SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 2, 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 MAY 2, 2025

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________	927	KA 23 00684	PEOPLE V DAIN O. KILIAN
________	106	CA 23 01438	KENNETH BAKER V STATE OF NEW YORK
________	113	CA 23 02030	BUFFALO NAVAL PARK COMMITTEE, INC. V WATER QUALITY INSURANCE SYNDICATE
________	118	KA 21 00059	PEOPLE V JERMAINE PATTERSON
________	154	CA 23 01739	NATHANIEL TOTARO V BRIAN MALINKOWSKI
________	157	CA 24 01288	LEE FANG V TOWN OF AMHERST
________	159	CA 23 02164	NATHANIEL TOTARO V BRIAN MALINKOWSKI
________	174	CA 24 01388	THOMAS WATKINS In the Matter of JAMES METZ
________	192	CA 24 00464	WIILLIAM MATTAR, P.C. V BRIDGET RILEY
________	213	CA 24 01167	BRADLEY J. GARLOW V SEAN G. CUNNINGHAM
________	218	KA 23 02073	PEOPLE V NORMAN H. VANDERBILT
________	231	CA 24 00660	CHARLES B. V STATE OF NEW YORK
________	239	KA 20 00368	PEOPLE V FRANK CASSATA
________	254	KA 24 00056	PEOPLE V RICHARD H. TAFT, JR.
________	285	CA 24 00818	MARK W. TIEDEMANN V ANN MARIE SALERNO
________	286	CAF 23 02033	Mtr of HANALISE S.
________	295	CA 24 00797	U.S. BANK NATIONAL ASSOCIATION V GUARDIAN PRESERVATION, LLC
________	297	CA 24 01420	TIARA R. SANABRIA V SJ TRANS, INC.
________	302	KA 24 00312	PEOPLE V VICTORIA TANDLE
________	303	KA 22 01434	PEOPLE V ANDREA LIPTON
________	304	KA 24 00394	PEOPLE V WILLIAM T. MORRISSEY, III
________	318	KA 23 00978	PEOPLE V LAWRENCE D. BAKER
________	324	KA 23 00980	PEOPLE V REGINALD BARNES
________	326	CAF 23 00309	Mtr of ALBERT S.

________	327	CAF 24 00693	Mtr of BENJAMIN H.
________	333	CA 24 00996	MELINDA SCHWARTZ V DANIEL A. SCHWARTZ
________	334	CA 24 01502	MELINDA SCHWARTZ V DANIEL A. SCHWARTZ
________	335	CA 24 01241	MELINDA SCHWARTZ V DANIEL A. SCHWARTZ
________	338	KA 09 00318	PEOPLE V DESHEQUAN L. NATHAN
________	362	KA 19 01796	PEOPLE V JOHN SANTANA
________	377	KA 21 01819	PEOPLE V PLUSH DOZIER
________	386	CA 24 00754	DANIEL T. WARREN V ZONING BOARD OF APPEALS OF TOWN
________	389	CAF 24 00914	Mtr of ARIELLE L.
________	394	CAF 24 00915	Mtr of ARIELLE L.
________	395	CAF 24 00918	Mtr of LARRY L., III
________	396	CAF 24 00919	Mtr of RICHARD L.
________	404	KA 22 00337	PEOPLE V WILLIAM B. COLLIER, III
________	411	CA 24 01519	ROBERT H. V THE STATE OF NEW YORK

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

927
KA 23-00684
PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAIN O. KILIAN, DEFENDANT-APPELLANT.

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

VINCENT A. HEMMING, ACTING DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Keith D. Kibler, J.), rendered March 17, 2023. The judgment convicted defendant, upon a nonjury verdict, of unlawful manufacture of methamphetamine in the second degree and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of unlawful manufacture of methamphetamine in the second degree (Penal Law § 220.74 [2]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). We affirm.

Defendant contends that the evidence is legally insufficient to support the conviction of unlawful manufacture of methamphetamine in the second degree because it fails to establish his intent to manufacture methamphetamine. We reject that contention. The evidence at trial establishes that, when law enforcement officers searched the hotel room where defendant had been staying, they discovered several items that could be used as "reagents" or "solvents" in the manufacture of methamphetamine, including lithium batteries, drain cleaner, and lighter fluid. They also found several items that constituted "laboratory equipment," including a measuring cup and a bottle cap with attached tubing. In addition, the People presented evidence establishing that defendant had previously been convicted of unlawful manufacture of methamphetamine in the third degree. A finder of fact could infer from that *Molineux* evidence, together with the items discovered in the hotel room, that defendant possessed the requisite intent to manufacture methamphetamine even though the items discovered were largely common household products (*see generally People v Alvino*, 71 NY2d 233, 247-248 [1987]; *People v Molineux*, 168 NY 264, 293-294 [1901]). Thus, we conclude that the evidence is legally sufficient to support defendant's conviction of unlawful

manufacture of methamphetamine in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, to the extent that defendant contends that the verdict is against the weight of the evidence, we conclude that, viewing the evidence in light of the elements of unlawful manufacture of methamphetamine in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that County Court erred in allowing the People to introduce the *Molineux* evidence (*see* CPL 470.05 [2]). In any event, that contention is without merit. The evidence of defendant's prior conviction was relevant to the issue of defendant's intent to manufacture methamphetamine and, under the circumstances of this case, its probative value outweighed its potential for prejudice (*see Molineux*, 168 NY at 293-294; *see also People v Ventimiglia*, 52 NY2d 350, 359-360 [1981]).

