SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 6, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED OCTOBER 6, 2023

_____	546.1	CA 23 00161	MEDICAL PROFESSIONALS FOR INFORMED CONSENT, INC. V MARY T. BASSETT
_____	595	KA 22 00998	PEOPLE V GREGORY P. PARISH
_____	596	KA 20 00418	PEOPLE V RAEKWON WINSTON
_____	598	KA 23 00229	PEOPLE V PARRIS J. RUFUS
_____	600	KA 22 00999	PEOPLE V GREGORY P. PARISH
_____	601	KA 17 00106	PEOPLE V MIKE A. BROWN
_____	603	OP 23 00478	PENNEY PROPERTY SUB HOLDINGS V THE TOWN OF AMHERST
_____	608	CA 22 00880	STEVEN M. V STATE OF NEW YORK
_____	625	KA 22 00598	PEOPLE V MATTHEW BRENNAN
_____	629	CA 23 00198	RUBY BELTON, M.D. V BORG & IDE IMAGING, P.C.
_____	632	CA 22 01916	EMESE OLAH V ANTAL ZSIRAI
_____	634	CA 22 01469	BRIAN F. ALDRICH V LNG ENTERPRISES, INC.
_____	638	KA 22 00490	PEOPLE V AL AMIN MCMILLON
_____	641	KA 22 00659	PEOPLE V DAION JORDAN
_____	642	KA 22 00189	PEOPLE V JAHLIL COOLEY
_____	645	KA 20 00765	PEOPLE V TYLER J. NEAL
_____	647	KA 23 00472	PEOPLE V KASHEIM JONES
_____	651	CA 21 00532	MARK D. BOGUMIL V GREENBAUM FAMILY HOLDINGS, LP
_____	653	CA 22 01455	ALEYSHA MARINO V RITA WEILER
_____	655	CA 22 00450	CHS, INC. V LAND O' LAKES PURINA FEED, LLC
_____	658	KA 20 00459	PEOPLE V KAMEL DAVIS
_____	658.1	KA 20 00458	PEOPLE V KAMEL DAVIS
_____	675	CA 22 01543	CHARLES L. V THE STATE OF NEW YORK
_____	676	CA 22 01961	CHARLES L. V STATE OF NEW YORK

_____	686	KA 20 01119	PEOPLE V WARREN MEREDITH
_____	687	KA 18 00796	PEOPLE V TYSHAWN KING
_____	694	CAF 22 00810	VIALMA RAMOS-ONEAL V MAYRA RAMOS
_____	697	CA 22 01613	L&W SUPPLY CORPORATION V BUILT-RITE DRYWALL CORP.
_____	700	CA 22 01294	AMY D. FALLETTA V ALLYN M. NORMAN, D.O.
_____	701	CA 22 01492	DARCY M. BLACK V 465 PAYNE AVENUE LLC
_____	706	CA 22 01941	VILLAGE GREEN EAST HOLDINGS LLC V GLEN BLAAKMAN
_____	707	KA 22 01636	PEOPLE V CASEY C. BURKE
_____	708	KA 22 00187	PEOPLE V KELLY ANDERSON
_____	727	KA 22 01167	PEOPLE V SCOTT J. ANDREWS
_____	729	KA 22 00177	PEOPLE V JAQUAN DENNARD
_____	730	KA 19 01044	PEOPLE V TIMOTHY A. FERRY
_____	731	KA 19 01030	PEOPLE V JQUANE WASHINGTON
_____	743	CA 22 01327	UNITED CHURCH OF FRIENDSHIP V NEW YORK DISTRICT ASSEMBLIES OF GOD
_____	744	CA 22 01328	UNITED CHURCH OF FRIENDSHIP V NEW YORK DISTRICT ASSEMBLIES OF GOD

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

546.1

CA 23-00161

PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF MEDICAL PROFESSIONALS FOR INFORMED CONSENT, INDIVIDUALLY AND ON BEHALF OF ITS MEMBERS, KRISTEN ROBILLARD, M.D., ZARINA HERNANDEZ-SCHIPPLICK, M.D., MARGARET FLORINI, A.S.C.P., OLYESYA GIRICH, RT (R), AND ELIZABETH STORELLI, R.N., INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARY T. BASSETT, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH FOR STATE OF NEW YORK, KATHLEEN C. HOCHUL, IN HER OFFICIAL CAPACITY AS GOVERNOR OF STATE OF NEW YORK, AND NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS.

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

GIBSON LAW FIRM, PLLC, ITHACA (SUJATA SIDHU GIBSON OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered January 13, 2023, in a proceeding pursuant to CPLR article 78 and a declaratory judgment action. The judgment, insofar as appealed from, denied the motion of respondents-defendants to dismiss and granted the petition-complaint for a declaration that 10 NYCRR 2.61 was beyond the scope of respondents-defendants' authority and was null, void and of no effect.

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

Memorandum: Respondents-defendants appeal from a judgment that, insofar as appealed from, denied their motion to dismiss and, instead, granted the petition-complaint for a declaration that 10 NYCRR 2.61—which mandated that "covered entities," i.e., hospitals, require that certain personnel be fully vaccinated against COVID-19 unless they fall within the regulation's medical exemption—was beyond the scope of authority of respondent-defendant New York State Department of Health (DOH) and was null, void, and of no effect. Upon the application of respondents-defendants, we granted a stay of the

judgment pending appeal. During oral argument of the appeal, the attorney for respondents-defendants announced that DOH would cease enforcing the regulation and that formal repeal of the regulation would occur through the appropriate regulatory process. The regulation has now been repealed (*see* former 10 NYCRR 2.61, repealed by NY St Reg, Oct. 4, 2023 at 22). We agree with respondents-defendants for the reasons that follow that the appeal should be dismissed as moot.

The jurisdiction of this Court "extends only to live controversies . . . [, and w]e are thus prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions' " (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003], *cert denied* 540 US 1017 [2003]; *see Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1558 [4th Dept 2021]). Courts are thus generally "precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances' " (*City of New York v Maul*, 14 NY3d 499, 507 [2010], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). "[A]n appeal is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *see Maul*, 14 NY3d at 507; *Hearst Corp.*, 50 NY2d at 714).

Here, in terms of the substantive relief requested in their petition-complaint, petitioners-plaintiffs sought to enjoin enforcement of the regulation and a declaration that the regulation was unenforceable. The repeal of the regulation has rendered the appeal of the judgment granting that relief moot inasmuch as "[a] declaration as to the validity or invalidity of the [regulation] would . . . have no practical effect on the parties" (*Saratoga County Chamber of Commerce*, 100 NY2d at 811; *see Matter of Hensley v Williamsville Cent. Sch. Dist.*, 206 AD3d 1655, 1656 [4th Dept 2022]; *Matter of Pharaohs GC, Inc. v New York State Liq. Auth.*, 197 AD3d 1010, 1011 [4th Dept 2021]; *Sportsmen's Tavern LLC*, 195 AD3d at 1558).

"An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts" (*Coleman*, 19 NY3d at 1090). Where the issue "falls within the well-recognized exception[,] . . . courts may exercise their extraordinary discretion to entertain the appeal notwithstanding mootness" (*Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311 [1988], *cert denied* 488 US 966 [1988]; *see Saratoga County Chamber of Commerce*, 100 NY2d at 811; *see also Matter of Duarte v City of New York*, 20 NY3d 1067, 1068 [2013]; *Ayoub v Ayoub*, 14 NY3d 921, 922 [2010]).

We conclude that the exception to the mootness doctrine does not apply here. "[A]lthough the issue of the lawfulness of the [regulation] implemented as part of the extraordinary response to the

COVID-19 pandemic is substantial and novel, that issue is not *likely* to recur" given the once-in-a-century nature of the pandemic and the emergency governmental response thereto (*Sportsmen's Tavern LLC*, 195 AD3d at 1558; *see generally Saratoga County Chamber of Commerce*, 100 NY2d at 811-812). Moreover, "the issue is not of the type that typically evades review" (*Wisholek v Douglas*, 97 NY2d 740, 742 [2002]; *see Hensley*, 206 AD3d at 1656; *Pharaohs GC, Inc.*, 197 AD3d at 1011; *Sportsmen's Tavern LLC*, 195 AD3d at 1558). Indeed, the regulation at issue here received significant review from numerous state and federal courts (*see Sportsmen's Tavern LLC*, 195 AD3d at 1558-1559). In any event, under the circumstances of this case, we would "decline to invoke the mootness exception" (*Duarte*, 20 NY3d at 1068; *see Ayoub*, 14 NY3d at 922; *Sportsmen's Tavern LLC*, 195 AD3d at 1559).

Inasmuch as the appeal is moot and the exception to the mootness doctrine does not apply, we are precluded from considering the merits of the issues raised on appeal and we "take no position on the propriety of the judgment appealed from" (*Johnston v State Bd. of Elections*, 79 AD2d 890, 890 [4th Dept 1980], *lv denied* 52 NY2d 706 [1981]; *see Sedita v Board of Educ. of City of Buffalo*, 43 NY2d 827, 828 [1977]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

595

KA 22-00998

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY P. PARISH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered June 9, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal contempt in the first degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from respective judgments convicting him, upon his plea of guilty, of criminal contempt in the first degree (Penal Law § 215.51 [b] [v]). Defendant waived his right to appeal in appeal No. 2, but did not do so in appeal No. 1.

In both appeals, defendant contends that County Court abused its discretion in denying his motion to, inter alia, withdraw his pleas of guilty because he had not taken his prescribed medication at the time he entered his pleas and, therefore, his pleas were not knowing, voluntary, and intelligent. We reject that contention. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of discretion unless there is some evidence of innocence, fraud, or mistake in inducing [a] plea" (*People v Floyd*, 210 AD3d 1530, 1530 [4th Dept 2022], *lv denied* 39 NY3d 1072 [2023] [internal quotation marks omitted]). Furthermore, where "a motion to withdraw a plea is patently insufficient on its face, a court may simply deny the motion" (*People v Mitchell*, 21 NY3d 964, 967 [2013]; *see Floyd*, 210 AD3d at 1531), and "a court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding" (*People v Fox*, 204 AD3d 1452, 1453 [4th Dept 2022], *lv*

denied 39 NY3d 940 [2022] [internal quotation marks omitted]). Here, defendant's belated and unsubstantiated assertion that the pleas were the result "of a failure to take prescribed medication is insufficient to support [that part of his] motion to withdraw [the] plea[s]" (*People v Hunt*, 188 AD3d 1648, 1649 [4th Dept 2020], *lv denied* 36 NY3d 1097 [2021]; *see People v Hayes*, 39 AD3d 1173, 1175 [4th Dept 2007], *lv denied* 9 NY3d 923 [2007]). In addition, the record of defendant's plea proceedings establishes that "defendant understood both the nature of the proceedings and that he was waiving various rights" (*Hayes*, 39 AD3d at 1175; *see People v Alexander*, 97 NY2d 482, 486 [2002]; *People v Watson*, 169 AD3d 1526, 1528 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019]).

Even assuming, arguendo, that defendant did not validly waive his right to appeal in appeal No. 2, we nevertheless reject defendant's contention in both appeals that his sentences are unduly harsh and severe.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

596

KA 20-00418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAEKWON WINSTON, DEFENDANT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered October 17, 2019. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

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

Defendant failed to preserve for our review his contention that his conviction is not supported by legally sufficient evidence because his general motion for a trial order of dismissal was not specifically directed at the alleged error raised on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Sides*, 215 AD3d 1250, 1251 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). In any event, we conclude that the evidence is legally sufficient and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that he was denied a fair trial by the admission of testimony that he was known to fire guns during parties is not preserved because he " 'did not object on *Molineux* grounds to the admission of [the] testimony . . . nor did he request a *Ventimiglia* hearing' " (*People v Kenney*, 209 AD3d 1301, 1303-1304 [4th Dept 2022], *lv denied* 39 NY3d 986 [2022]).

Contrary to defendant's further contention, he was not denied effective assistance of counsel by defense counsel's failure to object to details elicited about the victim's personal life. Although we agree with defendant that some of those details were irrelevant (*see People v Harris*, 98 NY2d 452, 490-491 [2002]), " 'the single error by defense counsel in failing to object to [the] admission [thereof] was not so egregious as to deprive defendant of a fair trial' " (*People v Escobar,* 181 AD3d 1194, 1198 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]; *cf. People v Salone*, 188 AD3d 1742, 1743 [4th Dept 2020]; *see also People v Concepcion*, 128 AD3d 612, 614 [1st Dept 2015], *lv denied* 26 NY3d 927 [2015]). Additionally, defendant was not denied effective assistance of counsel due to defense counsel's failure to make certain other objections or arguments (*see People v Williams*, 98 AD3d 1234, 1236 [4th Dept 2012], *lv denied* 21 NY3d 947 [2013]). We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's contention that County Court erred in denying defendant's request for a missing witness charge for various individuals. A missing witness instruction is appropriate where the witness in question has knowledge material to the trial, would be expected to give noncumulative testimony favorable to the party against whom the charge is sought, and is available to that party (*see People v Smith*, 33 NY3d 454, 458 [2019]). The witnesses in question refused to cooperate with prosecutors, which rendered them outside the People's control (*see People v Daniels*, 140 AD3d 1083, 1085 [2d Dept 2016], *lv denied* 28 NY3d 970 [2016]; *People v Mariano*, 36 AD3d 504, 505 [1st Dept 2007], *lv denied* 8 NY3d 987 [2007]; *People v Baker*, 174 AD2d 1019, 1020 [4th Dept 1991], *lv denied* 78 NY2d 1073 [1991]).

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

598

KA 23-00229

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PARRIS J. RUFUS, DEFENDANT-APPELLANT.

FIANDACH & FIANDACH, ROCHESTER (EDWARD L. FIANDACH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered October 7, 2022. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, as a class E felony.

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

Memorandum: On appeal from a judgment convicting him, upon a nonjury trial, of driving while intoxicated, as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that County Court erred in refusing to suppress evidence obtained as the result of an allegedly unlawful traffic stop. Contrary to defendant's contention, we conclude that "the record supports the court's finding that the police officer lawfully stopped defendant's car for crossing the white fog line in violation of Vehicle and Traffic Law § 1128 (a)" (*People v Eron*, 119 AD3d 1358, 1359 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]; *see also People v Wohlers*, 138 AD2d 957, 957 [4th Dept 1988]). The police officer testified at the suppression hearing that he observed defendant's vehicle depart from the lane unsafely, having witnessed it swerve and cross over the white fog line three times within a tenth of a mile, which is sufficient to provide probable cause for the stop.

We also reject defendant's further contentions that the evidence is legally insufficient to establish that he was intoxicated and that the verdict is against the weight of the evidence. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" from which the court could find that defendant operated a motor vehicle in an intoxicated condition (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

In addition, 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 conclude that, although a different verdict would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

All concur except CURRAN and OGDEN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent and vote to reverse the judgment, grant that part of the omnibus motion seeking to suppress evidence, and dismiss the indictment inasmuch as we conclude that the People did not "meet *their* burden of showing the legality of the police conduct in stopping [defendant's] vehicle" (*People v Suttles*, 214 AD3d 1313, 1314 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023] [emphasis added]). Specifically, we conclude that the police lacked probable cause to stop defendant's vehicle for a traffic violation (*see generally People v Hinshaw*, 35 NY3d 427, 429 [2020]; *People v Robinson*, 97 NY2d 341, 348-349 [2001]) because merely crossing the white edge line separating the roadway from the shoulder—i.e., what the majority refers to as the fog line—does not, standing alone, constitute a violation of Vehicle and Traffic Law § 1128 (a). Although we acknowledge this Court's precedent holding that "crossing the white fog line" per se violates Vehicle and Traffic Law § 1128 (a) (*People v Eron*, 119 AD3d 1358, 1359 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]; *see People v Wohlers*, 138 AD2d 957, 957 [4th Dept 1988]), we respectfully conclude, for the reasons that follow, that those cases were wrongly decided and should therefore no longer be followed.

We start with the relevant statutory text. Vehicle and Traffic Law § 1128 (a) provides that "[w]henever any roadway has been divided into two or more clearly marked lanes . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." In short, the text indicates that the statute is violated only when a driver *unsafely* moves from a lane. There is no language in the statute that expressly prohibits a driver from touching or crossing an edge line; it merely applies to unsafe movements outside of a designated lane. Thus, in our view, the clear and unambiguous text of Vehicle and Traffic Law § 1128 (a) does not support the conclusion of *Eron* and *Wohlers* that merely crossing the edge line establishes probable cause sufficient to support a traffic stop (*see People v Davis*, 58 AD3d 896, 897-898 [3d Dept 2009]).

Other statutory and regulatory provisions support the conclusion that merely crossing or touching the edge line is not per se prohibited by Vehicle and Traffic Law § 1128 (a). The Vehicle and Traffic Law defines a "roadway" as "[t]hat portion of a highway improved, designed, marked, or ordinarily used for vehicular traffic, exclusive of the shoulder and slope" (Vehicle and Traffic Law § 140; *see also* § 118). In turn, the "shoulder" is "[t]hat improved portion of a highway contiguous with the roadway" (§ 143-a). The edge line

serves merely to separate the roadway from the shoulder, and does not delineate an entirely separate lane of travel (*see* 17 NYCRR former 261.7 [a] [iii]; *see generally Bottalico v State of New York*, 59 NY2d 302, 305-306 [1983]).

The white line at issue in this case is therefore best understood as an edge line pavement marking. According to the Manual of Uniform Traffic Control Devices for Streets and Highways - 2009 Edition (MUTCD), as adopted and supplemented by the State of New York (*see* 17 NYCRR ch V; *see also* Vehicle and Traffic Law § 1680 [a]), such lines "delineate the right . . . edges of a roadway" (MUTCD § 3B.06 [1]; *see also* § 3A.05 [2] [B]) and "shall consist of a normal solid white line" (§ 3B.06 [4]). Those markings "have unique value as visual references *to guide* road users during adverse weather and visibility conditions" (§ 3B.06 [6] [emphasis added]) and "may be used where edge delineation is *desirable* to minimize *unnecessary* driving on paved shoulders" (§ 3B.07 [7] [emphases added]). Where a white edge line marking consists of "a normal or wide solid white line," the MUTCD provides that crossing the edge line marking is merely "discouraged" (§ 3B.04 [20]; *see People v Morales*, 54 Misc 3d 137[A], 2017 NY Slip Op 50139[U], *3 [App Term, 2d Dept, 9th & 10th Jud Dists 2017]). In short, rather than establishing that crossing an edge line is per se prohibited, the relevant regulations implicitly contemplate instances where a driver might properly traverse such a line to enter the shoulder.

