SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 21, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 21, 2025

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_____	778	KA 23 00572	PEOPLE V LINDA R. M.
_____	808	CA 23 02135	LEON MARTIN, III V KALEIDA HEALTH
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_____	849	CA 24 00383	MICHAEL SWEENEY V NIAGARA LUTHERAN DEVELOPMENT, IN
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

642

CAF 23-00969

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

IN THE MATTER OF JOHN C. PASSERO,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JENNIFER L. PATCYK,
RESPONDENT-PETITIONER-RESPONDENT.

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

SHAWN P. HENNESSY, EAST AMHERST, FOR RESPONDENT-PETITIONER-RESPONDENT.

JASON J. CAFARELLA, NIAGARA FALLS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered May 1, 2023, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, prohibited petitioner-respondent from exercising his visitation with the children at his residence.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and that part of the order prohibiting petitioner-respondent from exercising his visitation with the children at his residence is vacated.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father, as limited by his brief, appeals from an order to the extent that it, upon respondent-petitioner mother's cross-petition, modified the parties' custody and visitation arrangement by restricting the father from exercising his visitation with the parties' three children at his residence. We reverse the order insofar as appealed from.

We agree with the father that Family Court's determination that it was in the children's best interests to prohibit their visitation with the father from taking place at his home lacks a sound and substantial basis in the record. "In visitation proceedings, the guiding consideration is always the children's best interests" (*Matter of Mayo v Mayo*, 63 AD3d 1207, 1208 [3d Dept 2009]; *see Matter of Smith v Smith*, 92 AD3d 791, 792 [2d Dept 2012]). "Visitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record" (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451 [4th Dept 2011], *lv denied* 17 NY3d 701 [2011]). Here, while it is

undisputed that two of the three children have moderate or severe allergies to horses and the father's home is on property that has a barn in which horses are boarded, the home study of the father's residence did not conclude that visitation at the home was unsafe for the children. Rather, the home study stated that the horses were kept in stables, downwind and a moderate distance from the home. Moreover, the home study notes that safety precautions were taken by the father and his wife to not have allergens in the home. Additionally, the mother's expert allergist initially recommended that the children be treated with allergy medication before being exposed to an allergen but did not set forth any restrictions for the children with respect to visitation at the father's home. The expert changed his opinion, however, to one that the children are to strictly avoid horse allergens and seemingly the father's house, but such opinion was based on faulty information that the children were taken to urgent care as a result of an allergic reaction to the horses (*see generally Carlson v Manning*, 208 AD3d 997, 999 [4th Dept 2022]). Indeed, there is no evidence in the record that the children cannot safely visit with the father at his residence if the allergic children are precluded from having access to the horses and the father and his wife continue to take safety precautions to ensure the children's safety while at the residence.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

778

KA 23-00572

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LINDA R.M., DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, ACTING DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered January 5, 2023. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm.

We reject defendant's contention that her waiver of the right to appeal is invalid. Here, the oral waiver colloquy, which followed the appropriate model colloquy, establishes that defendant knowingly, voluntarily, and intelligently waived her right to appeal (*see People v Yeara*, 227 AD3d 1517, 1518 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *People v Clark*, 221 AD3d 1550, 1550-1551 [4th Dept 2023]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). That valid waiver encompasses defendant's challenge to the severity of her sentence (*see People v Lollie*, 204 AD3d 1430, 1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]).

Defendant also contends that she was denied effective assistance of counsel because defense counsel did not request a hearing to determine whether defendant should receive an alternative sentence as a victim of domestic violence pursuant to Penal Law § 60.12. Here, however, the plea colloquy reflects that, as part of the plea negotiations, the parties considered and, in lieu of a hearing, agreed to a sentence commensurate with what defendant might be entitled to under the Domestic Violence Survivors Justice Act sentencing guidelines based upon anticipated supporting evidence. Defense

counsel further represented on the record that he expressly discussed the specifics of the agreement with defendant and that she was in agreement with its terms. To the extent that defendant now contends that defense counsel was ineffective in negotiating the terms of the plea agreement, the issue involves facts outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440 (*see People v Nelson*, 206 AD3d 1692, 1692-1693 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

808

CA 23-02135

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

LEON MARTIN, III, AND JEAN LIU MARTIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS BUFFALO
GENERAL MEDICAL CENTER, DEFENDANT-RESPONDENT.

THE FITZGERALD FIRM, P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS LLP, BUFFALO (MOLLIE C. MCGORRY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 19, 2023. The order, insofar as appealed from, denied the motion of plaintiffs to compel and granted that part of defendant's cross-motion seeking a protective order.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the cross-motion seeking a protective order is denied and the motion is granted.

Memorandum: This action arises from treatment that Leon Martin, III (plaintiff) received while admitted as a patient in a hospital operated by defendant. Plaintiffs allege that, while plaintiff was hospitalized for treatment to an infection of his leg, he contracted COVID-19 after sharing a room with a nonparty patient infected with the COVID-19 virus. Plaintiffs allege, inter alia, that defendant was negligent and grossly negligent in placing the other patient in plaintiff's hospital room when defendant and its agents, servants and employees knew or should have known that the patient had COVID-19.

During discovery, plaintiffs sought production of "[t]he complete [hospital] record for the patient who was put in [plaintiff's] room with patient's name redacted so as to protect patient confidentiality." Defendant refused to produce those records and plaintiffs moved to compel production of the records "with patient name and other patient identifying information redacted." Defendant cross-moved for, inter alia, a protective order pursuant to CPLR 3103 with respect to those records. Plaintiffs now appeal from those parts of an order that denied plaintiffs' motion and granted that part of defendant's cross-motion seeking a protective order. We reverse the order insofar as appealed from.

Although "discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *see generally Sims v Reyes*, 195 AD3d 133, 137 [4th Dept 2021]). CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." "What is material and necessary is left to the sound discretion of the lower courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon*, 94 NY2d at 746 [internal quotation marks omitted]).

Pursuant to CPLR 4504 (a), "a person authorized to practice medicine . . . shall not be allowed to disclose any information which [they] acquired in attending a patient in a professional capacity, and which was necessary to enable [them] to act in that capacity." The physician-patient privilege may be overcome, however, where the plaintiff establishes that the information in the medical records is material and necessary to their claim (*see McMahon v New York Organ Donor Network*, 161 AD3d 680, 682 [1st Dept 2018]; *Gabriels v Vassar Bros. Hosp.*, 135 AD3d 903, 905 [2d Dept 2016]; *Seaman v Wyckoff Hgts. Med. Ctr., Inc.*, 25 AD3d 596, 597 [2d Dept 2006]; *Matter of Williams v Buffalo Gen. Hosp.*, 28 AD2d 777 [3d Dept 1967]). Here, plaintiffs established that the nonparty patient's hospital records would show when defendant, its agents, servants and employees became aware that the patient had tested positive for COVID-19 and that such information is material and necessary to establish whether defendant had notice that it was placing plaintiff in the same room as a person who had COVID-19 (*see generally Seaman*, 25 AD3d at 597). We therefore conclude that Supreme Court erred in granting that part of defendant's cross-motion seeking a protective order and in denying plaintiffs' motion to compel production of the nonparty patient's hospital records with patient name and other patient identifying information redacted.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

816

KA 23-00976

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATEONNA R., DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 14, 2022. The judgment convicted defendant upon a guilty plea of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that her waiver of the right to appeal is invalid, that Supreme Court erred in declining to sentence her under the Domestic Violence Survivors Justice Act (DVSJA) (*see* § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1), and that inflammatory statements by the prosecutor deprived her of a fair DVSJA hearing. Assuming, arguendo, that the waiver of the right to appeal does not encompass defendant's contentions regarding sentencing under the DVSJA and the statements made by the prosecutor, we conclude that defendant's contentions are without merit.

Pursuant to the DVSJA, a court may apply an alternative sentencing scheme where it determines, upon a preponderance of the evidence following a hearing, that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" (Penal Law § 60.12 [1]; *see*

People v Wendy B.-S., 229 AD3d 1317, 1319 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]; *People v Addimando*, 197 AD3d 106, 112 [2d Dept 2021]). Here, defendant "did not establish by a preponderance of the evidence that 'substantial physical, sexual or psychological abuse . . . was a significant contributing factor to [her] criminal behavior' " (*People v Gause*, 230 AD3d 1573, 1576 [4th Dept 2024]; *see People v Vilella*, 213 AD3d 1282, 1283 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]).

We also reject defendant's contention that prosecutorial misconduct deprived her of a fair hearing. Any inappropriate or inflammatory comments made by the prosecutor did not contribute to the outcome because there was no jury at the DVSJA hearing, and a court serving as the factfinder is "deemed uniquely capable of distinguishing those issues properly presented to [it] from those not" (*People v Dixon*, 50 AD3d 1519, 1520 [4th Dept 2008], *lv denied* 10 NY3d 958 [2008] [internal quotation marks omitted]; *see People v King*, 111 AD3d 1345, 1346 [4th Dept 2013], *lv denied* 23 NY3d 1022 [2014]; *People v Pruchnicki*, 74 AD3d 1820, 1822 [4th Dept 2010], *lv denied* 15 NY3d 855 [2010]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

848

CA 23-01166

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

MICHAEL SWEENEY, AS ADMINISTRATOR OF THE ESTATE
OF MARIE SWEENEY, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA LUTHERAN DEVELOPMENT, INC., DOING
BUSINESS AS GREENFIELD HEALTH & REHABILITATION
CENTER, NIAGARA LUTHERAN HEALTH SYSTEM, INC.,
DEFENDANTS-RESPONDENTS,
AND PATRICK SIAW, M.D., DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

CAMPBELL AND ASSOCIATES, HAMBURG (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 30, 2023. The order, among other things, denied in part the motion of defendant Patrick Siaw, M.D. for summary judgment dismissing the amended complaint against him, and granted the motion of defendants Niagara Lutheran Development, Inc., doing business as Greenfield Health & Rehabilitation Center, and Niagara Lutheran Health System, Inc., for summary judgment dismissing the amended complaint against them.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action seeking damages for injuries allegedly sustained after the muscle relaxant baclofen was prescribed and administered to plaintiff's decedent. Following successful hip replacement surgery at a hospital in Buffalo in June 2015, decedent was transferred to defendant Niagara Lutheran Development, Inc., doing business as Greenfield Health & Rehabilitation Center (Greenfield) for inpatient rehabilitation. A physician examined decedent and continued the hospital's medication plan, including the pain reliever Norco. Two days later, decedent complained of painful muscle spasms and a nurse

contacted defendant physician Patrick Siaw, M.D. (defendant), who prescribed baclofen. Decedent received 10 mg doses of baclofen that night and the following morning. A few hours after the second dose, decedent was found to have an altered mental state and was taken by ambulance back to the hospital, where she was evaluated for potential seizures. Decedent was discharged two and a half weeks later. Decedent died in May 2018, of septic shock attributable to pneumonia. As relevant on appeal, plaintiff alleges that defendant's prescription of baclofen, in conjunction with Norco, to decedent deviated from the standard of care for a reasonably prudent physician because it created a significant risk of brain injury. Plaintiff also alleges that Greenfield and defendant Niagara Lutheran Health System, Inc. (Niagara) are vicariously liable for defendant's alleged negligence.

In appeal No. 1, defendant appeals from an order insofar as it denied in part his motion for summary judgment dismissing the amended complaint against him, and plaintiff cross-appeals from the same order insofar as it granted the motion of Greenfield and Niagara for summary judgment dismissing the amended complaint against them. In appeal No. 2, defendant appeals from an order that granted plaintiff's motion to amend the order in appeal No. 1 and to settle the record on appeal and denied defendant's cross-motion to settle the record on appeal. In appeal No. 3, defendant appeals, and plaintiff cross-appeals, from those parts of an amended order providing the same relief as the order in appeal No. 1 that are adverse to defendant and plaintiff respectively.

In appeal No. 1, defendant contends that Supreme Court erred in denying in part his motion for summary judgment dismissing the amended complaint against him because he met his burden of proof and plaintiff failed to demonstrate the existence of a triable issue of fact. We reject that contention.

On a summary judgment motion in a medical malpractice action, a defendant has "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]). "Once a defendant meets the initial burden, [t]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact . . . only as to the elements on which the defendant met the prima facie burden" (*Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023] [internal quotation marks omitted]). Plaintiff does not dispute that defendant satisfied his initial burden but contends that plaintiff's experts raised triable issues of fact sufficient to defeat defendant's motion. We agree with plaintiff.

Plaintiff submitted expert affidavits from a physician who practices in internal medicine and geriatrics and a neurologist who practices in neurology. Both experts opined that there is a moderate contraindication for prescribing baclofen and Norco together and that, in decedent's case, prescribing those medications together was outside the standard of care of a reasonably prudent physician. They further

opined that, as a result of the baclofen, decedent sustained metabolic encephalopathy and, as a result of spending extended time on her back, decedent became more susceptible to aspiration and pneumonia, which ultimately caused her death. The opinions of plaintiff's experts raised triable issues of fact whether defendant departed from the applicable standard of care and whether any such deviation was a proximate cause of decedent's injuries (*see Leberman v Glick*, 207 AD3d 1203, 1205 [4th Dept 2022]; *Wilk v James*, 107 AD3d 1480, 1484 [4th Dept 2013]). Where, as here, plaintiff's experts' opinions directly opposed defendant's expert's opinions, the result is a "classic battle of the experts that is properly left to a jury for resolution" (*Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021] [internal quotation marks omitted]; *see Peevey v Unity Health Sys.*, 196 AD3d 1139, 1140 [4th Dept 2021]; *Ferlito v Dara*, 306 AD2d 874, 874 [4th Dept 2003]).

