006]). Plaintiff's expert did not, however, address the claims regarding inadequate staffing procedures and training, and those claims are accordingly deemed

abandoned (*see Pasek*, 186 AD3d at 1036). Consequently, we conclude that the court should have granted defendants' motion with respect to plaintiff's claims sounding in medical malpractice except for such claims regarding the failure to provide proper supervision and the failure to revise the decedent's plan of care in light of his deteriorating mental state.

We conclude that plaintiff's claims that defendants were negligent in failing to follow the care plan and to equip the decedent's wheelchair with a seatbelt sound in ordinary negligence inasmuch as they relate to defendants' general duty to safeguard the nursing home's residents, measured by "the capacity of [a resident] to provide for his or her own safety" (*Schnorr v Emeritus Corp.*, 118 AD3d 1307, 1307 [4th Dept 2014] [internal quotation marks omitted]) and "the [resident's] physical and mental ailments known to the [agency's] officials . . . and employees" (*Smart v Rivet*, 126 AD3d 1474, 1475 [4th Dept 2015] [internal quotation marks omitted]). Thus, with respect to those claims, defendants on their motion for summary judgment had the "burden of establishing that [they] exercised reasonable care and diligence in providing for the safety of [the] decedent and thus [were] not negligent as a matter of law" (*Edson v Community Gen. Hosp. of Greater Syracuse*, 289 AD2d 973, 974 [4th Dept 2001]). Defendants met that burden with respect to the claim alleging negligence in failing to equip the decedent's wheelchair with a seatbelt by submitting evidence that they formulated a plan of care that addressed the decedent's risk of falling, and that a restrictive lap belt was not used in their facility. Plaintiff failed to raise a triable issue of fact in opposition with respect to that claim inasmuch as plaintiff's expert failed to opine how a nonrestrictive lap belt would have prevented the subject accident (*cf. Warley v Grampp*, 107 AD3d 1111, 1114 [3d Dept 2013]).

With respect to the claim alleging negligence in failing to follow the decedent's care plan, we conclude that defendants failed to meet their initial burden on their motion of establishing that they followed the care plan, inasmuch as their own papers indicated that the decedent was left unsupervised for 10 minutes longer than permitted by his care plan (*cf. Carthon*, 83 AD3d at 1405). Thus, we conclude that the court should have granted defendants' motion with respect to the claim alleging negligence in failing to equip the decedent's wheelchair with a seatbelt, but that the court did not err in denying defendants' motion with respect to the claim alleging negligence in failing to follow the care plan.

Finally, with respect to plaintiff's Public Health Law claims, we conclude that defendants met their initial burden on their motion, and plaintiff failed to raise an issue of fact in opposition (*see* Public Health Law § 2801-d [1]; *Gold v Park Ave. Extended Care Ctr. Corp.*, 90 AD3d 833, 834 [2d Dept 2011]). Thus, the court should have granted defendants' motion with respect to those claims.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

529

CA 20-01694

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

HANNA G. MANSOUR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PADDOCK CHEVROLET, INC., DEFENDANT-APPELLANT,
KENT P. NEUBECK, DEFENDANT-RESPONDENT,
AND SANTINO C. LOCOCO, DEFENDANT.

THE TARANTINO LAW FIRM, LLP, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (KRISTIN A. TISCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered December 10, 2020. The order denied the motion of defendant Paddock Chevrolet, Inc. to dismiss the amended complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Paddock Chevrolet, Inc. in part and dismissing the amended complaint against it, and converting all cross claims by and against Paddock Chevrolet, Inc. into third-party complaints, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that he allegedly sustained when the vehicle in which he was a passenger, which was owned by defendant Paddock Chevrolet, Inc. (Paddock) and operated by defendant Kent P. Neubeck, collided with a vehicle owned and operated by defendant Santino C. Lococo. At the time of the accident, plaintiff was employed by Paddock as a car salesman who was accompanying Neubeck as he was test-driving the vehicle, and plaintiff applied for and received workers' compensation benefits following the accident. In their answers, both Neubeck and Lococo asserted cross claims against Paddock and each other for contribution and indemnification.

Paddock moved pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint and all cross claims asserted against it on the ground that they were barred under Workers' Compensation Law § 11.

Supreme Court denied the motion without prejudice to renew at the close of discovery. We agree with Paddock that the court erred in denying that part of its motion seeking dismissal of the amended complaint against it, but we conclude that the court properly denied the motion with respect to the cross claims inasmuch as it would be premature to determine the merits of the cross claims at this juncture. We therefore modify the order accordingly.

Aside from an exception not relevant here, Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by [section 10] shall be exclusive and in place of any other liability whatsoever, to such employee, . . . or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . ." We thus agree with Paddock that plaintiff's claims against it are barred.

Paddock correctly contends that New York has rejected the "dual capacity" doctrine (*see generally Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 158-159 [1980], *rearg denied* 52 NY2d 829 [1980]; *Falzon v Brown*, 282 AD2d 498, 499 [2d Dept 2001]), rendering it irrelevant whether the amended complaint and cross claims asserted against Paddock were based on its status as plaintiff's employer or its status as the owner of the vehicle who is vicariously liable for the negligence of a nonemployee driver under Vehicle and Traffic Law § 388 (*see e.g. Szumowski v PV Holding Corp.*, 90 AD3d 415, 415 [1st Dept 2011]; *Testerman v Zielinski*, 68 AD3d 1751, 1752 [4th Dept 2009]; *cf. Preston v APCH, Inc.*, 89 AD3d 65, 72-73 [4th Dept 2011]).

We likewise agree with Paddock that any allegation of an affirmative act of negligence by Paddock, e.g., that it failed to maintain the vehicle properly, does not render the amended complaint and cross claims viable. Such a contention does not apply where, as here, the party being sued is the party that is actually immune from suit pursuant to Workers' Compensation Law § 11. The cases wherein actions are permitted against owners of vehicles for their affirmative acts of negligence are cases in which the owners are third parties, i.e., the owners are not the employers of either the injured party or the operator of the vehicle, and their immunity from *vicarious* liability is based on the fact that the negligent operator of the vehicle was a co-employee of the injured party (*see* Workers' Compensation Law § 29 [6]; *see generally Isabella v Hallock*, 22 NY3d 788, 794-797 [2014]). "It is well settled that while Workers' Compensation Law § 29 (6) precludes suit against a fellow employee based on his [or her] negligence, it is not a bar to an action against a *third-party owner* based upon the owner's affirmative negligence toward the injured employee" (*Chiriboga v Ebrahimoff*, 281 AD2d 353, 354 [1st Dept 2001] [emphasis added]; *see Rascoe v Riteway Rentals*, 176 AD2d 552, 552 [1st Dept 1991]).

Although plaintiff's action against Paddock is barred by the provisions of Workers' Compensation Law § 11, we reject Paddock's contention that the cross claims asserted against it by Neubeck and Lococo fail to state a cause of action. "As amended by the

legislature in 1996, . . . section 11[, as relevant here,] now explicitly limits an employer's exposure to third-party liability to those situations where the employee suffers a grave injury" (*New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501, 510 [2014]). Inasmuch as there has been no discovery on the nature and degree of plaintiff's injuries, we cannot conclude that the cross claims fail to state a cause of action against Paddock.

Nevertheless, we conclude that all cross claims by and against Paddock should be converted to third-party complaints (*see Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 682 [2d Dept 1984]; *Javitz v Slatus*, 93 AD2d 830, 831 [2d Dept 1983]; *see also Schilling v Malark*, 13 AD3d 1153, 1153 [4th Dept 2004]), and we therefore further modify the order accordingly. Due to the fact that Paddock has been a party since the commencement of this action, no purpose would be served by compelling the remaining defendants to formally implead Paddock as a third-party defendant, nor by compelling Paddock to protect its claims against the other defendants by serving a third-party complaint (*see Cusick*, 105 AD2d at 682; *Javitz*, 93 AD2d at 831).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

569

CA 20-01635

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

MAXIMUM INCOME PARTNERS, INC., AND WEBBER ENTERPRISES, INC., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DANIEL G. SCHUM, DOING BUSINESS AS KENNEDY AND SCHUM, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHULMAN BHATTACHARYA, LLC, ROCHESTER (JEFFREY S. GAVENMAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 16, 2020. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the complaint with respect to plaintiff Maximum Income Partners, Inc., and as modified the order is affirmed without costs.

Memorandum: In 2013, plaintiff Webber Enterprises, Inc. (Webber) purchased three pieces of property (subject properties) from nonparty Homestead NY Properties, Inc. (Homestead). Defendant is an attorney who represented Homestead in that transaction. The subject properties, as well as numerous other properties owned by Homestead, were encumbered by a lien held by a third party. At the closing for the subject properties, defendant executed a guaranty providing that the lien would be released. It is undisputed that no lien release was ever recorded for the subject properties, and we previously affirmed an order concluding that a subsequent agreement did not serve to release the lien on those properties (*Maximum Income Partners, Inc. v Webber* [appeal No. 1], 158 AD3d 1090, 1090 [4th Dept 2018], *affg* 58 Misc 3d 1218[A], 2016 NY Slip Op 51903[U] [Sup Ct, Monroe County 2016]).

Webber subsequently obtained a loan from plaintiff Maximum Income Partners, Inc. (Maximum) secured by a mortgage on the subject properties. Webber defaulted on the loan and, on February 18, 2015, Webber delivered a deed in lieu of foreclosure for the subject properties to Maximum. Thereafter, the lienholder levied on the subject properties, which were then sold to Maximum at a sheriff's

auction to satisfy the lien. Plaintiffs commenced this action to recover damages resulting from defendant's failure to secure a release of the lien. Defendant moved for summary judgment dismissing the complaint, contending that he owed no duty to Maximum and that Webber suffered no damages. Supreme Court denied the motion.

We agree with defendant that the court erred in denying that part of his motion with respect to the breach of contract claims asserted by Maximum, and we therefore modify the order accordingly. Maximum was neither a party to the guaranty in question nor an intended third-party beneficiary of it. At the time of the guaranty, Maximum had no involvement with the subject properties, and nothing in the guaranty indicated an "assumption by the contracting parties of a duty to compensate" Maximum in the event of a breach (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] [internal quotation marks omitted]; *cf*. *Town of W. Seneca v Kideney Architects, P.C.*, 187 AD3d 1509, 1511 [4th Dept 2020]). Thus, there is no basis for holding defendant liable to Maximum based on his breach of the guaranty to Webber.

We further conclude, however, that the court properly denied that part of defendant's motion with respect to the claims asserted by Webber. There is no dispute that defendant failed to perform under the guaranty and, even assuming, arguendo, that Webber will not incur monetary damages as a result of that failure, we conclude that Webber is entitled to pursue an award of nominal damages, which "are always available in breach of contract actions" (*Kronos, Inc. v AVX Corp*., 81 NY2d 90, 95 [1993]; *see Ely–Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

599

CA 20-01537

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

UNIVERSITY SQUARE SAN ANTONIO, TX. LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MEGA FURNITURE DEZAVALA, LLC, AND MEGA
FURNITURE & ACCESSORIES, LLC,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered December 31, 2020. The judgment awarded money damages to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the affirmative defenses are reinstated, and the cross motion is granted.

Memorandum: Plaintiff commenced this action seeking damages for breach of a commercial lease agreement with defendant Mega Furniture Dezavala, LLC (tenant) and enforcement of the lease guarantee executed by defendant Mega Furniture & Accessories, LLC. Amid the COVID-19 pandemic and governmental restrictions executed in response thereto, the tenant closed its furniture store, stopped making lease payments and abandoned the premises. Thereafter, plaintiff reentered, re-keyed, and retained possession thereof. Plaintiff moved for summary judgment on its complaint and dismissing defendants' affirmative defenses, and defendants cross-moved to compel further discovery seeking information relating to plaintiff's conduct upon reentry of the premises and any actions taken to mitigate damages. Supreme Court issued an order that granted the motion in its entirety and denied the cross motion, and defendants filed a notice of appeal from that order. We note that a final judgment has been entered in this matter, and we exercise our discretion to treat the notice of appeal as valid and deem the appeal to be taken from the judgment instead of the order (*see* CPLR 5520 [c]; *Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *see generally Thornton v City of Rochester*, 160 AD3d 1446, 1446 [4th Dept 2018]).