We further reject defendant's contention that he received ineffective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]). In particular, we conclude that defense counsel's failure to object to the People's application with respect to the *Molineux* evidence was a tactical decision (*see generally People v Henry*, 95 NY2d 563, 565-566 [2000]), and does not rise to the level of ineffective assistance (*see People v Taylor*, 2 AD3d 1306, 1308 [4th Dept 2003], *lv denied* 2 NY3d 746 [2004]). Contrary to defendant's further contention, defense counsel was not ineffective for failing to join the pro se CPL 330.30 motion to set aside the verdict. "A defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Avent*, 178 AD3d 1403, 1405 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]). Defendant's remaining ineffective assistance of counsel contention is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Maffei*, 35 NY3d 264, 269-270 [2020]). We conclude that, because defendant has not made a CPL 440.10 motion, the merits of that contention may not be addressed on appeal.

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

Entered: May 2, 2025 Ann Dillon Flynn
Clerk of the Court

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

106

CA 23-01438

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

KENNETH BAKER, INDIVIDUALLY AND AS
PARENT AND NATURAL GUARDIAN OF BO BAKER,
DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 124072.)

MICHAEL E. DALEY, HERKIMER, FOR CLAIMANT-APPELLANT.

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

Appeal from a judgment of the Court of Claims (Richard E. Sise, J.), entered August 2, 2023. The judgment dismissed the claim after a trial.

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

Memorandum: This case arises from an accident where claimant's decedent lost control of the vehicle that he was driving on State Route 5 in the Town of Little Falls, crossed the center line and continued off the opposite shoulder. Once off the road, decedent's vehicle entered a pond and overturned, which led to decedent's death by drowning. Claimant commenced this action alleging, inter alia, that defendant, the State of New York (State), was negligent for failing to install a guiderail between the road and the pond. Following a nonjury trial, the Court of Claims determined that the State was entitled to qualified immunity and dismissed the claim. Claimant appeals, contending, inter alia, that the State is not entitled to qualified immunity with respect to its decision not to install a guiderail. We affirm.

"Highway planning, design, and maintenance . . . are proprietary functions, arising from a municipality's proprietary duty to keep its roads and highways in a reasonably safe condition" (*Turturro v City of New York*, 28 NY3d 469, 479 [2016] [internal quotation marks omitted]). "A municipality's proprietary duty to keep its roadways in a reasonably safe condition is well settled" (*id.*). "In the specific proprietary field of roadway safety, a municipality is afforded 'a qualified immunity from liability arising out of a highway planning decision' " (*id.*, quoting *Friedman v State of New York*, 67 NY2d 271,

283 [1986]). Qualified immunity may be invoked where the "decisions regarding design, maintenance and signage were 'the product of a deliberative decision-making process, of the type afforded immunity from judicial interference' " (*Betts v Town of Mount Morris*, 78 AD3d 1597, 1598 [4th Dept 2010]; *see Morris v Ontario County*, 152 AD3d 1185, 1186 [4th Dept 2017]). Thus, the State "may not be held liable for their discretionary judgments in the area of highway planning, design or safety absent proof that the plan evolved without adequate study or lacked a reasonable basis" (*Palloni v Town of Attica*, 278 AD2d 788, 789 [4th Dept 2000], *lv denied* 96 NY2d 709 [2001]).

During the nonjury trial, a New York State Department of Transportation (DOT) engineer testified that, in 2012, he was involved in a safety audit for a repaving project near the pond, and he explained that the audit considered "a long list of parameters as defined by [c]hapter 7" of the New York State Highway Design Manual. Another engineer involved in the 2012 safety audit testified that the DOT conducted an accident history analysis and, upon reviewing the safety audit and accident history, the DOT determined that a guiderail was not needed. " '[O]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1525 [4th Dept 2015]), and here, we cannot say that the court's determination could not have been reached under any fair interpretation of the evidence (*see generally Brown v State of New York* [appeal No. 2], 144 AD3d 1535, 1538 [4th Dept 2016], *affd* 31 NY3d 514 [2018]; *Palloni*, 278 AD2d at 789).