Requiring the People to show that defendant did more than merely cross the edge line to establish a violation of Vehicle and Traffic Law § 1128 (a) is also consonant with the burden applicable in civil cases involving that provision. Indeed, in that context, courts have held that a plaintiff establishes a defendant's liability under section 1128 (a) by supplying evidence that a lane change was done *unsafely* (*see e.g. Steigelman v Transervice Lease Corp.*, 145 AD3d 439, 439 [1st Dept 2016]; *Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016]; *Cascante v Kakay*, 88 AD3d 588, 589 [1st Dept 2011]).

In other words, the foregoing establishes that, on roads where Vehicle and Traffic Law § 1128 (a) applies, mere movement from a lane by itself does not violate the statute—this is so even if we were to assume, arguendo, that crossing the edge line between the roadway and the shoulder constitutes a lane change (a fairly dubious proposition). To that end, it is clear that the crossing of the edge line must be accompanied by some showing of unsafe conduct to establish a violation of Vehicle and Traffic Law § 1128 (a) (*see Davis*, 58 AD3d at 897-898). Thus, *Eron* and *Wohlers* were wrongly decided because they concluded that touching the edge line automatically violates Vehicle and Traffic Law § 1128 (a). Nothing in those cases established that the defendants *unsafely* changed lanes; indeed, both cases are wholly silent on the text of the relevant statute and the elements necessary to establish a violation thereof. As illustrated above, that conclusion is contrary to the text of section 1128 (a), and other relevant statutory and regulatory provisions.

In applying the facts of this case to the relevant legal

framework, we conclude that the People failed to demonstrate that there was probable cause that defendant violated Vehicle and Traffic Law § 1128 (a) by *unsafely* crossing the edge line. County Court's determination that the police stop of defendant's vehicle was lawful, due to a violation of Vehicle and Traffic Law § 1128 (a), was based solely on testimony that the vehicle briefly crossed the "fog line . . . three separate times within a tenth of a mile." Crucially, however, there was no testimony establishing that defendant was speeding, driving erratically, or that he had violated any other provision of the Vehicle and Traffic Law (*see Davis*, 58 AD3d at 897-898). To the extent that the majority notes that there was testimony that defendant unsafely crossed the edge line, that testimony was entirely conclusory on the issue of safety and wholly without any elaboration. "[P]robable cause cannot be established merely through conclusory testimony" (*People v Brown*, 238 AD2d 204, 204 [1st Dept 1997], *lv denied* 90 NY2d 1010 [1997]; *see generally People v Parris*, 83 NY2d 342, 350 [1994]; *People v Bigelow*, 66 NY2d 417, 425 [1985]). Nonetheless, we note that, the majority's election to inject safety into its analysis is tantamount to a concession that the per se rule of *Eron* and *Wohlers* is wrong and that it is an incorrect interpretation of the text of section 1128 (a).

Additionally, the People also failed to demonstrate that the edge line at issue here was anything other than a normal or wide solid white line where crossing the edge line marking would be merely discouraged (*see* MUTCD § 3B.04 [20]; *Morales*, 2017 NY Slip Op 50139[U], *3). Moreover, this is not a case where the People established that defendant, in addition to violating Vehicle and Traffic Law § 1128 (a), unlawfully drove on the shoulder of the controlled-access highway involved in this case (*see* § 1131; *see e.g. People v Tandle*, 71 AD3d 1176, 1177-1178 [2d Dept 2010], *lv denied* 15 NY3d 757 [2010]; *People v Parris*, 26 AD3d 393, 394 [2d Dept 2006], *lv denied* 6 NY3d 851 [2006]).

Ultimately, because there was no evidence that defendant unsafely crossed the edge line here, we conclude that the People failed to adduce sufficient evidence establishing probable cause for a violation of Vehicle and Traffic Law § 1128 (a) (*see e.g. People v Legnetti*, 73 Misc 3d 36, 39 [App Term, 2d Dept, 9th & 10th Jud Dists 2021], *lv denied* 38 NY3d 951 [2022]; *People v Krasniqi*, 58 Misc 3d 158[A], 2018 NY Slip Op 50245[U], *2 [App Term, 2d Dept, 9th & 10th Jud Dists 2018]; *People v Krantz*, 6 Misc 3d 129[A], 2005 NY Slip Op 50058[U], *1-2 [App Term, 2d Dept, 9th & 10th Jud Dists 2005]). To the extent that *Eron* and *Wohlers* compel a contrary result, we would not follow them, inasmuch as they are inconsistent with the statutory text.

Finally, although the court stated in its decision that "the [police who stopped defendant] had a *reasonable belief* that [he] violated" Vehicle and Traffic Law § 1128 (a) (emphasis added), it did not *expressly refuse* to suppress evidence on the ground that the vehicle stop was based on a reasonable mistake of law, even as an alternative basis for denial (*see generally People v Guthrie*, 25 NY3d 130, 134 [2015], *rearg denied* 25 NY3d 1191 [2015]). Indeed, at oral

argument on appeal the People conceded that they had not raised this alternative ground for affirmance at the suppression hearing. Thus, even if we were inclined to conclude that the police lawfully stopped defendant due to a reasonable mistake of law premised on *Eron* and *Wohlers*, we are precluded from affirming on that alternative basis (*see People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *see generally* CPL 470.15 [1]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

600

KA 22-00999

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY P. PARISH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered June 9, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree.

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

Same memorandum as in *People v Parish* ([appeal No. 1] — AD3d — [Oct. 6, 2023] [4th Dept 2023]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

601

KA 17-00106

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIKE A. BROWN, ALSO KNOWN AS MICHAEL A. BROWN, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered June 16, 2016. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]).

As defendant contends and the People correctly concede, his waiver of the right to appeal was inadequate under *People v Thomas* (34 NY3d 545 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant next contends that County Court erred in refusing to suppress evidence obtained as the result of an allegedly unlawful arrest. Contrary to defendant's contention, we conclude that there was probable cause to arrest defendant. " 'Probable cause requires, not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction . . . , but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed' " (*People v Rose*, 2 AD3d 1324, 1325 [4th Dept 2003], *lv denied* 2 NY3d 745 [2004], quoting *People v McRay*, 51 NY2d 594, 602 [1980]).

The record of the probable cause hearing establishes that two police officers were surveilling a vacant residence known to be a "chronic nuisance location for drug sales [and] drug use" when they

observed an individual exit the back door of the residence with what appeared to be numerous small bags containing crack cocaine. As the officers detained and searched that individual, they observed defendant open the back door, look out in the direction of the officers, and then slam the door shut. Thereafter, as one of the officers moved to the door, knocked and shouted "police, open the door," he heard what sounded like boards being placed in an effort to barricade the rear entrance, followed by footsteps and breaking glass. The officer ran to the other side of the residence, and observed defendant lying on the ground beneath a broken window. After attempting to run away, defendant was apprehended by the officer and placed under arrest. We conclude that those facts, i.e., defendant fleeing from a known drug house by breaking, and then leaping through, a window immediately after seeing police officers detain another individual leaving the residence while openly possessing what appeared to be crack cocaine, would lead a reasonable person with the same expertise as the officer to determine that defendant was involved in an illegal drug transaction (*see People v Whitaker*, 168 AD2d 656, 657 [2d Dept 1990], *lv denied* 78 NY2d 927 [1991], *reconsideration denied* 78 NY2d 976 [1991]).

Finally, defendant contends that the court erred in summarily refusing to suppress evidence obtained from a search of the vacant residence. We reject that contention and conclude that "the allegations in the motion papers were insufficient to warrant a hearing" (*People v Ibarguen*, 37 NY3d 1107, 1108 [2021], *cert denied* — US —, 142 S Ct 2650 [2022]). Although defendant provided an affidavit wherein he claimed to be the occupant of the vacant residence, he presented limited evidence showing "relatively tenuous ties to the [premises]" and, in light of the property manager's supporting deposition attesting that defendant has never "leased or legitimately occupied" the residence, the court properly determined that defendant "lack[ed] standing to contest the legality of the search" (*People v Smith*, 155 AD3d 1674, 1675 [4th Dept 2017], *lv denied* 30 NY3d 1120 [2018] [internal quotation marks omitted]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

603

OP 23-00478

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

IN THE MATTER OF PENNEY PROPERTY SUB HOLDINGS LLC, PETITIONER,

V MEMORANDUM AND ORDER

THE TOWN OF AMHERST, RESPONDENT.

HARTER SECREST & EMERY LLP, ROCHESTER (MEGAN K. DORRITIE OF COUNSEL), FOR PETITIONER.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to EDPL 207 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to review a determination of respondent. The determination condemned certain property of petitioner.

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

Memorandum: Petitioner commenced this original proceeding pursuant to EDPL 207 seeking to annul the determination of respondent, Town of Amherst (Town), authorizing the condemnation of approximately 62 acres of property consisting predominantly of the Boulevard Mall and surrounding parking area (Mall property). The Mall property includes petitioner's 2.3 acres of commercial land, which is leased and operated as a fully-functional JC Penney department store. The Town held a public hearing on November 22, 2022, prior to which it timely published a notice of hearing as required by EDPL 202. With respect to petitioner, the Town further served notice of the hearing on November 9, 2022, by both hand delivery to the secretary of state and by certified mail, return receipt requested, addressed to petitioner's tax billing address on file with the Town Assessor. The Town does not dispute that the secretary of state delayed in forwarding the notice of hearing to petitioner until after the hearing had been held, and further concedes that the notice sent to petitioner by certified mail was never delivered. On January 30, 2023, the Town adopted a resolution authorizing the acquisition.

Petitioner contends that the Town's failure to provide proper notice of the hearing deprived petitioner of due process, requiring this Court to annul the Town's determination. EDPL 202 (C) (1) provides that where, as here, a public hearing is required, the

condemnor "shall serve, either by personal service or certified mail, return receipt requested, a notice of the purpose, time, date, and location of [the] hearing . . . to each assessment record billing owner." We agree with petitioner that hand delivery of the hearing notice to the secretary of state does not constitute personal service (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 142 [1986]). Contrary to petitioner's contention, however, we conclude that the Town fulfilled the requirements of both EDPL 202 (C) (1) and procedural due process by serving notice of the hearing to petitioner by certified mail, return receipt requested.

With respect to procedural due process, it is well settled that " '[d]ue process does not require that a property owner receive actual notice before the government may take [their] property' " (*Matter of City of Rochester [Duvall]*, 92 AD3d 1297, 1298 [4th Dept 2012], quoting *Jones v Flowers*, 547 US 220, 226 [2006]). "Rather, due process is satisfied by 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections' " (*id.*, quoting *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]). If the Town had been made aware prior to the hearing "that its attempt at notice ha[d] failed" (*Jones*, 547 US at 227), then it would have been obliged to "take[ ] additional steps to notify [petitioner], if practicable to do so" (*id.* at 234). Here, however, the record lacks evidence that the Town was, or should have been, aware that the mailed notice had not actually reached petitioner prior to the hearing. Under these circumstances, the notice provided to petitioner satisfied the requirements of procedural due process.

Petitioner further contends that the hearing was not conducted in compliance with EDPL 203 because the Town failed to outline a specific future use for the proposed acquisition. That contention "is not properly before us [inasmuch] as th[at] precise issue was not timely raised in the petition" (*Matter of Tadasky Corp. v Village of Ellenville*, 45 AD3d 1131, 1132 [3d Dept 2007]; *see Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1812 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]). In any event, that contention is without merit.

Additionally, we reject petitioner's contention that the condemnation will not serve a public use, benefit, or purpose (*see* EDPL 207 [C] [4]). "What qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage" (*Matter of Syracuse Univ. v Project Orange Assoc. Servs. Corp.*, 71 AD3d 1432, 1433 [4th Dept 2010], *appeal dismissed & lv denied* 14 NY3d 924 [2010] [internal quotation marks omitted]), and "[i]t is well settled that redevelopment and urban renewal are valid public uses" (*United Ref. Co. of Pa.*, 173 AD3d at 1811), as is "removal of urban blight" (*Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 524 [2009], *rearg denied* 14 NY3d 756 [2010]). Here, condemnation of petitioner's property will "allow [the Town] to hold complete title to [the Mall property] and will thus foster the redevelopment of [the

area] . . . in order to eliminate blighting influences" (*Matter of Court St. Dev. Project, LLC v Utica Urban Renewal Agency*, 188 AD3d 1601, 1602 [4th Dept 2020]; *see Matter of Niagara Falls Redevelopment, LLC v City of Niagara Falls*, 218 AD3d 1306, 1308 [4th Dept 2023]; *Matter of Huntley Power, LLC v Town of Tonawanda* [proceeding No. 2], 217 AD3d 1325, 1327 [4th Dept 2023]). We therefore conclude that the Town's determination to exercise its eminent domain power "is rationally related to a conceivable public purpose" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 425 [1986] [internal quotation marks omitted]).

We further reject petitioner's contentions that the Town's finding of blight as it relates to petitioner's property is based on insufficient evidence and that the taking of petitioner's property is excessive. With respect to petitioner's property, the government "may condemn [an] unblighted parcel[ ] as part of an overall plan to improve a blighted area" (*Matter of Develop Don't Destroy [Brooklyn] v Urban Dev. Corp.*, 59 AD3d 312, 321 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009], *rearg denied* 14 NY3d 748 [2010] [internal quotation marks omitted]; *see Cannata v City of New York*, 14 AD2d 813, 813 [2d Dept 1961], *affd* 11 NY2d 210 [1962], *appeal dismissed* 371 US 4 [1962]; *see generally Yonkers Community Dev. Agency v Morris*, 37 NY2d 478, 483-484 [1975], *appeal dismissed* 423 US 1010 [1975]). There is support in the record for the Town's conclusions that the Mall property, as a whole, is an "[a]rea[ ] of economic underdevelopment and stagnation" (*Court St. Dev. Project, LLC*, 188 AD3d at 1602) and that "condemnation and subsequent improvement of [the Mall] property would benefit the area's redevelopment" (*United Ref. Co. of Pa.*, 173 AD3d at 1811). Thus, there is no basis for us to "supplant [the Town's] determination" (*Goldstein*, 13 NY3d at 528; *cf. Matter of Gabe Realty Corp. v City of White Plains Urban Renewal Agency*, 195 AD3d 1020, 1022 [2d Dept 2021]). Furthermore, we conclude that petitioner has not met its burden of demonstrating that the Town abused its considerable discretion in condemning petitioner's property in addition to the rest of the Mall property (*see Huntley Power, LLC*, 217 AD3d at 1327; *United Ref. Co. of Pa.*, 173 AD3d at 1811-1812; *Matter of Butler v Onondaga County Legislature*, 39 AD3d 1271, 1272 [4th Dept 2007]).

We likewise reject petitioner's contention that the Town's purpose for acquiring the property manifests an intent to engage in constitutionally-prohibited enterprise because the Town may sell the property to a private developer. "[T]he '[t]aking of substandard real estate by a municipality for redevelopment by private corporations has long been recognized as a species of public use' " (*Huntley Power, LLC*, 217 AD3d at 1328, quoting *Cannata*, 11 NY2d at 215), and " 'incidental private benefit will not invalidate an agency's determination so long as the public purpose is dominant' " (*Sun Co. v City of Syracuse Indus. Dev. Agency*, 209 AD2d 34, 43 [4th Dept 1995], *appeal dismissed* 86 NY2d 776 [1995], quoting *Matter of Waldo's, Inc. v Village of Johnson City*, 74 NY2d 718, 721 [1989]; *see Matter of Kaufmann's Carousel v City of Syracuse Indus. Dev. Agency*, 301 AD2d 292, 303 [4th Dept 2002], *lv denied* 99 NY2d 502 [2003]).

We have reviewed petitioner's remaining contentions, and conclude that they are without merit.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

608

CA 22-00880

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

IN THE MATTER OF THE DISCHARGE OF STEVEN M.,
FROM CENTRAL NEW YORK PSYCHIATRIC CENTER
PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH AND NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Oneida County Court (Gregory J. Amoroso, A.J.), entered May 3, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e), and directing his continued confinement to a secure treatment facility (*see* § 10.09 [h]). We affirm.

Petitioner contends that his sex offender treatment plan should be modified to focus on his diagnoses of antisocial personality disorder and the condition of hypersexuality, rather than a provisional diagnosis of pedophilic disorder. That contention is raised for the first time on appeal, and thus is not properly before us (*see Matter of State of New York v Edward T.*, 161 AD3d 1589, 1589 [4th Dept 2018]; *Matter of State of New York v Breeden*, 140 AD3d 1649, 1650 [4th Dept 2016]). In any event, we note that the adequacy of a sex offender treatment plan is not before the court in an annual review proceeding under Mental Hygiene Law § 10.09 (d) (*see generally*

Matter of James WW. v State of New York, 201 AD3d 1069, 1071 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

625

KA 22-00598

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW BRENNAN, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Stephen J. Dougherty, J.), rendered March 15, 2022. The judgment convicted defendant upon a plea of guilty of manslaughter in the first 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 his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [4]) and endangering the welfare of a child (§ 260.10 [1]). Defendant's contention that County Court abused its discretion or otherwise erred in sentencing him because the presentence report was incomplete and inadequate is not preserved for our review (*see generally People v Rodriguez*, 199 AD3d 1458, 1459 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]; *People v Morrow*, 167 AD3d 1516, 1517-1518 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). We reject defendant's related contention that he received ineffective assistance of counsel at sentencing inasmuch as defendant has not established that the sentence imposed was based upon the lack of information (*see People v Vaughan*, 20 AD3d 940, 941-942 [4th Dept 2005], *lv denied* 5 NY3d 857 [2005]; *see generally Rodriguez*, 199 AD3d at 1459). To the extent that defendant's contention involves matters outside the record, "a CPL 440.10 proceeding is the appropriate forum for review of the . . . claim" (*People v Barzee*, 204 AD3d 1422, 1423 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022] [internal quotation marks omitted]; *see People v Jones*, 214 AD3d 1410, 1411 [4th Dept 2023]).

We perceive no basis in the record for us to exercise our power to modify the sentence as a matter of discretion in the interest of

justice (*see* CPL 470.15 [6] [b]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

629

CA 23-00198

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

RUBY BELTON, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BORG & IDE IMAGING, P.C., AND
RADNET, INC., DEFENDANTS-RESPONDENTS.

COOPER ERVING & SAVAGE, LLP, ALBANY (PHILLIP G. STECK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAMS LECLAIR LLP, ROCHESTER (STACEY E. TRIEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered August 25, 2022. The order granted in part the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff, a radiologist previously employed by defendant Borg & Ide Imaging, P.C., commenced this action pursuant to the Human Rights Law (Executive Law § 290 *et seq.*) seeking to recover damages based on allegations that, inter alia, defendants discriminated against her on the basis of race and age, and retaliated against her after she complained about the alleged discrimination. Plaintiff, as limited by her brief, now appeals from that part of the order that granted defendants' motion to dismiss the complaint with respect to the discrimination and retaliation causes of action pursuant to, inter alia, CPLR 3211 (a) (5). We affirm.