We agree with defendants that the court erred in denying their cross motion and granting plaintiff's motion inasmuch as defendants established that "facts essential to justify opposition [to plaintiff's motion] may exist but cannot . . . be stated" without further discovery (CPLR 3212 [f]). Generally, a tenant is relieved of its obligation to pay full rent due under a lease where it surrenders the premises before expiration of the term and the landlord accepts its surrender (*see Centurian Dev. v Kenford Co.*, 60 AD2d 96, 100 [4th Dept 1977]). A surrender by operation of law may be inferred from the conduct of the parties where "the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem their lease terminated" (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691-692 [1986]; *see Centurian Dev.*, 60 AD2d at 100), i.e., where the tenant vacates the premises and returns the keys, and the landlord procures a new tenant (*see Underhill v Collins*, 132 NY 269, 271 [1892]). "Such a surrender and acceptance severs the relationship between the parties upon the creation of an estate inconsistent with the prior tenant's rights under the lease" (*Nicholas A. Cutaia, Inc. v Buyer's Bazaar*, 224 AD2d 952, 954 [4th Dept 1996]). Further, "conduct by the landlord which [falls] short of an actual reletting but which indicate[s] the landlord's intent to terminate the lease and use the premises for his [or her] own benefit" may evince an intent to accept a tenant's surrender of the premises (*Centurian Dev.*, 60 AD2d at 100). "Whether a surrender by operation of law has occurred is a determination to be made on the facts" (*Riverside Research Inst.*, 68 NY2d at 692). Only where the pertinent facts are not in dispute should the determination be made as a matter of law (*see Brock Enters. v Dunham's Bay Boat Co.*, 292 AD2d 681, 683 [3d Dept 2002]).

Here, we conclude that because plaintiff did not respond to the request for production of documents with respect to mitigating damages, or to defendants' notice of deposition, the record lacks evidence relating to plaintiff's conduct upon gaining possession of the premises. While plaintiff's agent averred in plaintiff's reply papers that plaintiff had not relet the premises, that fact alone is not dispositive on the issue whether plaintiff accepted the tenant's surrender of the premises (*see Centurian Dev.*, 60 AD2d at 100), nor is plaintiff's initial refusal to accept surrender (*see Gray v Kaufman Dairy & Ice Cream Co.*, 162 NY 388, 389, 398 [1900]).

Further, while plaintiff had no duty to mitigate damages (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 134 [1995]), any actions it may have taken to offset the rent owed by defendants are relevant to determining the amount of damages (*see Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 174 AD3d 1420, 1423 [4th Dept 2019]; *Clearview Farms LLC v Fannon*, 145 AD3d 1556, 1556-1557 [4th Dept 2016]). Thus, contrary to plaintiff's contention in its opposition to defendants' cross motion, the discovery sought by defendants is relevant to the issues presented in plaintiff's motion for summary judgment (*see generally* CPLR 3101 [a]). Additionally, because plaintiff seeks accelerated rent constituting liquidated damages (*see Trustees of Columbia Univ. in the City of N.Y. v D'Agostino*

Supermarkets, Inc., 36 NY3d 69, 74 n 3 [2020]; *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 535-536 [2014]), defendants should have been afforded an opportunity to obtain information regarding whether the undiscounted accelerated rent amount was disproportionate to plaintiffs's actual losses and thus an enforceable penalty (*see generally 172 Van Duzer Realty Corp.*, 24 NY3d at 537; *Clearview Farms LLC*, 145 AD3d at 1556-1557). We therefore conclude that the court abused its discretion in denying defendants' cross motion to compel inasmuch as the disclosure sought was " 'material and necessary' " to opposing plaintiff's motion (*Buffamante Whipple Buttafaro, Certified Public Accountants, P.C. v Dawson*, 118 AD3d 1283, 1284 [4th Dept 2014], quoting CPLR 3101 [a]), and we likewise conclude that the court erred in granting plaintiff's motion for summary judgment (*see* CPLR 3212 [f]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

620

CA 21-00114

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

SUSAN GAINES AND ROBERT GAINES,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

KENNETH I. BRYDGES, D.O., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (MATTHEW B. SCHUTTE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GATTUSO & CIOTOLI, PLLC, FAYETTEVILLE (FRANK S. GATTUSO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered July 14, 2020. The order, insofar as appealed from, denied that part of the motion of defendant Kenneth I. Brydges, D.O. seeking summary judgment dismissing plaintiffs' claim for punitive damages.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking summary judgment dismissing the claim for punitive damages is granted.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Susan Gaines (plaintiff) when, among other things, Kenneth I. Brydges, D.O. (defendant) allegedly failed to properly treat plaintiff's abdominal skin condition during her hospitalization in an emergency department. Defendant appeals, as limited by his brief, from that part of an order denying his motion insofar as it sought summary judgment dismissing the claim for punitive damages against him. We agree with defendant that Supreme Court should have granted that part of his motion seeking summary judgment dismissing the punitive damages claim.

"Because the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013], *rearg denied* 21 NY3d 976 [2013] [internal quotation marks omitted]; *see Dupree v Giugliano*, 20 NY3d

921, 924 [2012], *rearg denied* 20 NY3d 1045 [2013]). Thus, "[t]he standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty" (*Dupree*, 20 NY3d at 924).

Here, defendant met his initial burden on the motion. Defendant's deposition testimony and his affidavit submitted in support of the motion established that, while he had not "actively" treated plaintiff's abdominal wound during her hospitalization, given his focus on plaintiff's other conditions, he had visualized that wound and had treated it conservatively with dressings and antibiotic ointment. Defendant subsequently reexamined plaintiff's abdominal skin condition and continued the same treatment. Defendant explained that he initiated conservative treatment because, given plaintiff's other conditions, it was appropriate to address plaintiff's abdominal skin condition by attempting to alleviate her inflammatory process before considering surgical intervention. Defendant's submissions established that, contrary to plaintiffs' allegations, he had indeed treated plaintiff's abdominal skin condition, albeit conservatively as he deemed appropriate under the circumstances, and that he had not abandoned plaintiff's treatment in that regard (*cf. Graham v Columbia Presbyt. Med. Ctr.*, 185 AD2d 753, 754-756 [1st Dept 1992]). We conclude that, even viewing the evidence in the light most favorable to plaintiffs, defendant established that his conduct "did not manifest spite or malice, or a fraudulent or evil motive . . . , or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*DiNiro v Aspen Athletic Club, LLC*, 173 AD3d 1789, 1790 [4th Dept 2019] [internal quotation marks omitted]; *see Cleveland v Perry*, 175 AD3d 1017, 1020 [4th Dept 2019]; *see generally Marinaccio*, 20 NY3d at 511). We further conclude that plaintiffs failed to raise a triable issue of fact (*see DiNiro*, 173 AD3d at 1790; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

632

CA 20-00980

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

HELEN A. MARSHALL, NOW KNOWN AS HELEN BRADLEY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JERRY MARSHALL, DEFENDANT-RESPONDENT.

ANGELO T. CALLERI, P.C., ROCHESTER (ANGELO T. CALLERI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Cynthia Snodgrass, R.), dated January 2, 2020. The order denied the motion of plaintiff seeking, among other things, to "correct" a judgment of divorce.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs, defendant is awarded pursuant to 22 NYCRR 130-1.1 costs in the form of reimbursement by Angelo T. Calleri for actual expenses reasonably incurred and reasonable attorney's fees and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Plaintiff appeals from an order that, inter alia, denied her motion seeking, among other things, to "correct" the parties' judgment of divorce by increasing the amount of defendant's spousal maintenance payments and to vacate the judgment pursuant to CPLR 5015 (a) (1) insofar as the judgment denied her application for attorney's fees. The judgment was entered January 5, 2018; plaintiff did not appeal therefrom. Instead, on July 24, 2019, she filed her motion, by amended order to show cause, described above.

Contrary to plaintiff's contention, Supreme Court properly refused to "correct" the judgment as to the amount of defendant's maintenance payments. The relief that plaintiff seeks cannot be obtained under the sections of the CPLR upon which she relies, i.e., CPLR 2001 or 5019 (a). Under CPLR 2001, a court may disregard a party's error, such as a clerical error, "if a substantial right of a party is not prejudiced" (*id.*; *see Matter of Tagliaferri v Weiler*, 1 NY3d 605, 606 [2004]). Similarly, the types of mistakes correctable under CPLR 5019 (a) are "mere ministerial ones, not those involving new exercises of discretion or a further turn of the fact-finding wheel" (Siegel & Connors, NY Prac § 420 [6th ed 2018]; *see Meenan v*

Meenan, 103 AD3d 1277, 1278-1279 [4th Dept 2013]).

Contrary to plaintiff's further contention, the court properly denied that part of her motion seeking relief based on excusable default (*see* CPLR 5015 [a] [1]). CPLR 5015 (a) (1) relief is unavailable where, as here, there was no default. The record establishes that the denial of plaintiff's application for an award of attorney's fees was based not on a default, but on the court's discretionary assessment after a three-day trial that the proof in the trial record did not support such an award. We likewise reject plaintiff's request that we impose sanctions on defendant.

Finally, we consider defendant's request for costs, attorney's fees, and sanctions pursuant to 22 NYCRR 130-1.1. We grant defendant's request in part and award costs in the form of reimbursement by plaintiff's attorney, Angelo T. Calleri, for actual expenses reasonably incurred and reasonable attorney's fees resulting from the frivolous conduct of Calleri in prosecuting this appeal (*see* 22 NYCRR 130-1.1 [a], [b]; *Sonkin v Sonkin*, 157 AD3d 414, 415 [1st Dept 2018], *lv denied* 32 NY3d 904 [2018]), and we remit the matter to Supreme Court to determine such amount (*see Heilbut v Heilbut*, 18 AD3d 1, 9 [1st Dept 2005]). "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). We conclude that Calleri's appellate brief is replete with arguments that qualify as frivolous under the first paragraph of subdivision (c). Indeed, plaintiff's frivolous request that we impose sanctions against defendant by itself qualifies as frivolous conduct (*see id.*).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

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KA 18-01895

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEWODROS MINWALKULET, ALSO KNOWN AS TEWODROS BEYENE, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Frederick G. Reed, A.J.), rendered June 19, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, criminal sale of a controlled substance in the fifth degree, criminal sale of marihuana in the third degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and endangering the welfare of a child (§ 260.10 [1]). We affirm.

In early 2002, defendant sold drugs, including cocaine, ecstasy, and methamphetamine, to an undercover officer of the New York State Police Department (State Police). After several such transactions had taken place, the undercover officer contacted defendant and arranged to meet him in a parking lot in Ontario County for the purpose of buying two “eight balls” of cocaine. When defendant arrived at that location, officers removed him from the front seat of his car and placed him under arrest. The arresting officer recovered cocaine from defendant’s coat pocket and observed defendant’s young child in the back seat of the car. Defendant was subsequently indicted and arraigned in Ontario County. On June 8, 2002, he was released on his own recognizance, and absconded. State Police investigators were unable to locate defendant despite searching for him for the next 14 years. On May 15, 2016, defendant was arrested in Pennsylvania. The next day, defendant’s whereabouts in Pennsylvania became known to the

Monroe County Sheriff's Department. The authorities in that county commenced proceedings to extradite defendant to face charges unrelated to those at issue here; defendant waived extradition. The State Police learned of defendant's whereabouts over six months later after performing a search of a national law enforcement database. On November 22, 2016, the State Police informed the Ontario County District Attorney's office of defendant's location in Pennsylvania, and defendant was returned to Ontario County on March 20, 2017.

Contrary to defendant's contention, County Court properly denied his motion to dismiss the indictment on statutory speedy trial grounds. The People do not dispute that defendant met his initial burden "of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]; *see* CPL 30.30 [1] [a]; *People v Anderson*, 188 AD3d 1699, 1699 [4th Dept 2020], *lv denied* 36 NY3d 1055 [2021]), thereby shifting the burden to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]; *see Anderson*, 188 AD3d at 1699). Because defendant was charged with a felony, the People were permitted no more than six months of delay (*see* CPL 30.30 [1] [a]).

With respect to the period of time from defendant's March 22, 2002 arrest until his June 8, 2002 release, the People correctly concede that 54 days are chargeable to them, and defendant has abandoned any contention that any additional days are chargeable to the People.

The People contend that the period from June 8, 2002, until November 22, 2016, is excludable because defendant's location was unknown to them and he was attempting to avoid apprehension or prosecution (*see* CPL 30.30 [4] [c] [i]). It is well established that "[t]he People need not exercise due diligence in attempting to locate a defendant who is attempting to avoid apprehension or prosecution" (*People v Torres*, 88 NY2d 928, 931 [1996]). Moreover, knowledge of a defendant's location may not be imputed from one governmental entity to another; a defendant's location is unknown unless it is "*actually*" known to the People (*People v Sigismundi*, 89 NY2d 587, 592 [1997]). The People, however, failed to preserve that contention for our review because they failed to raise it before County Court (*see People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]), and therefore this Court has no power to review it (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]).