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

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

113
CA 23-02030
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, NOWAK, AND KEANE, JJ.

BUFFALO NAVAL PARK COMMITTEE, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WATER QUALITY INSURANCE SYNDICATE,
DEFENDANT-RESPONDENT.

RUPP PFALZGRAF LLC, BUFFALO (JOHN T. KOLAGA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CLYDE & CO US LLP, NEW YORK CITY (JOHN M. WOODS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered October 27, 2023. The order, inter alia, granted the motion of defendant to dismiss the complaint.

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

Memorandum: Plaintiff operates a naval and historical park and obtained liability insurance coverage for the park from defendant. After a decommissioned World War II vessel at the park released petroleum products into the Buffalo River, plaintiff commenced this action seeking, inter alia, payment under the insurance contract for costs allegedly incurred by plaintiff as a result of that incident. Defendant moved pursuant to CPLR 3211 (a) (1) to dismiss the complaint based on a forum selection clause in the insurance contract. Supreme Court, inter alia, granted the motion. We affirm.

The insurance contract between the parties provides, inter alia, that any lawsuit brought by plaintiff that arises out of the policy shall be brought in the United States District Court for the Southern District of New York (SDNY) and that defendant consents to the jurisdiction of that court. The contract further provides that the law applicable to the interpretation of the insurance policy shall be federal maritime law of the United States, or in the absence of federal maritime law of the United States, the law of the State of New York, without regard for New York’s choice of law rules.

Under federal maritime law, forum selection clauses in maritime contracts are “prima facie valid and should be enforced” unless enforcement would be “unreasonable under the circumstances” (*M/S*

Bremen v Zapata Off-Shore Co., 407 US 1, 10 [1972]; *see generally Carnival Cruise Lines*, *Inc. v Shute*, 499 US 585, 594 [1991]). A "party claiming unreasonableness of a forum-selection clause bears a heavy burden" (*New Moon Shipping Co., Ltd. v MAN B & W Diesel AG*, 121 F3d 24, 32 [2d Cir 1997]).

Similarly, under New York law, a forum selection clause is prima facie valid and enforceable unless shown to be " 'unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court' " (*Chiarizia v Xtreme Rydz Custom Cycles*, 43 AD3d 1353, 1353-1354 [4th Dept 2007]; *see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]; *Erie Ins. Co. of N.Y. v AE Design*, *Inc.*, 104 AD3d 1319, 1320 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]).

Contrary to plaintiff's contention, plaintiff did not meet its burden of establishing that the forum selection clause is unenforceable. In determining whether forum selection clauses are unreasonable or unjust, courts will consider: "(1) if their incorporation into the agreement was the result of fraud or overreaching . . . ; (2) if the complaining party 'will for all practical purposes be deprived of [its] day in court,' due to the grave inconvenience or unfairness of the selected forum . . . ; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy . . . ; or (4) if the clauses contravene a strong public policy of the forum state" (*Roby v Corporation of Lloyd's*, 996 F2d 1353, 1363 [2d Cir 1993], *cert denied* 510 US 945 [1993]).

Plaintiff contends that enforcement of the forum selection clause would deprive it of its day in court because the SDNY lacks subject matter jurisdiction over the dispute. We reject that contention. Although we defer to that court to determine whether it will exercise jurisdiction over this dispute, we note that Supreme Court dismissed the complaint without prejudice and stated that, in the event that the SDNY declines to exercise jurisdiction, "this matter may be renewed" in a New York court. Under these circumstances, we conclude that plaintiff has failed to establish that it could not commence an action in New York Supreme Court if the SDNY declined to exercise jurisdiction (*see generally New Moon Shipping Co.*, *Ltd.*, 121 F3d at 32).

We reject plaintiff's further contention that the forum selection clause lacks mutual consideration and is therefore unenforceable (*see Silverman v Carvel Corp.*, 192 F Supp 2d 1, 5 [WD NY 2001]).

Entered: May 2, 2025 Ann Dillon Flynn
Clerk of the Court

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

118

KA 21-00059

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE PATTERSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered December 16, 2020. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and burglary in the third degree (four counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]) and four counts of burglary in the third degree (§ 140.20). Defendant contends that the evidence is legally insufficient to support the conviction of burglary in the second degree. At the close of the People's proof, defendant moved for a trial order of dismissal, and County Court reserved decision but never ruled on the motion. Thus, we may not address defendant's contention because "we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Roach*, 213 AD3d 1274, 1274 [4th Dept 2023] [internal quotation marks omitted]; *see People v Capitano*, 198 AD3d 1324, 1325 [4th Dept 2021]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see Roach*, 213 AD3d at 1274). In light of our determination, we do not address defendant's remaining contentions.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

154
CA 23-01739
PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

NATHANIEL TOTARO, PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V   MEMORANDUM AND ORDER

BRIAN MALINOWSKI, DEFENDANT-RESPONDENT.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered March 24, 2023. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint of plaintiff Nathaniel Totaro.