On plaintiff's cross-appeal in appeal No. 1, plaintiff contends that there are issues of fact regarding Greenfield's and Niagara's vicarious liability for defendant's alleged negligence. We reject plaintiff's contention. Assuming, arguendo, that the contention is preserved for our review, Greenfield and Niagara met their initial burden of establishing entitlement to summary judgment by demonstrating that defendant was not an employee of Greenfield or Niagara and those organizations did not control the manner in which he performed his work (*see Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1381-1382 [4th Dept 2021]; *see also Mduba v Benedictine Hosp.*, 52 AD2d 450, 452 [3d Dept 1976]). In response, plaintiff failed to raise a triable issue of fact whether defendant was an employee of Greenfield or Niagara or whether Greenfield or Niagara controlled the manner in which he performed his work. The theory of ostensible agency is similarly inapplicable because Greenfield and Niagara established that decedent could not have reasonably believed that defendant was acting on Greenfield's or Niagara's behalf or that Greenfield or Niagara chose defendant to treat decedent (*see Pasek*, 195 AD3d at 1382-1383) and, in opposition, plaintiff failed to raise a triable issue of fact whether Greenfield or Niagara is liable under a theory of ostensible agency.

In appeal No. 2, defendant contends that the court erred in granting plaintiff's motion seeking leave to amend the order in appeal No. 1 and to settle the record on appeal as proposed by plaintiff. We reject that contention. Notably, the court considered the revised submissions that appended the experts' curricula vitae (CVs) and then issued an amended order to reflect that it so considered them. A court has the discretion to accept late papers as long as the delinquent party offers a valid excuse for the delay (*see Mallards Dairy, LLC v E&M Engrs. & Surveyors, P.C.*, 71 AD3d 1415, 1416 [4th Dept 2010]). Plaintiff identified law office failure as the reason why his experts' CVs were not attached to their submissions. Given the nonsubstantive nature of the error and the general preference for resolving cases on their merits, the court properly permitted the revised submissions (*see Fuller v Aberdale*, 130 AD3d 1277, 1279-1280 [3d Dept 2015]; *Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629 [4th Dept 2012]). Further, because the court relied on the revised expert

submissions in reaching its decision, it was not error for the court to settle the record on appeal and amend the prior order to correct the omission (*see Charalabidis v Elnagar*, 188 AD3d 44, 48 [2d Dept 2020]; *Smith v Monro Muffler Brake*, 275 AD2d 1028, 1030 [4th Dept 2000], *lv denied* 96 NY2d 710 [2001]; *see generally Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co.*, 175 AD3d 1100, 1101-1102 [4th Dept 2019]).

In appeal No. 3, because the amendment to the order in that appeal made no substantive change to the order in appeal No. 1 (*see Matter of Jennifer G.*, 190 AD2d 1095, 1095 [4th Dept 1993]; *Singer v Board of Educ. of City of N.Y.*, 97 AD2d 507, 507 [2d Dept 1983]), the appeal and cross-appeal from the amended order in appeal No. 3 must be dismissed (*see Schachtler Stone Prods., LLC v Town of Marshall*, 209 AD3d 1316, 1318 [4th Dept 2022]; *Gormel v Prudential Ins. Co. of Am.*, 151 AD2d 1048, 1048 [4th Dept 1989]; *Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

849

CA 24-00383

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

MICHAEL SWEENEY, AS ADMINISTRATOR OF THE ESTATE
OF MARIE SWEENEY, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA LUTHERAN DEVELOPMENT, INC., DOING
BUSINESS AS GREENFIELD HEALTH & REHABILITATION
CENTER, ET AL., DEFENDANTS,
AND PATRICK SIAW, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMPBELL AND ASSOCIATES, HAMBURG (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 26, 2024. The order, among other things, granted the motion of plaintiff to amend an order and to settle the record on appeal.

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

Same memorandum as in *Sweeney v Niagara Lutheran Dev., Inc.* ([appeal No. 1] — AD3d — [Mar. 21, 2025] [4th Dept 2025]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

850

CA 24-00384

PRESENT: WHALEN, P.J., LINDLEY, BANNISTER, NOWAK, AND HANNAH, JJ.

MICHAEL SWEENEY, AS ADMINISTRATOR OF THE ESTATE
OF MARIE SWEENEY, DECEASED,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA LUTHERAN DEVELOPMENT, INC., DOING
BUSINESS AS GREENFIELD HEALTH & REHABILITATION
CENTER, NIAGARA LUTHERAN HEALTH SYSTEM, INC.,
DEFENDANTS-RESPONDENTS,
AND PATRICK SIAW, M.D.,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 3.)

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

CAMPBELL AND ASSOCIATES, HAMBURG (DAVID J. WOLFF, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

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

Appeal and cross-appeal from an amended order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 1, 2024. The amended order, among other things, denied in part the motion of defendant Patrick Siaw, M.D. for summary judgment dismissing the amended complaint against him, and granted the motion of defendants Niagara Lutheran Development, Inc., doing business as Greenfield Health & Rehabilitation Center, and Niagara Lutheran Health System, Inc., for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that said appeal and cross-appeal are unanimously dismissed without costs.

Same memorandum as in *Sweeney v Niagara Lutheran Dev., Inc.* ([appeal No. 1] — AD3d — [Mar. 21, 2025] [4th Dept 2025]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

855

KA 23-00727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELUCIANO PINET PARRILLA, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM 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 (Theodore H. Limpert, J.), rendered March 1, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree (four counts), criminal possession of a firearm (two counts) and criminal possession of a controlled substance in the seventh 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 plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), criminal sale of a controlled substance in the third degree (§ 220.39 [1]), two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), four counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [8]), two counts of criminal possession of a firearm (§ 265.01-b [1]), and two counts of criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant contends that County Court erred in refusing to suppress physical evidence recovered from his girlfriend's apartment inasmuch as the initial entry into the apartment was made without a warrant and in the absence of exigent circumstances, and he further contends that the search warrant subsequently obtained by the police was not supported by probable cause. We reject those contentions.

"Police may enter private premises without a warrant if they have probable cause to believe that an occupant has committed a crime or that contraband will be found there, and if exigent circumstances justify the entry" (*People v Foster*, 245 AD2d 1074, 1074 [4th Dept 1997], *lv denied* 91 NY2d 972 [1998]; *see People v Clements*, 37 NY2d 675, 678-679 [1975], *cert denied* 425 US 911 [1976]). The record at the suppression hearing establishes that defendant was arrested pursuant to an arrest warrant that was based on controlled buys that occurred two or three years prior. At the time of the arrest, the police recovered 255 glassine envelopes of fentanyl from defendant's person. Defendant had just left his girlfriend's apartment when he was arrested and, in the course of surveillance conducted prior to the day of the arrest, the police had observed defendant exiting the apartment multiple times. The police thus had probable cause to believe that defendant had committed a crime in their presence and that contraband was present in the apartment. Moreover, it was not known to the police whether anyone remained in the apartment who might have observed defendant's arrest and might therefore attempt to dispose of any narcotics or to escape (*see Clements*, 37 NY2d at 684-685; *People v Seaberry*, 138 AD2d 422, 422-423 [2d Dept 1988], *lv denied* 72 NY2d 866 [1988]). Thus, the record adequately establishes that exigent circumstances justified the warrantless entry by the police into the apartment to ensure that no evidence was destroyed while they obtained a search warrant (*see People v Kelly*, 261 AD2d 133, 133-134 [1st Dept 1999], *lv denied* 94 NY2d 824 [1999]; *Foster*, 245 AD2d at 1074).

We reject defendant's contention that the police testimony during the suppression hearing was unworthy of belief (*see People v Berrios*, 28 NY2d 361, 369 [1971]; *People v Shaw*, 229 AD3d 1180, 1185 [4th Dept 2024]). Although defendant presented testimony from his girlfriend's son that contradicted the testimony of the police that they did not begin to search the apartment until a warrant was obtained, we reject defendant's assertion that the officers' testimony was thereby rendered "unbelievable as a matter of law." "The determination of a suppression court must be accorded great weight 'because of its ability to observe and assess the credibility of the witnesses[,] and its findings should not be disturbed unless clearly erroneous' " (*People v Jones*, 9 AD3d 837, 838-839 [4th Dept 2004], *lv denied* 3 NY3d 708 [2004], *reconsideration denied* 4 NY3d 745 [2004]; *see People v Goins*, 191 AD3d 1399, 1400 [4th Dept 2021], *lv denied* 36 NY3d 1120 [2021]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]).

Finally, we reject defendant's contention that the search warrant was not supported by probable cause. To establish probable cause, a search warrant application "must provide the Magistrate with information sufficient to support a reasonable belief that evidence of a crime may be found in a certain place" (*People v Montague*, 273 AD2d 840, 841 [4th Dept 2000] [internal quotation marks omitted]; *see People v Martinez*, 298 AD2d 897, 898 [4th Dept 2002], *lv denied* 98 NY2d 769 [2002], *cert denied* 538 US 963 [2003], *reh denied* 539 US 911 [2003]). "[T]he legal conclusion [as to whether probable cause existed] is to be made after considering all of the facts and

circumstances together . . . A synoptic evaluation is essential because [v]iewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found" (*People v Cruz*, 221 AD3d 1423, 1424 [4th Dept 2023], *lv denied* 41 NY3d 1001 [2024] [internal quotation marks omitted]; *see People v Shulman*, 6 NY3d 1, 26 [2005], *cert denied* 547 US 1043 [2006]). Here, the officer averred in the warrant application that the fentanyl found on defendant—255 packets, mostly in 10-packet bundles—was packaged in a manner consistent with sales and that, in his experience, drug dealers commonly use a residence to store their wares. We thus conclude that the search warrant application was sufficient to establish probable cause that evidence related to the drugs found on defendant at the time of his arrest could be found in the apartment he had just left.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

867

KA 18-01114

PRESENT: WHALEN, P.J., SMITH, MONTOUR, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. MEYERS, DEFENDANT-APPELLANT.

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

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (VICTOR D. ROWCLIFFE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered July 21, 2017. The appeal was held by this Court by order entered February 11, 2021, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (191 AD3d 1406 [4th Dept 2021]). The proceedings were held and completed (Chauncey J. Watches, J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of arson in the first degree (Penal Law § 150.20 [1] [a] [i], [ii]), one count of murder in the second degree (§ 125.25 [3]), and one count of murder in the first degree (§ 125.27 [1] [a] [vii]; [b]), arising from his involvement with a fire at a home, upon which his codefendant wife had property insurance, that killed a man for whom the codefendant was the beneficiary of a life insurance policy. We note as background that, on the appeal of the codefendant, who had been separately tried and convicted upon a jury verdict, we vacated that part of the sentence ordering restitution and remitted the matter for a restitution hearing but otherwise affirmed the judgment (*People v Meyers*, 182 AD3d 1037 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]).

When defendant's appeal was previously before us, we agreed with the parties that missing and otherwise defective transcripts from his trial precluded appellate review of his conviction (*People v Meyers*, 191 AD3d 1406, 1406 [4th Dept 2021]). We observed in particular that "the present state of the record on appeal is 'deplorable' . . . inasmuch as it is missing, inter alia, three days of jury selection, opening statements, summations, final jury instructions, County Court's handling of a jury note, and the verdict" and that "the

transcription of the testimony of some of the witnesses includes irregularities such as notations stating 'omitted,' 'untranscribable,' and 'blah, blah,' and unintelligible strings of characters that appear to be in code" (*id.*). We nonetheless rejected defendant's contention "that summary reversal and a new trial is the appropriate remedy at this point" (*id.*). Instead, applying the well-established principle that "[i]t is only when a defendant shows that a reconstruction is not possible that a defendant is entitled to summary reversal and a new trial," we concluded that defendant had failed to establish that alternative means to provide an adequate record were not available (*id.* at 1407). We reasoned that there was "no indication that defendant's former attorneys could not participate in a reconstruction hearing, despite the fact that one of them is now employed by the District Attorney's Office" and that there was "also no indication that the now-retired trial judge could not participate as well" (*id.*). We therefore held the case, reserved decision, and remitted the matter to County Court "to conduct a reconstruction hearing with respect to the missing and irregular transcripts" (*id.*).

Upon remittal, the court conducted a reconstruction hearing during which it heard the testimony of the trial judge and his confidential law clerk, the trial prosecutor, defendant's former attorneys, a court clerk, and a county clerk. The court also admitted in evidence the trial judge's notes; the court's voir dire challenge sheet; the trial prosecutor's notes on the jury charge and his copy of the verdict sheet; the court clerk's minutes, exhibit list, and witness list; the county clerk's case summary; and various court exhibits from the trial. Based on the record of the reconstruction hearing and the original record, we now affirm.

Defendant first contends on resubmission that the court's procedures at the reconstruction hearing violated his right to due process. We reject that contention.