Contrary to plaintiff's contention, Supreme Court properly granted that part of defendants' motion seeking to dismiss the discrimination and retaliation causes of action on the ground that they are barred by res judicata, i.e., claim preclusion. "To establish claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 73 [2018]; *see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *Zayatz v Collins*, 48 AD3d 1287, 1289 [4th Dept 2008]). Generally speaking, " 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Parker*, 93

NY2d at 347, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Consequently, "res judicata bars claims that were not actually decided in the prior action if they could have been decided in that action" (*Zayatz*, 48 AD3d at 1290; *see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Incredible Invs. Ltd. v Grenga* [appeal No. 2], 125 AD3d 1362, 1363 [4th Dept 2015]).

Here, plaintiff previously commenced an action in federal court asserting against defendants causes of action for, inter alia, race and age discrimination and retaliation, seeking to recover, as she also does in this action, damages. The federal court granted defendants' motion to dismiss the complaint, explaining that the race and age discrimination and retaliation causes of action were dismissed pursuant to Federal Rules of Civil Procedure rule 12 (b) (6), and entered judgment accordingly (*Belton v Borg & Ide Imaging, P.C.*, 512 F Supp 3d 433 [WD NY 2021]; *see generally Ashcroft v Iqbal*, 556 US 662, 678 [2009]). On appeal, the parties dispute whether dismissal of the race and age discrimination and retaliation causes of action in the federal action constituted a " 'judgment *on the merits*' " for res judicata purposes (*Buffalo Emergency Assoc., LLP v Aetna Health, Inc.*, 195 AD3d 1403, 1404 [4th Dept 2021], *lv denied* 37 NY3d 916 [2021] [emphasis added]).

Plaintiff contends that the federal court's failure to expressly state that its determination was on the merits means that its dismissal of the discrimination and retaliation causes of action in the federal complaint was without prejudice. We reject that contention. Federal Rules of Civil Procedure rule 41 (b) provides, in relevant part, that "[u]nless the dismissal order states otherwise, a dismissal under this subdivision . . . and *any dismissal not under this rule*—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an *adjudication on the merits*" (emphasis added). In interpreting that rule, the Court of Appeals has concluded that "[i]n [f]ederal court, as distinguished from our [s]tate courts, a dismissal is on the merits unless the contrary expressly appears" (*McLearn v Cowen & Co.* 48 NY2d 696, 699 n [1979], *on rearg* 60 NY2d 686 [1983]; *see generally Federated Dept. Stores, Inc. v Moitie*, 452 US 394, 399 n 3 [1981]). Here, there is nothing in the federal court's written decision to indicate that its grant of defendants' motion to dismiss with respect to the discrimination and retaliation causes of action was done *without prejudice*, and therefore the presumption is that its determination was on the merits and final (*see Johnson v McKay*, 208 AD3d 1558, 1560 [3d Dept 2022]). Consequently, we conclude that the federal court's dismissal of the discrimination and retaliation causes of action in the federal action constituted a final judgment that has preclusive effect if the other two elements of res judicata are satisfied.

We conclude that defendants, on their motion, established that those other elements have been satisfied. With respect to the second element, it is undisputed that there is a complete identity of parties between the federal action and this action. With respect to the final element, however, plaintiff contends that res judicata does not apply here on the grounds that there is no identity of claims between the

discrimination and retaliation claims in this action and the federal action. We reject that further contention. "[A] dismissal at the pleading stage [in federal court] is res judicata where the action is sought to be recommenced on the same pleading" (*McKinney v City of New York*, 78 AD2d 884, 886 [2d Dept 1980]). Specifically, "it is clear that in those instances where the [f]ederal court proceeding is predicated on the same basis as is the [s]tate court proceeding, [f]ederal court determinations must be given res judicata effect in New York State courts" (*id.*; *see McLearn*, 48 NY2d at 698-699; *Bradshaw v City of New York*, 200 AD3d 553, 553 [1st Dept 2021], *lv denied* 38 NY3d 907 [2021]). Stated another way, "dismissal on [a] motion [to dismiss] has preclusive effect only as to a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint" (*175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1 [1980]). Thus, dismissal is not required on res judicata grounds where the new complaint asserts causes of action that are "materially different" and "alleg[es] facts necessary thereto which did not exist at the time of the first action" (*id.*).

Here, we conclude that there is an identity of issues between the discrimination and retaliation claims in this action and in the federal action because all of those claims arise out of the same set of operative facts (*see Sciangula v Montegut*, 165 AD3d 1188, 1190 [2d Dept 2018]). Both complaints assert causes of action for race and age discrimination, as well as for retaliation, and are based on the same alleged instances of defendants' wrongful conduct (*see generally State Div. of Human Rights v Dunlop Tire & Rubber Corp.*, 105 AD2d 1071, 1072 [4th Dept 1984]). Although plaintiff's complaint in state court provided more factual detail than her federal complaint, that additional detail either pertained to claims that were dismissed in the federal action, or—if they were not raised in that action—could have been raised at that time (*see generally Hunter*, 4 NY3d at 269). To the extent that the complaint in this action asserts claims not contained in the federal complaint—i.e., claims that defendants retaliated by constructively discharging her from employment—we conclude that those claims are nonetheless precluded inasmuch as they are predicated on factual allegations that either were raised or could have been raised during the federal action (*see Bradshaw*, 200 AD3d at 554; *see generally Bielby v Middaugh*, 120 AD3d 896, 899 [4th Dept 2014]). Indeed, in her complaint for this action, plaintiff does not allege any wrongful conduct of defendants that occurred *after* the commencement of the federal action (*cf. UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 476 [1st Dept 2011]). Consequently, we conclude that the court properly granted that part of the motion seeking to dismiss the discrimination and retaliation causes of action in the complaint on res judicata grounds inasmuch as there is an identity of issue between the claims asserted in this action and the claims asserted in the federal action.

In light of our determination, plaintiff's remaining contention

is academic.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

632

CA 22-01916

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

IN THE MATTER OF THE ESTATE OF JAMES CHER,
DECEASED.
---------- MEMORANDUM AND ORDER
EMESE OLAH, PETITIONER-RESPONDENT;

ANTAL ZSIRAI, OBJECTANT-APPELLANT.

JR COLLESANO, LLC, BUFFALO (JENNIFER R. COLLESANO OF COUNSEL), FOR OBJECTANT-APPELLANT.

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

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered June 13, 2022. The order, among other things, granted the motion of petitioner for summary judgment, dismissed the objections, and admitted a certain will to probate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying petitioner's motion for summary judgment in part and reinstating objections six and seven, and as modified the order is affirmed without costs and the matter is remitted to Surrogate's Court, Erie County, for further proceedings in accordance with the following memorandum: Objectant appeals from an order that, inter alia, granted petitioner's motion for summary judgment dismissing his objections to the probate of decedent's will, and admitted the will to probate. We agree with objectant that Surrogate's Court erred in granting the motion with respect to the objections regarding undue influence, and we therefore modify the order by denying the motion in part and reinstating objections six and seven, which assert that the will was the product of undue influence, and remit the matter to Surrogate's Court for further proceedings on those objections.

"Generally, [t]he burden of proving undue influence . . . rests with the party asserting its existence . . . . Where, however, there was a confidential or fiduciary relationship between the beneficiary and the decedent, [a]n inference of undue influence arises which requires the beneficiary to come forward with an explanation of the circumstances of the transaction . . . , i.e., to prove the transaction fair and free from undue influence" (*Matter of Burrows*, 203 AD3d 1699, 1704 [4th Dept 2022], *lv denied* 39 NY3d 903 [2022] [internal quotation marks omitted]; *see Matter of Mary*, 202 AD3d 1418, 1420 [3d Dept 2022]). Here, there are questions of fact whether the

will's sole beneficiary and her husband were in confidential relationships with decedent and, if so, whether the will was free from undue influence, which preclude judgment as a matter of law.

Further, where, as here, "a will has been prepared by an attorney associated with a beneficiary, an explanation is called for, and it is a question of fact . . . as to whether the proffered explanation is adequate" (*Matter of Gobes*, 189 AD3d 1402, 1405 [2d Dept 2020]; *see Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]).

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

634

CA 22-01469

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

BRIAN F. ALDRICH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LNG ENTERPRISES, INC., DEFENDANT-RESPONDENT.

WRIGHT CALIMERI, PLLC, JAMESTOWN (JOSEPH M. CALIMERI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID M. CIVILETTE, P.C., DUNKIRK (DAVID M. CIVILETTE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered September 8, 2022. The order, among other things, granted the motion of defendant insofar as it sought summary judgment dismissing the complaint.

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

Memorandum: In this breach of contract action, plaintiff seeks to collect on a promissory note, dated May 6, 2003, memorializing a $50,000 loan he had made to defendant, a closely held family corporation. At the time of the note, plaintiff and his four brothers each held a 10 percent interest in defendant; plaintiff's father held the remaining 50 percent interest. Plaintiff's father died in 2016, at which point plaintiff and his brothers each held a 20 percent interest in defendant. Defendant made payments to plaintiff under the note until September 10, 2009. On January 8, 2019, plaintiff commenced the underlying action due to defendant's nonpayment. Defendant subsequently moved, inter alia, for summary judgment dismissing the complaint as time-barred. Plaintiff appeals from an order that, among other things, granted defendant's motion. We affirm.

We conclude that Supreme Court properly granted that part of defendant's motion seeking summary judgment dismissing the complaint inasmuch as defendant met its initial burden of showing that this action was commenced well after the expiration of the applicable six-year statute of limitations, and plaintiff failed to raise any triable issue of fact in opposition (*see* CPLR 213 [2]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). "It is well established that a cause of action against a maker of a demand instrument accrues upon the date of

the instrument" (*Skaneateles Sav. Bank v Modi Assoc.*, 239 AD2d 40, 41 [4th Dept 1998], *lv denied* 92 NY2d 803 [1998]; *see generally* UCC 3-122 [1] [b]). Nonetheless, it is equally well established that the applicable statute of limitations is "renewed by partial payment of principal or interest . . . [, which has] the effect of an acknowledgment or new promise" to pay under the note (*Skaneateles Sav. Bank*, 239 AD2d at 42; *see Mundaca Inv. Corp. v Rivizzigno*, 247 AD2d 904, 906 [4th Dept 1998]). Here, defendant met its initial burden by submitting evidence that the note was created on May 6, 2003, and that it had last tendered payment under the note on September 10, 2009. Thus, because plaintiff's commencement of the action in January 2019 occurred more than six years after the last partial payment under the note, defendant established that the action is barred by the statute of limitations (*see Skaneateles Sav. Bank*, 239 AD2d at 41-42; *see generally* CPLR 213 [2]; *Alvarez*, 68 NY2d at 324).

We conclude that, in opposition, plaintiff failed to raise any triable issues of fact with respect to the statute of limitations defense (*see generally Zuckerman*, 49 NY2d at 562). Plaintiff specifically contends that there are questions of fact whether the complaint is time-barred based on evidence that, in 2010, he and defendant orally agreed to modify the accrual date of any cause of action to collect on the note to, at the very least, September 1, 2013. We reject that contention because the note expressly stated that no modification "shall be binding unless in writing," thereby precluding any oral modification thereof (*see* General Obligations Law § 15-301 [1]). Indeed, in circumstances such as these, "the [s]tatute of [f]rauds precludes an oral executory modification" (*Ber v Johnson*, 163 AD2d 817, 818 [4th Dept 1990]; *see also Benderson Dev. Co. v Hallaway Props.*, 115 AD2d 339, 340 [4th Dept 1985], *affd* 67 NY2d 963 [1986]).

Additionally, we reject plaintiff's contention that, despite the applicable prohibition on oral modifications to the note, there are nonetheless triable issues of fact based on the doctrine of part performance and the parties' course of conduct (*see generally Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464, 1465 [4th Dept 2015]). The doctrine of part performance removes the protection of the statute of frauds when one party to a written agreement " 'induc[es] or permit[s] without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter [the] situation and make the interposition of the statute against performance a fraud' " (*Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999], quoting *Woolley v Stewart*, 222 NY 347, 351 [1918]). "The doctrine of part performance may be invoked only if [the party's] actions can be characterized as 'unequivocally referable' to the agreement alleged" (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]; *see Aegis Group*, 93 NY2d at 235; *Congdon v Everett*, 63 AD3d 1541, 1542 [4th Dept 2009]). To meet that standard, the party's "actions alone must be 'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement" (*Anostario*, 59 NY2d at 664, quoting

Burns v McCormick, 233 NY 230, 232 [1922]).

Here, we conclude that plaintiff's submission in opposition did not raise any issues of fact with respect to the application of the doctrine of part performance inasmuch as plaintiff failed to show that his actions in forbearing collection on the note were explainable only with reference to the purported oral modification of the note (*see Anostario*, 59 NY2d at 664). Indeed, plaintiff's own submissions supply "other explanations" for his conduct (*Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009]; *see Carey & Assoc. v Ernst*, 27 AD3d 261, 264 [1st Dept 2006]). Specifically, plaintiff's submissions allow for the inference that his forbearance in collecting on the note was explainable by his self-interest as a part owner of defendant, as well as by "the parties' familial relationship" (*Alayoff v Alayoff*, 112 AD3d 564, 566 [2d Dept 2013], *lv dismissed* 24 NY3d 945 [2014]).

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

638

KA 22-00490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AL AMIN MCMILLON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM 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 (Brian D. Dennis, J.), rendered March 22, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence and statements is granted, the indictment is dismissed, and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]), arising from an incident wherein sheriff's deputies, suspecting that defendant and other occupants of a vehicle had shoplifted in a mall, conducted a stop of the vehicle in the mall parking lot, which ultimately yielded evidence that defendant and the other occupants had stolen merchandise from several stores. Defendant contends on appeal that the People failed to meet their initial burden of showing the legality of the vehicle stop because, based on the evidence presented at the suppression hearing, the information available to the deputies was insufficient to provide them with the requisite reasonable suspicion that the occupants of the vehicle had committed or were committing a crime, and thus County Court erred in refusing to suppress physical evidence and statements as the fruits of an unlawful vehicle stop. We agree with defendant.

It is well settled that, although "a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to the burden of going forward to show the legality of the police conduct in the first instance" (*People v*

Berrios, 28 NY2d 361, 367 [1971] [internal quotation marks and emphasis omitted]; *see People v Dortch*, 186 AD3d 1114, 1115 [4th Dept 2020]). As relevant here, "a vehicle stop is lawful if based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime" (*People v Balkman*, 35 NY3d 556, 559 [2020]; *see People v Hinshaw*, 35 NY3d 427, 430 [2020]; *People v Spencer*, 84 NY2d 749, 752-753 [1995], *cert denied* 516 US 905 [1995]). "Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113 [1975]; *see People v Brannon*, 16 NY3d 596, 601-602 [2011]). "The requisite knowledge must be more than subjective; it should have at least some demonstrable roots," and a "[m]ere 'hunch' or 'gut reaction' will not do" (*People v Sobotker*, 43 NY2d 559, 564 [1978]; *see Hinshaw*, 35 NY3d at 438-439). Reasonable suspicion "may not rest on equivocal or innocuous behavior that is susceptible of an innocent as well as a culpable interpretation" (*Brannon*, 16 NY3d at 602 [internal quotation marks omitted]; *see Hinshaw*, 35 NY3d at 438). "A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion' " (*Brannon*, 16 NY3d at 602, quoting *Cantor*, 36 NY2d at 113; *see People v Johnson*, 40 NY3d 172, 175-176 [2023]; *Balkman*, 35 NY3d at 559).

Here, the evidence presented at the suppression hearing established that, after receiving information from mall security relaying a complaint that "two suspicious black males" had exited the mall "with H&M bags full of merchandise" and conveying that individuals who matched a description of the two males were subsequently observed on surveillance video in a particular vehicle in the parking lot outside a different entrance to the mall, the first testifying deputy observed via live surveillance video two individuals matching the description, accompanied by a third individual, reenter the mall through that entrance with an empty H&M bag, proceed to a nearby store, leave the store and walk out of the mall approximately five minutes later with a full H&M bag, return to the vehicle, and place the bag in the trunk. The first deputy then radioed his observations to other responding law enforcement personnel and the second testifying deputy initiated the stop of the vehicle in the parking lot.

We conclude that the vehicle stop was unlawful because the totality of the information known to the deputies at the time of the stop, along with any rational inferences to be drawn therefrom, were insufficient to establish reasonable suspicion that the occupants of the vehicle had committed or were committing a crime (*see generally People v Taylor*, 31 AD3d 1141, 1142 [4th Dept 2006]). The first deputy testified that the reported conduct in the initial complaint was of concern because there was no H&M store at the mall at that time and, based on his training and experience, it was rare for stores in the mall to fill personal, non-store bags with merchandise and, indeed, numerous of the 60 to 70 theft cases that he had investigated at the mall over a period of three years involved the use of outside

bags. The deputies readily acknowledged, however, that bringing outside bags into the mall was not unlawful or violative of mall policy, that it was not uncommon for mall visitors to return merchandise in bags that were not from the original store, and that mall visitors could properly put merchandise into personal, non-store bags if it was paid for. The first deputy conceded that, while viewing the live surveillance video, he did not observe defendant or the other individuals stealing anything from the subject store, and the second deputy likewise acknowledged that, prior to the vehicle stop, he had not made any observations to indicate that defendant or the other individuals had failed to pay for the merchandise. Additionally, the first deputy observed defendant and the other individuals walking, not running, back to the vehicle after exiting the store, and conceded that it was possible that they had purchased the merchandise during their time in the store (*cf. People v Espada*, 199 AD3d 499, 500 [1st Dept 2021], *lv denied* 37 NY3d 1160 [2022]). Thus, given the acknowledged existence of reasonable innocent explanations for the use of an outside bag from a store not present in the mall and the concession that it was possible under the circumstances that defendant and the other individuals had, in fact, properly purchased the merchandise before they again exited the mall, we conclude that the conduct known to the deputies constituted nothing more than "equivocal or innocuous behavior that is susceptible of an innocent as well as a culpable interpretation," which was insufficient to provide the requisite reasonable suspicion to justify the vehicle stop (*Hinshaw*, 35 NY3d at 438 [internal quotation marks omitted]; *see People v Dean*, 73 AD3d 801, 802-803 [2d Dept 2010]; *People v Sunley*, 171 AD2d 1063, 1063-1064 [4th Dept 1991], *lv denied* 77 NY2d 1001 [1991]).