Because the question whether defendant was attempting to avoid apprehension or prosecution is not properly before us, "the issue [here] is whether law enforcement acted with due diligence in attempting to locate him" (*Anderson*, 188 AD3d at 1700; *cf. Torres*, 88 NY2d at 930-931). Contrary to defendant's contention, we conclude that the People established that the State Police acted with due diligence (*see Anderson*, 188 AD3d at 1700; *People v Petrianni*, 24 AD3d 1224, 1224-1225 [4th Dept 2005]). Specifically, the State Police investigators routinely checked law enforcement databases and social media, investigated addresses formerly associated with defendant,

sought information about defendant's whereabouts from the FBI and the authorities in Canada, and interviewed defendant's wife and mother-in-law. In 2011, the investigation yielded photographic evidence that corroborated assertions that defendant had fled to his native Ethiopia. Nevertheless, the State Police continued to search for defendant. They repeatedly checked the same law enforcement databases and social media, contacted local police in Massachusetts and motor vehicle departments in Massachusetts and Florida after receiving information connecting defendant to those states, and put defendant's photograph in the newspaper, listing him as a person who was wanted by the police on felony charges. Eventually, a search of a law enforcement database yielded information that defendant had been jailed in Pennsylvania. Although it is true that the People would have learned of defendant's location more quickly if they had performed more frequent searches of the database, defendant had been on the run for 14 years, and " 'the police are not obliged to search for a defendant indefinitely as long as they exhaust all reasonable investigative leads as to his [or her] whereabouts' " (*Petrianni*, 24 AD3d at 1224). Under the circumstances, the actions of the State Police "constituted due diligence, notwithstanding the fact that greater efforts could have been undertaken" (*People v Grey*, 259 AD2d 246, 249 [3d Dept 1999], *lv denied* 94 NY2d 880 [2000]; *see Anderson*, 188 AD3d at 1700-1701).

Even if we assume, arguendo, that the four-month period from November 22, 2016, until March 20, 2017, is also chargeable to the People, defendant's speedy trial rights were not violated because that period, in addition to the 54 days conceded above, does not exceed six months (*see* CPL 30.30 [1] [a]).

Defendant further contends that the People violated his constitutional speedy trial rights. Initially, we note that defendant " 'moved to dismiss the indictment on statutory speedy trial grounds only and thus failed to preserve for our review his present contention that he was denied his constitutional right to a speedy trial' " (*People v Schillawski*, 124 AD3d 1372, 1373 [4th Dept 2015], *lv denied* 25 NY3d 1207 [2015]). In any event, his contention lacks merit. The factors we consider are "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445 [1975]). Although the delay was extensive, most of it is directly attributable to defendant because he absconded from the jurisdiction, fleeing the state and possibly even to a different country, thereby preventing the People from locating him (*see People v Lara*, 165 AD3d 563, 563 [1st Dept 2018], *lv denied* 32 NY3d 1206 [2019]; *see generally People v Williams*, 78 AD3d 160, 166 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]). The extent of defendant's pretrial incarceration was relatively brief and he "enjoyed significant freedom" before he was arrested in Pennsylvania (*People v Vernace*, 96 NY2d 886, 888 [2001]). Further, defendant failed to demonstrate that he was prejudiced by the delay (*see Lara*, 165 AD3d at 564; *People v Barnes*, 41 AD3d 1309, 1310 [4th Dept 2007], *lv denied* 9 NY3d 920 [2007]). "Far from giving the

People an unfair tactical advantage, the delay here has made the case against defendant," which was entirely dependent on police testimony, potentially "more difficult to prove beyond a reasonable doubt" (*Vernace*, 96 NY2d at 888).

Because a motion based on a violation of defendant's constitutional speedy trial rights had little or no chance of success, we reject defendant's contention that his counsel was constitutionally ineffective in failing to make such a motion (*see People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant further contends that the verdict is against the weight of the evidence with respect to the conviction of endangering the welfare of a child. 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 with respect to that count is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

672

KA 19-01175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR VAZQUEZ MELENDEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM G. PIXLEY 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 Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered December 12, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (seven counts) and criminal possession of a weapon in the third degree (five counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing those parts convicting defendant of criminal possession of a weapon in the second degree and dismissing counts 3, 5, 8, 11, 13, 16, and 19 of the indictment, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of seven counts of criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [3]) and five counts of CPW in the third degree (§ 265.02 [8]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon a jury verdict of criminal sale of a firearm in the first degree (§ 265.13 [1]). In appeal No. 1, defendant contends and the People correctly concede that the verdict is against the weight of the evidence with respect to those counts charging him with CPW in the second degree inasmuch as the People presented no evidence that the firearms were loaded at the time they were in defendant's possession (*see generally People v Santiago*, 195 AD3d 1460, 1460-1461 [4th Dept 2021]). We therefore modify the judgment in appeal No. 1 by reversing those parts convicting defendant of CPW in the second degree and dismissing counts 3, 5, 8, 11, 13, 16, and 19 of the indictment (*see People v Box*, 181 AD3d 1238, 1241 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]). In light of our determination, we do not address defendant's alternative contention in appeal No. 1.

In appeal No. 2, defendant contends that the verdict is against the weight of the evidence with respect to the count charging him with criminal sale of a firearm in the first degree. 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 with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, we note that the certificate of conviction in appeal No. 2 incorrectly reflects that defendant was convicted upon a plea of guilty, and it must therefore be amended to reflect that he was convicted upon a jury verdict (*see People v Baldwin*, 173 AD3d 1748, 1749-1750 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

673

KA 19-01176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VICTOR VAZQUEZ MELENDEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (WILLIAM G. PIXLEY 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 Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered December 12, 2018. The judgment convicted defendant upon a jury verdict of criminal sale of a firearm in the first degree.

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

Same memorandum as in *People v Vazquez Melendez* ([appeal No. 1] — AD3d — [Oct. 1, 2021] [4th Dept 2021]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

674

KAH 20-01256

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MARVIN BILLINGER, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN HARPER, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY, AND ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

THE LEGAL AID SOCIETY, NEW YORK CITY (NATALIE REA OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered August 6, 2020 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment denying his petition for a writ of habeas corpus. Because petitioner concedes that he has been released to parole supervision, the appeal has been rendered moot (*see People ex rel Bush v Awopetu*, 187 AD3d 1580, 1580 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]; *People ex rel. Sabino v New York State Dept. of Corr. & Community Supervision*, 178 AD3d 1446, 1447 [4th Dept 2019]), and the exception to the mootness doctrine does not apply in this case (*see People ex rel. Stokes v New York State Div. of Parole*, 144 AD3d 1550, 1551 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Although this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances here (*see Stokes*, 144 AD3d at 1551).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

690

CA 20-01686

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

LISA PRIESTER AND PAUL PRIESTER, INDIVIDUALLY
AND AS HUSBAND AND WIFE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANGELICA FRANGAKIS, DEFENDANT,
ASPIRE OF WESTERN NEW YORK, DEFENDANT-RESPONDENT,
AND WILLCARE, DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (SARAH RODMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 11, 2020. The order denied the motion of defendant Willcare to dismiss the amended complaint against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Lisa Priester (plaintiff) when the vehicle in which she was a passenger was involved in a motor vehicle accident. Plaintiff, who uses a wheelchair due to quadriplegia, was a participant in the New York State Consumer Directed Personal Assistance Program (CDPAP), which provided plaintiff with certain home care services including a personal aide, i.e., defendant Angelica Frangakis, who assisted plaintiff with various activities of daily living. Defendant Willcare served as a fiscal intermediary for plaintiff through CDPAP. One afternoon, Frangakis was transporting plaintiff from a medical appointment in plaintiff's wheelchair-accessible van when the van was involved in the accident. Plaintiff's injuries in the accident allegedly resulted from Frangakis's failure to properly restrain plaintiff's wheelchair. Plaintiffs alleged in the amended complaint, inter alia, that Willcare was an employer of Frangakis and granted Frangakis the authority to care for plaintiff, that Frangakis was providing care to plaintiff at the time of the accident, and that plaintiff suffered injuries as a result of the negligence and misconduct of Frangakis during the course of her

employment with Willcare. Plaintiffs further alleged that Willcare breached a duty to plaintiff because it knew or should have known when it hired Frangakis that she had a propensity to not properly restrain passengers or ensure the proper safety of Willcare's clients. Willcare moved to dismiss the amended complaint against it based upon documentary evidence (*see* CPLR 3211 [a] [1]), and Supreme Court denied the motion without prejudice with leave to renew the motion upon completion of further discovery. We affirm.

Willcare contends that the court erred in denying its motion. We reject that contention. We conclude that the documentary evidence submitted by Willcare in support of the motion does not utterly refute the factual allegation of plaintiffs that Frangakis was acting within the scope of her employment with Willcare at the time of the accident (*see Calabro v General Ins. Co. of Am.*, 23 AD3d 326, 326 [2d Dept 2005]; *see generally Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Although the documentary evidence establishes, inter alia, that Willcare was a "fiscal intermediary" in CDPAP, it does not conclusively establish that Willcare's only role with respect to plaintiff and Frangakis was that of a fiscal intermediary and, in any event, the responsibilities of a fiscal intermediary under CDPAP go beyond those of a payroll-processing company (*see generally Hardgers-Powell v Angels In Your Home LLC*, 330 FRD 89, 109 [WD NY 2019]). Indeed, "[t]he division of responsibilities under the program makes the employer determination anything but clear-cut" (*id.* at 110), and Frangakis testified during her deposition that she was jointly employed by, and took direction from, Willcare.

We further conclude that the court did not err in denying Willcare's motion without prejudice to renew because facts essential to justify opposition to the motion may exist (*see Amigo Food Corp. v Marine Midland Bank-N.Y.*, 39 NY2d 391, 395 [1976]; *see generally* CPLR 3211 [d]), and thus further discovery is needed (*see Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

691

KA 15-00784

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVIDE COGGINS, DEFENDANT-APPELLANT.

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

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE, FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered March 2, 2015. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts), arson in the first degree, burglary in the first degree (two counts), arson in the second degree, burglary in the second degree and conspiracy 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, two counts of murder in the second degree (Penal Law § 125.25 [3]), one count of arson in the first degree (§ 150.20 [1] [a] [i]), and two counts of burglary in the first degree (§ 140.30 [2]). The evidence at trial established that defendant and three codefendants, at approximately 3:30 a.m. on April 17, 2013, entered the home of a husband and wife, who were relatives of defendant, stole property, and set fire to the basement of the home. Defendant and the codefendants caused the death of the husband by stabbing him 12 times in the neck and chest and caused the death of the wife by stabbing her 17 times in the neck and back and causing her to inhale the products of combustion. At trial, two of the three codefendants testified against defendant, and defendant took the stand in his own defense. While defendant admitted being in the victims' house with the codefendants, he denied sharing the codefendants' intent to commit the crimes. The evidence was overwhelming, however, that defendant shared in the codefendants' intent to commit the crimes. The evidence established that it was defendant's idea to go to the victims' house in Frewsburg in the middle of the night to commit a burglary. Defendant had lived with the victims for a brief period when he was younger, but he had not seen them in 15 years. One codefendant and another witness testified about information defendant gave them concerning the victims that would be relevant to planning a

burglary, e.g., that the victims did not keep their money in banks. Defendant helped prepare for the burglary by going to a Walmart store and purchasing a crowbar while a codefendant stole gloves. Defendant drove the codefendants to the victims' house after personally asking for directions to Frewsburg from a Red Roof Inn employee, and defendant's phone was used to access Google Maps to provide more specific directions to the victims' house. Two codefendants testified that defendant fully participated in the burglary and arson. In addition, defendant's shoes matched a footwear impression at the top of the basement stairs, leading down the stairs to where the victims' bodies were found.

Defendant's actions after the crimes were further evidence of his participation therein and of his shared intent with the codefendants. He drove them back to the residence that he shared with, inter alia, two of the codefendants in Elmira, directed that the floor mats of the vehicle they used be removed from the vehicle, and divided up the stolen items with the codefendants. Some of the items were later found by the police in his bedroom. Defendant drove the codefendants to a Tops grocery store to cash in a bag of stolen coins; he carried the bag of coins into the store and later handed the Coinstar receipt to the cashier. Defendant's statement to the police and his testimony at trial were incredible (*see People v Ignatyev*, 147 AD3d 489, 491 [1st Dept 2017], *lv denied* 29 NY3d 1033 [2017]; *People v Rice*, 105 AD3d 1443, 1444 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013]; *see also People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]). In his statement to the police, defendant claimed that he went to the victims' house at 3:30 in the morning simply to visit them, even though he had not seen them for 15 years, which defies credibility. He told the police that he knew that two codefendants were going to steal from the victims, and that he left them for 30 minutes while he went to a Rite Aid drugstore so that they could do so. When he returned, he went inside the house and rendered aid to the wife, but then helped the codefendants carry stolen property to the car. Defendant gave no explanation to the police for his actions after the crimes in splitting the proceeds of the burglary.