"[A] defendant has a fundamental right to appellate review of a criminal conviction" (*People v Yavru-Sakuk*, 98 NY2d 56, 59 [2002]; *see People v Harrison*, 85 NY2d 794, 796 [1995]; *People v Glass*, 43 NY2d 283, 285 [1977]; *People v Rivera*, 39 NY2d 519, 522 [1976]; *People v Montgomery*, 24 NY2d 130, 132 [1969]). In addition, "[p]arties to an appeal are entitled to have th[e] record show the facts as they really happened at trial, and should not be prejudiced by an error or omission of the stenographer" (*People v Bethune*, 29 NY3d 539, 541 [2017]). "A stenographic transcript of the proceedings is, of course, an invaluable aid to the prosecution of most appeals" (*Rivera*, 39 NY2d at 522). Nevertheless, unless such transcripts "have become unavailable because of any active fault on the part of the People, it does not necessarily follow from the fact that their absence compels resort to a less perfect record, that the right to appeal must be deemed to be frustrated" (*id.* at 523; *see People v Parris*, 4 NY3d 41, 46-47 [2004], *rearg denied* 4 NY3d 847 [2005]; *Glass*, 43 NY2d at 285-286). Indeed, "in this imperfect world, the right of a defendant to a fair appeal, or for that matter a fair trial, does not necessarily guarantee [them] a perfect trial or a perfect appeal" (*Rivera*, 39 NY2d at 523). Consequently, "[t]hough not precisely

duplicating . . . missing [stenographic transcripts], [alternative methods] may suffice to satisfactorily demonstrate whether genuine appealable and reviewable issues do or do not exist" (*Glass*, 43 NY2d at 286). In appropriate circumstances, a court "may hold a reconstruction hearing with the parties[and] any witnesses or evidence the court deems helpful" (*Bethune*, 29 NY3d at 541; *see People v Velasquez*, 1 NY3d 44, 49 [2003]). When there are errors or omissions in the transcript of the subject proceeding or the stenographic record is unavailable, the proceeding may be adequately reconstructed at such a hearing through, among other things, the recollections of the judge who presided at the proceeding and the attorneys who participated in the proceeding, the judge's notes, and other documentary evidence regarding the proceeding (*see People v Alomar*, 93 NY2d 239, 246-248 [1999]; *Glass*, 43 NY2d at 285-287; *Rivera*, 39 NY2d at 523; *see also People v Ragbirsingh*, 153 AD3d 858, 858 [2d Dept 2017], *lv denied* 30 NY3d 1063 [2017]; *People v Zuniga*, 149 AD3d 660, 660-661 [1st Dept 2017], *lv denied* 29 NY3d 1136 [2017]).

Here, contrary to defendant's assertion, we conclude that the court properly admitted in evidence the trial judge's notes for consideration in reconstructing the record, even though the notes do not "precisely duplicat[e]" missing or error-free transcripts (*Glass*, 43 NY2d at 286; *see Alomar*, 93 NY2d at 246-248; *Ragbirsingh*, 153 AD3d at 858-859; *Zuniga*, 149 AD3d at 660-661). We likewise reject defendant's assertion that the court erred in permitting his former attorneys to provide their factual recollections of what happened at trial (*see generally Glass*, 43 NY2d at 286; *Zuniga*, 149 AD3d at 660-661; *People v Kinder*, 126 AD2d 60, 61-63 [4th Dept 1987], *lv denied* 70 NY2d 649 [1987]). Contrary to defendant's further assertion, we conclude under the circumstances of this case that the court did not abuse its discretion in denying defendant's request to exclude the witnesses from the courtroom except during their own testimony (*see People v Felder*, 39 AD2d 373, 379-380 [2d Dept 1972], *affd* 32 NY2d 747 [1973], *rearg denied* 39 NY2d 743 [1976], *appeal dismissed* 414 US 948 [1973]; *People v Cooke*, 292 NY 185, 190-191 [1944], *rearg denied* 292 NY 622 [1944]; *People v Streeter*, 118 AD3d 1287, 1289 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]). Contrary to the dissent's conclusion, the record does not support defendant's additional assertion that he was denied his right to a fair proceeding by the court's refusal to compel the People to produce all trial exhibits and other materials for purposes of the reconstruction hearing (*see generally People v Chappell*, 198 AD3d 1018, 1019 [3d Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *People v Russo*, 4 AD3d 777, 778 [4th Dept 2004], *lv denied* 2 NY3d 806 [2004]; *People v Ross*, 246 AD2d 561, 561 [2d Dept 1998], *lv denied* 91 NY2d 1012 [1998]). Nor does the record support the dissent's related conclusion that the People's efforts at the reconstruction hearing evinced a lack of diligence that "hindered effective reconstruction" of the record (*cf. Rivera*, 39 NY2d at 525; *see generally Parris*, 4 NY3d at 48-49). In sum, bearing in mind that the reconstruction hearing "was not a hearing to determine defendant's guilt, but rather one to 'reconstruct . . . the record,' " we "discern no error with the manner in which [the court] conducted

the reconstruction hearing" that would constitute a violation of defendant's right to due process and warrant a new hearing (*Chappell*, 198 AD3d at 1019; *see generally Alomar*, 93 NY2d at 245-246).

Defendant next contends on resubmission that, even after the reconstruction hearing, the record remains inadequate for meaningful appellate review and, therefore, he is entitled to summary reversal of the judgment of conviction and a new trial. We reject that contention.

"There is a presumption of regularity which attaches to a judicial proceeding . . . and the unavailability of a stenographic record, either because it has been lost or inadvertently destroyed, standing by itself, will not rebut that presumption" (*Harrison*, 85 NY2d at 796; *see Parris*, 4 NY3d at 46; *Glass*, 43 NY2d at 286-287). "[T]o rebut the presumption, the defendant has the burden to make an 'appropriate showing' that 'alternative methods to provide an adequate record are not available' " (*Yavru-Sakuk*, 98 NY2d at 60, quoting *Glass*, 43 NY2d at 286; *see Parris*, 4 NY3d at 46). Summary reversal "is appropriate only 'when a record cannot be reconstructed because of the lapse of time, the unavailability of the participants in the proceeding or some similar circumstance' " (*Yavru-Sakuk*, 98 NY2d at 60, quoting *Harrison*, 85 NY2d at 796). Thus, as we stated when the appeal was previously before us, "[i]t is only when a defendant shows that a reconstruction is not possible that a defendant is entitled to summary reversal and a new trial" (*Meyers*, 191 AD3d at 1407). Even where, as here, the defendant seeks that remedy after a reconstruction hearing, "it is the defendant's burden to demonstrate that genuine appealable issues exist, and that alternative methods of providing an adequate record are not available, before the defendant is entitled to [summary] reversal of [the] conviction" and a new trial (*People v Kings*, 100 AD3d 1019, 1019 [2d Dept 2012], *lv denied* 20 NY3d 1062 [2013]; *see People v Breaziel*, 246 AD2d 310, 310-311 [1st Dept 1998], *lv denied* 91 NY2d 940 [1998]; *People v Andino*, 183 AD2d 834, 834-835 [2d Dept 1992], *lv denied* 80 NY2d 901 [1992]; *People v Kenefick*, 144 AD2d 997, 997 [4th Dept 1988], *lv denied* 73 NY2d 979 [1989]). Contrary to the dissent's suggestion, the burden of establishing entitlement to summary reversal and a new trial, which is a remedy based on lack of appellate reviewability alone following a defendant's showing " 'that there were inadequate means from which it could be determined whether appealable and reviewable issues were present' " (*Parris*, 4 NY3d at 46, quoting *Glass*, 43 NY2d at 287), is distinct from the burden of proof placed on the People at a reconstruction hearing held to determine a particular factual issue as a predicate for an underlying substantive legal contention, such as whether the defendant was present at a *Sandoval* hearing (*see e.g. People v Walker*, 117 AD3d 1578, 1578-1579 [4th Dept 2014]; *People v Terry*, 225 AD2d 1058, 1058 [4th Dept 1996], *lv denied* 88 NY2d 886 [1996]). Moreover, we note that we are not bound by any incorrect concession made by the People on resubmission regarding the applicable burden (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Adair*, 177 AD3d 1357, 1357 [4th Dept 2019], *lv denied* 34 NY3d 1125 [2020]).

Here, defendant "failed to demonstrate that the reconstruction hearing was inadequate to protect his right of appeal" (*Kings*, 100 AD3d at 1020; *see Breaziel*, 246 AD2d at 310-311; *Andino*, 183 AD2d at 834-835; *Kenefick*, 144 AD2d at 997). Indeed, upon our review of the record, we conclude that the court "adequately reconstructed the missing [and irregular] portions of the record with the aid of both [defendant's former attorneys] and the [trial] prosecutor as well as the [trial judge's] notes and other documents," and the testimony of the trial judge, the confidential law clerk, and the other witnesses (*Kings*, 100 AD3d at 1020; *see Ragbirsingh*, 153 AD3d at 858-859; *Kenefick*, 144 AD2d at 997; *cf. People v Jacobs*, 286 AD2d 404, 405 [2d Dept 2001]). Despite his assertions to the contrary, defendant "has failed to demonstrate that these witnesses were collectively unable to reconstruct what transpired at the trial so as to adequately protect his right of appeal" (*People v Suren*, 131 AD2d 896, 897 [2d Dept 1987], *lv denied* 70 NY2d 804 [1987]). Moreover, defendant's "speculation that objections or motions might have been made which the witnesses did not recall is insufficient to rebut the presumption of regularity" (*Kenefick*, 144 AD2d at 997; *see Ragbirsingh*, 153 AD3d at 858-859; *Kings*, 100 AD3d at 1020; *Breaziel*, 246 AD2d at 310-311; *Andino*, 183 AD2d at 834). In sum, we conclude that the original record coupled with the reconstruction of the missing or irregular transcripts "suffice to satisfactorily demonstrate whether genuine appealable and reviewable issues do or do not exist," and thus defendant is not "entitled to automatic reversal" (*Glass*, 43 NY2d at 286).

With respect to the substantive legal issues, defendant contends in his original brief that the court, following a *Huntley* hearing that was unaffected by any stenographic transcription omissions or irregularities, erred in refusing to suppress his statements to investigators. We reject that contention. The evidence at the *Huntley* hearing establishes that defendant was not in custody when he made the statements, and thus *Miranda* warnings were not required (*see People v Bell-Scott*, 162 AD3d 1558, 1559 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]; *see generally Miranda v Arizona*, 384 US 436, 467 [1966]; *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]).

Contrary to defendant's further contention in his original brief, we conclude that the court did not abuse its discretion in denying his request for an adjournment to afford defense counsel additional time to prepare for trial (*see People v Benton*, 167 AD3d 1522, 1522 [4th Dept 2018], *lv denied* 33 NY3d 946 [2019]; *People v Resto*, 147 AD3d 1331, 1332 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]).

We reject defendant's contention in his original brief that he was denied effective assistance of counsel with respect to sentencing. We conclude that "no statement made by defense counsel at sentencing 'would have had an impact on the sentence imposed' " (*People v Saladeen*, 12 AD3d 1179, 1180 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005]; *see People v Peters*, 213 AD3d 1359, 1359 [4th Dept 2023], *lv*

denied 39 NY3d 1143 [2023]; *People v Agee*, 129 AD3d 1559, 1561 [4th Dept 2015]). Contrary to defendant's related contention in his original brief, we conclude under the circumstances of this case that "any violation of defendant's right to counsel at sentencing had no adverse impact, and he is not entitled to the remedy of a remand for resentencing . . . , which would serve no useful purpose" (*People v Rohadfox*, 175 AD3d 1813, 1815 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019] [internal quotation marks omitted]; *see People v Johnson*, 20 NY3d 990, 991 [2013]; *People v Barksdale*, 191 AD3d 1370, 1373 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]).

Even assuming, arguendo, that defendant's remaining contentions on resubmission are within the scope of the remittal and thus properly before us (*see e.g. People v Ramos*, 210 AD3d 1453, 1454 [4th Dept 2022], *lv denied* 39 NY3d 1074 [2023]; *People v Butler*, 75 AD3d 1105, 1105 [4th Dept 2010], *lv denied* 15 NY3d 919 [2010]), we conclude that none warrants reversal or modification of the judgment. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that defendant committed the crimes of which he was convicted based on the evidence presented at trial (*see People v Scott*, 93 AD3d 1193, 1194 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012], *reconsideration denied* 19 NY3d 1001 [2012]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, even if a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Roche*, 231 AD3d 1531, 1533 [4th Dept 2024], *lv denied* 42 NY3d 1081 [2025]; *see generally Bleakley*, 69 NY2d at 495). Defendant failed to preserve for our review his contention that he was denied his constitutional right to present a complete defense because the prosecutor, through a discussion with defendant's attorneys and the court outside the presence of the jury, intimidated his expert witness into not testifying at trial (*see* CPL 470.05 [2]; *People v Lawrence*, 221 AD3d 1583, 1584 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *People v Hasan*, 165 AD3d 1606, 1607 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *People v Barry*, 288 AD2d 1, 1 [1st Dept 2001], *lv denied* 97 NY2d 701 [2002]; *see generally People v Lane*, 7 NY3d 888, 889 [2006]; *People v Allen*, 88 NY2d 831, 833 [1996]), 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]; *Lawrence*, 221 AD3d at 1584; *Hasan*, 165 AD3d at 1607; *Barry*, 288 AD2d at 1). Finally, we have considered defendant's remaining contentions, including those raised in his original brief and on resubmission, and we conclude that none warrants relief.