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 complaint of plaintiff Nathaniel Totaro, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, among other things, to recover damages for injuries that Nathaniel Totaro (plaintiff) allegedly sustained in an automobile accident with defendant. Plaintiffs alleged that, as a result of the accident, plaintiff suffered injuries that constituted serious injuries within the meaning of Insurance Law § 5102 (d) under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories. Plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint as to plaintiff. We modify.

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]; *Lamar v Anastasi*, 188 AD3d 1637, 1637 [4th Dept

2020]).

Here, contrary to plaintiff's contention, Supreme Court properly granted the motion with respect to the 90/180-day category. Defendant submitted "competent evidence establishing that plaintiff's activities were not curtailed to a great extent and that [he] therefore did not sustain a serious injury under the 90/180[-day] category of serious injury," and plaintiff failed to raise a triable issue of fact with respect to that category (*Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012] [internal quotation marks omitted]; *see Swanson v Dominesey*, 187 AD3d 1551, 1552 [4th Dept 2020]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the significant limitation of use and permanent consequential limitation of use categories, and we therefore modify the order accordingly. Defendant failed to meet his initial burden of establishing that plaintiff did not sustain a serious injury under those categories that was causally related to the accident inasmuch as his own submissions raised triable issues of fact (*see Barnes v Occhino*, 171 AD3d 1455, 1456 [4th Dept 2019]; *Mancuso v Collins*, 32 AD3d 1325, 1325-1326 [4th Dept 2006]). Indeed, defendant's own medical expert diagnosed plaintiff with a cervical strain and cervicogenic headaches; noted plaintiff's ongoing complaints of numbness, stiffness and pain; performed objective testing that revealed loss of range of motion in the spine; and reviewed numerous imaging studies showing spinal irregularities (*see Rook v Wood*, 234 AD3d 1307, 1308 [4th Dept 2025]; *Banas v Waikiki*, 216 AD3d 1413, 1415 [4th Dept 2023]). Because defendant failed to meet his initial burden on the motion with respect to the significant limitation of use and permanent consequential limitation of use categories, "the burden never shifted to plaintiff to raise a triable issue of fact" (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation marks omitted]; *see Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: May 2, 2025 Ann Dillon Flynn
Clerk of the Court

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

157
CA 24-01288
PRESENT: WHALEN, P.J., BANNISTER, OGDEN, NOWAK, AND KEANE, JJ.

LEE FANG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-RESPONDENT.

LEE FANG, PLAINTIFF-APPELLANT PRO SE.

SAMUEL A. ALBA, INTERIM TOWN ATTORNEY, WILLIAMSVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 19, 2024. The order, inter alia, granted the motion of defendant and dismissed the complaint.

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

Memorandum: On November 7, 2023, plaintiff commenced this action against defendant Town of Amherst (Town) to recover for property damage allegedly caused by its negligence in repaving a street adjacent to his property in August 2020. The Town moved, as relevant here, to dismiss the complaint, contending, among other things, that the action was barred by the statute of limitations. Plaintiff appeals from an order that, inter alia, granted the motion, and we affirm.

General Municipal Law § 50-i (1) (c) requires commencement of an action against a town for damage to real property "alleged to have been sustained by reason of the negligence or wrongful act of such . . . town" to occur "within one year and [90] days after the happening of the event upon which the claim is based." An action to recover damages for injury to property "accrues 'when the damage [is] apparent' " (*Russell v Dunbar*, 40 AD3d 952, 953 [2d Dept 2007]; *see EPK Props., LLC v Pfohl Bros. Landfill Site Steering Comm.*, 159 AD3d 1567, 1568 [4th Dept 2018]).

Before the commencement of this action, plaintiff had commenced a prior action seeking the same relief and filed a timely notice of claim but failed to appear for a properly demanded General Municipal Law § 50-h examination because of concerns regarding the ongoing COVID-19 pandemic. As a result, Supreme Court granted the Town's prior cross-motion for summary judgment dismissing the amended complaint without prejudice (*Fang v Town of Amherst*, 217 AD3d 1318,

1318-1319 [4th Dept 2023]). In the prior appeal, we noted that the court granted the cross-motion "without prejudice and only after securing from [the Town's] counsel concessions that plaintiff's refiling would not be precluded by the statute of limitations and that accommodations would be offered to hold the [section 50-h] hearing in a manner that addressed plaintiff's pandemic-related concerns" (*id.* at 1319). In other words, plaintiff was not precluded on statute of limitations grounds from subsequently filing a summons and complaint should he appear for a General Municipal Law § 50-h examination, which provided relevant accommodations and had been timely demanded by the Town under General Municipal Law § 50-h (2).