In concluding otherwise, the dissent opines that "[t]he rational inference to be drawn from the fact that defendant and the other individuals went into a store with an empty bag from a store not located in the mall and left the store just five minutes later with a full bag of merchandise in a bag not from that store, which the [first] deputy testified was very rare, is that they stole the merchandise from the store" because "[i]t simply strains credulity to believe that someone could retrieve a large quantity of merchandise and pay for it through a cashier in such a short amount of time." That deduction, however, conflicts with the acknowledgments in the first deputy's testimony that he did not observe the individuals stealing anything from the store and that it was possible that they had purchased the merchandise during their time in the store. The dissent's attempt to discount the first deputy's acknowledgment of the possibility that the individuals had not shoplifted by resorting to an unfinished fragment of his testimony is unconvincing given that the People, who had "the burden of going forward to show the legality of the police conduct in the first instance" (*Berrios*, 28 NY2d at 367 [internal quotation marks and emphasis omitted]), declined to ask any additional questions immediately following the first deputy's concession. Inasmuch as the first deputy conceded that, when the individuals were observed walking out of the store with a full bag approximately five minutes after entering, it was possible that they had just purchased the merchandise, the record indicates that the

observed conduct might have been innocent. However, as previously stated, reasonable suspicion "may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation" (*Brannon*, 16 NY3d at 602). For those reasons, and in light of the totality of the circumstances previously discussed, we are not persuaded by the reasoning offered by the dissent.

Consequently, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping the vehicle in which defendant was a passenger in the first instance, we conclude that the court erred in refusing to suppress the physical evidence and statements obtained as a result of the vehicle stop (*see People v Suttles*, 214 AD3d 1313, 1314 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v Reedy*, 211 AD3d 1629, 1630 [4th Dept 2022]). Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed (*see Suttles*, 214 AD3d at 1314; *Reedy*, 211 AD3d at 1630). In light of our determination, we do not reach defendant's remaining contention.

All concur except BANNISTER and GREENWOOD, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and vote to affirm the judgment because we conclude that County Court properly refused to suppress physical evidence and statements as the fruits of a stop of a vehicle in a mall parking lot. Contrary to the majority, we conclude that the police had reasonable suspicion to justify the vehicle stop.

A vehicle stop is permissible " 'when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' " (*People v Walls*, 37 NY3d 987, 988 [2021]; *see People v Spencer*, 84 NY2d 749, 752-753 [1995], *cert denied* 516 US 905 [1995]). "Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113 [1975]). It requires "specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion" (*People v Brannon*, 16 NY3d 596, 602 [2011] [internal quotation marks omitted]; *see People v Floyd*, 158 AD3d 1146, 1147 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]). It does not require absolute certainty (*see Brannon*, 16 NY3d at 602).

The evidence presented at the suppression hearing established that mall security reported to the police that two men had exited the mall with H&M bags full of merchandise, which was suspicious because there was no H&M store at that mall and it was "very rare" for stores in the mall to fill personal, non-store bags with merchandise. A deputy further testified that, of the 60 to 70 theft cases that he had investigated at the mall, numerous ones involved the use of outside bags. The deputy learned that the men were in a particular sedan in the parking lot outside another entrance of the mall, and he proceeded to view live video surveillance, from the cameras in the mall, at the sheriff's department office. He observed three individuals, two of whom matched a description of the men, reenter the mall, now with an

empty H&M bag. They went into a nearby store and, about five minutes later, exited the mall with the H&M bag full of merchandise and placed the bag in the trunk of the same sedan. The deputy radioed his observations to responding law enforcement personnel, and the vehicle was stopped in the parking lot.

We agree with the court that the police had the requisite reasonable suspicion that the driver or occupants of the vehicle had committed a crime to justify the vehicle stop. The rational inference to be drawn from the fact that defendant and the other individuals went into a store with an empty bag from a store not located in the mall and left the store just five minutes later with a full bag of merchandise in a bag not from that store, which the deputy testified was very rare, is that they stole the merchandise from the store. It simply strains credulity to believe that someone could retrieve a large quantity of merchandise and pay for it through a cashier in such a short amount of time (*see generally People v Wesley*, 175 AD3d 1194, 1194-1195 [1st Dept 2019], *lv denied* 34 NY3d 1134 [2020]). In criticizing us for making that deduction, the majority relies on the first deputy's testimony that he did not actually observe the individuals steal anything from the store and that it was "possible" that the individuals had purchased the merchandise during that brief period in the store. The deputy's testimony, however, showed that he could not have observed whether the individuals stole anything from the store because the camera he was monitoring showed only the hallways and not inside the store. Moreover, in order for the deputy to have reasonable suspicion that criminal activity was at hand, he did not need to actually see the individuals steal anything. In addition, the deputy was asked by defense counsel on recross-examination whether it was "[p]ossible that they just bought merchandise," and the deputy answered "[i]t is possible, but in my training and experience - -" before defense counsel cut off his response.

The majority concludes that the conduct known to the deputies constituted merely equivocal or innocuous behavior that was susceptible of an innocent explanation, relying on the testimony of the deputies that it was not unlawful to bring an outside bag into the mall and that it was not uncommon for mall visitors to return merchandise in bags that were not from the original store. First, while it may not have been *unlawful* to bring an outside bag into the mall, the first deputy testified that it was very rare for stores to fill an outside bag with merchandise and that numerous theft cases that he had investigated involved the use of outside bags. Second, the fact that mall visitors may return merchandise in bags that were not from the original store is irrelevant where, as here, defendant and the other individuals were entering the mall with *empty* bags, and therefore they obviously were not returning any merchandise.

Moreover, while the various activities of defendant and the other individuals observed by mall security and the deputy may have had innocent explanations by themselves, when those activities are considered in combination and through the lens of a trained law enforcement officer who was "well versed" in the methods used by

shoplifters, we conclude that they gave rise to reasonable suspicion to justify the vehicle stop (*People v Valentine*, 17 NY2d 128, 132 [1966]; *see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). The testimony at the suppression hearing and the fair inferences from the testimony showed that it was common for shoplifters to use outside bags to commit their crimes, and that defendant exited the mall with outside bags full of merchandise, emptied them in a vehicle, carried a now-empty bag back into the mall through a different entrance, and quickly exited with that same bag again full of merchandise. We see no reason to disturb the "common sense conclusion[]" (*United States v Cortez*, 449 US 411, 418 [1981]) by the trained deputy that the driver or occupants of the vehicle had committed a crime, i.e., shoplifting. Indeed, based on the information known and witnessed by the deputy, the "inference was inescapable" that criminal activity was taking place (*People v Edey*, 183 AD3d 430, 430 [1st Dept 2020], *lv denied* 35 NY3d 1044 [2020]; *see generally Bigelow*, 66 NY2d at 423).

Defendant's remaining contention that the plea was not knowingly, intelligently, and voluntarily entered is not preserved for review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Davilla*, 202 AD3d 1452, 1453 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022]; *People v Newsome*, 198 AD3d 1357, 1357-1358 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]). This case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]), and we would decline to exercise this Court's power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

641

KA 22-00659

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAION JORDAN, DEFENDANT-APPELLANT.

THE LAW OFFICES OF MATTHEW ALBERT, DARIEN CENTER (MATTHEW ALBERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 15, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the seventh degree (three counts) and criminal possession of stolen property in the fifth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). We affirm.

Where, as here, a defendant is charged with a felony, the People must announce readiness for trial within six calendar months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]; *People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]; *People v Gaskin*, 214 AD3d 1353, 1353 [4th Dept 2023]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]).

Here, the criminal action was commenced on July 23, 2019 (*see* CPL 1.20 [1], [17]). As stated above, inasmuch as defendant's charges included a felony, the People were permitted no more than six calendar

months of delay. The People declared their readiness for trial on November 8, 2019. Thus, 108 days are chargeable to the People. On January 1, 2020, the new discovery laws of CPL article 245 went into effect and the People reverted to a state of unreadiness for purposes of CPL 30.30 (*see People v King*, 216 AD3d 1400, 1405-1406 [4th Dept 2023]). Even assuming, arguendo, that the People's certificate of compliance filed on January 10, 2020 did not validly state the People's readiness for trial at that time (*see* CPL 30.30 [5]), the speedy trial clock stopped running when defendant made an omnibus motion on January 23, 2020. Thus, the People's delay was only an additional 23 days. The time attributable to pretrial motions and the period during which such matters are under consideration by the court is excludable from the People's time under CPL 30.30 (4) (a) and thus could not be charged to the People (*see generally People v Abergut*, 202 AD3d 1497, 1498 [4th Dept 2022], *lv denied* 38 NY3d 1068 [2022]). The court decided defendant's motions on August 18, 2021, the same day that defendant pleaded guilty. Thus, we conclude that the total period of time chargeable to the People was 131 days, less than the six months allowable in this case (*see* CPL 30.30 [1] [a]). Therefore, the People did not violate defendant's statutory right to a speedy trial.

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

642

KA 22-00189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAHLIL COOLEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRIDGET L. FIELD 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 January 4, 2022. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, sexual abuse in the first degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96), predicated on commission of course of sexual conduct against a child in the first degree (*see* § 130.75 [1] [a]), sexual abuse in the first degree (§ 130.65 [4]), and two counts of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends that the conviction is not supported by legally sufficient evidence. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although neither child victim identified defendant in court, both child victims identified defendant by name and specifically explained their respective relationships to defendant, and the jury was entitled to credit that testimony (*see generally People v McKenzie*, 2 AD3d 348, 348 [1st Dept 2003], *lv denied* 2 NY3d 764 [2004]). Moreover, defendant failed to preserve for our review his specific contention that there is legally insufficient evidence that he perpetrated the charged sexual conduct over a period not less than three months in duration (*see* Penal Law § 130.75 [1]), inasmuch as he failed to move for a trial order of dismissal on that basis (*see generally People v Bassett*, 55 AD3d 1434, 1438 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, we conclude that, 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 Bleakley*, 69 NY2d at 495; *People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]).

Defendant additionally contends that County Court erred in refusing to issue a subpoena for counseling records of one of the victims. Even assuming, arguendo, that defendant's contention is fully preserved for our review, we reject that contention. In determining whether to grant access to otherwise confidential records and data, the court must balance the competing interests of confidentiality and the defendant's rights to compulsory process and confrontation (*see People v Gissendanner*, 48 NY2d 543, 548 [1979]; *People v Tirado*, 109 AD3d 688, 688 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013], *reconsideration denied* 22 NY3d 1091 [2014], *cert denied* 574 US 877 [2014]), and the decision whether to issue a subpoena for such records is committed to the court's sound discretion (*see Tirado*, 109 AD3d at 688). At the outset, we note that defendant's reliance on *People v Wildrick* (83 AD3d 1455, 1457 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]) is misplaced. Here, unlike in *Wildrick*, the court had previously issued subpoenas, conducted an in camera review, and provided defendant with copies of pertinent medical and school records. We further conclude that defendant did not set forth how the counseling records that he sought might be employed in a line of inquiry "beyond that of general credibility impeachment" (*Gissendanner*, 48 NY2d at 550) or "point to specific facts demonstrating a reasonable likelihood . . . that [he was] not engaged in a fishing expedition" (*People v Kozlowski*, 11 NY3d 223, 242 [2008], *rearg denied* 11 NY3d 904 [2009], *cert denied* 556 US 1282 [2009]). Thus, defendant's application for a subpoena was "supported solely by speculation" (*People v Reddick*, 43 AD3d 1334, 1335 [4th Dept 2007], *lv denied* 10 NY3d 815 [2008] [internal quotation marks omitted]) and the court did not abuse its discretion in denying defendant's application (*see Gissendanner*, 48 NY2d at 550).

We reject defendant's further contention that the court erred in denying his request for a circumstantial evidence charge. "[W]here there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*People v Hardy*, 26 NY3d 245, 249 [2015]). A victim's testimony identifying a defendant as the perpetrator of a crime is direct evidence of guilt (*see People v James*, 147 AD3d 1211, 1212-1213 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]; *People v Cruz*, 41 AD3d 893, 896 [3d Dept 2007], *lv denied* 10 NY3d 933 [2008]). In light of the victims' direct testimony, the court did not err in refusing to charge circumstantial evidence (*see Hardy*, 26 NY3d at 251).

Defendant additionally contends that the court erred in charging the jury on flight as consciousness of guilt. We reject that contention. While flight evidence is of "limited probative force," that "is no reason for its exclusion" (*People v Yazum*, 13 NY2d 302,

304 [1963], *rearg denied* 15 NY2d 679 [1964]; *see People v Martinez*, 298 AD2d 897, 899 [4th Dept 2002], *lv denied* 98 NY2d 769 [2002], *cert denied* 538 US 963 [2003], *reh denied* 539 US 911 [2003]). Here, it is not disputed that once defendant knew that the victims had accused him, defendant boarded a bus alone for New York City. Under the circumstances, the court appropriately charged the jury on flight as consciousness of guilt (*see People v Jones*, 213 AD3d 1279, 1280 [4th Dept 2023], *lv denied* 39 NY3d 1155 [2023]; *People v Jamison*, 173 AD2d 341, 342 [1st Dept 1991], *lv denied* 78 NY2d 955 [1991]) and gave an appropriate limiting instruction (*see Martinez*, 298 AD2d at 899).

By failing to object during the prosecutor's summation, defendant failed to preserve for our review his contention that allegedly improper comments made by the prosecutor during summation deprived him of a fair trial (*see People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019], *lv denied* 33 NY3d 1104 [2019]). In any event, we conclude that the allegedly improper comments were a "fair response to the comments made by the defense or fair comment on the evidence," and therefore that defendant was not deprived of a fair trial by those remarks (*People v Palmer*, 204 AD3d 1512, 1514 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). We thus further conclude that counsel's failure to object did not deprive defendant of effective assistance of counsel (*see id*. at 1514-1515).

Contrary to defendant's further contention, the use of face coverings by prospective jurors did not deprive defendant "of the ability to meaningfully participate in jury selection" (*People v Ramirez*, 208 AD3d 897, 898 [2d Dept 2022], *lv granted* 39 NY3d 1074 [2023]).

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

645

KA 20-00765

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER J. NEAL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 5, 2020. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant contends that his waiver of the right to appeal is invalid and that the police lacked probable cause to arrest him. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review, we conclude that probable cause existed for defendant's arrest. During the suppression hearing, police officers testified, among other things, that defendant and his codefendant were placed, by means of their ankle monitors, at the locations of burglarized homes. The officers also testified that as part of their investigation they obtained surveillance footage that showed defendant in a pawnshop with property matching items that had been stolen (*see generally People v Muhammad*, 204 AD3d 1402, 1403 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]; *People v Young*, 152 AD3d 981, 982-983 [3d Dept 2017], *lv denied* 30 NY3d 955 [2017]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

647

KA 23-00472

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASHEIM JONES, DEFENDANT-APPELLANT.

JAMES C. EGAN, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 17, 2022. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Although defendant waived his right to appeal, as part of his plea agreement, he expressly reserved the right to raise on appeal his contention that Supreme Court improperly refused to direct the enforcement of a more advantageous preindictment plea offer, as a sanction for the prosecution's alleged violation of CPL 245.25 (1). We nonetheless conclude that defendant's contention is without merit. The subdivision cited by defendant directs, as relevant here, that when a plea offer is made on a felony complaint prior to indictment, as here, "[t]he prosecution shall disclose the discoverable items and information not less than three calendar days prior to the expiration date of any guilty plea offer by the prosecution or any deadline imposed by the court for acceptance of the guilty plea offer" (CPL 245.25 [1]). On a defendant's motion seeking a sanction based on the prosecution's alleged violation of that subdivision, "the court must consider the impact of any violation on the defendant's decision to accept or reject [the] plea offer" (CPL 245.25 [1]). Inasmuch as defendant conceded in his motion that he was *unaware* of the preindictment plea offer prior to its expiration, due to his absence from the jurisdiction and lack of communication with defense counsel, the court properly determined that a violation of CPL 245.25 (1) by the prosecution, if any, could not have "materially affected" defendant's "decision to accept or reject [the] plea offer" (CPL

245.25 [1]; *see generally People v Hewitt*, 201 AD3d 1041, 1043-1044 [3d Dept 2022], *lv denied* 38 NY3d 928 [2022]).

Defendant further contends that he was denied effective assistance of counsel because defense counsel failed to communicate the preindictment plea offer to him in a timely manner. Even assuming, arguendo, that defendant's contention survives his guilty plea and waiver of the right to appeal (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]), it " 'involves matters outside the record on appeal and, thus, it must be raised by way of a motion pursuant to CPL article 440' " (*People v Spencer*, 170 AD3d 1614, 1615 [4th Dept 2019], *lv denied* 37 NY3d 974 [2021]; *see People v Goodwin*, 159 AD3d 1433, 1435 [4th Dept 2018]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

651

CA 21-00532

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

MARK D. BOGUMIL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GREENBAUM FAMILY HOLDINGS, LP, TORTORA PROPERTY MANAGEMENT, INC., VINCENT TORTORA, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

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

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered March 29, 2021. The order granted the motion of defendants Greenbaum Family Holdings, LP, Tortora Property Management, Inc., and Vincent Tortora to bifurcate.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he fell from an "upper patio or balcony" of an apartment building owned by defendant-respondent Greenbaum Family Holdings, LP and maintained by defendants-respondents Tortora Property Management, Inc. and Vincent Tortora. We agree with plaintiff that Supreme Court abused its discretion in granting defendants-respondents' motion to bifurcate the trial with respect to the issues of liability and damages. "As a general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried separately" (*Abate v Wolf*, 219 AD3d 1118, 1120 [4th Dept 2023] [internal quotation marks omitted]; *see Almuganahi v Gonzalez*, 156 AD3d 1491, 1492 [4th Dept 2017]). Here, however, we conclude that the issue of liability is not distinct from the issue of plaintiff's injuries because plaintiff made statements to several of his medical care providers following his fall that render the testimony of several medical witnesses as well as hospital and medical records relevant to the liability phase of the trial. Plaintiff has thus established that bifurcation would not "assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" (22 NYCRR 202.42 [a]; *see*

Zbock v Gietz, 162 AD3d 1636, 1636 [4th Dept 2018]; *Kasprzak v Delaware YMCA*, 289 AD2d 1002, 1002 [4th Dept 2001]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

653

CA 22-01455

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

ALEYSHA MARINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RITA WEILER, DEFENDANT,
AND NORTHWEST BANK, FORMERLY KNOWN AS
NORTHWEST SAVINGS BANK, FORMERLY KNOWN AS
JAMESTOWN SAVINGS BANK, DEFENDANT-RESPONDENT.

STEINER & BLOTNIK, BUFFALO (RICHARD J. STEINER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, BUFFALO (CHLOE J. MACDONALD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered August 22, 2022. The order granted the motion of defendant Northwest Bank, formerly known as Northwest Savings Bank, formerly known as Jamestown Savings Bank to dismiss and dismissed plaintiff's amended complaint against it.

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

Memorandum: Plaintiff appeals from an order that granted defendant-respondent's motion to dismiss the amended complaint against it pursuant to CPLR 3211 (a) and 3016 (b). We affirm.

At the outset, we note that plaintiff did not oppose those parts of defendant-respondent's motion seeking to dismiss her causes of action for aiding and abetting conversion, civil conspiracy, and an accounting, as well as her request for punitive damages, and plaintiff has thus abandoned those causes of action and that request for relief (*see Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]; *Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]).