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent inasmuch as I agree with defendant that the reconstruction hearing was inadequate to protect his right of appeal. Further, under the unique circumstances of this case, I would reverse the judgment and grant

defendant a new trial.

As the majority notes, we previously held this case, reserved decision, and remitted the matter to County Court to conduct a reconstruction hearing necessitated by the " 'deplorable' " state of the record on appeal, which was missing several days of trial proceedings and those portions of the trial that were transcribed were riddled with irregularities (*People v Meyers*, 191 AD3d 1406, 1406 [4th Dept 2021]). In ordering the reconstruction hearing, this Court in effect determined that "defendant had rebutted the presumption of regularity" (*People v Walker*, 117 AD3d 1578, 1578 [4th Dept 2014]; *see Meyers*, 191 AD3d at 1406). Upon remittal, the court convened a reconstruction hearing without expressly delineating the missing and irregular transcripts to be reconstructed. Instead, the court heard the testimony of witnesses offered by the People and closed the hearing without determining whether the evidence submitted was sufficient to reconstruct a record that would permit defendant to review "whether genuine appealable and reviewable [trial] issues do or do not exist" (*People v Glass*, 43 NY2d 283, 286 [1977]). That was error. Although the reconstruction required by the substantial irregularities in this trial transcript was considerably broader than the discrete issues for which reconstruction is more frequently directed (*see e.g. People v Terry*, 225 AD2d 1058, 1058 [4th Dept 1996], *lv denied* 88 NY2d 886 [1996]; *see Walker*, 117 AD3d at 1578), the intent of our prior decision was for the court to make a determination whether the missing and irregular transcripts were sufficiently reconstructed, not merely to assist in the marshaling of evidence from which this Court could reconstruct the trial record behind closed doors (*see generally People v Wilson*, 187 AD3d 1586, 1586 [4th Dept 2020]).

I also agree with defendant that the court erred in denying his motion to, inter alia, compel the prosecution to provide him with copies of or access to the original trial exhibits that had been returned to the People following the original trial. As defense counsel explained at the reconstruction hearing, the trial exhibits were essential to reconstruction of the trial testimony, either by confirming the recollections of the witnesses or disputing the same. By denying defendant's request for access to the trial exhibits, the court adversely affected defendant's ability to meaningfully participate in the reconstruction hearing as well as to ensure accuracy of the reconstruction itself.

Although the above errors could potentially be remedied by remittal for a new reconstruction hearing, I conclude that, on the unique facts of this case, defendant is entitled to a new trial. Although a defendant "should be diligent in maximizing the possibility that [a reconstruction] hearing can accomplish its purpose" (*People v Parris*, 4 NY3d 41, 48 [2004]), it is the People who at all times "have the constitutional burden of proving defendant's guilt beyond a reasonable doubt with respect to every element of the crime charged" (*Terry*, 225 AD2d at 1058, citing *People v Newman*, 46 NY2d 126, 128 [1978]). I therefore agree with defendant, and the People do not dispute, that the People had the burden at the reconstruction hearing

to submit sufficient evidence to "reconstruct[] . . . a substitute [trial] record from which any existing reviewable issues could be presented" (*Glass*, 43 NY2d at 286; *see also Terry*, 225 AD2d at 1058).

I agree with defendant that the People failed to meet that burden. As noted above, upon remittal, the missing and irregular transcripts were never expressly delineated. Instead, at the hearing, the People sought to reconstruct the trial record generally through the testimony from the judge that presided over defendant's trial, defendant's trial counsel, and the trial prosecutor without reference to the existent trial record. I agree with the majority that the proffered testimony, along with the judge's trial notes entered into evidence at the hearing, can be effective tools to aid in reconstruction of the trial record (*see People v Ragbirsingh*, 153 AD3d 858, 858 [2d Dept 2017], *lv denied* 30 NY3d 1063 [2017]). Here, however, the testimony of several of the witnesses that needed to be reconstructed related to exhibits central to the People's case in chief against defendant. The People failed to enter any of the trial exhibits into evidence at the reconstruction hearing and further refused to provide defendant's current counsel with access to those original exhibits. I find no reason not to hold the People to the same standard of diligence as defendant "in maximizing the possibility that [a reconstruction] hearing can accomplish its purpose" (*Parris*, 4 NY3d at 48). Here, the People's refusal to offer into evidence or provide defendant access to the original trial exhibits within their control hindered effective reconstruction. Thus, the failure of the reconstruction hearing to produce a sufficient record for appellate review is not solely premised on a cause "beyond the control of either party" (*People v Rivera*, 39 NY2d 519, 525 [1976]). Instead, the People's refusal "seriously impeded [defendant's] right to a fair [appeal]" (*id.* [internal quotation marks omitted]). I therefore conclude that the attempted "alternative means to provide an adequate record," i.e., the reconstruction hearing at which the People bore the burden, failed to produce "a substitute [trial] record from which any existing reviewable issues could be presented" (*Glass*, 43 NY2d at 286; *see generally Meyers*, 191 AD3d at 1407), and defendant should be granted a new trial.

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

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

922

KA 22-01350

PRESENT: SMITH, J.P., CURRAN, MONTOUR, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCO A. ALMONTE, DEFENDANT-APPELLANT.

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

MARCO A. ALMONTE, DEFENDANT-APPELLANT PRO SE.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered August 16, 2022. The appeal was held by this Court by order entered May 3, 2024, decision was reserved and the matter was remitted to Ontario County Court for further proceedings (227 AD3d 1429 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of kidnapping in the second degree (Penal Law § 135.20), strangulation in the second degree (§ 121.12), assault in the third degree (§ 120.00 [1]), and criminal contempt in the first degree (§ 215.51 [b] [iii]). We previously determined, with respect to that part of defendant's omnibus motion seeking dismissal of the charge of kidnapping in the second degree pursuant to the merger doctrine, that County Court "erred in concluding that the merger doctrine did not apply because defendant was charged only with kidnapping and, therefore, there was no other crime with which the count could merge" (*People v Almonte*, 227 AD3d 1429, 1431 [4th Dept 2024]). We therefore held the case, reserved decision, and remitted the matter to County Court to rule on the People's unaddressed alternative argument that the merger doctrine did not apply because any alleged menacing of the victim was incidental to the kidnapping (*id.*). Upon remittal, the court concluded that the merger doctrine did not apply. We agree.

"[A] kidnapping is generally deemed to merge with another offense only where there is minimal asportation immediately preceding the

other crime or where the restraint and underlying crime are essentially simultaneous" (*People v Hanley*, 20 NY3d 601, 606 [2013] [internal quotation marks omitted]). Here, the restraint of the victim continued well after the completion of the actions that defendant alleges would constitute menacing. The victim testified that, even after defendant prevented her from leaving the house by threatening her with a gun, she continued to believe that she was not free to leave because defendant remained armed and was positioned between her and the front door. The court thus properly concluded that the menacing was incidental to the kidnapping (*see People v McEathron*, 86 AD3d 915, 915-916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012]; *People v Wegman*, 2 AD3d 1333, 1336 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

947

CAF 23-01134

PRESENT: SMITH, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF MICHELLE L. KING,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. KING, JR.,
RESPONDENT-PETITIONER-APPELLANT.

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

VAN LOON LAW, LLC, ROCHESTER (NATHAN A. VAN LOON OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered June 12, 2023, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner father appeals from an order that, inter alia, modified the parties' prior order of custody by awarding petitioner-respondent mother sole custody of the subject child and vacating the appointment of a parenting coordinator to mediate between the parties in the implementation of their custody arrangements.

Contrary to the father's contention, a sound and substantial basis in the record supports Family Court's determination that an award of sole legal custody to the mother was in the child's best interests (*see Matter of Williams v Grau*, 230 AD3d 1539, 1540 [4th Dept 2024]). "[J]oint custody should not be imposed on embattled and embittered parents who appear unable to put aside their differences for the benefit of the child" (*Matter of Campbell v Knapp*, 132 AD3d 1420, 1421 [4th Dept 2015], *lv denied* 26 NY3d 917 [2016] [internal quotation marks omitted]; *see Leonard v Leonard*, 109 AD3d 126, 128 [4th Dept 2013]; *see generally Braiman v Braiman*, 44 NY2d 584, 589-590 [1978]), and here the record establishes that the parties have an acrimonious relationship. We reject the father's contention that the court's best interests analysis "placed undue emphasis on [his]

purported shortcomings." In making its determination, the court was required to consider all factors that could impact the best interests of the child (*see Matter of K.C. v N.C.*, 215 AD3d 1238, 1240 [4th Dept 2023], *lv denied* 40 NY3d 907 [2023]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]; *Matter of Braga v Bell*, 151 AD3d 1924, 1925 [4th Dept 2017], *lv denied* 30 NY3d 905 [2017]), and the court properly considered the father's actions and determined that his inability to work with the child's third-party providers, including the child's school and health care providers, was detrimental to the child (*see Matter of James EE. v Vanessa EE.*, 228 AD3d 1025, 1026-1027 [3d Dept 2024]; *Matter of Andrea C. v David B.*, 146 AD3d 1104, 1105-1106 [3d Dept 2017]; *Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015]). We also reject the father's contention that the court should have granted zones of decision-making power to each parent. The record supports the court's determination that such an arrangement would not be feasible in light of the negative effect of the father's involvement in decision making, as evidenced by the fact that the school had to limit the father's communications to the principal and vice principal; the fact that the pediatrician refused to communicate with the father; the existence of substantial conflicts between the father and the mother, including arguments concerning the use of in-network and out-of-network doctors; and the existence of friction between the father and the child's therapist (*see Burns v Grandjean*, 210 AD3d 1467, 1472 [4th Dept 2022]; *Leonard*, 109 AD3d at 128).

We reject the father's contention that the court erred in vacating its prior appointment of a parenting coordinator. During custody disputes, the court may "appoint a parenting coordinator to mediate between parties and oversee the implementation of their court ordered parenting plan" (*Silbowitz v Silbowitz*, 88 AD3d 687, 687-688 [2d Dept 2011]). Here, the court vacated the appointment on the ground that mediation was not feasible given the high level of conflict between the parties, noting that the appointed parenting coordinator "actually just gave up" because there was so much conflict between the parents. Contrary to the father's contention, the record supports the court's conclusion that assigning another parenting coordinator would not have been beneficial due to the high level of conflict between the parties (*see generally Mastrocola v Alcoff*, 204 AD3d 471, 472-473 [1st Dept 2022]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00715

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

MARY M. HURLEY AND DANIEL M. HURLEY, INDIVIDUALLY AND ON BEHALF OF THEIR INFANT CHILDREN, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROCHESTER REGIONAL HEALTH ACO, INC., GREATER ROCHESTER INDEPENDENT PRACTICE ASSOCIATION, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

PHETERSON SPATORICO LLP, ROCHESTER (STEVEN A. LUCIA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered October 18, 2023. The order, insofar as appealed from, granted the motion of defendants Rochester Regional Health ACO, Inc., and Greater Rochester Independent Practice Association, Inc. to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the negligence claim against defendants Rochester Regional Health ACO, Inc. and Greater Rochester Independent Practice Association, Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action alleging that, attendant to the health care services they received from defendant Rochester General Hospital (RGH), confidential medical records were generated and that those confidential medical records were stored on computer systems and networks maintained by RGH and defendants Rochester Regional Health ACO, Inc. (RRH) and Greater Rochester Independent Practice Association, Inc. (GRIPA). Plaintiffs further allege that defendant Christine M. Smith, R.N., a nurse at RGH, impermissibly accessed those records due to the failure of RGH, RRH and GRIPA "to exercise reasonable care in obtaining, retaining, securing, safeguarding, and protecting this confidential medical information from unlawful access." On appeal, plaintiffs contend that Supreme Court erred in granting the motion of RRH and GRIPA (hereafter, defendants) to dismiss the complaint against them on the

grounds of documentary evidence and failure to state a cause of action (*see* CPLR 3211 [a] [1], [7]). We agree with plaintiffs in part.

On a motion to dismiss, a court must accept the plaintiff's allegations as true and determine whether they fit into any cognizable legal theory (*see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Matter of Machado v Tanoury*, 142 AD3d 1322, 1323 [4th Dept 2016]). Affidavits submitted by a plaintiff may also be considered to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Affidavits submitted by the defendant, however, rarely warrant dismissal of the complaint unless they conclusively establish that the plaintiff has no cause of action (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; *see generally Koike Aronson, Inc. v Bearing Distribs., Inc.*, 208 AD3d 956, 957 [4th Dept 2022]).

"A medical corporation may . . . be liable in tort for failing to establish adequate policies and procedures to safeguard the confidentiality of patient information or to train their employees to properly discharge their duties under those policies and procedures. These potential claims provide the requisite incentive for medical providers to put in place appropriate safeguards to ensure protection of a patient's confidential information" (*Doe v Guthrie Clinic, Ltd.*, 22 NY3d 480, 485 [2014]). Here, plaintiffs alleged that defendants generated and maintained the medical records that Smith impermissibly accessed and that they breached their duty to properly safeguard or monitor access to those records. Accepting as true the allegations in the complaint and the averments in the affidavits submitted in opposition to the motion, we conclude that plaintiffs have sufficiently alleged a negligence claim. We therefore conclude that the court erred in granting the motion with respect to the negligence claim against defendants, and we modify the order accordingly.