In his testimony at trial, defendant's story changed insofar as he now claimed that he drove the codefendants to the victims' house only so that the codefendants could use their bathroom, which again defies credibility. He further claimed that when he saw that lights were out at the victims' house, he pulled over to the side of the road so that the codefendants could go to the bathroom in the woods. Defendant then left the codefendants there because they were "playing around" outside and would not get back inside the car, and he went to visit his mother's grave. He supposedly "cleaned up" her grave, despite it being dark and in the middle of the night. He admitted that, upon returning to the victims' house, he helped the codefendants carry stolen items to the car. Defendant again had no good explanation for his actions after the crime; although he testified that he had been threatened by the codefendants, he was the leader in cashing in the coins at the Tops grocery store.

Defendant contends that he was deprived of his constitutional right to present a defense when County Court precluded him from recalling the two testifying codefendants to the stand during the presentation of his case and precluded him from playing tape-recorded telephone conversations made by the codefendants while confined in jail. Initially, defendant's related contentions that the court failed to timely address his motion for a subpoena and should have granted an adjournment for defense counsel to review the recordings are not preserved for our review (*see* CPL 470.05 [2]). We conclude that defendant was not deprived of his constitutional right to present a defense (*see People v Williams*, 94 AD3d 1555, 1556 [4th Dept 2012]). It appears from the record that defendant had possession of all the recordings before the People rested and chose not to request a further cross-examination of the two testifying codefendants before then. Thus, "[d]efense counsel had a full and fair opportunity to cross-examine the witness[es]" (*People v Taylor*, 231 AD2d 945, 946 [4th Dept 1996], *lv denied* 89 NY2d 930 [1996]; *see People v Comerford*, 70 AD3d 1305, 1306 [4th Dept 2010]; *People v Alicea*, 33 AD3d 326, 328 [1st Dept 2006], *lv denied* 7 NY3d 923 [2006]; *People v Stevenson*, 281 AD2d 323, 323-324 [1st Dept 2001]). In any event, any error is harmless inasmuch as the evidence against defendant is overwhelming and there is no reasonable possibility that the error might have contributed to the conviction (*see People v Meyers*, 182 AD3d 1037, 1040-1041 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]; *People v Gilchrist*, 98 AD3d 1232, 1233 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012]; *People v Smith*, 90 AD3d 561, 561 [1st Dept 2011], *lv denied* 18 NY3d 998 [2012]; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). The jury was aware of the defense theory that the codefendants colluded to blame defendant for the crimes, and one codefendant admitted trying to coordinate stories with the other codefendants.

Defendant further contends that he was deprived of his constitutional right to present a defense when the court precluded him from introducing evidence regarding brass knuckles found at the crime scene and from questioning a codefendant on the facts underlying a prior youthful offender adjudication. Any error with respect to the brass knuckles is harmless (*see People v Arnold*, 147 AD3d 1327, 1328 [4th Dept 2017], *lv denied* 29 NY3d 996 [2017]; *see generally Crimmins*, 36 NY2d at 237). With respect to the youthful offender adjudication, it is well settled that, "[a]lthough it is impermissible to use a youthful offender or juvenile delinquency adjudication for impeachment purposes because those adjudications are not convictions of a crime . . . , 'the illegal or immoral acts underlying such adjudications' may nevertheless be utilized for impeachment purposes" (*People v Lucius*, 289 AD2d 963, 964 [4th Dept 2001], *lv denied* 98 NY2d 638 [2002]; *see People v Gray*, 84 NY2d 709, 712 [1995]). Here, however, defendant sought to introduce evidence of the youthful offender adjudication itself, and not the acts underlying that adjudication, which the court properly determined was impermissible (*see People v Dizak*, 93 AD3d 1182, 1183 [4th Dept 2012], *lv denied* 19 NY3d 972 [2012], *reconsideration denied* 20 NY3d 932 [2012]). In any event, even assuming, arguendo, that defendant sought to question the relevant codefendant on the acts underlying the youthful offender

adjudication and that the court erred in limiting such cross-examination, we conclude that the error is harmless (*see Dizak*, 93 AD3d at 1183-1184; *Lucius*, 289 AD2d at 964).

Defendant contends that the court erred in denying his request for a missing witness instruction with respect to the nontestifying codefendant. Defendant failed, however, to include a copy of the court's decision in the record on appeal and thus failed to meet his burden of submitting a sufficient factual record to permit appellate review of his contention (*see People v Lostumbo*, 107 AD3d 1395, 1397 [4th Dept 2013]; *People v Combo*, 291 AD2d 887, 887 [4th Dept 2002], *lv denied* 98 NY2d 650 [2002]; *People v Hickey*, 284 AD2d 929, 930 [4th Dept 2001], *lv denied* 97 NY2d 656 [2001]). But even assuming, arguendo, that the court erred in denying the request, we conclude that the error is harmless inasmuch as the evidence of guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the error (*see People v Abdul-Jaleel*, 142 AD3d 1296, 1296-1297 [4th Dept 2016], *lv denied* 29 NY3d 946 [2017]; *People v McCullough*, 117 AD3d 1415, 1415 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014]; *see generally Crimmins*, 36 NY2d at 241-242).

Defendant's contention that prosecutorial misconduct on summation deprived him of a fair trial is largely unpreserved for our review (*see People v Gibson*, 134 AD3d 1512, 1512-1513 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). In any event, we conclude that the alleged instances of misconduct constituted fair comment on the evidence or fair response to defense counsel's summation (*see People v Townsend*, 171 AD3d 1479, 1480 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]; *People v Martinez*, 114 AD3d 1173, 1173-1174 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *People v Green*, 60 AD3d 1320, 1322 [4th Dept 2009], *lv denied* 12 NY3d 915 [2009]).

Defendant contends that he was denied due process, a fair trial, and effective assistance of counsel by the court's actions in granting defense counsel's request to charge the affirmative defense to felony murder (Penal Law § 125.25 [3]) prior to summations, but then after summations informing defendant that it would marshal the evidence with respect to that affirmative defense. The court's proposed instruction did not constitute an unfair marshaling of the evidence (*see People v Matos*, 28 AD3d 1120, 1121 [4th Dept 2006]; *People v Gray*, 300 AD2d 27, 27 [1st Dept 2002], *lv denied* 99 NY2d 614 [2003]; *People v Croskery*, 265 AD2d 846, 846-847 [4th Dept 1999], *lv denied* 94 NY2d 878 [2000]; *see generally* CPL 300.10 [2]), and the court's actions did not deprive defendant of effective assistance of counsel. "[A] defendant is ordinarily deprived of the right to an effective summation where the court informs the parties of the charges that it intends to deliver and, after summations, changes the instructions" (*People v Nunes*, 168 AD3d 1187, 1193 [3d Dept 2019], *lv denied* 33 NY3d 979 [2019]). Here, the court promised to give an instruction on the affirmative defense to felony murder, and it maintained that promise after summations. The court never promised or indicated to defendant that it would *not* marshal the evidence in giving that instruction, so no change was made

by the court to any promise; it was defendant who decided to withdraw the request for the affirmative defense charge. In any event, we conclude that any error is harmless in light of the overwhelming evidence of defendant's guilt and the lack of any reasonable possibility that defendant otherwise would have been acquitted, considering that defense counsel did not actually argue the affirmative defense during his summation (*see People v Gonzalez-Alvarez*, 129 AD3d 647, 647-648 [1st Dept 2015], *lv denied* 27 NY3d 997 [2016]; *People v Peterkin*, 195 AD2d 1015, 1015-1016 [4th Dept 1993], *lv denied* 82 NY2d 758 [1993]; *see generally Crimmins*, 36 NY2d at 237).

Finally, defendant contends that the court erred in submitting an annotated verdict sheet to the jury without first obtaining defense counsel's consent. Defendant was provided with a copy of the verdict sheet, at the very latest, right after the court had delivered its instructions to the jury using that verdict sheet, i.e., before the jury "retir[ed] to deliberate" (CPL 310.20). Inasmuch as defendant had an opportunity to review the verdict sheet before the jury retired for deliberations and made no objection to it, he impliedly consented to the annotations (*see People v Howard*, 167 AD3d 1499, 1500-1501 [4th Dept 2018], *lv denied* 32 NY3d 1205 [2019]; *People v Johnson*, 96 AD3d 1586, 1587-1588 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]; *see generally People v Brown*, 90 NY2d 872, 874 [1997]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

692

KA 16-00232

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER J. MERROW, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, JEFFREY WICKS, PLLC (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 19, 2016. The judgment convicted defendant upon a jury verdict of assault in the second degree and driving while intoxicated.

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 assault in the second degree (Penal Law § 120.05 [7]) and driving while intoxicated (DWI) as a misdemeanor (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [b] [i]), arising from a vehicular accident she caused while intoxicated and her subsequent physical altercation with a deputy during the booking process at a jail. We affirm.

We reject defendant's contention that the verdict is against the weight of the evidence with respect to the count of assault in the second degree. 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 crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Acevedo*, 136 AD3d 1357, 1357 [4th Dept 2016], *lv denied* 27 NY3d 1127 [2016]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's related assertion, " '[v]iewing the evidence in a neutral light and weighing the probative value of the conflicting testimony and the conflicting inferences that could be drawn, while deferring to the [jury's] ability to observe the witnesses and assess their credibility, aided by the video recording' " of the physical altercation (*People v Simmons*, 113 AD3d 1081, 1082 [4th Dept 2014]), we conclude that the

jury's rejection of the justification defense is not against the weight of the evidence (*see Acevedo*, 136 AD3d at 1357; *People v Porter*, 304 AD2d 845, 846 [3d Dept 2003], *lv denied* 100 NY2d 565 [2003]). We also conclude, contrary to defendant's additional assertion, that "there is not a grave risk that an innocent [person] has been convicted" (*People v Henderson*, 275 AD2d 948, 948 [4th Dept 2000], *lv denied* 95 NY2d 964 [2000] [internal quotation marks omitted]; *see People v Echevarria*, 126 AD3d 1450, 1451 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015]).

Defendant failed to object to County Court's jury instructions on the issue of physical injury and thus failed to preserve for our review her challenge to those instructions (*see* CPL 470.05 [2]; *People v Smith*, 45 AD3d 1483, 1483 [4th Dept 2007], *lv denied* 10 NY3d 771 [2008]). We decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, defendant contends that the court erred in refusing to dismiss the indictment on the ground that she was deprived of her statutory right to testify before the grand jury when the People announced their intention to present the assault in the second degree and DWI charges to the same grand jury and refused to limit their examination of her to the assault charge only. We reject that contention. Here, the court properly concluded that the charges were joinable pursuant to CPL 200.20 (2) (b) (*see People v Lee*, 275 AD2d 995, 997 [4th Dept 2000], *lv denied* 95 NY2d 966 [2000]). Inasmuch as the charges were joinable, the People were "entitled to present them to a single grand jury and, [if] defendant exercised [her] right to testify, to question [her] about all the crimes the grand jury was considering" (*People v Colon*, 306 AD2d 213, 214 [1st Dept 2003], *lv denied* 1 NY3d 539 [2003]). We thus conclude that defendant "was not denied [her] statutory right to testify before the [g]rand [j]ury by the [People's] announced intention to present [the] joinable charge[s] to the same [g]rand [j]ury" (*People v Panzardi*, 209 AD2d 1017, 1017 [4th Dept 1994], *lv denied* 85 NY2d 912 [1995]; *see People v Hemmings*, 264 AD2d 529, 530-531 [2d Dept 1999], *lv denied* 94 NY2d 863 [1999]), nor by the People's refusal to limit their examination of her to the assault charge only (*see Hemmings*, 264 AD2d at 530-531; *People v Edwards*, 240 AD2d 427, 428 [2d Dept 1997], *lv denied* 90 NY2d 904 [1997]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

694

KA 19-00778

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 10, 2018. The judgment convicted defendant upon a jury verdict of rape in the third degree and unlawful imprisonment 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 after a jury trial of rape in the third degree (Penal Law § 130.25 [3]) and unlawful imprisonment in the second degree (§ 135.05). We affirm.

Viewing the evidence in light of the elements of the crime of rape in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]). "The jury was entitled to credit the testimony of the People's witnesses . . . over the testimony of defendant's witnesses, including that of defendant [himself]," and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). In particular, we note that there was nothing about the victim's testimony that was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31

NY3d 1011 [2018] [internal quotation marks omitted]; *see People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). We also note that the victim's testimony that defendant engaged in sexual intercourse with her was corroborated by physical evidence, supporting the jury's rejection of defendant's testimony to the contrary (*see People v King*, 21 AD3d 1319, 1319 [4th Dept 2005], *lv denied* 6 NY3d 755 [2005]).