Contrary to plaintiff's contention, her remaining causes of action against defendant-respondent are time-barred. On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired (*see Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). Defendant-respondent met its burden. Plaintiff does not dispute that her causes of action accrued at the latest in 2009, and she commenced this action on

December 1, 2021. The burden then shifted to plaintiff to "aver evidentiary facts . . . establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*id.* at 1562 [internal quotation marks omitted]). Plaintiff failed to sustain her burden.

Here, plaintiff was an infant at the time that her causes of action accrued, and she relies on the infancy toll of CPLR 208. However, we note that the plain language of that statute extends the time to commence an action to no more than "three years after the disability ceases," where, as here, the statute of limitations is "three years or more" (CPLR 208 [a]; *see MP v Davidsohn*, 169 AD3d 788, 790 [2d Dept 2019]). Thus, each of plaintiff's remaining causes of action expired on April 23, 2018, three years after she turned 18 and her infancy ceased (*see* CPLR 105 [j]; 208 [a]).

Plaintiff further contends that her causes of action for aiding and abetting fraud and aiding and abetting a breach of fiduciary duty perpetuated through fraud are timely pursuant to the discovery rule for actions based on fraud (*see* CPLR 213 [8]; *Kaufman v Cohen*, 307 AD2d 113, 122-123 [2d Dept 2003]), because she first learned of the alleged fraud in March 2021. We reject that contention. Plaintiff does not allege that any fraudulent statement was made by a representative of defendant-respondent directly to plaintiff or that defendant-respondent itself owed a fiduciary duty to plaintiff. As a result, plaintiff's fraud-based causes of action against defendant-respondent sound in constructive fraud, not actual fraud, and thus the discovery rule is not applicable to them because it "does not apply in cases alleging constructive fraud" (*Kaufman*, 307 AD2d at 126). In light of our determination, plaintiff's remaining contentions are academic.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

655

CA 22-00450

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

CHS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAND O'LAKES PURINA FEED, LLC,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

FINAZZO COSSOLINI O'LEARY MEOLA & HAGER, LLC, NEW YORK CITY (ROBERT B. MEOLA OF COUNSEL), AND BOUSQUET HOLSTEIN PLLC, SYRACUSE, FOR DEFENDANT-APPELLANT.

KENNEDY LILLIS SCHMIDT & ENGLISH, NEW YORK CITY (NATHAN T. WILLIAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (J. Scott Odorisi, J.), entered March 2, 2022. The order granted plaintiff's motion for leave to file an amended complaint.

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

Memorandum: Plaintiff commenced this action for, inter alia, damages sustained after a fire at a bulk storage warehouse leased by defendant Commodity Resource Corp. and subleased to defendant Land O'Lakes Purina Feed, LLC (Land). At the time of the fire, plaintiff was storing bulk fertilizer it owned as well as bulk fertilizer owned by its customer, Mosaic Crop Nutrition, LLC (Mosaic). That fertilizer was destroyed by the fire. On a prior appeal, we reversed an order that denied defendants' cross-motions for partial summary judgment dismissing plaintiff's claims for damages to the Mosaic property (*CHS, Inc. v Land O'Lakes Purina Feed, LLC*, 197 AD3d 973, 974-975 [4th Dept 2021]). Plaintiff subsequently moved for leave to amend its complaint, inter alia, to join Mosaic as a plaintiff in the action. Land now appeals from an order granting plaintiff's motion. We affirm.

"Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a [pleading] is committed to the sound discretion of the court" (*Weldon v McMahon*, 207 AD3d 1046, 1047 [4th Dept 2022] [internal quotation marks omitted]). Here, plaintiff established that the relation-back doctrine applied for statute of limitations purposes

with respect to adding Mosaic, because the proposed claims concerning the damage suffered by Mosaic were based on the same facts and occurrence as plaintiff's prior claims concerning the damage to the Mosaic property and thus related back to the original complaint (*see* CPLR 203 [f]; *Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]; *Taylor v Deubell*, 153 AD3d 1662, 1662 [4th Dept 2017]). In opposition to the motion, defendants failed to establish that they would be prejudiced by plaintiff's delay in seeking leave to amend the complaint (*see Wojtalewski*, 161 AD3d at 1561; *see generally Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Land further contends that the proposed amendment is patently devoid of merit because Mosaic lacks standing and the proposed amended complaint fails to comply with CPLR 1004. We reject that contention (*see generally Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

658.1

KA 20-00458

PRESENT: WHALEN, P.J., SMITH, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KAMEL DAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 5, 2020. The judgment convicted defendant, upon his plea of guilty, of bail jumping in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 20 and September 28, 2023,

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

658

KA 20-00459

PRESENT: WHALEN, P.J., SMITH, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAMEL DAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 5, 2020. The appeal was held by this Court by order entered June 3, 2022, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (206 AD3d 1603 [4th Dept 2022]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of attempted gang assault in the second degree (Penal Law §§ 110.00, 120.06). When this appeal was previously before us, we concluded that County Court erred in summarily denying defendant's motion to withdraw his guilty plea because—insofar as defense counsel had erroneously advised defendant regarding the possibility of a conviction at trial of attempted gang assault in the second degree even though such a crime is a legal impossibility for trial purposes—the circumstances raised a genuine factual issue with respect to the voluntariness of the plea that could only be resolved after a hearing (*People v Davis*, 206 AD3d 1603, 1604-1605 [4th Dept 2022]). We held this case, reserved decision, and remitted the matter to County Court for a hearing to resolve that issue (*id.* at 1605). Following the hearing on remittal, the court denied defendant's motion. We now affirm.

Defendant contends that, as a result of the erroneous advice provided by his attorneys, the plea was not knowingly, intelligently, and voluntarily entered, and that the court thus abused its discretion in denying his motion. We reject that contention.

"A determination on a defendant's motion to withdraw a plea prior to sentencing is left to the sound discretion of the court" (*People v*

Fisher, 28 NY3d 717, 721 [2017]; *see* CPL 220.60 [3]). "Whether a plea was knowing, intelligent and voluntary is dependent upon a number of factors 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' . . . That the defendant allegedly received inaccurate information regarding [the possibility of a conviction at trial and the resulting impact upon] his possible sentence exposure is another factor which must be considered by the court, but it is not, in and of itself, dispositive" (*People v Garcia*, 92 NY2d 869, 870 [1998]; *see Davis*, 206 AD3d at 1605).

Here, although we agree with defendant that his attorneys erroneously advised him about the possibility of being convicted at trial of an ostensible lesser included charge of attempted gang assault in the second degree (*see Davis*, 206 AD3d at 1604-1605; *People v Delacruz*, 177 AD3d 541, 542 [1st Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *Matter of Cisely G.*, 81 AD3d 508, 508-509 [1st Dept 2011]), that fact " 'is not, in and of itself, dispositive' of the issue whether defendant's plea was knowingly and voluntarily entered" (*People v Johnson*, 24 AD3d 1259, 1259 [4th Dept 2005], *lv denied* 6 NY3d 814 [2006], quoting *Garcia*, 92 NY2d at 870; *see People v Williams*, 170 AD3d 1666, 1667 [4th Dept 2019]). As the court properly determined, the record establishes that defendant was 24 years old at the time he pleaded guilty and had a number of previous experiences with the criminal justice system, including several prior convictions by guilty plea, some of which were to reduced charges (*see Williams*, 170 AD3d at 1667; *Johnson*, 24 AD3d at 1259-1260). The hearing testimony further establishes that defendant's attorneys discussed with him the strengths and weaknesses of the People's case (*see People v Thompson*, 174 AD2d 702, 703 [2d Dept 1991], *lv denied* 79 NY2d 833 [1991]). The court also properly determined that the nature and terms of the plea agreement were advantageous and the bargain was reasonable inasmuch as defendant satisfied an indictment charging him with two counts of gang assault in the second degree (Penal Law § 120.06), along with another indictment charging him with bail jumping (§ 215.56), and received concurrent sentences aggregating to three years of imprisonment to be followed by two years of postrelease supervision while he avoided the possibility of consecutive sentences that could have totaled over 30 years of imprisonment (*see Williams*, 170 AD3d at 1667; *Johnson*, 24 AD3d at 1260). Based on the foregoing, we conclude that the court did not abuse its discretion in denying defendant's motion (*see Williams*, 170 AD3d at 1667; *Johnson*, 24 AD3d at 1260).

We also reject defendant's related contention that the court abused its discretion in denying his motion based on alleged ineffective assistance of counsel. "In the context of a guilty plea, a defendant has been afforded meaningful representation when [the defendant] receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Price*, 194 AD3d 1382, 1385 [4th Dept 2021], *lv denied* 37 NY3d 974 [2021]). "The phrase 'meaningful representation' does not mean 'perfect

representation' " (*Ford*, 86 NY2d at 404, quoting *People v Modica*, 64 NY2d 828, 829 [1985]). Here, we conclude that the mistaken advice by defendant's attorneys with respect to the possibility of conviction at trial of attempted gang assault in the second degree does not rise to the level of ineffective assistance of counsel, particularly considering that defense counsel negotiated a very favorable plea (*see Modica*, 64 NY2d at 829; *People v Lovette*, 188 AD3d 1726, 1728 [4th Dept 2020], *lv denied* 36 NY3d 1051 [2021]; *People v Cave*, 278 AD2d 941, 941 [4th Dept 2000], *lv denied* 96 NY2d 798 [2001]; *see generally People v Couser*, 28 NY3d 368, 378 [2016]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

675

CA 22-01543

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

IN THE MATTER OF CHARLES L.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered September 12, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the request for an in-person evidentiary hearing and directed an evidentiary hearing on submission.

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

Same memorandum as in *Matter of Charles L. v State of New York* ([appeal No. 2] — AD3d — [Oct. 6, 2023] [4th Dept 2023]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

676

CA 22-01961

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

IN THE MATTER OF CHARLES L.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered December 7, 2022, in a proceeding pursuant to Mental Hygiene Law article 10. The order, insofar as appealed from, denied the motion of petitioner to vacate an order directing an evidentiary hearing.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion insofar as it seeks to vacate the order dated September 12, 2022, is granted, that order is vacated, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: Petitioner, who was previously determined to be a dangerous sex offender requiring confinement and committed to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*), appeals in appeal No. 1 from an order (letter order) directing, sua sponte, that his annual review hearing pursuant to Mental Hygiene Law § 10.09 (d) be conducted by the submission of documentary evidence only. In appeal No. 2, he appeals from a subsequent order insofar as it denied that part of his motion seeking to vacate the letter order. Petitioner contends with respect to both appeals that Supreme Court violated, inter alia, his statutory rights under article 10 of the Mental Hygiene Law by not scheduling an evidentiary hearing with live witness testimony.

Initially, we conclude that appeal No. 1 should be dismissed. The letter order is not appealable as of right inasmuch as it was entered sua sponte and did not decide a "motion . . . made upon notice" (CPLR 5701 [a] [2]; *see Mosley v Parnell*, 211 AD3d 1530, 1531 [4th Dept 2022]). We decline to treat the notice of appeal as an application for leave to appeal because all of petitioner's

contentions are before us in appeal No. 2.

With respect to appeal No. 2, Mental Hygiene Law § 10.09 (d) requires the court to "hold an evidentiary hearing as to retention of [an offender] . . . if it appears from one of the annual submissions to the court under [§ 10.09 (c)] . . . that the [offender] has petitioned, or has not affirmatively waived the right to petition, for discharge." Petitioner here has petitioned for annual review, and he is therefore entitled to an evidentiary hearing with live witness testimony where he "may, as a matter of right, testify in his . . . own behalf, call and examine other witnesses, and produce other evidence in his . . . behalf" (Mental Hygiene Law § 10.08 [g]; *see Matter of State of New York v Enrique D.*, 22 NY3d 941, 944 [2013]; *see also Matter of Charada T. v State of New York*, 149 AD3d 1588, 1589 [4th Dept 2017]). We therefore reverse the order insofar as appealed from, and we remit the matter to Supreme Court to hold such a hearing.

We have considered petitioner's remaining contentions and conclude that, under the circumstances of this case, none warrants further relief. We note that we have not considered arguments and documents submitted to this Court for the first time in a postargument submission in this appeal (*see Matter of Fichera v New York State Dept. of Envtl. Conservation*, 159 AD3d 1493, 1495-1496 [4th Dept 2018]; *see generally Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1039 [4th Dept 2021]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

686

KA 20-01119

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WARREN MEREDITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 7, 2019. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]).

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

We reject defendant’s contention that County Court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30. A motion to set aside a verdict based on allegedly improper juror conduct or newly discovered evidence “must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the

latter event the affiant must state the sources of such information and the grounds of such belief" (CPL 330.40 [2] [a]; *see* CPL 330.30 [2], [3]). Here, the court properly exercised its discretion in summarily denying defendant's motion insofar as it sought to set aside the verdict based on juror misconduct inasmuch as it "was supported only by hearsay allegations contained in an [affirmation] of defense counsel" (*People v Kerner*, 299 AD2d 913, 913 [4th Dept 2002], *lv denied* 99 NY2d 583 [2003] [internal quotation marks omitted]; *see People v Barizone*, 201 AD3d 810, 811 [2d Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *cf. People v Tokarski*, 178 AD2d 961, 961 [4th Dept 1991]). Similarly, the unsworn statement submitted in support of defendant's motion insofar as it sought to set aside the verdict on the ground of newly discovered evidence was insufficient to satisfy the requirements of CPL 330.40 (2) (a) (*see People v Abrams*, 73 AD3d 1225, 1228 [3d Dept 2010], *affd* 17 NY3d 760 [2011]; *see generally People v Shilitano*, 215 NY 715, 715-716 [1915]; *People v Lopez*, 104 AD2d 904, 905 [2d Dept 1984]).

We reject defendant's further contention that the court erred in excluding him from the hearing held pursuant to *People v Hinton* (31 NY2d 71 [1972], *cert denied* 410 US 911 [1973]) to determine whether the courtroom should be closed during the testimony of a witness. The *Hinton* hearing "did not constitute a material stage of the trial during which defendant's presence was required" (*People v Floyd*, 45 AD3d 1457, 1458 [4th Dept 2007], *lv denied* 10 NY3d 811 [2008]; *see also People v Wood*, 259 AD2d 777, 779 [3d Dept 1999], *lv denied* 93 NY2d 1007 [1999]). The evidence adduced at the hearing "did not bear on defendant's guilt or innocence but rather [focused] on the safety of the witness[ ] and was unrelated to factual issues presented at trial" (*People v Frost*, 100 NY2d 129, 135 [2003]). Further, defendant had a full opportunity to cross-examine the witness at trial, and as such, his confrontation rights were not violated by his exclusion from the *Hinton* hearing (*see id.*).

Defendant's contentions regarding prosecutorial misconduct are not preserved for our review (*see People v Maull*, 167 AD3d 1465, 1467-1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]; *People v Machado*, 144 AD3d 1633, 1635 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

687

KA 18-00796

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYSHAWN K. KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered April 27, 2018. 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 his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his waiver of indictment and consent to be charged under a single-count superior court information (SCI) was defective because the felony complaint charged a lesser included offense of a charge, arising from the same underlying incident, on which he had already been indicted. We reject that contention (*see generally People v D'Amico*, 76 NY2d 877, 879 [1990]; *People v Colon*, 42 AD3d 411, 412 [1st Dept 2007]; *People v Waid*, 26 AD3d 734, 735 [4th Dept 2006], *lv denied* 6 NY3d 839 [2006]). The fact that a defendant has already been indicted for a related offense does not prohibit a waiver of indictment on a "new charge contained in [a subsequent] felony complaint" (*D'Amico*, 76 NY2d at 879). Although we agree with defendant that a lesser included offense of a related charge on which a defendant has already been indicted would not constitute a "new charge" that would permit defendant to waive indictment and consent to be prosecuted by an SCI (*see Colon*, 42 AD3d at 412; *see generally People v Pierce*, 14 NY3d 564, 568 [2010]), we nevertheless reject defendant's contention inasmuch as the offense charged in the subsequent felony complaint—criminal possession of a weapon in the second degree (§ 265.03 [3])—is not a lesser included offense of the related charge on which he was indicted, criminal use of a firearm in the first degree (§ 265.09 [1]; *see People v Argueta*, 194 AD3d 857, 859-860 [2d Dept 2021], *lv denied* 37 NY3d 970 [2021]).

To establish that a count is a lesser included offense, a defendant must show " 'that it is theoretically impossible to commit the greater crime without at the same time committing the lesser' " (*People v Repanti*, 24 NY3d 706, 710 [2015], quoting *People v Glover*, 57 NY2d 61, 64 [1982]). "Such determination requires the court to compare the statutes in the abstract, without reference to any factual particularities of the underlying prosecution," and defendant must demonstrate that one offense is a lesser included offense of the other "in all circumstances, not only in those presented in the particular case" (*id.*). Defendant failed to do so. Comparing the applicable statutes, we conclude that criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) can "only be committed if the possession occurs outside of the defendant's home or place of business," an element that is not required by the count of criminal use of a firearm in the first degree (*Argueta*, 194 AD3d at 859; *see* § 265.09 [1]). To the extent that defendant relies on *People v Lott* (55 AD3d 1274, 1276 [4th Dept 2008]) and *People v Fowler* (45 AD3d 1372, 1374 [4th Dept 2007], *lv denied* 9 NY3d 1033 [2008]) for the contrary conclusion, those cases addressed former Penal Law § 265.03 (2), which did not contain this location-based element.

As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Grabowski*, 200 AD3d 1718, 1718 [4th Dept 2021]). Contrary to defendant's contention, however, the sentence is not unduly harsh or severe.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

694

CAF 22-00810

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

IN THE MATTER OF VIALMA RAMOS-O'NEAL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MAYRA RAMOS, RESPONDENT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (Tanya Conley, R.), entered May 9, 2022, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to refrain from communication with petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the language "Refrain from communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means with Vialma Ramos-ONeal . . . including face to face or through third-party" and substituting therefor the language: "Refrain from communication by mail, telephone, e-mail, voice-mail or other electronic or any other means, including face-to-face communication and contact through third parties, with Vialma Ramos-O'Neal."

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued upon Family Court's determination that she committed acts constituting the family offense of harassment in the second degree against petitioner, her sister (*see* Family Ct Act § 812 [1]; Penal Law § 240.26). We reject respondent's contention that she was denied effective representation. Respondent failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Elniski v Junker*, 142 AD3d 1392, 1393 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Bryleigh E.N. [Derek G.]*, 187 AD3d 1685, 1687 [4th Dept 2020]).