However, given that such a claim "gives rise to a cause of action sounding in tort" and not in breach of an implied contract (*MacDonald v Clinger*, 84 AD2d 482, 482 [4th Dept 1982]), we conclude that the court properly granted the motion with respect to the implied contract claim against defendants.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-00805

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

NICHOLAS R. HAZLETT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW D. NIEZGODA, DEFENDANT-RESPONDENT.

RICHARD G. MONACO, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

MURA LAW GROUP, PLLC, BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered November 6, 2023. The order denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking damages for the diminution in value of his motor vehicle, a 2019 Tesla Model 3 sedan that was damaged in a collision with a vehicle owned and operated by defendant, and for loss of use of the vehicle while it was being repaired.

Defendant's insurer paid for the repairs to plaintiff's vehicle, in the amount of $17,141.07. As a result of those repairs, the vehicle drove and handled as well as it had before the accident, but plaintiff observed that the gaps between the trunk of his vehicle and the side panels were wider than before the accident, so that in his view the vehicle had not been "restored to its pre-accident value."

Following discovery, plaintiff moved for summary judgment on his complaint and defendant moved for summary judgment dismissing the complaint. Although defendant did not dispute that he was negligent or that his negligence caused damage to plaintiff's vehicle, he contended that the complaint should be dismissed because plaintiff had been made whole and thus had no cognizable damages. Supreme Court denied plaintiff's motion, granted defendant's motion, and dismissed the complaint. Plaintiff appeals. We now modify the order by denying defendant's motion and reinstating the complaint.

Contrary to plaintiff's contention, the court properly concluded that he was not entitled to summary judgment on either of his causes of action. With respect to the cause of action alleging diminution in value, the relevant legal principles are well settled. "The measure of damages for injury to property resulting from negligence is the difference in the market value immediately before and immediately after the accident, or the reasonable cost of repairs necessary to restore it to its former condition, whichever is the lesser" (*Johnson v Scholz*, 276 App Div 163, 164 [2d Dept 1949]; *see Freitas v Ahmed*, 225 AD3d 1261, 1261–1262 [4th Dept 2024], *lv denied* 42 NY3d 905 [2024]; *Angielczyk v Lipka*, 132 AD3d 1380, 1381 [4th Dept 2015]). "Where the repairs do not restore the property to its condition before the accident, the difference in market value immediately before the accident and after the repairs have been made may be added to the cost of repairs" (*Johnson*, 276 App Div at 165). However, where repairs have fully restored the vehicle to its pre-accident condition, the owner of the vehicle cannot recover damages for "the diminution in resale value" of the vehicle arising from the fact that it has been involved in a collision (*id.*; *see Freitas*, 225 AD3d at 1262; *Parkoff v Stavsky*, 109 AD3d 646, 648 [2d Dept 2013], *lv denied* 22 NY3d 864 [2014]).

Here, although plaintiff testified that his vehicle did not look the same after the accident due to the gaps in the paneling, he failed to offer any evidence that the repairs did not restore the vehicle to its pre-accident value. In support of his motion, plaintiff did not submit any photographs of the vehicle showing its post-accident condition. Instead, plaintiff relied on an unsworn "Diminished Value Report" by a purported expert in automobiles who concluded that, *as a result of the subject accident*, the market value of plaintiff's Tesla diminished by $21,600. The expert did not attribute any diminution in value to alleged gaps in the paneling. Nor did the expert state that the repairs did not restore the vehicle to its pre-accident condition. Because plaintiff failed to meet his initial burden of establishing as a matter of law that his vehicle was not restored to its pre-accident value, the burden never shifted to defendant to raise a triable issue of fact, and denial of plaintiff's motion to that extent was required "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In a separate cause of action, plaintiff seeks damages for the loss of use of his vehicle for over a month while it was undergoing repairs. While his vehicle was in the collision shop, defendant's insurer paid for plaintiff's rental of a Nissan automobile. According to plaintiff, however, the rental car was not comparable in value to his Tesla Model 3, and he seeks loss of use damages of $11,816.19. Finally, plaintiff seeks $33.40 to reimburse him for Uber rides he took to the collision shop.

Plaintiff failed to meet his initial burden of proof with respect to his loss of use cause of action. In his motion papers, plaintiff did not identify the model or year of the Nissan he was given as a rental vehicle while his Tesla was being repaired. Moreover, although plaintiff established the rental cost of the Nissan, he did not offer

any proof as to how much it would cost to rent a 2019 Tesla Model 3 for the same period of time. We note that calculation of plaintiff's alleged damages for loss of use must take into account whether he was provided with a rental car of comparable quality and value to his Tesla (*see Jacobson v Purdue*, 65 Misc 3d 1232[A], 2018 NY Slip Op 52001[U], *3-4 [Sup Ct, Ontario County 2018], *affd for reasons stated* 177 AD3d 1318 [4th Dept 2019]), and that here it cannot be determined whether the Nissan was generally similar to his Tesla for the purpose of calculating plaintiff's loss of use damages. Because the burden never shifted to defendant to raise a triable issue of fact, denial of plaintiff's motion with respect to loss of use was required (*see Alvarez*, 68 NY2d at 324). The court therefore properly denied plaintiff's motion for summary judgment in its entirety.

We agree with plaintiff, however, that the court erred in granting defendant's motion for summary judgment dismissing the complaint. In support of his motion, defendant offered no proof establishing as a matter of law that the repairs to plaintiff's vehicle restored the vehicle to its pre-accident condition. Defendant relied largely on an affirmation from his attorney, who has no personal knowledge of the facts, along with plaintiff's deposition testimony. Although defendant contends that plaintiff admitted during his deposition that the repairs to his vehicle were done to his satisfaction, plaintiff made clear during his testimony that, due to the gaps in the paneling, the vehicle was not in the same condition as before the accident. Defendant offered no evidence to the contrary, and it is well established that a party moving for summary judgment "must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]; *see Freeland v Erie County*, 204 AD3d 1465, 1467 [4th Dept 2022]).

Finally, with respect to the loss of use cause of action, defendant merely asserted that plaintiff was not entitled to the use of a vehicle comparable to his Tesla while the Tesla was being repaired. According to defendant, any operable vehicle will suffice regardless of its make, model, size, or safety features. We agree with plaintiff, however, that he is entitled to damages to the extent that he was not provided with the use of a vehicle generally comparable to his Tesla Model 3 (*see Jacobson*, 2018 NY Slip Op 52001[U], *3-4), and the record does not establish whether the Nissan provided to plaintiff was generally comparable to his Tesla.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-02093

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF NEDIA M., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ASHLEY M., RESPONDENT-APPELLANT,
AND GREGORY M., RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 6, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, appointed petitioner as the guardian of the subject child.

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

Memorandum: In these proceedings for appointment of a kinship guardian pursuant to Family Court Act article 6 and SCPA article 17, respondent mother (respondent) appeals in appeal No. 1 and in appeal No. 2 from orders appointing petitioner, the paternal aunt of the subject children, as their kinship guardian.

Respondent contends in each appeal that Family Court lacked subject matter jurisdiction over these proceedings because the guardianship petitions were filed at a time when the permanency goal in each child's Family Court Act article 10-A proceeding was return to parent rather than referral for legal guardianship (*see generally* Family Ct Act § 661 [c]). We reject that contention. Family Court Act § 661 (c) allows a child's relative to file a kinship guardianship petition while an article 10 or 10-A proceeding is pending (*see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 661; *see generally Matter of Rebecca B. v Michael B.*, 152 AD3d 675, 676 [2d Dept 2017]). Indeed, the court was required to consider

all potential placement options, including the possibility of referral for legal guardianship or other permanent placement with a relative, at each permanency hearing held pursuant to article 10-A for the subject children (*see* § 1089 [c] [1]; [d] [2] [i]). Further, although a court may not impose "concurrent and contradictory permanency goals" (*Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098-1099 [3d Dept 2012]), "simultaneously considering [guardianship] and working with a parent is not necessarily inappropriate" (*Matter of Kiara F. [Evan F.]*, 231 AD3d 1489, 1490-1491 [4th Dept 2024] [internal quotation marks omitted]; *see Matter of Steven S. [Lyndsey M.]*, 229 AD3d 1207, 1209 [4th Dept 2024]).

Respondent further contends that the court erred in failing to hold a joint hearing on the issues of permanency and guardianship, particularly inasmuch as the permanency goal for the children had not changed from return to parent. We reject that contention. Initially, we note that the court was not required to hold a joint hearing; rather, the Family Court Act provides that the court "may consolidate the hearing of the guardianship petition . . . with . . . a permanency hearing under article [10-A]" (Family Ct Act § 661 [c]; *see also* § 1089-a [a]). Nevertheless, the record demonstrates that the court held a joint permanency and guardianship hearing—regardless of how that hearing was formally denominated—inasmuch as the court considered both the appropriate permanency goal and the merits of the guardianship petitions. The record further demonstrates that, in connection with granting the guardianship petitions, the court ultimately determined that referral for guardianship was an appropriate permanency goal and that there were compelling reasons why return to parent was not an appropriate goal. Contrary to respondent's contention, the court's determination that return to parent was no longer an appropriate permanency goal is supported by a sound and substantial basis in the record inasmuch as a preponderance of the evidence established that the children would be at risk of neglect if returned to respondent because of her ongoing relationship with respondent father, despite the danger he posed to the children, and because of her refusal to substantiate that she was no longer using drugs (*see Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1402 [4th Dept 2019]; *Matter of Carson W. [Jamie G.]*, 128 AD3d 1501, 1504 [4th Dept 2015], *lv dismissed* 26 NY3d 976 [2015]).

Even assuming, arguendo, that respondent preserved for our review her contention that the court erred in granting those parts of petitioner's motions seeking partial summary judgment on the issue of the existence of extraordinary circumstances (*cf. Matter of Torres v Burchell*, 228 AD3d 1303, 1303 [4th Dept 2024], *lv denied* 42 NY3d 908 [2024]; *Van Sharma, Inc. v Chamberlain*, 109 AD3d 1094, 1095 [4th Dept 2013]), we conclude that the court did not err in granting those parts of the motions. Petitioner sustained her initial burden of demonstrating the existence of extraordinary circumstances based on, inter alia, the court's prior finding that respondent neglected the subject children (*see Matter of Emma D. [Kelly V.(D.)]*, 180 AD3d 1331, 1332-1333 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]; *see generally Matter of Holmes v Glover*, 68 AD3d 868, 869 [2d Dept 2009]).

Respondent failed to raise a triable issue of fact on that discrete issue (*see generally Matter of Paige K. [Jay J.B.]*, 81 AD3d 1284, 1285 [4th Dept 2011]).

We reject respondent's contention that the court erred in failing to hold age-appropriate consultation with the children pursuant to Family Court Act § 1089-a (e). The Family Court Act does not require that a young child be personally produced in court for such consultation, and we conclude that the court's obligation was satisfied by "eliciting . . . the child[ren]'s wishes from the attorney for the child[ren]" (*Dakota F.*, 92 AD3d at 1098; *see also Matter of Isayah R. [Shaye R.]*, 189 AD3d 1942, 1944 [3d Dept 2020]).

Contrary to respondent's contention, the court had the authority to set terms for respondent's visitation with the children upon its appointment of petitioner as their kinship guardian (*see Matter of Eliza JJ. v Felipe KK.*, 173 AD3d 1285, 1285 [3d Dept 2019]; *Matter of Caron C.G.G. [Alicia G.–Jasmine D.]*, 165 AD3d 476, 477 [1st Dept 2018]). "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Mountzouros v Mountzouros*, 191 AD3d 1388, 1389 [4th Dept 2021], *lv denied* 37 NY3d 902 [2021] [internal quotation marks omitted]). Although neither petitioner nor respondent requested supervised visitation, the record supports the court's determination that "the best interests of the child[ren] would be served by the continuation of supervised visitation" (*Matter of Burczynski v Rodgers*, 61 AD3d 1401, 1401 [4th Dept 2009]; *see Matter of Reska v Browne*, 182 AD3d 1052, 1052 [4th Dept 2020]).

Finally, we reject respondent's contention that she was denied effective assistance of counsel. Respondent asserts that counsel was ineffective in failing to oppose petitioner's motions, each of which sought partial summary judgment on the issue of extraordinary circumstances and an order requiring respondent to submit to drug testing, and in failing to obtain certification for certain other drug test results and introduce them as a part of respondent's case. We note, however, that "[t]here is no denial of effective assistance of counsel . . . arising from a failure to make a motion or argument that has little or no chance of success" (*Matter of DeVita v DeVita*, 155 AD3d 1587, 1588 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018] [internal quotation marks omitted]). With respect to respondent's assertion that counsel was ineffective in failing to certify and introduce certain other drug test results during the guardianship hearing, we conclude that respondent failed to demonstrate "the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Doner v Flora*, 229 AD3d 1158, 1158 [4th Dept 2024] [internal quotation marks omitted]). Despite respondent's contentions that counsel did not sufficiently communicate with her during the proceedings, we conclude that the record, viewed in totality, establishes that respondent received meaningful

representation (*see Matter of Rotundo v Deptola*, 232 AD3d 1323, 1324 [4th Dept 2024]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

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CAF 23-02095

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF NEDIA M., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ASHLEY M., RESPONDENT-APPELLANT,
AND GREGORY M., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 6, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, appointed petitioner as the guardian of the subject child.