While the prior appeal was pending, the Town sent plaintiff a timely demand for a new, virtual section 50-h examination. However, plaintiff again failed to appear despite the Town's accommodations for plaintiff's pandemic-related concerns. Instead, plaintiff filed a new notice of claim and commenced the current action. Inasmuch as this new action was filed more than one year and 90 days " 'after the happening of the event upon which the claim is based' " (*Sharpe v Town of Conesus*, 19 AD3d 1029, 1029 [4th Dept 2005]), the Town established that this action is time-barred (*see generally Collins v Davirro*, 160 AD3d 1343, 1343-1344 [4th Dept 2018]).

Contrary to plaintiff's contention, the continuing wrong doctrine does not apply under these circumstances. Because that doctrine " 'may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct' " (*Coe v Village of Waterloo*, 229 AD3d 1119, 1121 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025]; *see Matter of Salomon v Town of Wallkill*, 174 AD3d 720, 721 [2d Dept 2019]), it does not apply where, as here, plaintiff's allegation of damages is predicated on a single specific act.

We also reject plaintiff's contention that the Town should be equitably estopped from pleading a statute of limitations defense (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]). A defendant is estopped from pleading a statute of limitations defense if the " 'plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action' " (*id.*). Here, plaintiff has failed to show that the Town engaged in any fraud, misrepresentations, or deception (*see generally Merrill Lynch Credit Corp. v Smith*, 87 AD3d 1391, 1393 [4th Dept 2011]; *Pecoraro v M&T Bank Corp.*, 11 AD3d 950, 952 [4th Dept 2004]).

Entered: May 2, 2025 Ann Dillon Flynn
Clerk of the Court

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

159

CA 23-02164

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

NATHANIEL TOTARO, PLAINTIFF,
AND KRISTINE SIMMONS-KINDRON,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN MALINOWSKI, DEFENDANT-RESPONDENT.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered December 14, 2023. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint of plaintiff Kristine Simmons-Kindron.

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 complaint of plaintiff Kristine Simmons-Kindron, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, among other things, to recover damages for injuries that Kristine Simmons-Kindron (plaintiff) allegedly sustained in an automobile accident with defendant. Plaintiffs alleged that, as a result of the accident, plaintiff suffered injuries that constituted serious injuries within the meaning of Insurance Law § 5102 (d) under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories. Plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint as to plaintiff. We modify.

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Cohen v Broten*, 197 AD3d 949,

950 [4th Dept 2021]; *Lamar v Anastasi*, 188 AD3d 1637, 1637 [4th Dept 2020]).

Here, contrary to plaintiff's contention, Supreme Court properly granted the motion with respect to the 90/180-day category. Defendant submitted "competent evidence establishing that plaintiff's activities were not curtailed to a great extent and that [she] therefore did not sustain a serious injury under the 90/180[-day] category of serious injury," and plaintiff failed to raise a triable issue of fact with respect to that category (*Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012] [internal quotation marks omitted]; *see Swanson v Dominesey*, 187 AD3d 1551, 1552 [4th Dept 2020]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the significant limitation of use and permanent consequential limitation of use categories, and we therefore modify the order accordingly. We conclude that defendant failed to meet his initial burden of establishing that plaintiff did not sustain a serious injury under those categories that was causally related to the accident inasmuch as his own submissions raised triable issues of fact (*see Barnes v Occhino*, 171 AD3d 1455, 1456 [4th Dept 2019]; *Mancuso v Collins*, 32 AD3d 1325, 1325-1326 [4th Dept 2006]). With respect to plaintiff's alleged preexisting conditions, defendant failed to establish that plaintiff's "alleged injuries sustained in the accident were preexisting . . . or, if they were, that they were not exacerbated by the accident" (*Clark v Aquino*, 113 AD3d 1076, 1076 [4th Dept 2014] [internal quotation marks omitted]; *see generally Pommells v Perez*, 4 NY3d 566, 580 [2005]). Because defendant failed to meet his initial burden to that extent, "the burden never shifted to plaintiff to raise a triable issue of fact" (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation marks omitted]; *see Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

174

CA 24-01388

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

IN THE MATTER OF THE ESTATE OF
JEANNETTE M. METZ, DECEASED.

THOMAS WATKINS, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAMES METZ, LAURIE CRAWFORD, DAVID PELLEGRINO
AND LESLIE PECK, OBJECTANTS-APPELLANTS.

THE BLAIR LAW GROUP LLP, TONAWANDA (MICHAEL S. SILVERSTEIN OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

RUPP PFALZGRAF LLC, BUFFALO (THOMAS J. LANG OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate’s Court, Erie County (Acea M. Mosey, S.), entered February 26, 2024. The order, inter alia, dismissed in part the objections of objectants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by sustaining objections (a) and (h) to the extent of directing petitioner to file an amended account that includes the years 2008 and 2009, sustaining objections (e) and (f) to the extent of directing an additional surcharge of petitioner in the amount of $58,000, and sustaining objection (g), and as modified the order is affirmed without costs and the matter is remitted to Surrogate’s Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to SCPA article 22 for a judicial settlement of his account as the attorney-in-fact for decedent, Jeannette M. Metz. Objectants, interested parties who filed objections to the account, appeal from an order that denied their objections in part, and we modify.