Defendant's contention that he was deprived of a fair trial due to instances of prosecutorial misconduct during the prosecutor's opening statement and on summation is unpreserved because defense counsel did not object to any of the purportedly improper comments (*see* CPL 470.05 [2]; *People v Romero*, 7 NY3d 911, 912 [2006]; *People v O'Donnell*, 195 AD3d 1430, 1433 [4th Dept 2021], *lv denied* — NY3d — [2021]; *People v Carlson*, 184 AD3d 1139, 1142 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]). 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, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

696

KA 18-00080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRASHAWN D. BELL, DEFENDANT-APPELLANT.

WILLIAM CLAUSS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 22, 2016. The judgment convicted defendant upon a nonjury verdict of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of assault in the second degree (Penal Law § 120.05 [7]), defendant contends that the evidence is legally insufficient to establish that he intended to cause physical injury to the victim and that the victim sustained a physical injury. Because defendant's motion for a trial order of dismissal was not " 'specifically directed' at th[ose] alleged error[s]," defendant failed to preserve his contention for our review (*People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). Viewing the evidence in light of the elements of the crime in this nonjury trial (*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]). Indeed, based upon our independent review of the evidence, we conclude that a different verdict would have been unreasonable (*see People v Peters*, 90 AD3d 1507, 1508 [4th Dept 2011], *lv denied* 18 NY3d 996 [2012]; *see generally Bleakley*, 69 NY2d at 495). The video of the jail fight supports the conclusion that defendant had the requisite intent to cause physical injury by repeatedly punching the victim (*see People v Hernandez*, 192 AD3d 1528, 1531 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *People v Stover*, 174 AD3d 1150, 1151-1153 [3d Dept 2019], *lv denied* 34 NY3d 954 [2019]; *see also People v Lovenia V.*, 128 AD3d 537, 537 [1st Dept 2015], *lv denied* 26

NY3d 931 [2015]) and that the victim sustained a physical injury from the attack (*see People v Rudge*, 185 AD3d 1214, 1216-1217 [3d Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *see generally People v Chiddick*, 8 NY3d 445, 447 [2007]).

Defendant's contention that County Court erred in failing to consider a justification defense pursuant to Penal Law § 35.15 (1) is not preserved for our review because he did not request a justification charge under that section (*see People v Hardy*, 166 AD3d 645, 647 [2d Dept 2018], *lv denied* 32 NY3d 1172 [2019]; *People v Acevedo*, 84 AD3d 1390, 1391 [2d Dept 2011], *lv denied* 17 NY3d 951 [2011]; *see also People v Brown*, 194 AD3d 1399, 1400 [4th Dept 2021]). 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]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

698

KA 18-01618

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMARCUS L. DEAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 10, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm. All references herein to "the officer" are to the police officer that testified second at the suppression hearing.

Supreme Court properly refused to suppress the subject gun. Contrary to defendant's contention, the officer's direct observation of the outline of a handgun tucked into defendant's waistband was itself sufficient, standing alone, to establish the reasonable suspicion necessary for the level three forcible stop in this case (*see People v Vernon*, 164 AD3d 1657, 1657-1658 [4th Dept 2018], *lv denied* 32 NY3d 1179 [2019]; *People v Jarrett*, 157 AD3d 534, 534 [1st Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *People v Carver*, 147 AD3d 415, 415 [1st Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *see generally People v Moore*, 6 NY3d 496, 498-499 [2006]; *People v Thornton*, 238 AD2d 33, 35 [1st Dept 1998]). There is no basis for rejecting the court's determination to credit the officer's testimony at the suppression hearing (*see Vernon*, 164 AD3d at 1658). Moreover, and notwithstanding defendant's contrary assertion, the fact that the police did not know whether the subject gun was properly licensed at the inception of the stop merely underscores the distinction between reasonable suspicion and proof beyond a reasonable doubt (*see United States v Goss*, 537 Fed Appx 276, 280 n 5 [4th Cir 2013]; *see generally*

United States v Trogdon, 789 F3d 907, 913 [8th Cir 2015], *cert denied* 577 US 946 [2015]; *Spear v Sowders*, 71 F3d 626, 631 [6th Cir 1995]).

We reject defendant's further contention that the court erred in denying his request for a circumstantial evidence instruction. A circumstantial evidence instruction is properly denied "where there is both direct and circumstantial evidence of the defendant's guilt" (*People v Hardy*, 26 NY3d 245, 249 [2015]), and "[d]irect evidence . . . include[s] . . . eyewitness testimony attesting to a defendant's participation in the crime" (*People v James*, 147 AD3d 1211, 1212 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]). The officer's eyewitness testimony at trial attesting to the handgun in defendant's waistband thus constituted direct evidence of guilt, and it follows that defendant was not entitled to a circumstantial evidence instruction (*see People v Myers*, 194 AD3d 431, 431-432 [1st Dept 2021], *lv denied* 37 NY3d 967 [2021]; *People v Battle*, 160 AD2d 948, 948-949 [2d Dept 1990], *lv denied* 76 NY2d 784 [1990]). Contrary to defendant's assertions, the purported unpersuasiveness of the officer's trial testimony could not "change the character of th[at] evidence from direct to circumstantial" (*Hardy*, 26 NY3d at 251; *see Battle*, 160 AD2d at 949), and the fact that such testimony did not singlehandedly prove each and every element of the crime charged is irrelevant to defendant's entitlement to a circumstantial evidence instruction (*see Hardy*, 26 NY3d at 251).

Defendant failed to preserve his due process contention regarding the trial justice's remarks to and about a prospective juror during voir dire (*see People v Williams*, 164 AD3d 842, 844-845 [2d Dept 2018], *lv denied* 32 NY3d 1116 [2018]; *People v McDuffie*, 270 AD2d 362, 362 [2d Dept 2000]). Contrary to defendant's assertion, his argument on that point does not implicate a mode of proceedings error (*see People v Prokop*, 155 AD3d 975, 976 [2d Dept 2017], *lv denied* 30 NY3d 1118 [2018]; *People v Mason*, 132 AD3d 777, 779 [2d Dept 2015], *appeal dismissed* 29 NY3d 972 [2017]; *see also People v Brown*, 7 NY3d 880, 881 [2006]). We nevertheless urge the trial justice to exercise greater restraint in addressing prospective jurors in the future.

Contrary to defendant's further contention, defense counsel's comments at sentencing "never strayed beyond a factual explanation of his efforts on his client's behalf" and thus did not create an actual conflict of interest (*People v Washington*, 25 NY3d 1091, 1095 [2015]; *see People v Nelson*, 7 NY3d 883, 884 [2006]; *People v Avent*, 178 AD3d 1403, 1405 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]). Indeed, it is well established that "counsel does *not* create an actual conflict merely by outlining his efforts on his client's behalf . . . and defending his performance" (*Washington*, 25 NY3d at 1095 [internal quotation marks omitted]).

Finally, the sentence is not unduly harsh or severe.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

699

KA 18-00689

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY A. WILLIAMS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRITTNEY N. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 23, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). We affirm.

At the outset, although defendant purportedly waived his right to appeal, we conclude that there is no reason for us to address his contention that the waiver is invalid inasmuch as defendant's substantive contention challenging the plea would survive even a valid waiver of the right to appeal (*see People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]).

Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because Supreme Court improperly coerced him into accepting the plea. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that contention (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Darling*, 125 AD3d 1279, 1279 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]; *People v Boyd*, 101 AD3d 1683, 1683 [4th Dept 2012]). Contrary to defendant's contention, this case does not implicate the narrow exception to the preservation rule "where the particular circumstances of a case reveal that a

defendant had no actual or practical ability to object to an alleged error in the taking of a plea that was clear from the face of the record" (*People v Conceicao*, 26 NY3d 375, 381 [2015]; *see People v Williams*, 27 NY3d 212, 221 [2016]; *cf. People v Stanley*, 191 AD3d 1411, 1412 [4th Dept 2021]).

In any event, defendant's challenge to the plea is without merit. Indeed, defendant's assertion that the court coerced him into pleading guilty is belied by the record because, at the plea colloquy, defendant denied that he had been threatened or otherwise pressured into pleading guilty (*see People v Pitcher*, 126 AD3d 1471, 1472 [4th Dept 2015], *lv denied* 25 NY3d 1169 [2015]). The court's statement requiring defendant to accept or reject the plea offer within a short time period "does not amount to coercion" (*People v Carr*, 147 AD3d 1506, 1507 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]; *see People v Green*, 140 AD3d 1660, 1661 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]). Further, the court did not coerce defendant into pleading guilty merely by informing him of the range of sentences he faced if he proceeded to trial and was convicted (*see People v Juarbe*, 162 AD3d 1625, 1626 [4th Dept 2018]; *Pitcher*, 126 AD3d at 1472; *People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

701

CAF 19-02317

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

IN THE MATTER OF BRANDON I.J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAISY D., RESPONDENT-APPELLANT.

IN THE MATTER OF BRANDON I.J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

DAISY D., RESPONDENT-APPELLANT.

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

LAW OFFICE OF JAMES D. BELL, BROCKPORT (JAMES D. BELL OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered November 19, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect.

We reject the mother's contention that Family Court abused its discretion in denying the requests of the mother's attorney for adjournments of the fact-finding and dispositional hearings when the mother failed to appear. The record supports the court's conclusion that the mother was fully aware of the court dates, and no excuse was offered for her absences (*see Matter of Evelyn R. [Franklin R.]*, 117 AD3d 957, 957-958 [2d Dept 2014]; *Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747 [4th Dept 2011]; *see generally Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1573 [4th Dept 2014]).

Contrary to the mother's contention, the court properly determined that petitioner demonstrated by clear and convincing evidence that it made the requisite diligent efforts—i.e., "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child" (Social Services Law § 384-b [7] [f])—to reunite the mother with the child (*see* § 384-b [7] [a]; *Matter of Sheila G.*, 61 NY2d 368, 380-381 [1984]; *Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1550 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). Petitioner coordinated regular visitation with the child, provided the mother with transportation assistance to those visits, encouraged the mother to obtain the required substance abuse and mental health treatment, referred her to agencies that assisted with people suffering from a traumatic brain injury, encouraged her to maintain employment and housing, and offered her budget counseling. We reject the mother's further contention that petitioner failed to establish by clear and convincing evidence that she permanently neglected the child. The evidence established that, among other things, the mother failed to complete mental health and substance abuse treatment and failed to obtain adequate and safe housing during the relevant time period (*see Matter of Eden S. [Joshua S.]*, 170 AD3d 1580, 1582-1583 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]; *Matter of Miguel Angel S. [Wendy Carolina S.]*, 155 AD3d 587, 588 [1st Dept 2017]; *Matter of Peter D.*, 262 AD2d 998, 998-999 [4th Dept 1999]).

Contrary to the mother's contention, the court did not abuse its discretion in refusing to issue a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *see* Family Ct Act § 633) and may be warranted where the parent has made sufficient progress in addressing the issues that led to the child's removal from custody (*see Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; *Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]). Here, the evidence at the dispositional hearing established that the child had been removed from the mother's care when he was approximately eight months old and had been in foster care ever since, that the child had been with the same foster mother for almost 2½ years, and that the foster mother was willing to adopt the child. In addition, the evidence established that the mother had made no progress in addressing the issues that led to the removal of the child and still had only supervised visits with the child. We therefore conclude that the court properly determined that a suspended judgment was unwarranted.

The mother contends that she was deprived of her right to the assistance of counsel or to effective assistance of counsel at the dispositional hearing. We reject that contention. At the start of the dispositional hearing, the mother failed to appear, and her counsel elected not to participate. The court heard the testimony of petitioner's caseworker and, after a lunch break, the mother appeared in court and her counsel resumed participating. We conclude that counsel's decision not to participate when the mother was absent was tactical and did not deprive the mother of representation or meaningful representation (*see Matter of Thaiheed O.H.*, 162 AD3d 477,

478 [1st Dept 2018]; *see generally People v Diggins*, 11 NY3d 518, 525 [2008]).

We have considered the mother's remaining contention and conclude that it is without merit.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

708

CA 20-01208

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

IN THE MATTER OF DONNA F. FROELICH,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

SOUTH WILSON VOLUNTEER FIRE COMPANY,
THOMAS E. WALDER, RESPONDENTS,
AND TOWN OF WILSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered August 18, 2020. The order, insofar as appealed from, denied that part of the application of claimant seeking leave to serve a late notice of claim on respondent Town of Wilson.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the application is granted with respect to respondent Town of Wilson upon condition that the proposed notice of claim is served within 30 days of the date of entry of the order of this Court.

Memorandum: Claimant sustained injuries in a motor vehicle accident and sought leave to serve a late notice of claim on respondents, Thomas E. Walder, South Wilson Volunteer Fire Company (fire company), and the Town of Wilson (Town). Claimant alleged that Walder was acting within the scope of his duties as a firefighter with the fire company and caused the collision with claimant's vehicle. Supreme Court granted the application with respect to Walder and the fire company but denied it with respect to the Town. Claimant now appeals from the order insofar as it denied her application with respect to the Town, and we reverse.