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

Same memorandum as in *Matter of Nedia M. v Ashley M.* ([appeal No. 1] — AD3d — [Mar. 21, 2025] [4th Dept 2025]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-01726

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON PERRY, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (James A. Vazzana, A.J.), rendered August 2, 2021. The judgment convicted defendant after a nonjury trial of offering a false instrument for filing in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]), defendant contends that Supreme Court erred in denying his motion to dismiss the indictment on speedy trial grounds pursuant to CPL 30.30. The motion was based on defendant's claim that the People failed to comply with their discovery obligations under CPL 245.20, thus rendering their certificate of compliance invalid and their statement of readiness illusory. We reject defendant's contention.

This case was commenced before CPL article 245 took effect on January 1, 2020, and the People announced readiness for trial in court on December 23, 2019. Thus, even assuming, arguendo, that the People were required to comply with the discovery obligations set forth in CPL 245.20 (*see People v King*, 42 NY3d 424, 428 n 2 [2024]), the People were not required to file a certificate of compliance (COC) to stop the speedy trial clock (*id.* at 428). "Because the legislature established the COC requirement as a condition precedent to declaring ready for trial and did not indicate an intent to undo the People's prior readiness statements, there is no basis to apply that requirement prospectively to a case such as the present one where the People were in a trial-ready posture when it went into effect" (*id.*). Stated otherwise, the People did not revert to a state of unreadiness when article 245 became effective on January 1, 2020. Although,

assuming again that they were required to comply with the discovery obligations set forth in CPL 245.20, the People committed a discovery violation by failing to turn over certain evidence in a timely manner, the court precluded the People from using such evidence at trial, which is an appropriate sanction under CPL 245.80.

Defendant's further contention that the evidence is legally insufficient is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, 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 a rational [factfinder] could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). Finally, viewing the evidence in light of the elements of the crime in this nonjury trial (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

151

CAF 23-02051

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

IN THE MATTER OF JOSE M.F., RESPONDENT-APPELLANT.

SENECA COUNTY PRESENTMENT AGENCY, PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

DEBORAH K. JESSEY, CLARENCE, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Seneca County (Barry L. Porsch, J.), entered October 27, 2023. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

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

Memorandum: Respondent appeals from an order of disposition that, inter alia, placed him in the custody of the Office of Children and Family Services for a period of 18 months based on the determination, after a fact-finding hearing, that respondent committed an act that, if committed by an adult, would constitute the crime of making a terroristic threat (Penal Law § 490.20 [1]). We agree with respondent that the evidence is legally insufficient to establish the element of intent with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

As relevant here, a person is guilty of making a terroristic threat when "with intent to intimidate or coerce a civilian population . . . [they] threaten[ ] to commit or cause to be committed a specified offense and thereby cause[ ] a reasonable expectation or fear of the imminent commission of such offense" (Penal Law § 490.20 [1]). Here, petitioner presented testimony that respondent sent private messages to another student in a different school district that respondent was planning to commit a mass shooting to end bullying in his school. There was no evidence that those threats were made to anyone other than the student or that respondent requested that the student relay the threats to others. "A private conversation between immature teenage friends, without more, does not establish the element of intent to intimidate a civilian population" (*Matter of Brittany A.*, 47 Misc 3d 761, 765 [Fam Ct, Clinton County 2015]; *cf. People v Allen*, 66 Misc 3d 913, 916 [Orange County Ct 2020]; *see generally* § 490.20 [1]).

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

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

155

CA 24-00027

PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

CYNTHIA WELCH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE FATHER'S HOUSE OF ROCHESTER, NEW YORK,
DEFENDANT-APPELLANT.

LAW OFFICES OF REINERS & ROSENBERG, GARDEN CITY (MARC A. SHERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF FRANCIS M. CIARDI, ROCHESTER (LORENZO NAPOLITANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered December 12, 2023. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: In this action to recover damages for injuries plaintiff sustained when she fell while descending stairs inside defendant's church, defendant appeals from an order denying its motion for summary judgment dismissing the complaint. We affirm.

Defendant failed to meet its initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although defendant contends that the stairs did not constitute a dangerous condition, the determination of such an issue "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1533 [4th Dept 2012] [internal quotation marks omitted]). Defendant submitted the report of plaintiff's expert, who opined that the stairs were inherently dangerous and were not in compliance with applicable building codes for permanent stairways. Defendant also submitted the affidavit of its expert, who opined that the codes cited by plaintiff's expert were inapplicable and that the stairs were in compliance with codes applicable to bleacher stairs. Thus, defendant's own submissions raise an issue of fact as to which section of the code is applicable to the stairs where plaintiff fell. It will be for a jury to decide whether defendant violated the relevant section of the code (*see Hartnett v Zuchowski*, 175 AD3d 1831, 1832 [4th Dept 2019]; *see also Grayson v Hall*, 31 AD3d 606, 607 [2d Dept 2006]; *Romanowski v Yahr*, 5 AD3d 985, 986 [4th Dept 2004]). In

any event, "[e]vidence of a defendant's compliance with industry standards, . . . does not establish" that defendant was not negligent (*Hayes*, 100 AD3d at 1532; *see Baity v General Elec. Co.*, 86 AD3d 948, 950-951 [4th Dept 2011]), and here defendant failed to establish as a matter of law that the stairs were not inherently dangerous (*see Hayes*, 100 AD3d at 1533; *Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219 [4th Dept 2003]).

Defendant also failed to establish that the alleged defect was not a proximate cause of plaintiff's injuries as a matter of law. Although plaintiff may have been comparatively negligent in failing to observe the step or in believing that she had reached the floor when she was still on the stairs, we conclude that, contrary to its contention, defendant failed to establish that plaintiff fell solely due to her own negligence (*see Powers*, 309 AD2d at 1219-1220). Finally, we note that "defendant improperly contended for the first time in its reply papers that it did not" have notice of the dangerous condition, and that contention was therefore not properly before Supreme Court (*Spacht v County of Chautauqua*, 133 AD3d 1335, 1336 [4th Dept 2015]; *see Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]).

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

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

161

KA 22-00046

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHMIERE DUNHAM COFFEE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 December 8, 2021. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). In appeal No. 2, he appeals from a judgment convicting him, upon his plea of guilty in the same plea proceeding, of burglary in the second degree (§ 140.25 [2]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Rivera*, 225 AD3d 1286, 1286 [4th Dept 2024], *lv denied* 41 NY3d 1004 [2024]; *People v Fernandez*, 218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]) and thus does not preclude our review of his challenge to the sentences imposed (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]; *see also People v Johnson*, 215 AD3d 1282, 1282 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023]), we nevertheless conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

162

KA 22-00259

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAHMIERE DUNHAM COFFEE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 December 8, 2021. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Same memorandum as in *People v Coffee* ([appeal No. 1] — AD3d — [Mar. 21, 2025] [4th Dept 2025]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

163

KA 22-01843

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL EASLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered September 28, 2022. The judgment convicted defendant, upon a guilty plea, 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 a plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [12]). As the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Harold*, 233 AD3d 1503, 1503 [4th Dept 2024]) and therefore does not preclude our review of his challenge to the severity of the sentence (*see Harold*, 233 AD3d at 1503). We nevertheless conclude that the sentence is not unduly harsh or severe. Finally, we note that County Court misstated at sentencing that defendant was a second felony offender, rather than a second felony drug offender previously convicted of a violent felony, and the uniform sentence and commitment form incorrectly states that defendant was sentenced as a second felony offender. The uniform sentence and commitment form must be amended to reflect that defendant was actually sentenced as a second felony drug offender previously convicted of a violent felony (*see* § 70.70 [1] [b]; [4]; *People v Chourb*, 232 AD3d 1272, 1274-1275 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

164

KA 23-01700

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHYHEIM RODRIGUEZ, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (APRIL J. ORLOWSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered August 31, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third 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 third degree (Penal Law § 265.02 [1]), defendant contends that his plea was involuntary because Supreme Court did not advise him during the plea colloquy that he would be forfeiting his right against self-incrimination by pleading guilty. Defendant "failed to preserve that contention for our review because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Yanga*, 213 AD3d 1276, 1277 [4th Dept 2023], *lv denied* 40 NY3d 932 [2023] [internal quotation marks omitted]; *see People v Martin*, 222 AD3d 1414, 1415 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *People v Ramos-Perez*, 188 AD3d 1741, 1742 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]). In any event, defendant's contention is without merit. After reviewing the record as a whole and the circumstances of the plea in its totality, we conclude that the plea was knowing, intelligent, and voluntary (*see Yanga*, 213 AD3d at 1277; *People v Barnes*, 206 AD3d 1713, 1714-1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

167

KA 24-00767

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNATHON T. FLESCH, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, SPECIAL PROSECUTOR, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered April 12, 2024. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the People breached the terms of the plea agreement by requesting, prior to sentencing, that County Court not abide by the sentencing promise negotiated at the time defendant entered the plea, which had contemplated a term of probation without imprisonment. Initially, as the People correctly concede, defendant's waiver of the right to appeal does not encompass his present contention (*see generally People v Johnson*, 14 NY3d 483, 487 [2010]; *People v Cannon*, 158 AD3d 1123, 1124 [4th Dept 2018], *lv denied* 31 NY3d 1079 [2018]). Contrary to defendant's contention, however, the record does not reflect that the People violated a term of the plea agreement (*cf. People v Vogel*, 20 AD3d 865, 865 [4th Dept 2005], *appeal dismissed* 6 NY3d 728 [2005]). Instead, the record reflects that the court itself determined that the negotiated sentence was not appropriate. "[E]ven where a plea agreement has been reached, and a defendant has entered a plea in reliance on the agreement, it is ultimately up to the court to impose what it considers an appropriate sentence" (*People v Hicks*, 98 NY2d 185, 188 [2002]). Where the court decides to depart from a previously negotiated sentencing promise, the court must permit the defendant to withdraw the plea (*see People v Sierra*, 85 AD3d 1659, 1659 [4th Dept 2011], *lv denied* 17 NY3d 905 [2011]; *People v Stiles*, 78 AD3d 1570, 1570 [4th Dept 2010], *lv denied* 16 NY3d 863 [2011]; *People v Herber*, 24 AD3d 1317, 1318 [4th Dept 2005], *lv denied* 6 NY3d 814 [2006]). Here, the court properly afforded defendant the opportunity to withdraw his guilty plea rather

than proceeding to sentencing at which the court would impose a term of imprisonment (*see Stiles*, 78 AD3d at 1570).

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

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

168

KA 20-00014

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID EVANCHO, DEFENDANT-APPELLANT.

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

MICHAEL JOSEPH KEANE, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 15, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [12]), defendant contends that his plea was involuntary because his statements during the plea proceeding indicated that he had a learning disability and was confused and Supreme Court failed to conduct a sufficient inquiry to ensure that the plea was voluntary. Although defendant retains the right to appellate review of his challenge to the voluntariness of the plea regardless of the validity of his waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), defendant correctly concedes that his challenge is not preserved for our review because he did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Miranda*, 233 AD3d 1524, 1524 [4th Dept 2024]; *People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024], *lv denied* – NY3d – [2025]). Contrary to defendant's contention, we conclude this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). While defendant initially indicated that he had a learning disability that made it difficult for him to understand the proceeding and that he was slightly confused about pleading guilty, the record establishes that the court properly accepted the plea only after making appropriate "further inquir[ies] to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered" (*id.*; *see People v Tapia*, 158 AD3d 1079, 1080 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018];

People v Brown, 305 AD2d 1068, 1068-1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

172

KA 21-01644

PRESENT: CURRAN, J.P., MONTOUR, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESEAN COOPER, ALSO KNOWN AS CORDELLE COOPER,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered October 22, 2021. The judgment convicted defendant upon a guilty plea of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously 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]) and criminal possession of a weapon in the third degree (§ 265.02 [3]), defendant contends that County Court erred in refusing to suppress physical evidence—specifically, a handgun—that was seized from the vehicle in which he was a passenger because the police unlawfully pursued him after he fled the vehicle and because his flight was the result of unlawful police conduct. We reject that contention.

The police officers' initial approach in this case was precipitated by complaints received that day of a man threatening another person with a handgun. Responding to the area where the suspect was believed to be, officers observed a man whose clothing and appearance matched the description provided by the complainant. The man was standing directly outside of a parked vehicle containing defendant and another man. Based on the description of the suspect involved in the handgun incident, officers were justified in approaching the man who was standing outside the vehicle (*see generally People v Drake*, 93 AD3d 1158, 1159 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]). At that point, defendant exited the vehicle and fled. Even assuming, arguendo, that defendant was illegally pursued and detained after he fled, we conclude that his

"entirely unprovoked flight, leaving the vehicle . . . , constituted an abandonment of the . . . [handgun] found in the . . . car and undermined any claim to a reasonable expectation of privacy he might otherwise have had" (*People v Layou*, 159 AD3d 1413, 1414 [4th Dept 2018], *lv denied* 31 NY3d 1084 [2018], *reconsideration denied* 32 NY3d 939 [2018] [internal quotation marks omitted]; *see People v Barker*, 113 AD3d 1111, 1111 [4th Dept 2014]; *People v White*, 40 AD3d 535, 536 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]). Moreover, the handgun, which one officer testified was in plain view on the floor of the vehicle, was "not obtained by exploitation of the allegedly illegal detention" but was instead—"derived from a source independent of the detention and . . . attenuated from any illegal activity" (*Layou*, 159 AD3d at 1414 [internal quotation marks omitted]; *see People v Washington*, 37 AD3d 1131, 1132 [4th Dept 2007], *lv denied* 8 NY3d 992 [2007]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

201

TP 24-01441

PRESENT: LINDLEY, J.P., CURRAN, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF PEDRO OSORIO, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
AND MCALPIN INDUSTRIES, INC., RESPONDENTS.