Objectants first contend that petitioner’s account is incomplete because, inter alia, it does not cover the time period prior to 2010 despite the fact that petitioner acted as decedent’s agent pursuant to a durable short form power of attorney (*see generally* General Obligations Law art 5, title 15) during 2008 and 2009. We agree. Petitioner testified that in 2008 he transferred and then liquidated one of decedent’s investment accounts in his role as decedent’s attorney-in-fact, and documentary evidence establishes that petitioner was also acting as decedent’s attorney-in-fact when he liquidated one of decedent’s annuities in 2009. Although the parameters of an account are generally a matter of discretion for Surrogate’s Court (*see Matter of Adam D. & Krystyna M. Dioguardi Living Trust U/A Dtd.*

Jan. 28, 1997 [Beck—Dioguardi], 145 AD3d 1494, 1495 [4th Dept 2016]; *see generally* SCPA 2205 [1] [a]), we conclude that petitioner's account should cover the entire time period during which he was handling decedent's financial affairs as her attorney-in-fact (*see Matter of Hastings*, 184 AD2d 849, 851 [3d Dept 1992]). Inasmuch as the account here does not cover the years 2008 and 2009, during which petitioner was handling decedent's financial affairs as her attorney-in-fact, it is incomplete. We therefore modify the order by sustaining objections (a) and (h) in part and direct petitioner to file an amended account that includes the years 2008 and 2009, and we remit the matter to Surrogate's Court for further proceedings with respect to the amended portion of the account pursuant to SCPA article 22 (*see generally Matter of Jewett*, 145 AD3d 1114, 1124 [3d Dept 2016]).

Objectants next contend that the Surrogate erred in failing to surcharge petitioner for 12 cashier's checks totaling $58,000 that were withdrawn from decedent's savings account and deposited into petitioner's account. "In an accounting proceeding, the party submitting the account has the burden of proving that he or she has fully accounted for all the assets [at issue] . . . , and this evidentiary burden does not change in the event the account is contested" (*Matter of Schnare*, 191 AD2d 859, 860 [3d Dept 1993], *lv denied* 82 NY2d 653 [1993]; *see Matter of Pavlyak*, 139 AD3d 1338, 1339 [4th Dept 2016]). Here, petitioner failed to satisfy his burden of proof with respect to the cashier's checks inasmuch as the account and his testimony failed to substantiate any expense of decedent relating to those checks. Thus, we further modify the order by sustaining objections (e) and (f) in part and directing an additional surcharge of petitioner in the amount of $58,000.

Objectants also contend that petitioner, in breach of his fiduciary duty to decedent, engaged in self-dealing when acting as decedent's attorney-in-fact by managing her assets in a way that frustrated her estate plan to his benefit. "[A] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal," and thus "the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Matter of Ferrara*, 7 NY3d 244, 254 [2006] [internal quotation marks omitted]; *see Blase v Blase*, 148 AD3d 1777, 1778-1779 [4th Dept 2017]; *Mantella v Mantella*, 268 AD2d 852, 852 [3d Dept 2000]; *see generally* General Obligations Law § 5-1505 [2] [a]). Although the power of attorney gave petitioner authority to "make[ ] gifts and transfers of [decedent's] property, of any kind and in any amount, real or personal, to the agent or others, with or without consideration," petitioner was obligated to exercise that authority "consistent with [decedent's] financial, estate or tax planning techniques and objectives—not to create gift-giving authority generally, and certainly not to supplant a will" (*Ferrara*, 7 NY3d at 253). Here, we agree with objectants that petitioner exercised his authority as attorney-in-fact to selectively preserve certain assets in which he

had a greater interest as a beneficiary at the expense of other assets in which he had a lesser interest as beneficiary, thereby frustrating decedent's estate plan and supplanting her will. In particular, in determining which assets to liquidate, petitioner looked first to those assets in which he had a lesser interest as beneficiary and then transferred portions of those liquidated assets into accounts that he held jointly with decedent. We therefore further modify the order by sustaining objection (g), and we remit the matter to Surrogate's Court to determine an appropriate surcharge.