"In determining whether to grant . . . leave [to serve a late notice of claim], the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause

substantial prejudice to the municipality" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; *see Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1653 [4th Dept 2018]). Although claimant proffered no excuse for the delay, "the failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" (*Shane v Central N.Y. Regional Transp. Auth.*, 79 AD3d 1820, 1821 [4th Dept 2010] [internal quotation marks omitted]; *see Matter of Bingham v Town of Wheatfield*, 185 AD3d 1482, 1484 [4th Dept 2020]). "While the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [respondent] received actual knowledge of the facts constituting the claim in a timely manner" (*Matter of Henderson v Town of Van Buren*, 281 AD2d 872, 873 [4th Dept 2001]; *see Bingham*, 185 AD3d at 1484-1485; *Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). Claimant established that the Town had actual knowledge of the facts constituting the claim within 90 days and that it would not be prejudiced by the delay, and the Town offered no argument to the contrary.

Rather, the Town argued, and the court agreed, that the application should be denied with respect to the Town because the proposed claim against the Town was meritless (*see generally Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179 [2004]). The Town argued that there was "no legal relationship between [the fire company] and the Town" and that the Town "does not employ any members of the fire company." We agree with claimant that the Town's argument is without any record support, and the court thus abused its discretion in denying the application with respect to the Town (*see Lawton v Town of Orchard Park*, 138 AD3d 1428, 1428 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]; *see generally Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 465 [2016], *rearg denied* 29 NY3d 963 [2017]).

A town board is authorized to establish fire districts, fire alarm districts, and fire protection districts in a town for the benefit of the town residents (*see* Town Law § 170 [1]; *Cuddy v Town of Amsterdam*, 62 AD2d 119, 120 [3d Dept 1978]). A fire district is a "wholly independent political subdivision whose members, including its volunteer firemen, are employees of the district and not of the town" (*Matter of State Farm Fire & Cas. Co. v Village of Bronxville*, 24 AD3d 453, 454 [2d Dept 2005] [internal quotation marks omitted]; *see* § 174 [7]; *Thygesen v North Bailey Volunteer Fire Co., Inc.*, 106 AD3d 1458, 1459 [4th Dept 2013]). The "fire district rather than the town appoints its own members, furnishes fire and ambulance service and is liable for negligence on the part of its members, including their negligent operation of vehicles" (*Nelson v Garcia*, 152 AD2d 22, 25 [4th Dept 1989]; *see Knapp v Union Vale Fire Co.*, 141 AD2d 509, 509-510 [2d Dept 1988]). Accordingly, a "town is not liable on the theory of respondent superior for the negligence of a volunteer fireman in the employ of a fire district" (*Nelson*, 152 AD2d at 25).

In contrast, "a fire protection district is simply a geographic

area, with no independent corporate status, for which the town board is responsible for providing for the furnishing of fire protection" (*Thygesen*, 106 AD3d at 1459 [internal quotation marks omitted]) and, "[t]o that end, [a town board] may 'contract with any city, village, fire district or incorporated fire company . . . for the furnishing of fire protection' " (*Matter of Waite v Town of Champion*, 31 NY3d 586, 590 [2018], quoting Town Law § 184 [1]; *see Cuddy*, 62 AD2d at 120-121). "Members of the fire departments or companies established within a fire protection district 'are deemed officers, employees, or appointees of the town[,] and the town is liable for any negligence on the part of such members' " (*Thygesen*, 106 AD3d at 1459-1460, quoting *Nelson*, 152 AD2d at 24; *see* General Municipal Law §§ 50-a [1]; 50-b [1]; 205-b; Town Law § 184 [1]; N-PCL 1402 [e] [1]; *Miller v Savage*, 237 AD2d 695, 696 [3d Dept 1997]).

Here, the contract between the fire company and the Town shows that the Town "duly established . . . a fire protection district" and entered into a contract with the fire company to furnish fire protection within that fire protection district. The Town offered no evidence establishing that its town board created a fire district as opposed to a fire protection district. Thus, the creation of the fire protection district means that the members of the fire company " 'are deemed . . . employees' " of the Town, and the Town is liable for any negligence on the part of Walder (*Thygesen*, 106 AD3d at 1460; *see Miller*, 237 AD2d at 696).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

709

CA 20-01624

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

IN THE MATTER OF DONNA F. FROELICH,
CLAIMANT-APPELLANT,

V ORDER

SOUTH WILSON VOLUNTEER FIRE COMPANY,
THOMAS E. WALDER, RESPONDENTS,
AND TOWN OF WILSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered November 17, 2020. The amended order, insofar as appealed from, denied that part of the application of claimant seeking leave to serve a late notice of claim on respondent Town of Wilson.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

712

CA 20-01013

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

LAKEYSHA WICKS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF KELVIN BRADLEY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMARJIT SINGH VIRK, M.D., BUFFALO GENERAL HOSPITAL AND KALEIDA HEALTH, DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN, GRUTTADARO & PRATO, PLLC, ROCHESTER (JOHN M. CONIGLIO OF COUNSEL), FOR DEFENDANT-RESPONDENT AMARJIT SINGH VIRK, M.D.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO GENERAL HOSPITAL AND KALEIDA HEALTH.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 23, 2020. The order granted the motions of defendants for summary judgment and dismissed the complaint.

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

Memorandum: In this medical malpractice action, plaintiff appeals from an order that granted defendants' respective motions for summary judgment dismissing the complaint against them. We affirm.

Defendant Amarjit Singh Virk, M.D. satisfied his initial burden on his motion with respect to both deviation and causation by submitting his own expert affidavit opining, with detailed reasoning, that he "did not deviate from good and accepted medical practice . . . and that [his] care and treatment of [the decedent] did not proximately cause [him] any injury" (*Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]; *see Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]; *see also Page v Niagara Falls Mem. Med. Ctr.*, 174 AD3d 1318, 1319-1320 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]). Plaintiff failed to raise a triable issue of fact in opposition

because her expert's affidavit addressed neither the specific conclusions in Virk's affidavit nor many of the undisputed facts concerning the decedent's treatment (*see Ruiz v Reiss*, 180 AD3d 623, 623-624 [1st Dept 2020]; *Pigut v Leary*, 64 AD3d 1182, 1183 [4th Dept 2009]). Without a viable cause of action against Virk, there is no predicate for imposing vicarious liability on defendants Buffalo General Hospital and Kaleida Health (*see Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1274 [4th Dept 2015]; *Kukic v Grand*, 84 AD3d 609, 610 [1st Dept 2011]; *Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 1178 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

721

TP 21-00279

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

IN THE MATTER OF VINCENT HILL, 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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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 February 19, 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 is unanimously confirmed without costs and the second amended petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III hearing, that he violated inmate rules 100.10 (7 NYCRR 270.2 [B] [1] [i] [assault on an inmate]), 100.13 (7 NYCRR 270.2 [B] [1] [iv] [fighting]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), and 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). A civilian teacher at the correctional facility authored a misbehavior report against petitioner after observing two inmates fighting in a classroom. Petitioner joined the fight and made slashing motions to the face of one inmate (victim), who sustained a laceration to his cheek that required stitches. The evidence at the disciplinary hearing included the testimony of the teacher, a video of the incident, and petitioner's admission that he kicked the victim. Contrary to petitioner's contention, the determination finding that he violated the inmate rules is supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]), notwithstanding the fact that no weapon was ever recovered (*see Matter of Jones v Annucci*, 166 AD3d 1174, 1175 [3d Dept 2018]).

We reject petitioner's contention that the Hearing Officer was biased (*see Matter of Clark v Annucci*, 170 AD3d 1499, 1500-1501 [4th Dept 2019]; *Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502 [4th Dept 2011]). Finally, the penalty was not so "disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks omitted]; *see Matter of Ford v Smith*, 23 AD3d 874, 875-876 [3d Dept 2005], *lv denied* 6 NY3d 708 [2006]; *Matter of McGill v Coughlin*, 182 AD2d 1103, 1104 [4th Dept 1992]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

723

KA 19-00209

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE L. BORLAND, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered October 29, 2018. The judgment convicted defendant upon a plea of guilty of attempted burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). We agree with defendant that the waiver of the right to appeal "is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, we affirm. Defendant failed to preserve for our review his contention that his guilty plea was not knowingly, voluntarily, or intelligently entered inasmuch as he did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Turner*, 175 AD3d 1783, 1784 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]), and we conclude that this case does not fall within the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666-667 [1988]). Further, the sentence is not unduly harsh or severe.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

727

KA 17-01712

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILBERT A. JACKSON, II, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered September 28, 2016. The judgment convicted defendant upon a 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: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. Although language in the written waiver form arguably portrays the waiver as an absolute bar to the taking of an appeal (*see generally People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Kubiak*, 195 AD3d 1451, 1451 [4th Dept 2021], *lv denied* — NY3d — [2021]), a trial court's "oral colloquy with defendant . . . can cure incorrect language in the written waiver form" (*Thomas*, 34 NY3d at 563). Here, County Court informed defendant during the oral colloquy that he was giving up "most claims of error," with the exception of those "errors that survive the waiver of the right to appeal," including, for example, whether defendant's plea is voluntary, whether he was denied effective assistance of counsel, and whether he was competent to understand the legal proceedings and to stand trial (*see* NY Model Colloquies, Waiver of Right to Appeal; *cf. People v Murray-Adams*, 195 AD3d 1450, 1450 [4th Dept 2021]; *Kubiak*, 195 AD3d at 1451). Moreover, the court specifically informed defendant that a notice of appeal could and would be filed (*see* NY Model Colloquies, Waiver of Right to Appeal). Given that language in the court's oral colloquy, we conclude that the record establishes that defendant " 'comprehended the nature of the waiver of appellate rights' " (*Thomas*, 34 NY3d at 565-566), and thus the "appeal waiver

was knowingly and voluntarily entered and sufficiently comprehensive to cover [defendant's] appellate challenge to the suppression ruling – without any need for express mention of it during the waiver colloquy" (*id.* at 565).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

736

CA 21-00313

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

COMMUNITY RESTORATION CORPORATION,
PLAINTIFF-RESPONDENT,

V ORDER

IGOR VALOSHKA, ET AL., DEFENDANTS,
AND ROBERT M. WHIPPLE, DEFENDANT-APPELLANT.

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROACH & LIN, P.C., SYOSSET (MICHAEL C. MANNIELLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered August 7, 2020. The order, inter alia, granted the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 17, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

737

CA 21-00240

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

BRIGHTON GRASSROOTS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V ORDER

TOWN OF BRIGHTON ZONING BOARD OF APPEALS, M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, DANIELE MANAGEMENT, LLC, AND MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS THE DANIELE FAMILY COMPANIES, RESPONDENTS-DEFENDANTS-RESPONDENTS.

THE ZOGHLIN GROUP, PLLC, ROCHESTER (JACOB H. ZOGHLIN OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WEAVER MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT TOWN OF BRIGHTON ZONING BOARD OF APPEALS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS M&F, LLC, DANIELE SPC, LLC, MUCCA MUCCA LLC, DANIELE MANAGEMENT, LLC, AND MARDANTH ENTERPRISES, INC., COLLECTIVELY DOING BUSINESS AS THE DANIELE FAMILY COMPANIES.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered February 8, 2021 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment denied the motion of petitioner-plaintiff for a preliminary injunction, and granted the cross motions of respondents-defendants to dismiss the petition-complaint.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

738

CA 20-00871

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

ABDUKADIR ABDULLAHI, AS ADMINISTRATOR OF THE ESTATE OF MARYAN M. ISSA, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

SADASHIV S. SHENOY, M.D., SADASHIV S. SHENOY, M.D., PLLC, KALEIDA HEALTH, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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

BROWN, GRUTTADARO, & PRATO, PLLC, ROCHESTER (WILLIAM KALISH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SADASHIV S. SHENOY, M.D. AND SADASHIV S. SHENOY, M.D., PLLC.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANT-RESPONDENT KALEIDA HEALTH.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered June 25, 2020. The order, insofar as appealed from, granted the motions of defendants Sadashiv S. Shenoy, M.D., Sadashiv S. Shenoy, M.D., PLLC, and Kaleida Health insofar as they sought a protective order regarding certain raw data, precluded the use and dissemination of certain raw data and directed plaintiff to return all copies of the raw data to Kaleida Health and to delete electronically stored copies of the data.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

742

TP 21-00345

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

IN THE MATTER OF JOHN TOLLIVER, 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 (KATHLEEN M. TREASURE 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 February 19, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

744

KA 14-01624

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONDELL JOHNSON, DEFENDANT-APPELLANT.