FAMIGHETTI & WEINICK, PLLC, MELVILLE (MATTHEW WEINICK OF COUNSEL), FOR PETITIONER.

GALLO & IACOVANGELO, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR RESPONDENT MCALPIN INDUSTRIES, INC.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wayne County [Richard M. Healy, A.J.], entered July 30, 2024) to review a determination of respondent New York State Division of Human Rights. The determination, among other things, dismissed petitioner's complaint in its entirety.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing his complaint against respondent McAlpin Industries, Inc. (McAlpin), which alleged discrimination on the basis of age, race, color, and national origin, hostile work environment, and retaliation. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, "is limited to consideration of whether substantial evidence supports the agency determination" (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]; *Matter of Scheuneman v New York State Div. of Human Rights*, 147 AD3d 1523, 1524 [4th Dept 2017]). "Although a contrary decision may be reasonable and also sustainable, a reviewing court may not substitute its judgment for that of the Commissioner [of SDHR] if [their determination] is supported by substantial evidence" (*Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417 [1991], *rearg denied* 78 NY2d 909 [1991]).

Contrary to petitioner's contention, there is substantial evidence to support the determination that he was not discriminated against on the basis of his age, race, color, or national origin (*see* Executive Law § 296 [1] [a]). To establish a prima facie case of discrimination, petitioner was required to demonstrate that he was a member of a protected class, that he was qualified for his position, that he suffered an adverse employment action, and that the adverse action "occurred under circumstances giving rise to an inference of discriminatory motive" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306 [2004]; *see Matter of Phillips v New York State Div. of Human Rights*, 217 AD3d 1595, 1596 [4th Dept 2023]). Here, we agree with SDHR that petitioner failed to establish a prima facie case of discrimination because the written warnings he received from McAlpin did not constitute an adverse employment action (*see generally Forrest*, 3 NY3d at 306; *Sims v Trustees of Columbia Univ. in the City of N.Y.*, 168 AD3d 622, 623 [1st Dept 2019]; *Matter of Russo v New York State Div. of Human Rights*, 137 AD3d 1600, 1601 [4th Dept 2016]).

Contrary to petitioner's further contention, we conclude that there is substantial evidence to support SDHR's determination that he was not subjected to retaliation following his complaints of workplace discrimination. "In order to make out [a] claim [for unlawful retaliation], [a petitioner] must show that (1) [the petitioner] has engaged in protected activity, (2) [the] employer was aware that [the petitioner] participated in such activity, (3) [the petitioner] suffered an adverse employment action based upon [such] activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest*, 3 NY3d at 312-313; *see Matter of Mario v New York State Div. of Human Rights*, 200 AD3d 1591, 1593 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]). "Once that showing is made, 'the burden then shifts to [the employer] to present legitimate, independent and nondiscriminatory reasons to support [its] actions. Then, if [the employer] meet[s] this burden, [the petitioner] has the obligation to show that the reasons put forth by [the employer] were merely a pretext' " (*Russo*, 137 AD3d at 1602).

Here, petitioner alleged that he was retaliated against because he was terminated after he made several complaints of discrimination to McAlpin's human resources staff. It is undisputed that petitioner met his initial burden with respect to his retaliation claim. Nonetheless, we conclude that there is substantial evidence in the record to support the determination that McAlpin "present[ed] legitimate, independent and nondiscriminatory reasons to support [its] action[ ]" in terminating petitioner's employment (*id.*). Specifically, substantial evidence adduced at the hearing established that petitioner was terminated by McAlpin because, in April 2020, during the early months of the COVID-19 pandemic, he purposefully coughed and sneezed on his direct supervisor as a joke, and that, in doing so, he violated the terms of McAlpin's employee handbook. We further conclude that petitioner failed to establish that McAlpin's proffered reason for his termination was a pretext for unlawful retaliation (*see Mario*, 200 AD3d at 1593; *Russo*, 137 AD3d at 1602). We further conclude that there is substantial evidence to support SDHR's determination that petitioner was not subjected to a hostile

work environment under the circumstances of this case (*see* Executive Law § 296 [1] [h]; *see generally Golston-Green v City of New York*, 184 AD3d 24, 41 n 3 [2d Dept 2020]).

Finally, we have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

203

KA 22-00861

PRESENT: LINDLEY, J.P., CURRAN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY WOODWARD, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (AXELLE LECOMTE MATHEWSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 11, 2022. The judgment convicted defendant upon his plea of guilty of burglary in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of burglary in the third degree (Penal Law § 140.20). We agree with defendant that the waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Thomas*, 34 NY2d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Humphrey*, 218 AD3d 1354, 1354 [4th Dept 2023]; *People v Martin*, 213 AD3d 1299, 1299-1300 [4th Dept 2023]). Nonetheless, we conclude that the sentence is not unduly harsh or severe.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

205

KA 23-00690

PRESENT: LINDLEY, J.P., CURRAN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY REYNOLDS, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, 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 March 20, 2023. The judgment convicted defendant upon a guilty plea 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: On appeal from a judgment convicting him upon his guilty plea of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking suppression of a loaded firearm found by the police during an inventory search following a stop of the vehicle he was operating. According to defendant, the firearm should be suppressed because the search of the vehicle was unlawful. Although defendant does not challenge the validity of his waiver of the right to appeal, he asks us to address his suppression contention as a matter of discretion in the interest of justice pursuant to CPL 470.15 (3) (c). However, defendant's valid waiver of his right to appeal forecloses our review of his suppression claim (*see People v Seaberg*, 74 NY2d 1, 9-10 [1989]; *People v Hill*, 16 AD3d 229, 229 [1st Dept 2005]; *People v Graham*, 220 AD2d 215, 215 [1st Dept 1995], *lv denied* 87 NY2d 1019 [1996]).

Defendant's remaining contention—that his guilty plea was not voluntarily entered—survives his valid waiver of the right to appeal (*see People v Dozier*, 59 AD3d 987, 987 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]). By failing to move to withdraw his plea or to vacate the judgment, however, defendant failed to preserve that contention for our review (*see People v Edmonds*, 229 AD3d 1275, 1276 [4th Dept 2024], *lv denied* – NY3d – [2025]; *People v Brown*, 151 AD3d 1951, 1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]), and we

decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

217

KA 18-01283

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PERVEZ IQBAL, ALSO KNOWN AS IQBAL PERVEZ,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered April 6, 2018. The judgment convicted defendant upon a jury verdict of assault in the third degree and strangulation in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on count 2 of the indictment, and count 1 of the indictment is dismissed without prejudice to the People to re-present any appropriate charge with respect to such dismissed count to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the third degree (Penal Law § 120.00 [1]) and strangulation in the second degree (§ 121.12). Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), giving "[g]reat deference . . . to the fact[ ]finder's resolution of credibility issues," we conclude that the jury was justified in finding defendant guilty beyond a reasonable doubt (*People v Wertman*, 114 AD3d 1279, 1280 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014] [internal quotation marks omitted]; *see People v Ruiz*, 159 AD3d 1375, 1375 [4th Dept 2018]).

Defendant also contends that he was denied a fair trial as a result of several improper comments made by the prosecutor during summation. Although defendant did not object to all of the prosecutor's allegedly improper remarks and thus failed to preserve his contention for our review with respect to those remarks, we

exercise our power to review his contention with respect to all of the prosecutor's allegedly improper remarks as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note one remark in particular, where the prosecutor stated, "[t]his is America, and we do have the American judicial system. And you cannot do this in America. You cannot strangle people, you cannot threaten to slit their throat, you cannot light them on fire." In the context of this case and the context in which the remark was made, we conclude that the remark was an improper attempt at stereotyping defendant, the alleged victim, and the underlying circumstances of the case. Although improper, we nevertheless conclude that reversal on that ground is unwarranted because the comments "[did] not substantially prejudice[ ] . . . defendant's trial" (*People v Barber*, 155 AD3d 1543, 1547 [4th Dept 2017] [internal quotation marks omitted]).

We agree with defendant, however, that County Court erred in admitting in evidence testimony from a police officer who responded to the scene regarding his observations of other, unnamed complainants in prior, unspecified cases. The officer was permitted to testify that he had taken photographs "once or twice" of complainants who had "alleged strangulations," and that he could not recall having observed bruises on those other complainants. The officer's testimony was used by the People in order to explain that the lack of marks on the neck of the victim in the present case did not mean that defendant did not strangle her. Indeed, during closing argument the People invited the jury to "recall the testimony of [the officer], that he did not observe any signs of bruising on [the victim's] neck. You'll also recall that he has been to other strangulations and investigated those, and he didn't find any injuries there either." We conclude that the officer's testimony regarding prior, unrelated cases is entirely irrelevant to the instant case, and that it was error to admit that "irrelevant and highly prejudicial testimony" (*People v Frederick*, 53 AD3d 1088, 1088-1089 [4th Dept 2008]). We further conclude that the error is not harmless. The jury in this case acquitted defendant on other charges regarding other alleged acts committed on the same day as the alleged strangulation, and the evidence in this case relied primarily on witness credibility. In such a case, we cannot say either that "the proof of guilt was overwhelming" or that "there was no significant probability that the jury would have acquitted had the error not occurred" (*People v Grant*, 7 NY3d 421, 424 [2006]). We therefore reverse the judgment and grant a new trial on count 2 of the indictment. Inasmuch as defendant was convicted of assault in the third degree as a lesser included offense under count 1 of the indictment, we dismiss that count without prejudice to the People to re-present any appropriate charge with respect thereto to another grand jury (*see People v Tillmon*, 197 AD3d 956, 958 [4th Dept 2021], *lv dismissed* 37 NY3d 1148 [2021]).

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

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

221

CAF 24-00748

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

IN THE MATTER OF LAURA A. SEELEY-SICK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JASON PAUL ALLISON, RESPONDENT-RESPONDENT.

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

EDWARD F. MURPHY, III, HAMMONDSPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), entered March 6, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Family Court, Livingston County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, among other things, denied her petition to enforce visitation pursuant to a prior court order and ordered that, until the mother completes domestic violence counseling or no longer resides with her husband, respondent father shall not be required to allow the mother to have supervised visitation with the children.

We reject the mother's contention that Family Court erred in failing to find the father in civil contempt for violating the visitation provisions of the prior court order. Initially, we agree with the mother that a finding of willfulness by the court was not necessary inasmuch as it is not an element of civil contempt (*see Matter of Fowler v Fowler*, 206 AD3d 1718, 1718 [4th Dept 2022], *lv dismissed* 39 NY3d 926 [2022]; *Matter of Menard v Roberts*, 194 AD3d 1427, 1428 [4th Dept 2021]). Nonetheless, the evidence at the hearing established that the purported violations of the prior order were the result of the children's refusal to comply with the order and not the result of any action taken by the father (*see Matter of Unczur v Welch*, 159 AD3d 1405, 1405-1406 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of James XX. v Tracey YY.*, 146 AD3d 1036, 1038 [3d Dept 2017]).

We conclude that the mother waived her contention that the father

failed to establish a change of circumstances warranting an inquiry into the best interests of the children inasmuch as the mother alleged in her own petition that there had been such a change in circumstances (*see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *see generally Panaro v Panaro*, 133 AD3d 1306, 1307 [4th Dept 2015]). We agree with the mother, however, that the court erred in conditioning her visitation upon either her participation in domestic violence counseling or that she no longer reside with her husband (*see generally Matter of Derek KK. v Jennifer KK.*, 196 AD3d 765, 768 [3d Dept 2021]; *Matter of Ordona v Cothern*, 126 AD3d 1544, 1546 [4th Dept 2015]). We therefore modify the order accordingly, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation, if any, between the mother and the children.

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

222

CAF 23-02090

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

IN THE MATTER OF CANDACE CATHCART,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CANIA WILLIAMS, RESPONDENT-RESPONDENT,
AND DASHAWN CUNNINGHAM, RESPONDENT-APPELLANT.

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

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

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR NONPARTY RESPONDENT ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered November 9, 2023, in a proceeding pursuant to Family Court Act articles 6 and 10. The order, inter alia, awarded kinship guardianship of the subject child to petitioner.

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

Memorandum: In a proceeding pursuant to Family Court Act articles 6 and 10, respondent father appeals from an order that, inter alia, awarded kinship guardianship of the subject child to petitioner maternal grandmother. Contrary to the father's contention, on the date he first orally requested a determination of paternity, he did not possess a statutory right to counsel pursuant to Family Court Act §§ 262 (a) (i), (v) and (b) and 1035 (d) inasmuch as, at that time, he was not a "petitioner," "respondent," or "parent" as contemplated by those statutory provisions.