Contrary to objectants' further contentions, we conclude that the Surrogate did not abuse her discretion in declining to award either attorney's fees or pre-judgment interest on the surcharge (*see generally Matter of Janes*, 90 NY2d 41, 55 [1997], *rearg denied* 90 NY2d 885 [1997]; *Matter of Manufacturers & Traders Trust Co. [Adams]*, 72 AD3d 1573, 1574 [4th Dept 2010]), although we note that the Surrogate's prior determination does not foreclose an award of attorney's fees or prejudgment interest upon remittal. Additionally, we conclude that the Surrogate did not abuse her discretion in denying objectants' posthearing motion to reopen the record. "Although a court has discretion to grant leave to reopen a matter to allow additional proof . . . , that discretion should be exercised sparingly" (*Matter of Markham v Comstock*, 38 AD3d 1262, 1263-1264 [4th Dept 2007]). Here, the motion was not timely made (*see id.* at 1264), and this is not an instance in which "a party [sought] to reopen and supply defects in evidence which have inadvertently occurred" (*Matter of Radisson Community Assn., Inc. v Long*, 28 AD3d 88, 91 [4th Dept 2006] [internal quotation marks omitted]).

We have reviewed objectants' remaining contentions and conclude that they are without merit.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

192

CA 24-00464

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

IN THE MATTER OF WILLIAM MATTAR, P.C.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIDGET RILEY, RESPONDENT-RESPONDENT.

RICHARD T. SULLIVAN PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (PETER A. SAHASRABUDHE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered February 28, 2024. The order granted in part and denied in part each party's motion for summary judgment.

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

Memorandum: Petitioner, a law firm, commenced this special proceeding seeking to resolve a dispute over attorney's fees with respondent, a former employee. Respondent answered the petition and asserted three counterclaims, alleging breach of contract, quantum meruit, and violations of the Labor Law, respectively, in which she sought compensation for certain "bonus" payments that she alleges were unlawfully withheld by petitioner after it terminated her employment. Petitioner thereafter moved for, inter alia, summary judgment dismissing the counterclaims, and respondent moved for summary judgment on the counterclaims. The fee dispute that was the subject of the petition has been resolved. Petitioner now appeals from an order that, inter alia, granted in part and denied in part the parties' respective motions.

Pursuant to the terms of her relevant employment and "Bonus Eligibility" agreements, respondent was entitled to receive an annual salary, plus certain "bonus" compensation if she exceeded certain thresholds. Such bonus compensation was calculated based on the actual gross receipts attributable to respondent for legal fees she generated during her employment, and it was conditioned upon respondent's continued employment at the time the fees "cleared" petitioner's operating account after being deposited therein. In her motion papers, respondent asserted, inter alia, that she is entitled to $28,000 in bonus payments that she earned by generating certain

fees, and that such bonus payments constituted nondiscretionary wages. Petitioner, on its motion and in response to respondent's motion, did not dispute that respondent generated certain fees, but asserted, inter alia, that respondent is not entitled to compensation for them because she was no longer employed when the fees were deposited into petitioner's account. Supreme Court granted petitioner's motion in part by dismissing the third counterclaim insofar as it sought liquidated damages under the Labor Law and granted respondent's motion in part by, inter alia, ordering that she is entitled to $21,216 under the first counterclaim. We affirm.

Labor Law § 193 (1) provides that "[n]o employer shall make any deduction from the wages of an employee" except under certain enumerated conditions not relevant here. Labor Law § 190 (1) defines "wages," in pertinent part, as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." It is well settled that "[t]he term 'wages,' despite its broad definition . . . [,] does not encompass an incentive compensation plan" (*Matter of Dean Witter Reynolds v Ross*, 75 AD2d 373, 381 [1st Dept 1980]; *see Magness v Human Resource Servs.*, 161 AD2d 418, 419 [1st Dept 1990]). The dispositive factor in determining whether compensation constitutes wages is not the labeling used in a compensation plan but whether the compensation is vested and mandatory as opposed to discretionary and forfeitable (*see Caruso v Allnet Communication Servs.*, 242 AD2d 484, 484-485 [1st Dept 1997]).

Contrary to petitioner's contention, it failed to meet its initial burden on its motion with respect to the breach of contract counterclaim, and the court properly determined on respondent's motion that she is entitled to $21,216 on that counterclaim. There is no dispute that the additional compensation owed to respondent in connection with the relevant underlying fees constituted earned "wages" that were "vested and mandatory as opposed to discretionary and forfeitable" (*Truelove v Northeast Capital & Advisory*, 268 AD2d 648, 649 [3d Dept 2000], *affd* 95 NY2d 220 [2000]; *see* Labor Law § 190 [1]; *see also Doolittle v Nixon Peabody LLP*, 126 AD3d 1519, 1520 [4th Dept 2015]). In addition, we conclude that petitioner's failure to pay respondent that compensation constituted a deduction from wages in violation of Labor Law § 193 (1) (*cf. Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449-450 [1st Dept 2017]; *Miles A. Kletter, D.M.D. & Andrew S. Levine, D.D.S., P.C. v Fleming*, 32 AD3d 566, 567 [3d Dept 2006]; *see generally Doolittle*, 126 AD3d at 1522). To the extent that the provisions of the relevant "Bonus Eligibility" agreement restricted payments of bonuses to current employees, such provisions are void as against public policy (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 110 [2018]). Thus, with respect to that part of her motion seeking compensation in the amount of $21,216 under the first counterclaim, respondent met her initial burden of establishing her entitlement to judgment as a matter of law (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and petitioner failed to raise a triable issue of fact (*see generally Jacobsen v New York City

Health & Hosps. Corp., 22 NY3d 824, 833 [2014]). In addition, we conclude that, contrary to petitioner's contention, the court properly determined that there are questions of fact regarding $6,784 in additional compensation sought by respondent in connection with other underlying fees (*see generally Alvarez*, 68 NY2d at 324).