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

RONDELL JOHNSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 16, 2014. The judgment convicted defendant upon a jury verdict of robbery in the first degree, robbery in the second degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]), robbery in the second degree (§ 160.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). In his pro se supplemental brief, defendant contends that the police lacked reasonable suspicion to stop, detain and frisk him, and thus Supreme Court erred in refusing to suppress tangible evidence obtained as a result of that police conduct. We reject that contention. A police officer testified at the suppression hearing that he received a radio dispatch reporting a robbery, providing a description of two suspects who were armed with handguns, and providing the global position system tracking location of a cellular phone taken from a victim during the robbery. Within seconds of the radio dispatch, the officer arrived at that location and stopped defendant, who matched the general description from the dispatch call. Under these circumstances, the stop and ensuing detention and frisk of defendant were supported by the requisite reasonable suspicion of criminal activity (*see People v Hicks*, 68 NY2d 234, 240-242 [1986]; *People v Thomas*, 167 AD3d 1519, 1520 [4th Dept 2018], *lv denied* 32 NY3d 1210 [2019]; *see generally People v De Bour*, 40 NY2d 210, 223 [1976]). In addition, we reject the further contention of defendant in his pro se supplemental brief

that the showup identification procedure was unduly suggestive. Defendant was apprehended near the crime scene within minutes of the crime and the showup procedure took place shortly thereafter (*see People v Duuvon*, 77 NY2d 541, 543 [1991]; *People v Wilson*, 104 AD3d 1231, 1232 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied* 21 NY3d 1078 [2013]). Furthermore, the fact that defendant was handcuffed and accompanied by a uniformed officer did not render the showup procedure unduly suggestive (*see People v Newton*, 24 AD3d 1287, 1288 [4th Dept 2005], *lv denied* 6 NY3d 836 [2006]; *People v Ponder*, 19 AD3d 1041, 1043 [4th Dept 2005], *lv denied* 5 NY3d 809 [2005]).

However, we agree with defendant's contention in his main brief, as the People correctly concede, that the court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence" (*People v Towns*, 33 NY3d 326, 328 [2019]). We conclude that, "by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal' " (*id*. at 333). We therefore reverse the judgment and grant a new trial before a different justice (*see People v Lawhorn*, 178 AD3d 1466, 1467 [4th Dept 2019]).

Defendant's remaining contention in his main brief is academic in light of our determination.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

751

CAF 20-00091

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

IN THE MATTER OF STACEY C. BAUER,
PETITIONER-APPELLANT,

V ORDER

JACOB G. DAILEY, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered November 21, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition without prejudice.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Shelley H. v Melvin Jermaine R.*, 172 AD3d 638, 638 [1st Dept 2019]; *Kulhan v Courniotes*, 209 AD2d 383, 384 [2d Dept 1994]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

753

CA 20-00739

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

PAUL MOTONDO, AS PRESIDENT OF SYRACUSE
FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 280,
PLAINTIFF-RESPONDENT,

V ORDER

CITY OF SYRACUSE, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BLITMAN & KING LLP, SYRACUSE (NATHANIEL G. LAMBRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 15, 2020. The judgment granted the motion of plaintiff for summary judgment and denied the cross motion of defendant for summary judgment.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

757

CA 20-01346

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

JACQUELINE DUVAL AND DENNIS DUVAL,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

DELTA-SONIC CARWASH SYSTEMS, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

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

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

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered September 15, 2020. The order granted in part and denied in part the motion of defendant for summary judgment.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

758

CA 20-00745

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

IN THE MATTER OF ARBITRATION BETWEEN
CITY OF SYRACUSE, PETITIONER-APPELLANT,

AND ORDER

SYRACUSE POLICE BENEVOLENT ASSOCIATION, INC.,
RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR PETITIONER-APPELLANT.

BLITMAN & KING LLP, SYRACUSE (KENNETH L. WAGNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 4, 2020 in a proceeding pursuant to CPLR article 75. The order and judgment, insofar as appealed from, denied the petition to stay arbitration and granted the cross motion of respondent to dismiss the petition and to compel arbitration.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

759

CA 20-01007

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

IN THE MATTER OF ANTHONY J. COSTELLO & SON (SPENCER) DEVELOPMENT, LLC, ANTHONY J. COSTELLO & SON (LANDON) DEVELOPMENT, LLC, AND ANTHONY J. COSTELLO & SON (SAMANTHA) DEVELOPMENT, LLC, PETITIONERS-APPELLANTS,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY, MONROE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, CITY OF ROCHESTER, AND COUNTY OF MONROE, RESPONDENTS-RESPONDENTS.

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR RESPONDENT-RESPONDENT COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (PATRICK N. BEATH OF COUNSEL), FOR RESPONDENT-RESPONDENT CITY OF ROCHESTER.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 30, 2020 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

761.1

CA 20-01198

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

JAYME A. MAST, PLAINTIFF-RESPONDENT,

V ORDER

MICHELLE D. LEICHTMAN, AS EXECUTOR OF THE ESTATE OF GERARD A. DESIMONE, DECEASED, DEFENDANT-APPELLANT.

THOMAS P. DURKIN, BUFFALO, FOR DEFENDANT-APPELLANT.

NICHOLAS J. SHEMIK, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered August 10, 2020. The order denied the motion of defendant to preclude certain trial testimony.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 28, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

765

KA 19-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK M. HACKETT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN J. MORRISSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), entered September 10, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he did not validly waive his right to contest the risk designation recommended by the Board of Examiners of Sex Offenders (*see People v Akinpelu,* 126 AD3d 1451, 1451-1452 [4th Dept 2015], *lv denied* 25 NY3d 912 [2015]; *People v Kyle*, 64 AD3d 1177, 1178 [4th Dept 2009], *lv denied* 13 NY3d 709 [2009]; *People v Gliatta*, 27 AD3d 441, 441 [2d Dept 2006]) and, in any event, that contention lacks merit.

Defendant further contends that the court erred in assessing points under risk factor 11 of the risk assessment instrument and in failing to grant a downward departure from defendant's presumptive risk level. Those contentions are not preserved for our review (*see People v Phillips*, 162 AD3d 1752, 1752-1753 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]; *People v Puff*, 151 AD3d 1965, 1966 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]), however, because at the SORA hearing defendant neither contested the points assessed under risk factor 11 nor requested a downward departure (*see People v Saraceni*, 153 AD3d 1561, 1561 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]; *Puff*, 151 AD3d at 1966).

Finally, to the extent that it is reviewable on this appeal (*see*

People v Eiss, 158 AD3d 905, 907 [3d Dept 2018], *lv denied* 31 NY3d 907 [2018]), we reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of this particular 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]; *People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

767

KA 19-00886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS CAPITANO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 20, 2019. The judgment convicted defendant, upon a nonjury verdict, of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs as a class D felony (Vehicle and Traffic Law §§ 1192 [4-a]; 1193 [1] [c] [ii-a]). Contrary to defendant's contention, we conclude that Supreme Court properly refused to suppress his statements to two police officers (*see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]; *People v Schumaker*, 136 AD3d 1369, 1373 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016], *reconsideration denied* 28 NY3d 974 [2016]; *People v Carbonaro*, 134 AD3d 1543, 1546-1547 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]).

Defendant further contends that the evidence is legally insufficient to support the conviction. At the close of the People's proof, defendant moved for a trial order of dismissal, and the court reserved decision. Although defendant renewed the motion at the close of his proof, the court never ruled on the motion and, at a later appearance, rendered a guilty verdict. Thus, we may not address defendant's contention because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof"

(*People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020] [internal quotation marks omitted]; *see People v White*, 134 AD3d 1414, 1415 [4th Dept 2015]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion (*see Bennett*, 180 AD3d at 1358; *White*, 134 AD3d at 1415). In light of our determination, we do not address defendant's remaining challenge to the verdict.

Finally, we note—as the People correctly concede—that the sentence is illegal insofar as the court directed that defendant serve a term of five years of probation, with an ignition interlock device for a period thereof, consecutive to the indeterminate term of imprisonment of 1 to 3 years on his conviction for violating Vehicle and Traffic Law § 1192 (4-a) (*see* Penal Law §§ 60.01 [2] [d]; 60.21; *People v Giacona*, 130 AD3d 1565, 1566 [4th Dept 2015]; *People v Flagg*, 107 AD3d 1613, 1614 [4th Dept 2013], *lv denied* 22 NY3d 1138 [2014]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

768

KA 18-00447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONDELL SCOTT, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 November 20, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), stemming from a shooting in which one person was killed and two were injured. We reject defendant's contention that the evidence is legally insufficient to support the conviction. The People presented evidence establishing every element of the crimes charged and defendant's commission thereof. The fact that no eyewitness to the shooting identified defendant as the person who fired the weapon does not render the evidence legally insufficient inasmuch as there was ample circumstantial evidence and other testimony establishing defendant's identity as the shooter (*see People v Suarez*, 175 AD3d 1036, 1037 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *People v Clark*, 142 AD3d 1339, 1340-1341 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659 [4th Dept 2010]). We further 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, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, the prosecutor did not improperly vouch for the credibility of the People's witnesses and his comments constituted fair comment on the evidence (*see People v*

Redfield, 144 AD3d 1548, 1550 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]). Finally, in light of the nature of the offense, we conclude that the sentence is not unduly harsh or severe.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

769

KA 18-00463

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SYLVESTER L. BRITT, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM 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 (Alex R. Renzi, J.), rendered January 10, 2018. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the seventh degree, assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, assault in the second degree (Penal Law § 120.05 [3]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). Contrary to defendant's contention, County Court (Randall, J.) did not err in refusing to suppress physical evidence inasmuch as the court properly determined that police officers had probable cause to arrest defendant. A police officer observed defendant engage in hand-to-hand transactions with two known drug users in a known drug location. In each exchange, defendant provided the individual with an object in a glassine baggie and the individual provided defendant with an undetermined amount of money.

The Court of Appeals has recognized that the passing of a glassine envelope is "the hallmark of an illicit drug exchange" (*People v McRay*, 51 NY2d 594, 604 [1980]). "[I]f money is passed in exchange for the envelope, probable cause almost surely would exist" (*id.*). Based on the officer's observations of the exchanges, the drug-prone location in which the exchanges took place, defendant's furtive acts, and his attempt to flee, we conclude that there was probable cause to believe that defendant had committed a narcotics offense and, as a result, there was no basis to suppress the physical evidence (*see People v Nichols*, 175 AD3d 1117, 1118 [4th Dept 2019],

lv denied 34 NY3d 1018 [2019]; *see generally People v Jones*, 90 NY2d 835, 837 [1997]).

Defendant further contends that Supreme Court (Renzi, J.) deprived him of his right to counsel when it denied defense counsel's "application to be relieved due to a confidential conflict." Before trial, defense counsel learned that the Public Defender's Office (PD's Office), i.e., his employer, was representing another individual who was charged with murder and that defendant had information relevant to that crime. Defendant wanted to use that information to secure an advantageous plea bargain with the prosecutor's office. As a result of the conflict of interest, the PD's Office sought to be relieved of representing that other individual as well as defendant. The court presiding over the murder case granted that request, but the court herein denied it, stating that "there was going to be no plea bargaining or any disposition short of a trial. This case was given to me for trial, and I'm going to try the case."

Even assuming, arguendo, that there was an actual conflict of interest (*see generally People v Sanchez*, 21 NY3d 216, 223 [2013]; *People v Solomon*, 20 NY3d 91, 97 [2012]), we conclude that any conflict was resolved when the court presiding over the murder case relieved the PD's Office from its representation of the other individual (*see People v Wright*, 13 AD3d 726, 728-729 [3d Dept 2004], *lv denied* 5 NY3d 857 [2005]; *see also People v Patterson*, 173 AD3d 1737, 1738-1739 [4th Dept 2019], *affd* 34 NY3d 1112 [2019]).

Defendant further contends that the court's remarks, i.e., stating that there would be no plea negotiations or "any disposition short of a trial," infringed on his right to plead guilty pursuant to CPL 220.10 (2). Although "there is no constitutional right to plea bargain" (*Weatherford v Bursey*, 429 US 545, 561 [1977]), a defendant has the right, subject to limited exceptions not relevant here, to enter a guilty plea to the entire indictment (*see* CPL 220.10 [2]; *People v Sanchez*, 124 AD3d 685, 689 [2d Dept 2015], *lv denied* 25 NY3d 1207 [2015]; *see generally People v Esajerre*, 35 NY2d 463, 466-467 [1974]). Here, however, there is no evidence in the record that defendant ever indicated a desire to plead guilty to the entire indictment. To the extent that such evidence exists outside the record on appeal, defendant's contention should be addressed in a CPL 440.10 motion (*see generally People v Norman*, 128 AD3d 1418, 1419 [4th Dept 2015], *lv denied* 27 NY3d 1003 [2016]; *People v Johnson*, 88 AD3d 1293, 1294 [4th Dept 2011]).