We agree with respondent, however, that there is a conflict between the order and the court's decision. The order prohibits "communication or any other contact by mail, telephone, e-mail, voice-mail or other electronic or any other means . . . including face to face or through [a] third party." The court's decision, however, prohibited "communication," including "face to face" communication, and also prohibited "third-party contact." In its decision, the court

explicitly stated its intent to abide by petitioner's wish that the order not preclude petitioner and respondent from being in the same room, so long as there was no "communication" between them, and thus face-to-face contact is not prohibited. We therefore modify the order accordingly (*see generally Matter of Chase v Chase*, 181 AD3d 1323, 1324 [4th Dept 2020]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

697

CA 22-01613

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

L&W SUPPLY CORPORATION, DOING BUSINESS AS BUILDING SPECIALTIES, FORMERLY DOING BUSINESS AS CAPITAL GYPSUM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BUILT-RITE DRYWALL CORP., ET AL., DEFENDANTS, AND SAMUEL BRAUN, DEFENDANT-APPELLANT.

THE LAW OFFICE OF JEREMY ROSENBERG, CHESTNUT RIDGE (JEREMY ROSENBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered March 17, 2022. The order denied the motion of defendant Samuel Braun seeking, inter alia, to vacate a default judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Samuel Braun (defendant) appeals from an order denying his motion seeking, inter alia, to vacate the default judgment entered against him in this action. Defendant contends that Supreme Court erred in treating his motion as one to vacate the default judgment on the ground of excusable default pursuant to CPLR 5015 (a) (1) and denying it based on his purported failure to demonstrate a reasonable excuse for the default. We agree. "Where, as here, a defendant moves to vacate a judgment entered upon [the defendant's] default in appearing or answering the complaint on the ground of lack of personal jurisdiction [under CPLR 5015 (a) (4)], the defendant is not required to demonstrate a reasonable excuse for the default and a potentially meritorious defense" (*Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept 2017]). Thus, contrary to the court's determination, it is immaterial when defendant first learned of the judgment.

With respect to the merits, defendant contended in support of his motion that the court lacked personal jurisdiction over him because he was not properly served with the supplemental summons and amended complaint pursuant to CPLR 308 (4) (*see* CPLR 5015 [a] [4]). "Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served[, but] . . . a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's

affidavit" (*Cach, LLC v Ryan*, 158 AD3d 1193, 1194 [4th Dept 2018] [internal quotation marks omitted]). We agree with defendant that, by submitting uncontradicted evidence that the address listed in the affidavit of service does not exist, he overcame the presumption of proper service and created "a genuine question" whether the "nail and mail" service used here was effected in accordance with the statute (*Fabian v Mullen*, 20 AD3d 896, 897 [4th Dept 2005] [internal quotation marks omitted]).

We therefore reverse the order and remit the matter to Supreme Court to conduct a hearing on the issue whether service was properly effectuated and to determine defendant's motion following the hearing (*see id.*). We note that, at the hearing on defendant's motion, plaintiff is "required to establish jurisdiction by a preponderance of the evidence" (*id.* [internal quotation marks omitted]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

700

CA 22-01294

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

AMY D. FALLETTA, AS EXECUTOR OF THE ESTATE OF
JAMES A. FALLETTA, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLYN M. NORMAN, D.O., INDIVIDUALLY AND DOING
BUSINESS AS MAPLE AYER MEDICAL, ET AL., DEFENDANTS,
AND DAVID M. ZLOTNICK, M.D., DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELINDA L. GRABOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 28, 2022. The order denied the motion of defendant David M. Zlotnick, M.D. to dismiss the amended complaint against him.

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

Memorandum: In February 2016, James A. Falletta (decedent) arrived at the emergency department at Millard Fillmore Suburban Hospital (Millard Fillmore) complaining of burning in his chest and shortness of breath. Defendant Kaleida Health (Kaleida) owned and operated Millard Fillmore and Buffalo General Medical Center (Buffalo General). Shortly after decedent's arrival at Millard Fillmore, one of the examining physicians at Millard Fillmore called an interventional cardiologist who was on call at Buffalo General and available to physicians at other hospitals owned and operated by Kaleida. Decedent's medical records included a note that an interventional cardiologist was contacted, but the name of the physician was not listed. Decedent died of a myocardial rupture due to myocardial infarction the day after he arrived at Millard Fillmore. The executor of decedent's estate commenced this medical malpractice and wrongful death action almost two years later, in January 2018. Plaintiff named as a defendant "John Doe I," who was described as "the interventionalist contacted by" one of the examining physicians at Millard Fillmore. In November 2021, in response to plaintiff's request, Kaleida identified the on-call interventional cardiologist as David M. Zlotnick, M.D. Supreme Court granted plaintiff's subsequent

motion for leave to file a supplemental summons and amended complaint to add Zlotnick as a defendant. After Zlotnick was served with the amended complaint, he moved to dismiss the amended complaint against him as time-barred pursuant to CPLR 3211 (a) (5). The court denied the motion, and Zlotnick now appeals.

We agree with Zlotnick that plaintiff failed to establish that Zlotnick should be named in place of the John Doe I defendant pursuant to CPLR 1024. Plaintiff did not serve Zlotnick within 120 days of filing the summons and complaint and did not seek leave to extend the time for service (*see Walker v Hormann Flexon, LLC*, 153 AD3d 997, 997 [3d Dept 2017]; *cf. Rogers v Dunkirk Aviation Sales & Serv., Inc.*, 31 AD3d 1119, 1120 [4th Dept 2006]; *see generally Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31 [2d Dept 2009]; *Luckern v Lyonsdale Energy Ltd. Partnership*, 229 AD2d 249, 254 [4th Dept 1997]). In addition, she failed to show that she made "timely and diligent efforts to ascertain the identity of [Zlotnick] prior to the expiration of the statute of limitations" (*Walker v Glaxosmithkline, LLC*, 161 AD3d 1419, 1420 [3d Dept 2018]; *see Wilmington Trust, N.A. v Shasho*, 197 AD3d 534, 536 [2d Dept 2021]).

We nevertheless reject Zlotnick's contention that the court erred in denying his motion inasmuch as we conclude that plaintiff raised a triable issue of fact with respect to the applicability of the relation back doctrine. "On a motion to dismiss pursuant to CPLR 3211 (a) (5) on statute of limitations grounds, the defendant has the initial burden of establishing that the limitations period has expired" (*Rider v Rainbow Mobile Home Park, LLP*, 192 AD3d 1561, 1561-1562 [4th Dept 2021]). It is undisputed that Zlotnick met that burden here. The burden thus shifted to plaintiff to raise an issue of fact whether the relation back doctrine applied (*see Marcotrigiano v Dental Specialty Assoc., P.C.*, 209 AD3d 850, 851 [2d Dept 2022]; *see generally Stepanian v Bed, Bath, & Beyond, Inc.*, 207 AD3d 1182, 1183 [4th Dept 2022]; *Kulback's Inc. v Buffalo State Ventures, LLC*, 197 AD3d 890, 891 [4th Dept 2021]; *U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020]).

" 'In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff[ ] must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that [the new defendant] will not be prejudiced in maintaining [a] defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff[ ] as to the identity of the proper parties, the action would have been brought against [the new defendant] as well' " (*May v Buffalo MRI Partners, L.P.* [appeal No. 2], 151 AD3d 1657, 1658 [4th Dept 2017]; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]). "[T]he 'linchpin' of the relation back doctrine [is] notice to the defendant within the applicable limitations period" (*Buran*, 87 NY2d at 180; *see Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1194 [4th Dept 2013]; *Cole v*

Tat-Sum Lee, 309 AD2d 1165, 1167 [4th Dept 2003]).

Zlotnick does not dispute that the first prong is met here, and we reject his contention that plaintiff failed to raise an issue of fact with respect to the second and third prongs. "The second prong, unity of interest, is satisfied when the interest of the parties in the subject-matter is such that they [will] stand or fall together and that the judgment against one will similarly affect the other" (*May*, 151 AD3d at 1658 [internal quotation marks omitted]; *see Johanson v County of Erie*, 134 AD3d 1530, 1531 [4th Dept 2015]). "There is unity of interest where the defenses available . . . will be identical, [which occurs] . . . where one is vicariously liable for the acts of the other" (*May*, 151 AD3d at 1658-1659 [internal quotation marks omitted]; *see Norman K. v Posner*, 207 AD3d 1228, 1230 [4th Dept 2022]).

Zlotnick was not an employee of Kaleida, but plaintiff alleged that he was an agent of Kaleida and that Kaleida was thus liable for his actions based on the theory of respondeat superior. Hospitals are liable for the negligence of their employees but are not necessarily liable for the acts of independent physicians, even if they are affiliated with the hospital (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). The determination of whether vicarious liability applies "generally turns . . . on agency or control in fact" or apparent or ostensible agency (*id.*). " 'In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal . . . , [and] the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal' " (*Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1382 [4th Dept 2021]; *see Greene v Hellman*, 51 NY2d 197, 204 [1980]). " 'In the context of a medical malpractice action against a hospital, the patient must have reasonably believed that the [treating] physicians . . . were provided by the hospital or acted on the hospital's behalf' " (*Pasek*, 195 AD3d at 1382). Where, as here, "a patient presents . . . at an emergency room, seeking treatment from the hospital and not from a particular physician of the patient's choosing, the hospital may be held vicariously liable for the malpractice of a physician who is an independent contractor" under a theory of apparent agency (*Litwak v Our Lady of Victory Hosp. of Lackawanna*, 238 AD2d 881, 881 [4th Dept 1997]; *see Lewis v Sulaiman*, 217 AD3d 1443, 1445 [4th Dept 2023]; *Mignone v Nyack Hosp.*, 212 AD3d 802, 803-804 [2d Dept 2023]; *Cole*, 309 AD2d at 1167; *Mduba v Benedictine Hosp.*, 52 AD2d 450, 453 [3d Dept 1976]).

In opposing Zlotnick's motion, plaintiff relied on evidence submitted by Zlotnick himself that raises a triable issue whether Kaleida is vicariously liable for Zlotnick's acts under a theory of apparent agency (*see Lewis*, 217 AD3d at 1445-1446; *Syracuse v Diao*, 272 AD2d 881, 881-882 [4th Dept 2000]; *Litwak*, 238 AD2d at 881; *Casucci v Kenmore Mercy Hosp.*, 144 AD2d 910, 910-911 [4th Dept 1988]). Decedent presented to Millard Fillmore and was subsequently

transferred to Buffalo General. Those hospitals furnished the physicians who treated decedent, and decedent could properly assume that those physicians were acting on behalf of the hospitals. Zlotnick was the interventional cardiologist for Buffalo General who was on call that day and was thus the one provided by Buffalo General to speak with one of Millard Fillmore's examining physicians when that physician needed a consultation. Based on that evidence, plaintiff raised a triable issue of fact whether Kaleida and Zlotnick are united in interest, and thus there is a triable issue of fact whether the second prong of the relation back doctrine is satisfied (*see Marcotrigiano*, 209 AD3d at 852; *see also Mignone*, 212 AD3d at 803-804; *Cole*, 309 AD2d at 1167).

With respect to the third prong, plaintiff established that her failure to include Zlotnick was a mistake and not the result of a strategy to obtain a tactical advantage (*see Norman K.*, 207 AD3d at 1230; *May*, 151 AD3d at 1659). The third prong "focuses, inter alia, on whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as [that defendant] is concerned" (*Mignone*, 212 AD3d at 804 [internal quotation marks omitted]). Plaintiff raised an issue of fact whether Zlotnick should have known that the action would be asserted against him and that he had notice within the applicable limitations period. The complaint specifically listed the interventional cardiologist contacted by one of the examining physicians as the John Doe I defendant. Thus, it cannot be said that Zlotnick "could have reasonably concluded that the plaintiff['s] failure to sue him within the applicable limitations period meant that [she] had no intent to sue him" (*Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 983 [2d Dept 2009]; *see May*, 151 AD3d at 1659).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

701

CA 22-01492

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

DARCY M. BLACK AND ROBERT J. BLACK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

465 PAYNE AVENUE, LLC, DEFENDANT-RESPONDENT.

GRECO TRAPP, PLLC, BUFFALO (JOSEPHINE A. GRECO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered September 1, 2022. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Darcy M. Black (plaintiff) when, after walking inside from a snow-covered sidewalk, she slipped and fell on uncovered laminate flooring in the entryway of a building that was owned by defendant, leased to a related corporation (lessee), and occupied by plaintiff's employer, which paid the rent owed under the lease. Plaintiffs appeal from an order that granted defendant's motion for summary judgment dismissing the complaint. We agree with plaintiffs that Supreme Court erred in granting the motion on the ground that plaintiffs' action was barred by the exclusive remedy provisions of the Workers' Compensation Law (*see* Workers' Compensation Law §§ 11, 29 [6]). Contrary to the court's determination, defendant failed to meet its initial burden on the motion of establishing that it functioned as an alter ego of plaintiff's employer (*see Taitt v Shipwreck Tavern, Inc.*, 162 AD3d 1746, 1746 [4th Dept 2018]; *Cleary v Walden Galleria LLC*, 145 AD3d 1524, 1525 [4th Dept 2016]). We nonetheless affirm the order on the alternative ground raised by defendant, which is properly before us (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Stewart v Dunkleman*, 128 AD3d 1338, 1341 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]), that its status as an out-of-possession landlord absolves it of liability.

"Landowners generally owe a duty of care to maintain their

property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty" (*Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]; *see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). "The duty is premised on the landowner's exercise of control over the property, [because] the person in possession and control of property is best able to identify and prevent any harm to others" (*Henry*, 34 NY3d at 142 [internal quotation marks omitted]; *see Gronski*, 18 NY3d at 379; *Butler v Rafferty*, 100 NY2d 265, 270 [2003]). In contrast, "a landowner who has transferred possession and control [i.e., an out-of-possession landlord] is generally not liable for injuries caused by dangerous conditions on the property" (*Henry*, 34 NY3d at 142 [internal quotation marks omitted]; *see Gronski*, 18 NY3d at 379). "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*Gronski*, 18 NY3d at 380-381). There are, however, exceptions to the general rule of nonliability for an out-of-possession landlord that has relinquished control of the premises (*see Henry*, 34 NY3d at 142; *Truax v M.D. Meyer's Props., LLC*, 218 AD3d 1328, 1328 [4th Dept 2023]). Thus, an out-of-possession landlord may be liable for injuries that occur on its premises where, for example, " 'the landlord . . . is contractually obligated to repair the premises or . . . has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision' " (*Weaver v DeRonde Tire Supply, Inc.*, 211 AD3d 1503, 1504 [4th Dept 2022], *appeal dismissed* 39 NY3d 1149 [2023]; *see Henry*, 34 NY3d at 142; *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565-567 and n 4 [1987]).

Here, we conclude that defendant met its initial burden on the motion of establishing that it was an out-of-possession landlord that had relinquished control of the premises and was not obligated to perform repairs or maintenance of the premises, including removal of snow (*see Adolf v Erie County Indus. Dev. Agency*, 174 AD3d 1519, 1519 [4th Dept 2019]; *Sexton v Resinger*, 70 AD3d 1360, 1361 [4th Dept 2010]). In support of its motion, defendant submitted the lease between defendant and the lessee, which provided that the lessee was responsible for all maintenance and repair of the premises (*see Tarantelli v 7401 Willowbrook Rd. Assoc., LLC*, 13 AD3d 1184, 1184 [4th Dept 2004]). Defendant's submissions also established that the executive director of plaintiff's employer was responsible for ensuring that such maintenance was completed and that the flooring was safe—a job that included having floor mats placed in the entryway—and that a maintenance worker hired by plaintiff's employer was responsible for maintenance, repairs, and snow and ice removal at the premises (*see McLaughlin v 22 New Scotland Ave., LLC*, 132 AD3d 1190, 1192 [3d Dept 2015]). Contrary to plaintiffs' assertion that defendant retained control of the premises because the lease

prohibited the lessee from making any alterations, we conclude that the lease, when its language is properly construed pursuant to applicable grammatical rules (*see Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 141-142 [1st Dept 2008]), allowed the lessee to make certain alterations to the building with defendant's preapproval; expressly prohibited only those alterations that would be for a purpose other than the one stipulated in the lease, that would be for a purpose deemed an extra hazardous fire risk, or that would be in violation of law; and otherwise contemplated that the lessee might make improvements to the premises (*cf. Rios v 1146 Ogden LLC*, 136 AD3d 606, 607 [1st Dept 2016]).

Moreover, contrary to plaintiffs' further contention, a question of fact is not raised by evidence in defendant's submissions that its sole owner, who was also the sole owner of the lessee and of plaintiff's employer, approved the installation of the laminate flooring and would occasionally visit the premises to examine any work that had been completed (*see Hart v O'Brien*, 72 AD3d 1257, 1259 [3d Dept 2010]; *cf. Gronski*, 18 NY3d at 380-381; *Dill v Lahr*, 194 AD3d 1473, 1474-1475 [4th Dept 2021]). The fact that defendant "retained the right to visit and examine [the] premises, and to approve alterations, additions or improvements[,] . . . [is] insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord who reserves the right to enter the leased premises to make necessary repairs" (*Schwegler v City of Niagara Falls*, 21 AD3d 1268, 1269-1270 [4th Dept 2005] [internal quotation marks omitted]; *see Hart*, 72 AD3d at 1259; *see also Ferro v Burton*, 45 AD3d 1454, 1455 [4th Dept 2007]). Although an out-of-possession landlord may be liable for injuries that occur on its premises where the landlord has " 'reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision' " (*Weaver*, 211 AD3d at 1504), the alleged slippery condition of the laminate flooring caused by tracked-in snow combined with the removal of floor mats from the entryway is not a structural or design defect (*see Padilla v Hope W. 118th Hous. Co., Inc.*, 204 AD3d 545, 545 [1st Dept 2022]; *Lindquist v C & C Landscape Contrs., Inc.*, 38 AD3d 616, 616-617 [2d Dept 2007]; *Evans v Citicorp*, 276 AD2d 370, 370 [1st Dept 2000]) and plaintiffs failed to allege a specific statutory violation pertaining to the condition of the floor (*see Truax*, 218 AD3d at 1329; *Weaver*, 211 AD3d at 1504-1505; *Addeo v Clarit Realty, Ltd.*, 176 AD3d 1581, 1582-1583 [4th Dept 2019]). Plaintiffs' allegation that defendant violated Multiple Residence Law § 174 was improperly raised for the first time in opposition to defendant's motion (*see Addeo*, 176 AD3d at 1583).

To the extent that plaintiffs contend that defendant affirmatively created the dangerous condition simply by approving the replacement of the old carpeting in the entryway with the smoother surface of laminate flooring, we reject that contention because, "[i]n the absence of evidence of a negligent application of floor wax or polish [or other substance], the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence" (*Flynn v Haddad*, 109 AD3d 1209, 1209 [4th Dept 2013]

[internal quotation marks omitted]; *see Kline v Abraham*, 178 NY 377, 379-381 [1904]; *Kaplan v Menlo Realty Income Props. 28, LLC*, 218 AD3d 1301, 1303 [4th Dept 2023]). Additionally, defendant was not responsible for the removal of the floor mats from the entryway prior to plaintiff's slip and fall.