The father also contends that Family Court erred in finding that extraordinary circumstances existed to warrant an inquiry into whether an award of custody to a nonparent is in the best interests of the child (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). Here, however, the grandmother moved for partial summary judgment on the issue of extraordinary circumstances and, instead of opposing the

motion, the father instead consented to proceed to trial on the issue of the best interests of the child. We therefore conclude that the father failed to preserve that issue for our review (*see generally Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]; *Matter of Davis v Delena*, 159 AD3d 900, 901 [2d Dept 2018]; *Matter of Isaiah O. v Andrea P.*, 287 AD2d 816, 817 [3d Dept 2001]). In any event, we conclude that the grandmother established the existence of extraordinary circumstances based on, inter alia, the prolonged separation of the child from the father, the attachment the child had formed to the grandmother and a sibling who also lived with the grandmother, and the father's abdication of parental rights and responsibilities (*see generally Matter of Hilkert v Parsons-O'Dell*, 187 AD3d 1675, 1676 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]).

Contrary to the father's further contention, in making its determination of the best interests of the child, the court properly compared the circumstances of the father to those of the grandmother (*see generally Matter of Sevilla v Torres*, — AD3d —, —, 2025 NY Slip Op 00777, *2 [4th Dept 2025]; *Matter of Lillyana B. [Brittney B.]*, 221 AD3d 1522, 1523 [4th Dept 2023]), and we conclude that there is a sound and substantial basis in the record for the court's determination that an award of custody to the grandmother is in the best interests of the child (*see generally Matter of Brady J.S. v Darla A.B.*, 208 AD3d 1023, 1027 [4th Dept 2022], *lv denied* 39 NY3d 904 [2022]).

We reject the father's contention that he was denied effective assistance of counsel. The father's contention that his attorney was ineffective for failing to request an adjournment at a permanency hearing on the ground that the father did not personally appear at that hearing is without merit because the record reflects that the father did, in fact, appear at that hearing. With respect to the father's contention that his attorney was ineffective for failing to object to certain permanency hearing orders, by otherwise failing to take action prior to trial to end the child's placement with the grandmother, or by failing to move to dismiss the grandmother's petition at the close of her proof, "[t]here is no denial of effective assistance of counsel . . . arising from a failure to make a motion or argument that has little or no chance of success" (*Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1562 [4th Dept 2018] [internal quotation marks omitted]). Finally, we reject the father's contention with respect to the remaining instances of allegedly ineffective assistance inasmuch as the father did not "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*id.* at 1563 [internal quotation marks omitted]; *see Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

223

CAF 23-01472

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

IN THE MATTER OF KYLE BOWEN,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

BRITTANY BABB, RESPONDENT-PETITIONER-APPELLANT.

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

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Deborah J. Scinta, R.), entered May 22, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner-respondent sole decision-making authority with respect to the subject child's health-related care.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order of Family Court (Scinta, R.) that, inter alia, modified a prior joint custody order by granting petitioner-respondent father sole decision-making authority with respect to the subject child's health-related care. Initially, we take judicial notice of the fact that, after the issuance of the order on appeal, Family Court (Howden, J.) issued an order in February 2025 (subsequent order) that confirmed a Referee's report, which recommended in relevant part that the court continue the order on appeal based upon the finding that each party had failed to establish a change in circumstances sufficient to warrant an inquiry into whether modification of the order on appeal was in the best interests of the child. Inasmuch as the subsequent order therefore provided that the order on appeal remained in effect and did not supersede the order on appeal, we conclude that the mother's appeal is not moot (*see Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021]; *Matter of Fowler v Rothman*, 198 AD3d 1374, 1374 [4th Dept 2021], *lv dismissed* 38 NY3d 995 [2022]; *cf. Matter of Wallace v Eure*, 181 AD3d 1329, 1329 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

With respect to the merits, although we agree with the mother that the court (Scinta, R.) erred in considering hospital records that

had not been properly received into evidence, we conclude that the error is harmless because the result reached by the court would have been the same even had such records not been considered (*see Matter of King v Pelkey*, 229 AD3d 1161, 1162 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]; *Matter of Adorno v Vaillant*, 177 AD3d 1275, 1276 [4th Dept 2019]). Indeed, there is a sound and substantial basis in the record for the court's determination without consideration of those records (*see Kopciowski v Kopciowski*, 195 AD3d 1455, 1456 [4th Dept 2021]; *Matter of Rice v Cole*, 125 AD3d 1466, 1467 [4th Dept 2015], *lv denied* 26 NY3d 909 [2015]). Contrary to the mother's further contention, we conclude that the court did not misinterpret the language of a psychological evaluation of the child regarding the effectiveness of certain medication (*see generally Matter of Klein v Klein*, 251 AD2d 733, 735 [3d Dept 1998]; *Matter of Kathy G. J. v Arnold D.*, 80 AD2d 896, 896 [2d Dept 1981]). Even assuming, arguendo, that the court erred in that regard, we conclude that any error is harmless (*see King*, 229 AD3d at 1162).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

238

KA 21-00920

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRE'SIONE R. BOWSER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered April 7, 2021. The judgment convicted defendant upon a plea of guilty of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of assault in the second degree (Penal Law § 120.05 [2]). We affirm. Defendant's challenge to the legal sufficiency of the evidence before the grand jury and his contention that evidence before the grand jury was admitted without an adequate foundation do not survive his guilty plea (*see People v Hansen*, 95 NY2d 227, 231-232 [2000]; *People v Scarbrough*, 162 AD3d 1575, 1575 [4th Dept 2018]). Furthermore, we conclude that "[b]y pleading guilty, defendant [also] forfeited review of his contention that the integrity of the grand jury proceedings was impaired . . . by the prosecutor's failure to give a circumstantial evidence charge" (*People v Wilkins*, 1 AD3d 962, 963 [4th Dept 2003], *lv denied* 1 NY3d 603 [2004]; *see People v Wheeler*, 216 AD3d 1314, 1315-1316 [3d Dept 2023], *lv denied* 40 NY3d 1082 [2023]; *People v Ivey* [appeal No. 2], 229 AD2d 1020, 1021 [4th Dept 1996], *lv denied* 89 NY2d 865 [1996]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

240

KA 23-00420

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. MCKNIGHT, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 1, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) arising from his conduct in stabbing the victim to death in her apartment. As relevant to this appeal, the People called an FBI special agent to testify regarding the results of an analysis of defendant's cell phone, which showed that defendant was in the vicinity of the victim's apartment around the time of the murder. Defendant contends that he was deprived of effective assistance of counsel because defense counsel should have investigated a challenge to the "cell site data analysis" and should have consulted an expert on that topic. Defendant's contention concerns matters outside the record on appeal and must be raised in a motion pursuant to CPL 440.10 (*see People v Keane*, 221 AD3d 1586, 1588-1589 [4th Dept 2023]; *People v Howden*, 215 AD3d 1261, 1262 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]; *see also People v Defio*, 200 AD3d 1672, 1674 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]). To the extent that the record before us permits review of defendant's contention, we conclude that it is without merit inasmuch as he failed to demonstrate that opposing expert testimony was available, that it would have assisted County Court in its determination or that he was prejudiced by its absence (*see People v Young*, 206 AD3d 1631, 1633 [4th Dept 2022]; *People v Hunter*, 202 AD3d 1449, 1450 [4th Dept 2022], *lv denied* 38 NY3d 1008 [2022]; *People v Finch*, 180 AD3d 1362, 1363 [4th Dept 2020], *lv denied* 35 NY3d 993 [2020]), and failed to demonstrate the absence of a strategic explanation for defense counsel's alleged shortcomings (*see*

People v Freeman, 206 AD3d 1694, 1695 [4th Dept 2022]; *Defio*, 200 AD3d at 1674; *see also People v Caldavado*, 166 AD3d 792, 794 [2d Dept 2018], *lv denied* 32 NY3d 1170 [2019], *cert denied* 587 US 987 [2019]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

248

CAF 24-00966

PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, AND KEANE, JJ.

IN THE MATTER OF LATAYVIA BROOKS-MORRISON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARINA JOHNSON, RESPONDENT-RESPONDENT.

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

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Casie L. Ponticello, R.), entered June 7, 2024, in a proceeding pursuant to Family Court Act article 8. The order, among other things, dismissed the petition.

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

Memorandum: Petitioner brought a petition pursuant to Family Court Act article 8 alleging that respondent committed various family offenses. Family Court effectively granted respondent's motion to dismiss the petition, without prejudice, pursuant to CPLR 3211 (a) (7). We affirm.

In determining a motion to dismiss a family offense petition pursuant to CPLR 3211 (a) (7), " 'the petition must be liberally construed, the facts alleged in the petition must be accepted as true, and the petitioner must be granted the benefit of every favorable inference' " (*Matter of Xin Li v Ramos*, 125 AD3d 681, 682 [2d Dept 2015]; *see Matter of Little v Little*, 175 AD3d 1070, 1072 [4th Dept 2019]). Petitioner contends that the petition, together with the additional allegations that she made in ex parte sworn testimony, were sufficient to state the alleged family offenses. However, inasmuch as nothing in the record reflects that respondent was aware of the allegations made in the sworn testimony, we decline to consider those allegations. " '[N]otice is a fundamental component of due process' " and, in the absence of evidence that respondent was on notice of the allegations in the sworn testimony, our consideration of that testimony would violate respondent's due process rights (*Matter of King v King*, 167 AD3d 1272, 1274 [3d Dept 2018]; *see generally Matter of Ferratella v Thomas*, 173 AD3d 1834, 1836 [4th Dept 2019]).

Considering solely the petition, liberally construing the allegations therein, and giving them the benefit of every favorable inference, petitioner failed to adequately allege an enumerated family offense (*see Little*, 175 AD3d at 1072; *see generally* Family Ct Act § 812 [1]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

259

CAF 23-01239

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

IN THE MATTER OF TIFFANY A. THAYER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ADAM J. DARLING, RESPONDENT-RESPONDENT.

MICHAEL J. CAPUTO, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

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

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

SUSAN E. GRAY, CATONSVILLE, MARYLAND, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Wayne County (Arthur B. Williams, J.), entered July 3, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner primary physical residence of the subject children on the condition that she relocate back to Wayne County or any contiguous county in New York State.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, petitioner mother and the Attorney for the Child (AFC) assigned to the younger of the parties' two children appeal from an order that, among other things, granted the mother primary physical residence of the children on the condition that she "relocate back to Wayne County or any contiguous [c]ounty in New York State by no later than August 31, 2023." According to the mother and the AFC for the younger child, Family Court should have awarded sole custody to the mother and allowed her to remain with the children in North Carolina, where they had moved over respondent father's objection during the pendency of this proceeding. The mother did not return to New York as directed, and the father was awarded primary physical residence of the children in Wayne County pursuant to a subsequent temporary order not challenged herein. The mother now exercises visitation rights with the children in the summer and during school breaks, as agreed upon by the parties, under that temporary order. We conclude that there is a sound and substantial basis in the record for the court's custody

determination at issue here (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]).

"[I]nasmuch as this case involves an initial custody determination, it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied . . . Although a court may consider the effect of a parent's [proposed] relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination . . . [T]he relevant issue is whether it is in the best interests of the child[ren] to reside primarily with the mother or the father" (*Matter of Hochreiter v Williams*, 201 AD3d 1303, 1303-1304 [4th Dept 2022] [internal quotation marks omitted]; *see Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeals dismissed* 19 NY3d 887 [2012], 20 NY3d 1052 [2013]; *see generally Eschbach*, 56 NY2d at 172-174). "A court's evaluation of a child's best interests is entitled to great deference and will not be disturbed as long as it is supported by a sound and substantial basis in the record" (*Kaleta v Kaleta*, 225 AD3d 1293, 1294 [4th Dept 2024]).

Here, upon reviewing all of the relevant factors, including the mother's desire to remain with the children in North Carolina (*see Hochreiter*, 201 AD3d at 1303-1304; *Saperston*, 93 AD3d at 1272; *see generally Eschbach*, 56 NY2d at 172-174; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]), we perceive no basis upon which to set aside the court's determination.

Although some of the custody factors favored the mother, others favored the father, particularly the fact that the mother is generally hostile toward the father and did not demonstrate a willingness to help maintain a positive relationship between him and the children while they resided with her in North Carolina. In fact, the mother did not even inform the father that she planned to move out of state with the children; the father found out when he saw a moving van outside her residence. Moreover, there is no compelling reason for the mother to reside in North Carolina, where she works at a restaurant earning less than she did at a comparable job in New York. When the mother moved to North Carolina in September 2022, her parents resided in Wayne County within seven miles of the father's home, although they later followed the mother to North Carolina. The children's paternal grandmother also resides in New York, which is where the parties met and the children had resided since August 2017.

Furthermore, contrary to the contention of the AFC for the younger child, the court did not err in conditioning the mother's continued primary physical residence of the children on her return to Wayne County or a contiguous county. Where an order following an initial custody hearing includes a requirement conditioning physical residence on a parent's return to the geographic area where the parties resided, it should be upheld where, as here, it "ha[s] a sound and substantial basis in the record" (*Matter of Crivelli v Tolento*, 100 AD3d 884, 885 [2d Dept 2012]; *see Matter of Streid v Streid*, 46 AD3d 1155, 1156 [3d Dept 2007]; *cf. Matter of Ross v Ross*, 185 AD3d

595, 597 [2d Dept 2020]).

Entered: March 21, 2025

Ann Dillon Flynn
Clerk of the Court