Assuming, arguendo, that defendant, by controverting the prosecutor's race-neutral reasons for striking a prospective juror, preserved for our review his contention that the prosecutor's reasons for striking that prospective juror were pretextual (*see People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *cf. People v Massey*, 173 AD3d 1801, 1802 [4th Dept 2019]; *People v Holloway*, 71 AD3d 1486, 1486-1487 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010]), we conclude that the prosecutor's stated reasons, i.e., that the prospective juror was a former prison employee and a former minister, were sufficiently race-neutral to withstand

defendant's *Batson* challenge (*see e.g. People v Jackson*, 185 AD3d 1454, 1454-1455 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Diaz*, 268 AD2d 534, 534-535 [2d Dept 2000], *lv denied* 95 NY2d 834 [2000]; *see generally People v Page*, 105 AD3d 1380, 1381 [4th Dept 2013], *lv denied* 23 NY3d 1023 [2014]).

Defendant's contention that the conviction of assault in the second degree (Penal Law § 120.05 [3]) is not based on legally sufficient evidence is preserved only in part (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude that, viewing the evidence in light of the elements of assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict with respect to that crime is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

772

CAF 20-01143

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

IN THE MATTER OF SADIAUS A., ALSO KNOWN
AS SADIAUS Y.
---------- ORDER
MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

SHANEQUA A., RESPONDENT-APPELLANT.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

BRYAN S. OATHOUT, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (James A. Vazzana, J.), entered July 28, 2020 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, granted the application for removal of the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 1 and 2, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

774

CA 21-00297

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

LILY CACHE CREEK BOLINGBROOK IL, LLC,
PLAINTIFF-APPELLANT,

V ORDER

JABARIA JODI, INC., AND PRADEEP PATEL,
DEFENDANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

R. BRIAN GOEWEY, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered December 29, 2020. The order granted defendants' motion to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 2, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

776

CA 20-01358

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

JIMMY LEVINE, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

HRISHIKESH BHATTACHARYA,
DEFENDANT-APPELLANT-RESPONDENT,
MATTHEW NARDOLILLO AND WORLD WIDE STONE, INC.,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

VANDETTE PENBERTHY LLP, BUFFALO (VINCENT T. PARLATO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (NELSON E. SCHULE, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered September 28, 2020. The order, among other things, denied the motion of defendant Hrishikesh Bhattacharya for summary judgment and denied in part plaintiff's cross motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 17, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

780

CA 20-01631

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

ENGLISH ROAD PEDIATRICS & ADOLESCENT MEDICINE, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAREN ELIZABETH GELLIN, M.D., DEFENDANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (RYAN K. CUMMINGS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (AMBER E. STORR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered June 16, 2020. The order and judgment, among other things, granted that part of defendant's cross motion seeking summary judgment on her counterclaim for declaratory judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that defendant is the sole and exclusive owner of the cash consideration paid to her as a result of the demutualization and conversion of Medical Liability Mutual Insurance Company,

and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration of the rights and obligations of the parties with respect to demutualization proceeds issued by Medical Liability Mutual Insurance Company to defendant when it converted from a mutual insurance company to a stock insurance company. We conclude that, for reasons stated in its decision, Supreme Court properly denied plaintiff's motion for summary judgment on the complaint and granted that part of defendant's cross motion seeking summary judgment on her counterclaim. The court erred, however, in failing to declare the rights of the parties, and we therefore modify the order and judgment by making the requisite declaration (*see Maurizzio v Lumbermens Mut.*

Cas. Co., 73 NY2d 951, 954 [1989]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

787

KA 18-02204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MEJIA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered October 11, 2018. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order denying his CPL 440.10 motion to vacate the judgment convicting him following a jury trial of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [2]). We affirmed the judgment of conviction on direct appeal (*People v Mejia*, 126 AD3d 1364 [4th Dept 2015], *lv denied* 26 NY3d 1090 [2015], *cert denied* — US —, 136 S Ct 2416 [2016]). Defendant made the motion herein to vacate the judgment of conviction on the ground, inter alia, that defense counsel was ineffective. Contrary to defendant's contention, we conclude that Supreme Court properly denied the relevant part of the motion pursuant to CPL 440.10 (2) (c) because the allegations of ineffectiveness that are in question involve matters of record that could have been raised on direct appeal from the judgment of conviction (*see People v Watkins*, 79 AD3d 1648, 1648 [4th Dept 2010], *lv denied* 16 NY3d 800 [2011]; *People v Smith*, 269 AD2d 769, 770 [4th Dept 2000], *lv denied* 95 NY2d 858 [2000]; *see also People v McCullough*, 144 AD3d 1526, 1526-1527 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

789

KA 17-00555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMORINSE P. SANON, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered November 3, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Contrary to defendant's contention, we conclude that he received effective assistance of counsel (*see People v Ramsaran*, 29 NY3d 1070, 1070-1071 [2017]; *cf. People v Wright*, 25 NY3d 769, 771 [2015]). We have reviewed defendant's remaining contentions and conclude that none requires reversal or modification of the judgment.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

799

CAF 19-01842

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

IN THE MATTER OF TRINITY B.-S. AND KARINA N.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WILLIAM R.N., RESPONDENT-APPELLANT.

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

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

LAWRENCE BROWN, BRIDGEPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered September 6, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent neglected the subject children.

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

Memorandum: On appeal from an order in this Family Court Act article 10 proceeding, we reject the contention of respondent father that the evidence does not establish his neglect of the subject children by a preponderance of the evidence. Petitioner established a presumption of neglect based on the father's chronic and repeated misuse of drugs while entrusted with the care of the subject children (*see* Family Ct Act § 1046 [a] [iii]; *Matter of Jack S. [Franklin O.S.]*, 173 AD3d 1842, 1843 [4th Dept 2019]; *Matter of Kenneth C. [Terri C.]*, 145 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 29 NY3d 905 [2017]). Contrary to the father's contention, the presumption of neglect was not rebutted inasmuch as the evidence did not establish that he was "voluntarily and regularly participating in a recognized rehabilitative program" (§ 1046 [a] [iii]; *see Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1698-1699 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]). In any event, the evidence established that the children's "physical, mental or emotional condition[s] [were] impaired or [were] in imminent danger of becoming impaired" as a result of the father's failure to exercise a minimum degree of care in providing the children with proper supervision and guardianship "by misusing a drug or drugs" (§ 1012 [f] [i] [B]; *see Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1462 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]). Additionally, petitioner established that the children's

mental or emotional condition was impaired or was in imminent danger of becoming impaired by their exposure to domestic violence (*see Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 371 [2004]; *Matter of Nevin H. [Stephanie H.]*, 164 AD3d 1090, 1091-1092 [4th Dept 2018]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

807

CA 20-01413

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

JOSEPH P. BASLA AND THERESA BASLA,
PLAINTIFFS-RESPONDENTS,

V ORDER

CHARISSA MARIE MIRRA, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLC, SYRACUSE (MICHAEL C. BOISVERT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 26, 2020. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 25, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

808

CA 20-01560

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

CARISMA ANDERSON, PLAINTIFF-APPELLANT,

V ORDER

NYSARC, INC., NIAGARA COUNTY CHAPTER,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

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

BOND, SCHOENECK & KING, LLC, BUFFALO (RIANE F. LAFFERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 24, 2020. The order and judgment dismissed the complaint.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

813

KA 19-01450

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEON ANDERSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a purported judgment of the Onondaga County Court (Thomas J. Miller, J.), purportedly rendered July 15, 2019. The purported judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Budner*, 14 NY2d 723, 724 [1964]; *People v Craig*, 267 App Div 907, 908 [2d Dept 1944]; *People v Nunez*, 21 Misc 3d 141[A], 2008 NY Slip Op 52379[U], *1 [App Term, 2d Dept, 9th & 10th Jud Dists 2008]; *see generally* CPL 1.20 [14], [15]; 450.10; *People v Pagan*, 19 NY3d 368, 370-371 [2012]; *People v Cioffi*, 1 NY2d 70, 72 [1956]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

819

KA 17-00399

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL J. GRIFFIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered December 15, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed for criminal possession of a weapon in the second degree under count one of the indictment to a determinate term of imprisonment of six years and a period of postrelease supervision of 2½ years and by reducing the sentence imposed for criminal possession of a weapon in the third degree under count two of the indictment to an indeterminate term of imprisonment of 2 to 6 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon (CPW) in the second degree (Penal Law § 265.03 [3]) and CPW in the third degree (§ 265.02 [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). However, we agree with defendant that the sentence is unduly harsh and severe. Thus, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence imposed for CPW in the second degree under count one of the indictment to a determinate term of imprisonment of six years and a period of postrelease supervision of 2½ years and by reducing the sentence imposed for CPW in the third degree under count two of the indictment to an indeterminate term of imprisonment of 2 to 6 years (*see* CPL

470.15 [6] [b]).

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

820

CAF 20-01532

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

IN THE MATTER OF BENJAMIN C. KAYE,
PETITIONER,

V ORDER

KAREN C. KAYE, RESPONDENT-RESPONDENT.

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

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

KAREN C. KAYE, RESPONDENT-RESPONDENT PRO SE.

ANASTASIA C. GAGAS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered July 29, 2020 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

821

CAF 20-01533

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

IN THE MATTER OF KAREN KAYE,
PETITIONER-RESPONDENT,

V ORDER

BENJAMIN KAYE, RESPONDENT.

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

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

KAREN C. KAYE, PETITIONER-RESPONDENT PRO SE.

ANASTASIA C. GAGAS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered July 29, 2020 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that petitioner shall continue to have sole legal and physical custody of the subject children.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

826

CA 20-00126

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

IN THE MATTER OF THE APPLICATION OF RICHARD M.,
AS EXECUTOR OF THE ESTATE OF FRANK J.M.,
DECEASED, PETITIONER-APPELLANT; ORDER

LUCY K., RESPONDENT,
ROBERT K., RICHARD K. AND JOAN H.,
RESPONDENTS-RESPONDENTS.

LAW OFFICE OF DAVID H. TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PETITIONER-APPELLANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JOSHUA MARK AGINS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Douglas A. Randall, A.J.), entered July 9, 2019 in a proceeding pursuant to Mental Hygiene Law article 81. The judgment granted the motion of respondents Robert K., Richard K., and Joan H. to dismiss the petition.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

829

CA 20-01196

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

MICHELLE LARCA, PLAINTIFF-RESPONDENT,

V ORDER

BJ'S WHOLESALE CLUB, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF C. SAMUEL BEARDSLEY, NEDROW (C. SAMUEL BEARDSLEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 4, 2020. The order, among other things, denied defendant's motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 25, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

830

CA 20-00938

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

THE HARENTON HOTEL, INC., AND RANDY M. HARE, INDIVIDUALLY AND AS AGENT FOR E. PROPERTIES, LLC, PLAINTIFFS-APPELLANTS,

V ORDER

VILLAGE OF WARSAW, DANIEL HURLBURT, CODE ENFORCEMENT OFFICER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND VALERIE DUELL, VILLAGE OF WARSAW ZONING BOARD MEMBER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, DEFENDANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 18, 2020. The order granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

833

KA 19-02150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAUL MORALES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MATTHEW BELLINGER 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 (James H. Cecile, A.J.), rendered October 1, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on August 2, 2021 and by the attorneys for the parties on August 26 and September 2, 2021,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

843

CAF 19-00801

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

IN THE MATTER OF JEDEDIAH K.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

GIANNA H., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 24, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

844

CAF 20-00224

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

IN THE MATTER OF VALOREE A. FRUMUSA,
PETITIONER-RESPONDENT,

V ORDER

LAWRENCE FRUMUSA, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered August 20, 2019 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found respondent in willful violation of a support order.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

851

CA 20-01063

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

BRANDON COLON, PLAINTIFF-RESPONDENT,

V ORDER

WYATT BOURDEAU, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS PRESIDENT OF PHI KAPPA PSI FRATERNITY, ET AL., DEFENDANTS,
AND THE ESTATE OF HUNTER BROOKS WATSON, DECEASED, DEFENDANT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (PATRICK B. SARDINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

COOPER ERVING & SAVAGE, LLP, ALBANY (BRETT D. FRENCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered July 14, 2020. The order granted the motion of plaintiff for partial summary judgment against defendant the Estate of Hunter Brooks Watson, deceased.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 3, 2021,

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court

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

876

CA 20-00998

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

DAWN K. RIZZO, PLAINTIFF-RESPONDENT,

V ORDER

DAVID E. MYERS AND DEM SERVICES, INC.,
DEFENDANTS-APPELLANTS.

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

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered February 18, 2020. The order, inter alia, directed defendants to return certain real property to plaintiff by quitclaim deed.

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

Entered: October 1, 2021

Ann Dillon Flynn
Clerk of the Court