We further conclude that plaintiffs failed to raise a triable issue of fact in opposition to defendant's motion (*see Adolf*, 174 AD3d at 1519-1520; *Tarantelli*, 13 AD3d at 1184; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Finally, we reject plaintiffs' remaining contentions, including their procedural challenge to defendant's invocation of the out-of-possession landlord doctrine.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

706

CA 22-01941

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

VILLAGE GREEN EAST HOLDINGS LLC, DOING BUSINESS AS FIRST CHOICE GLASS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GLEN BLAAKMAN AND GLASS ELEGANCE LLC, DEFENDANTS-RESPONDENTS.

DAVID H. TENNANT, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CLAIRE G. BOPP OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered October 26, 2022. The judgment, among other things, awarded money damages to plaintiff as against defendant Glen Blaakman.

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

Memorandum: In early 2019, defendant Glen Blaakman was employed by plaintiff, a commercial glass business that earned 20 to 25% of its gross revenue from its wholesale business, which sold glass to other local glass shops. As plaintiff's operations manager, Blaakman was responsible for, inter alia, contacting wholesale customers and ordering glass for their commercial jobs and determining pricing. Blaakman ended his employment with plaintiff on April 26, 2019, and began working for defendant Glass Elegance LLC (Glass Elegance).

Plaintiff commenced this action asserting various causes of action, including, as relevant to this appeal, a cause of action against Blaakman for breach of fiduciary duty, a cause of action against Glass Elegance for aiding and abetting breach of fiduciary duty, and a faithless servant cause of action against Blaakman. Plaintiff alleged that Glass Elegance was formerly its customer but was now a competitor in the wholesale business. After a bench trial, Supreme Court granted a judgment in favor of plaintiff against Blaakman in the amount of $5,169.98 for breach of fiduciary duty and $4,967 for faithless servant, plus interest. The amount awarded for breach of fiduciary duty represented the lost profits on 61 orders from seven customer accounts that Blaakman diverted to Glass Elegance in April 2019 while he was still employed by plaintiff. The amount awarded for faithless servant represented Blaakman's salary and

benefits from April 1, 2019, until April 26, 2019. Plaintiff now appeals.

Where, as here, the appeal follows a nonjury trial, "the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *see Buchmann v State of New York*, 214 AD3d 1412, 1413 [4th Dept 2023]). "Nonetheless, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Unger v Ganci* [appeal No. 2], 200 AD3d 1604, 1605 [4th Dept 2021] [internal quotation marks omitted]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Davis v Hinds*, 215 AD3d 1242, 1243 [4th Dept 2023]).

Plaintiff contends that the court abused its discretion in precluding plaintiff from introducing expert testimony regarding the diminution in value of its wholesale business. Although we agree with plaintiff that it is not estopped from contesting the court's in limine ruling on the ground that plaintiff withdrew its prior appeal from that order (*cf. Bray v Cox*, 38 NY2d 350, 353-355 [1976]; *Montalvo v Nel Taxi Corp.*, 114 AD2d 494, 494 [2d Dept 1985], *lv dismissed in part & denied in part* 68 NY2d 643 [1986]; *see generally Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 755-756 [1999]), we nevertheless reject plaintiff's contention (*see generally Dischiavi v Calli*, 125 AD3d 1435, 1436 [4th Dept 2015]). In a cause of action for breach of fiduciary duty, damages may be measured by calculating the employee's improper gain or by calculating the employer's lost profits arising from the employee's wrong (*see Gomez v Bicknell*, 302 AD2d 107, 113-114 [2d Dept 2002], *lv dismissed in part & denied in part* 100 NY2d 574 [2003]; *Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 188-189 [1st Dept 2000]). Plaintiff elected to seek as damages the net loss of profits from the business diverted by Blaakman (*see Gibbs*, 271 AD2d at 189; *see generally Gomez*, 302 AD2d at 114), and plaintiff provided no authority for the proposition that the "larger category of damages" of a decrease in plaintiff's value would be a proper measure of damages for the breach of fiduciary duty cause of action.

Contrary to plaintiff's contention, the court's damages determination on the breach of fiduciary duty cause of action is supported by a fair interpretation of the evidence. Although plaintiff sought three years of lost opportunities for profits from the seven diverted accounts, plaintiff failed to establish that Blaakman's breach of fiduciary duty was the cause of those lost opportunities (*see Gibbs*, 271 AD2d at 189; *R.M. Newell Co. v Rice*, 236 AD2d 843, 844 [4th Dept 1997], *lv denied* 90 NY2d 807 [1997]; *Stoeckel v Block*, 170 AD2d 417, 417 [1st Dept 1991]). Rather, the evidence showed that Blaakman had established relationships with customers who would have followed Blaakman to Glass Elegance regardless of Blaakman's breach.

We reject plaintiff's further contention that the court erred in concluding that plaintiff did not establish that Glass Elegance aided and abetted Blaakman's breach of fiduciary duty. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Ginsberg Dev. Cos., LLC v Carbone*, 134 AD3d 890, 893-894 [2d Dept 2015] [internal quotation marks omitted]; *see Schroeder v Pinterest Inc.*, 133 AD3d 12, 25 [1st Dept 2015]). The court determined that plaintiff failed to establish that Glass Elegance knowingly participated in the breach of fiduciary duty, and its determination is supported by a fair interpretation of the evidence.

Under the faithless servant doctrine, which applies when an employee breaches the duty of loyalty owed to the employer, "[o]ne who owes a duty of fidelity to a principal and who is faithless in the performance of [their] services is generally disentitled to recover [their] compensation, whether commissions or salary" (*Feiger v Iral Jewelry*, 41 NY2d 928, 928 [1977]). Here, the court determined that plaintiff was limited to recovering the amount it paid to Blaakman during April 2019, and we reject plaintiff's contention that it is also entitled to recover the salary and benefits it paid to Blaakman from February 25, 2019, through March 31, 2019. Plaintiff relies on certain emails sent by Blaakman to third parties during that period. The court, however, determined that the evidence established that those communications were made to promote plaintiff's relations with its clients or were made with companies who were no longer plaintiff's customers and thus did not result in any monetary loss to plaintiff. We conclude that the court's determination is based on a fair interpretation of the evidence.

Finally, we reject plaintiff's contention that the court erred in declining to award punitive damages; Blaakman did not "manifest evil or malicious conduct beyond any breach of [fiduciary] duty" (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012], *rearg denied* 20 NY3d 1045 [2013]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

707

KA 22-01636

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CASEY C. BURKE, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered August 31, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the motion to suppress physical evidence and statements is granted, the indictment is dismissed, and the matter is remitted to Jefferson County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress, as the product of an unlawful arrest, physical evidence found on his person and his statements to the police. We agree with defendant.

The record establishes that law enforcement in Cortland County initiated a traffic stop of a vehicle operated by defendant for a nonmoving violation of the Vehicle and Traffic Law. The officer who initiated the traffic stop discovered that defendant had an outstanding arrest warrant for the class A misdemeanor of petit larceny (Penal Law § 155.25) that had been signed nearly seven years earlier by a justice of Watertown Town Court in Jefferson County. The arrest warrant authorized any officer of the Jefferson County Sheriff's Office or the New York State Police to arrest defendant.

After defendant was placed inside a police vehicle, Cortland County law enforcement contacted the Jefferson County Sheriff's Office to confirm the validity of the outstanding arrest warrant and to inquire whether the Jefferson County Sheriff's Office wanted defendant

extradited on the warrant. When defendant was informed that he would be taken to jail in Cortland County before being turned over to the Jefferson County Sheriff's Office on the arrest warrant, defendant allegedly began to behave in an irate and combative manner, which included punching the rear window of the police vehicle. Defendant was then transported to jail in Cortland County where he was charged with resisting arrest and traffic infractions.

Approximately four hours after the traffic stop, Cortland County law enforcement obtained an endorsement of the arrest warrant pursuant to CPL 120.70 (2) (b) by a justice of Lapeer Town Court in Cortland County. Shortly thereafter, deputies with the Jefferson County Sheriff's Office took custody of defendant and transported him to jail in Jefferson County. While booking defendant at that jail on the arrest warrant, deputies discovered, among other things, packages of drugs on defendant's person. Defendant was then arrested on controlled substances offenses and, during processing, allegedly engaged in conduct constituting obstruction of governmental administration in the second degree.

Defendant moved to suppress physical evidence and statements. The parties agreed that the court would consider the motion on submissions and without an evidentiary hearing, and they stipulated that, if the execution of the arrest warrant was improper, the physical evidence and statements would be suppressed as fruit of the poisonous tree. As relevant to this appeal, the court determined that, contrary to defendant's contention, Cortland County law enforcement properly "detained" defendant on the arrest warrant until it could be endorsed by a local criminal court and that Cortland County law enforcement did not execute the arrest warrant but rather arrested defendant for separate offenses. The court further determined in the alternative that, even if Cortland County law enforcement had executed the arrest warrant at the time that defendant was taken into custody, suppression was still unwarranted because defendant's arrest in Cortland County on a warrant issued by a town court in Jefferson County before that warrant was endorsed pursuant to CPL 120.70 (2) (b) constituted a mere irregularity in the arrest that was not a jurisdictional error. The court denied defendant's motion.

"A warrant of arrest is a process issued by a local criminal court directing a police officer to arrest a defendant designated in an accusatory instrument filed with such court and to bring him before such court in connection with such instrument" (CPL 120.10 [1]; *see* CPL 1.20 [28]; *see also* CPL 10.10 [3]). Under authority delegated to it by the State Constitution (*see* NY Const, art VI, § 1 [c]), the legislature has provided that "[a] warrant of arrest issued by a district court, by the New York City criminal court, the youth part of a superior court or by a superior court judge sitting as a local criminal court may be executed anywhere in the state" (CPL 120.70 [1]). In contrast, the permissible geographical area for execution of an arrest warrant issued "by a city court, a town court or a village court" is limited to "the county of issuance or . . . any adjoining county" (CPL 120.70 [2] [a]; *see* NY Const, art VI, § 1 [c]; William C. Donnino, Prac Commentaries, McKinney's Cons Laws of NY, CPL § 120.10).

Critically, however, an arrest warrant issued by a city court, a town court, or a village court may be executed "[a]nywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the arrest is to be made" and, "[w]hen so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court" (CPL 120.70 [2] [b]).

Preliminarily, we agree with defendant that, contrary to the People's assertion, CPL 120.70 (2) (b) dictates that, in order for a police officer to lawfully execute an arrest warrant issued by a city court, a town court, or a village court other than in the county of issuance or in a county adjoining the county of issuance, the requisite endorsement must be obtained prior to the execution of the warrant. It is fundamental that, "[w]hen presented with a question of statutory interpretation, [a court's] primary consideration is to ascertain and give effect to the intention of the Legislature" (*People v Andujar*, 30 NY3d 160, 166 [2017] [internal quotation marks omitted]; *see People v Roberts*, 31 NY3d 406, 418 [2018]; *People v Burman*, 173 AD3d 1727, 1727 [4th Dept 2019]). " 'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' " (*People v Golo*, 26 NY3d 358, 361 [2015]; *see Roberts*, 31 NY3d at 418). "If the words chosen have a definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add or take away from that meaning" (*Roberts*, 31 NY3d at 418 [internal quotation marks omitted]). "Nevertheless, in construing a statute[,] courts 'should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy' " (*id.* at 418-419, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 95). Thus, in general, " 'inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history' " (*People v Wallace*, 31 NY3d 503, 507 [2018]; *see Roberts*, 31 NY3d at 422-424; *Burman*, 173 AD3d at 1728).

Here, the statute provides that an arrest warrant issued by a city court, a town court, or a village court may be executed "[a]nywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the arrest *is to be* made" (CPL 120.70 [2] [b] [emphasis added]). As defendant correctly contends, inasmuch as "[t]he use of the future tense . . . indicates that the statute was intended to relate to [the] future act" of an arrest, the plain meaning of the statutory language indicates that the requisite endorsement must be obtained *prior* to execution of a subject arrest warrant in a non-issuing or non-adjoining county (*Town of Hempstead v City of New York*, 52 App Div 182, 186-187 [2d Dept 1900]; *see* 1 New York Criminal Practice § 7.09 [2023]; 1990 Ops Atty Gen No. 90-43 at 1079). Contrary to the People's assertion, "the plain language of the statute is *not* ambiguous, and thus we are bound to follow it" (*People v Talluto*, 39 NY3d 306, 314 [2022]).

That interpretation is also supported by the overall

constitutional and statutory scheme (*see generally Roberts*, 31 NY3d at 423-424). As stated, the statute further provides that, "[w]hen so endorsed, the warrant is deemed the process of the endorsing court as well as that of the issuing court" (CPL 120.70 [2] [b]). Consequently, once endorsed, the warrant "can be executed by any police officer whose jurisdiction encompasses that of the endorsing court" (1990 Ops Atty Gen No. 90-43 at 1078). When the police obtain the requisite endorsement prior to execution of an arrest warrant issued by a city, town, or village court in a non-issuing or non-adjoining county, thereby rendering the warrant the process of both the issuing court and the endorsing court in the county wherein the arrest is to be made (*see* CPL 120.70 [2] [b]), the police properly avoid violation of the State Constitution's geographic restriction on the execution of an arrest warrant issued by such courts (*see* NY Const, art VI, § 1 [c]).

In accordance with the proper interpretation of the law, we agree with defendant that the court erred in determining that Cortland County law enforcement properly "detained" defendant on the arrest warrant until it could be endorsed by a local criminal court. The arrest warrant was not executable in Cortland County by any police officer because it had been issued by a town court in Jefferson County, which does not adjoin Cortland County, and had not yet been endorsed in writing thereon by a local criminal court in Cortland County, by which it would be deemed the process of both the issuing court and the endorsing court (CPL 120.70 [2] [b]; *see* NY Const, art VI, § 1 [c]). Additionally, the Jefferson County Sheriff's Office was unable to lawfully delegate to Cortland County law enforcement the authority to execute the arrest warrant here because the warrant, having been issued by a town court in Jefferson County, was not "executable in [Cortland C]ounty without endorsement by a local criminal court thereof" under CPL 120.70 (CPL 120.60 [2] [b]). To the extent that the court determined that Cortland County law enforcement lawfully took defendant into custody on a basis other than the execution of the arrest warrant, we conclude that the court erred. "In order to execute a warrant of arrest, the arresting officer must merely inform the defendant that such a warrant has been issued" (*People v Duncan*, 241 AD2d 566, 566 [3d Dept 1997]; *see* CPL 120.80 [2]). Here, Cortland County law enforcement informed defendant that, as a result of the outstanding arrest warrant, he would be taken to jail in Cortland County before being turned over to the Jefferson County Sheriff's Office on the warrant. Moreover, although the court determined that defendant was arrested for separate offenses arising from his belligerent conduct after he was informed that he would be turned over to the Jefferson County Sheriff's Office on the arrest warrant, the record establishes that defendant was charged by Cortland County law enforcement with resisting arrest, which necessarily means that Cortland County law enforcement alleged that defendant intentionally prevented or attempted to prevent a police officer from effecting a purported authorized arrest (*see* Penal Law § 205.30), i.e., an arrest on the warrant. Inasmuch as the arrest warrant issued by a town court in Jefferson County was not endorsed prior to defendant's arrest in Cortland County on that warrant, we conclude that defendant was arrested in violation of the relevant

constitutional and statutory law (*see* NY Const, art VI, § 1 [c]; CPL 120.70 [2] [b]).

We further agree with defendant that, contrary to the People's assertion, the court also erred in denying defendant's motion on the alternative ground that defendant's arrest in Cortland County on a warrant that was issued by a town court in Jefferson County and not yet endorsed as required by CPL 120.70 (2) (b) constituted a mere irregularity in the arrest that was not a jurisdictional error. Defendant did not contend that the unlawful execution of the warrant deprived the court of personal jurisdiction over him (*cf. People v Harmer*, 75 Misc 399, 400 [Onondaga County Ct 1912]). Rather, defendant seeks to suppress, as the product of an unlawful arrest, physical evidence found on his person and his statements to the police (*see generally People v McGrew*, 103 AD3d 1170, 1171 [4th Dept 2013]). In that regard, inasmuch as defendant was arrested in violation of state constitutional and statutory law (*see* NY Const, art VI, § 1 [c]; CPL 120.70 [2] [b]), we conclude that the court erred in refusing to suppress the physical evidence seized from defendant's person following his arrest and his statements to the police (*see People v Hodge*, 206 AD3d 1682, 1685 [4th Dept 2022]; *see generally People v Greene*, 9 NY3d 277, 280-281 [2007]). We have examined the People's remaining assertions in support of affirming the judgment, and we conclude that none has merit.

Based on the foregoing, defendant's plea must be vacated and, because our determination results in the suppression of all evidence in support of the charged controlled substances offenses (*see People v King*, 206 AD3d 1576, 1577-1578 [4th Dept 2022]; *People v Jennings*, 202 AD3d 1439, 1440 [4th Dept 2022]) and because the Jefferson County Sheriff's Office was not engaged in authorized conduct necessary to support the charged crime of obstructing governmental administration in the second degree (*see Hodge*, 206 AD3d at 1685; *People v Lupinacci*, 191 AD2d 589, 590 [2d Dept 1993]), the indictment must be dismissed. We therefore reverse the judgment, vacate the plea, grant defendant's motion to suppress physical evidence and statements, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

708

KA 22-00187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELLY L. ANDERSON, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered September 21, 2021. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), stemming from the asphyxiation death of her 16-month-old son (victim). We affirm.

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence "is legally sufficient [inasmuch as] there is [a] valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt,"—including defendant's identity as the person who intentionally caused the victim's death (*People v Delamota*, 18 NY3d 107, 113 [2011]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent there was conflicting testimony, we conclude that it merely "presented an issue of credibility for the jury to resolve" (*People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018] [internal quotation marks omitted]; *see generally People v Lane*, 7 NY3d 888, 890 [2006]; *People v Garrow*, 171 AD3d 1542, 1550 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]).

Defendant contends that County Court erred in admitting in evidence recordings of wiretapped telephone calls, obtained by means of an eavesdropping warrant, on the grounds that their admission infringed on her constitutional rights. As defendant concedes, however, that contention is unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant likewise failed to preserve her contention that the court erred in admitting in evidence certain statements that she made to the police that were not included in the pretrial CPL 710.30 notice (*see* CPL 470.05 [2]; *People v Hernandez*, 192 AD3d 1505, 1506 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *see generally People v Nickerson*, 75 NY2d 883, 884 [1990]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that the court, in making its *Molineux* ruling, erred in admitting in evidence testimony regarding defendant's alleged prior abuse of the victim because that abuse was not established by clear and convincing evidence. We conclude that defendant failed to preserve that particular aspect of her *Molineux* contention for our review (*see* CPL 470.05 [2]; *see generally People v Robinson*, 68 NY2d 541, 544-545, 547-548 [1986]; *People v Larkins*, 108 AD3d 1210, 1211-1212 [4th Dept 2013], *lv denied* 23 NY3d 1022 [2014]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

To the extent that defendant further contends that she was unduly prejudiced by the court's *Molineux* ruling, we conclude that the court properly determined that the probative value of the challenged evidence outweighed its prejudicial effect (*see generally People v Chavis*, 218 AD3d 1368, 1370 [4th Dept 2023]). Here, the charged crime "occurred in the privacy of the home and the facts are not easily unraveled" (*People v Hall*, 182 AD3d 1023, 1024 [4th Dept 2020], *lv denied* 35 NY3d 1045 [2020] [internal quotation marks omitted]; *see People v Riley*, 23 AD3d 1077, 1077 [4th Dept 2005], *lv denied* 6 NY3d 817 [2006]). Moreover, the testimony about the prior abuse was relevant to controvert defendant's theory that the victim's death was medically-related and not due to her own intentional actions (*see People v Majors*, 291 AD2d 927, 928 [4th Dept 2002], *affd* 100 NY2d 567 [2003]; *Riley*, 23 AD3d at 1077; *People v Holloway*, 185 AD2d 646, 647 [4th Dept 1992], *lv denied* 80 NY2d 1027 [1992]). We note that the court minimized the prejudicial effect of the *Molineux* testimony by providing appropriate limiting instructions to the jury (*see Hall*, 182 AD3d at 1024; *People v Vega*, 3 AD3d 239, 247 [1st Dept 2004], *lv denied* 2 NY3d 766 [2004]).

We reject defendant's contention that she was deprived of effective assistance of counsel based on several acts or omissions on the part of defense counsel throughout the underlying proceedings. Defendant contends that defense counsel was ineffective for failing to seek preclusion of certain intercepted telephone calls in which

defendant and others referenced defendant's right to counsel and right to silence. We conclude, however, that defendant failed to establish the absence of strategic reasons for defense counsel's failure to seek preclusion of that evidence. Defense counsel attempted to portray defendant in a sympathetic light, and the intercepted telephone calls—none of which was directly incriminating—arguably presented defendant as an innocent, distraught, and confused mother who understandably gave inconsistent accounts about the morning her son died (*see People v Sposito*, 193 AD3d 1236, 1239 [3d Dept 2021], *affd* 37 NY3d 1149 [2022]; *see generally People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Smith*, 61 AD2d 91, 99 [4th Dept 1978]). Indeed, defense counsel's argument on summation emphasized that clips from those conversations were strung together to make defendant appear guilty but that there were innocent explanations for any seemingly incriminating statements. To the extent that those telephone calls contained statements made by defendant from which her guilt could be inferred—i.e., party admissions—defense counsel was not ineffective for failing to make a motion that had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Chico*, 90 NY2d 585, 589 [1997]).

Defendant also contends that defense counsel was ineffective in failing to seek preclusion of statements she made to the police that were not properly noticed pursuant to CPL 710.30. We conclude that defense counsel was not ineffective in that regard inasmuch as a motion to preclude the statements on that basis had little or no chance of success (*see Stultz*, 2 NY3d at 287). Specifically, we note that there is no allegation that the challenged statements to the police were involuntarily made by defendant, which is fatal to any argument that preclusion was warranted for a violation of CPL 710.30 (*see generally People v Chase*, 85 NY2d 493, 500 [1995]; *People v Stewart*, 160 AD2d 966, 966 [2d Dept 1990]).

Defendant also contends that defense counsel was ineffective in failing to seek review of the eavesdropping warrant that led to interception of defendant's telephone conversations. We reject that contention because such a challenge would have had little or no chance of success on the merits (*see Stultz*, 2 NY3d at 287; *People v Smith*, 145 AD3d 1631, 1632 [4th Dept 2016], *lv denied* 29 NY3d 1086 [2017]). Contrary to defendant's argument, "[t]o satisfy the requirements for issuance of an eavesdropping warrant set forth in CPL 700.15 (4) and 700.20 (2) (d), the applicant need not make a showing that every conceivable method of investigation has been tried and failed" (*People v Brown*, 233 AD2d 764, 765 [3d Dept 1996], *lv denied* 89 NY2d 1009 [1997]). In our view, the People adequately established entitlement to an eavesdropping warrant because of "the nature and progress of the investigation and . . . the difficulties inherent in the use of normal law enforcement methods" (*id.* [internal quotation marks omitted]; *see People v Cruz*, 134 AD3d 1455, 1456 [4th Dept 2015], *lv denied* 27 NY3d 1067 [2016]; *People v Moon*, 168 AD2d 110, 112-113 [3d Dept 1991], *lv denied* 78 NY2d 1078 [1991]).

Defendant failed to demonstrate the absence of "strategic or other legitimate explanations" (*Benevento*, 91 NY2d at 712) for defense

counsel's failure to request a hearing pursuant to *People v Singer* (44 NY2d 241 [1978]) to challenge the preindictment delay. In that part of the omnibus motion seeking to dismiss the indictment on speedy trial grounds, defense counsel sought dismissal of the indictment due to the preindictment delay in this case, citing *Singer* and *People v Taranovich* (37 NY2d 442 [1975]) and arguing that the lengthy delay was due to the People's negligence, that the People failed to show good cause for the delay, and that there was no new evidence developed in the case beyond the wiretapped telephone conversations. In light of the court's summary denial of that part of the omnibus motion, we cannot conclude that defense counsel was ineffective in failing to press for a hearing on the issue of preindictment delay (*see Stultz*, 2 NY3d at 287). We further note that it is unlikely that defendant would have prevailed at a *Singer* hearing inasmuch as the only factor that weighed in her favor was the extent of the preindictment delay (*see generally People v Decker*, 13 NY3d 12, 14-15 [2009]; *Taranovich*, 37 NY2d at 445; *People v Pilmar*, 193 AD3d 467, 467 [1st Dept 2021], *lv denied* 37 NY3d 967 [2021]).

Defendant's remaining claims of ineffective assistance are without merit. Viewing the evidence, the law, and the circumstances of the case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally Benevento*, 91 NY2d at 712; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that the court abused its discretion in refusing to recuse itself. We reject that contention. " '[U]nless disqualification is required under Judiciary Law § 14, a judge's decision on a recusal motion is one of discretion' " (*People v Hazzard*, 129 AD3d 1598, 1598 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]). "[W]hen recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " (*People v Moreno*, 70 NY2d 403, 406 [1987]). Here, defendant did not allege a disqualification and made no showing that the court displayed actual bias (*see People v Sides*, 215 AD3d 1250, 1252 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *People v McCray*, 121 AD3d 1549, 1551 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]), and we conclude that the court did not abuse its discretion in denying defendant's request (*cf. People v Roshia*, 206 AD3d 1057, 1057-1058 [3d Dept 2022]).

We further conclude that defendant failed to "establish that [s]he was denied a fair trial by alleged cumulative errors of defense counsel, the prosecutor and the court" (*People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000]; *see People v Neil*, 188 AD3d 1765, 1767 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021]).

Finally, we reject defendant's contention that the sentence is

unduly harsh and severe.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

727

KA 22-01167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT J. ANDREWS, DEFENDANT-APPELLANT.

MULLEN ASSOCIATES PLLC, BATH (ALAN P. REED OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered July 5, 2022. The judgment convicted defendant upon a jury verdict of falsifying business records in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, the indictment is dismissed, and the matter is remitted to Steuben County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of falsifying business records in the first degree (Penal Law § 175.10). Defendant contends that the conviction is not supported by legally sufficient evidence. We agree. Although defendant correctly concedes that he failed to preserve that contention for our review, we exercise our power to review the issue as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence in the light most favorable to the People, as we must, we conclude that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt (*see People v Contes*, 60 NY2d 620, 621 [1983]).

"A person is guilty of falsifying business records in the first degree when [that person] commits the crime of falsifying business records in the second degree, and when [that person's] intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof" (Penal Law § 175.10). "A person is guilty of falsifying business records in the second degree when, with intent to defraud, [that person] . . . [m]akes or causes a false entry in the business records of an enterprise" (§ 175.05 [1]). County Court charged the jury that, as relevant, a business record is "any

writing or article . . . kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity" (§ 175.00 [2]).

Here, the prosecution failed to enter into evidence the business record purportedly falsified by defendant. Instead, to meet its burden, the prosecution relied on testimony from a county sheriff's office sergeant that, during the investigation into a shooting incident, he recorded his conversation with defendant in a report and the report became part of the business records for the sheriff's office. The sergeant as well as additional sheriff's deputies testified that defendant's version of events conflicted with the concurrent observations of defendant's gunshot wound by the members of the sheriff's office. The People's theory was that, by lying to the sergeant, defendant caused a false entry in the business records of the sheriff's office. The trial testimony established, however, that the sergeant's report was written to record the "condition or activity" of the sheriff's office's *investigation* into the shooting (Penal Law § 175.00 [2]). We conclude that there is no valid line of reasoning and permissible inferences from which a rational jury could have concluded beyond a reasonable doubt that the sergeant's report contained a false record of that investigation. Indeed, the sergeant testified that the report accurately documented defendant's responses to the sergeant's investigatory questions. Inasmuch as there is legally insufficient evidence that defendant "cause[d] a *false* entry in the business records" of the sheriff's office (§ 175.05 [1] [emphasis added]; *see* § 175.10), we reverse the judgment and dismiss the indictment.

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

729

KA 22-00177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN DENNARD, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN R. LEWIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 7, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Contrary to defendant's contention, County Court properly determined that the People did not commit a *Rosario* violation.

Pursuant to former CPL 240.45 (1) (a), the People were required to disclose to defendant "[a]ny written or recorded statement . . . made by a person whom the prosecution intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony." "To establish a *Rosario* violation, it is incumbent upon a defendant to show that the claimed *Rosario* material was available and was not turned over to the defense" (*People v Gillis*, 220 AD2d 802, 805 [3d Dept 1995], *lv denied* 87 NY2d 921 [1996]).

Here, during trial, a prosecution witness testified that she had overheard an inculpatory utterance about defendant made by a third party. Upon further questioning, the witness testified that she had told detectives about the utterance during a second meeting with them and that the detectives had taken notes on a notepad. Defendant contends that the People committed a *Rosario* violation inasmuch as the detectives' notes concerning the witness's statement about the utterance were not disclosed to defendant. The court conducted an

evidentiary hearing at which one of the detectives denied that any notes were taken during the second meeting and testified that all interview notes of the witness were turned over to defense counsel. Contrary to defendant's contention, the court did not err in crediting the testimony that no notes existed for the second meeting. We conclude that the court properly determined that the People did not commit a *Rosario* violation inasmuch as defendant offered only speculation at the evidentiary hearing as to the possible existence of missing notes (*see People v Scullark*, 272 AD2d 268, 269 [1st Dept 2000], *lv denied* 95 NY2d 938 [2000]; *Gillis*, 220 AD2d at 805-806).

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

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

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

730

KA 19-01044

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY A. FERRY, DEFENDANT-APPELLANT.

PAUL J. VACCA, JR., ROCHESTER, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 8, 2019. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child, course of sexual conduct against a child in the first degree, and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96), course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]), and sexual abuse in the first degree (§ 130.65 [4]). We note at the outset that the notice of appeal incorrectly states that defendant, "Eulese Cruz," is appealing from a February 1, 2019 judgment of conviction. The notice of appeal, including the caption, is otherwise accurate, however, and we therefore "exercise our discretion, in the interest of justice, and treat the notice of appeal as valid" (*People v Mitchell*, 93 AD3d 1173, 1173 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]; *see* CPL 460.10 [6]; *People v Delgado*, 183 AD3d 1236, 1236 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]). We now affirm.

Defendant contends that he was deprived of his right to testify at trial. Insofar as defendant contends that County Court was obligated to ensure that he knowingly waived his right to testify, defendant's contention lacks merit. "The trial court has no obligation to inform a defendant of [the] right to testify or to ascertain if the failure to testify was a voluntary and intelligent waiver of [the] right to do so" (*People v Cosby*, 82 AD3d 63, 66 [4th Dept 2011], *lv denied* 16 NY3d 857 [2011]; *see People v Richards*, 177 AD3d 1280, 1282 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]). To the extent that defendant relatedly contends that defense counsel

deprived him of his right to testify, that contention is based primarily on matters outside the record and must be raised in a motion pursuant to CPL 440.10 (*see Richards*, 177 AD3d at 1282; *see generally People v Mirabella*, 187 AD3d 1589, 1589-1590 [4th Dept 2020], *lv dismissed* 36 NY3d 930 [2020]).

Defendant did not request that the court charge the jury with any lesser included offense and thus failed to preserve for our review his current contention that the court erred in failing to do so (*see* CPL 470.05 [2]; *People v Vrooman*, 115 AD3d 1189, 1191 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]; *People v Pross*, 302 AD2d 895, 898 [4th Dept 2003], *lv denied* 99 NY2d 657 [2003]). 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, we reject defendant’s contention that the sentence is unduly harsh and severe.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

731

KA 19-01030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JQUANE WASHINGTON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 1, 2019. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

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

Defendant's challenge to the constitutionality of Penal Law § 265.03 in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]) is not preserved for our review (*see* CPL 470.05 [2]; *People v McWilliams*, 214 AD3d 1328, 1329 [4th Dept 2023], *lv denied* 39 NY3d 1156 [2023]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]). For the reasons stated in *People v McWilliams*, we reject defendant's contention that his constitutional challenge to his conviction is exempt from preservation (*see McWilliams*, 214 AD3d at 1329-1330). We decline to exercise our power to review defendant's challenge as a matter of discretion in the

interest of justice (*see* CPL 470.15 [3] [c]).

The sentence is not unduly harsh or severe.

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

743

CA 22-01327

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

UNITED CHURCH OF FRIENDSHIP,
PLAINTIFF-RESPONDENT,

V ORDER

NEW YORK DISTRICT OF ASSEMBLIES OF GOD,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROLLINSON & GRAINGER, SYRACUSE (MICHAEL P. GRAINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARDSON, PULLEN & BUCK, P.C., FILLMORE (DAVID T. PULLEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered April 26, 2022. The order, among other things, granted in part the motion of plaintiff for summary judgment and denied the cross-motion of defendant for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court

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

744

CA 22-01328

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

UNITED CHURCH OF FRIENDSHIP,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK DISTRICT OF ASSEMBLIES OF GOD,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROLLINSON & GRAINGER, SYRACUSE (MICHAEL P. GRAINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARDSON, PULLEN & BUCK, P.C., FILLMORE (DAVID T. PULLEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered July 7, 2022. The judgment, insofar as appealed from, granted in part plaintiff's motion for summary judgment and declared that plaintiff is the sole owner and has the sole right to possess the real and personal property of the United Church of Friendship.

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

Memorandum: United Church of Friendship (UCF), by its Board of Trustees (plaintiff), commenced this action seeking a judgment declaring that, inter alia, plaintiff is the duly constituted board of UCF and not the supervisory board appointed by defendant. Defendant appeals from a judgment to the extent that it granted in part plaintiff's motion for summary judgment on the complaint, declaring that plaintiff is the sole owner of the property of UCF, and to the extent that the judgment brings up for review a prior order that, inter alia, denied defendant's cross-motion for summary judgment dismissing the complaint (*see* CPLR 5501 [a] [1]). We now reverse the judgment insofar as appealed from.

By a court order, in 1978 the Friendship Assembly of God, Inc. church and the Friendship Baptist Society church were merged and consolidated into one religious corporation pursuant to Religious Corporations Law § 13 under the name UCF. The consolidation agreement and UCF's constitution provided that the new corporation shall

continue "affiliation with" both the American Baptist Churches of New York State and defendant, and the consolidation agreement further provided that all real and personal property of the two churches would now become the property of UCF.

In 2018, UCF requested assistance from defendant due to difficulty with finances and membership numbers. Defendant agreed to assist by placing UCF under temporary "District" supervision, meaning that defendant would appoint a new acting supervisory board for UCF made up of defendant's leadership representatives while retaining the current board as a non-voting advisory board. On December 2, 2018, UCF voted "at an official meeting of its membership" to come under District supervision of defendant.

Disputes between plaintiff and defendant arose in 2021, leading to this lawsuit that essentially seeks a determination as to who is in control of UCF—plaintiff or the supervisory board placed by defendant. Plaintiff contends that UCF is affiliated with defendant only for financial support and is otherwise independent and not subordinate to defendant. Plaintiff further contends that UCF's constitution and bylaws control and not the rules, policies and procedures of the Assemblies of God denomination. Defendant, on the other hand, contends that when UCF voted for temporary District supervision, it was reverted from sovereign, autonomous and self-governing General Council-affiliated status to non-autonomous and non-self-governing District Council-affiliated status, consistent with the Assemblies of God policy, polity, doctrine, customs and usages. Defendant further contends that when an Assemblies of God church is placed under supervision and is reverted to District Council-affiliated status, its constitution, bylaws and other corporate documents are suspended until supervision is over and General Council-affiliated status is returned with the rights of autonomy and self-governance, which is a determination made by defendant in the exercise of its ecclesiastical authority.

"The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs . . . Civil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution" (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]; *see Sam v Church of St. Mark*, 293 AD2d 663, 664 [2d Dept 2002]).

We conclude that none of the relief requested by plaintiff in its complaint may be decided by a court based on neutral principles of law (*see Drake v Moulton Mem. Baptist Church of Newburgh*, 93 AD3d 685, 686 [2d Dept 2012]). Instead, resolution of those issues would "necessarily involve an impermissible inquiry into religious doctrine or practice" (*id.*; *see Eltingville Lutheran Church v Rimbo*, 174 AD3d 856, 858-859 [2d Dept 2019], *appeal dismissed* 34 NY3d 1024 [2019]). There is no dispute that UCF is the owner of its real and personal

property, and thus there was no need for Supreme Court to issue a declaration to that effect (*cf. North Cent. N.Y. Annual Conference v Felker*, 28 AD3d 1130, 1130-1131 [4th Dept 2006]; *see generally Rice v Cayuga-Onondaga Healthcare Plan*, 190 AD2d 330, 333 [4th Dept 1993]). To the extent plaintiff contends that UCF's affiliation with the Assemblies of God denomination was financial only, it is not for a court to determine what is a "real" Assemblies of God church or what is meant by being "affiliated" with that church. Likewise, the dispute whether UCF's constitution and bylaws have been suspended during the period of General Council-affiliated status is an ecclesiastical matter involving church governance in which civil courts should not intervene (*see generally Upstate N.Y. Synod of Evangelical Lutheran Church in Am. v Christ Evangelical Lutheran Church of Buffalo*, 185 AD2d 693, 694 [4th Dept 1992]). We therefore conclude that plaintiff's claims are not justiciable and that defendant is entitled to summary judgment dismissing the complaint (*see Drake*, 93 AD3d at 686).

Entered: October 6, 2023

Ann Dillon Flynn
Clerk of the Court