We reject petitioner's contention that respondent's counterclaims for breach of contract and quantum meruit are duplicative and that the quantum meruit counterclaim should therefore have been dismissed (*see generally* CPLR 3014; *Haythe & Curley v Harkins*, 214 AD2d 361, 362 [1st Dept 1995]).

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

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

213
CA 24-01167
PRESENT: LINDLEY, J.P., CURRAN, GREENWOOD, AND OGDEN, JJ.

BRADLEY J. GARLOW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SEAN G. CUNNINGHAM, DEFENDANT-APPELLANT.

LEWIS BRISBOIS BISGAARD & SMITH, LLP, NEW YORK CITY (NICHOLAS HURZELER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered April 26, 2024. The order denied the motion of defendant pursuant to CPLR 2104.

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

Memorandum: In this negligence action arising from a collision between a motorcycle operated by plaintiff and a vehicle operated by defendant, defendant appeals from an order denying his motion to enforce a purported settlement agreement pursuant to CPLR 2104 and discontinue the action with prejudice. As a result of the accident, plaintiff sustained personal injuries and his motorcycle was damaged. Defendant's insurance carrier offered to settle both the personal injury claim and the property damage claim for $100,000. Consistent with that offer, an adjuster from the insurer sent a proposed release to plaintiff. Upon advice of counsel, plaintiff signed the release but deleted all language referencing his property damage claim and inserted the clause "other than property damage." In other words, the release signed by plaintiff and returned to defendant's carrier was limited to his personal injury claim. When she received the modified release, the adjuster called plaintiff's attorney and rejected it. Several months later, the parties settled the property damage claim for $7,163.63, and the carrier sent plaintiff a check in that amount.

The adjuster subsequently sent plaintiff another release in the amount of $100,000, but plaintiff refused to sign that release or a stipulation of discontinuance. Defendant thereafter moved for an order enforcing the purported "settlement," contending that the modified release signed by plaintiff constituted a stipulation under CPLR 2104. Supreme Court denied the motion and we now affirm.

CPLR 2104 provides that "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk." "[T]o be enforceable under CPLR 2104 an out-of-court settlement must be adequately described in a signed writing" (*Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]) and should reflect a complete agreement as to "all the material terms of the settlement" (*id.* at 285; *see Velazquez v St. Barnabas Hosp.*, 13 NY3d 894, 895 [2009]).

Here, defendant failed to establish that the modified release signed by plaintiff constitutes an enforceable stipulation of settlement. The modified release amounted to a counteroffer from plaintiff to settle the personal injury claim alone for $100,000, and that counteroffer was expressly rejected by defendant's insurer (*cf. Herz v Transamerica Life Ins. Co.*, 172 AD3d 1336, 1338 [2d Dept 2019]; *Gaglia v Nash*, 8 AD3d 992, 993 [4th Dept 2004]). As the court determined, at no time was there a meeting of the minds between the parties with respect to settlement of the personal injury claim. When plaintiff initially was willing to accept $100,000 for his injuries, defendant insisted that the $100,000 settlement encompassed the property damage claim as well. By the time defendant's insurer was willing to settle the personal injury claim alone for $100,000 (having already paid plaintiff for his property damage), plaintiff had changed his mind and no longer wished to accept $100,000 for his injuries. Under the circumstances, the court properly determined that there was no writing signed by both parties reflecting an agreement on all material terms (*see generally Velazquez*, 13 NY3d at 895).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

218
KA 23-02073
PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN H. VANDERBILT, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIAN SHIFFRIN 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 (Richard M. Healy, J.), rendered January 25, 2023. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, resisting arrest and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on the conviction of reckless driving under count 3 of the indictment, and as modified the judgment is affirmed, and the matter is remitted to Wayne County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the second degree (Penal Law § 120.05 [3]), resisting arrest (§ 205.30), and reckless driving (Vehicle and Traffic Law § 1212). The charges arose from an incident in which defendant, who was operating a motorcycle affixed with an illegal license plate while he lacked a valid driver's license, fled from a traffic stop through a village at a high rate of speed and eventually engaged in a physical struggle with the arresting police officer in a residential yard, resulting in injuries to the officer.

We note at the outset that the notice of appeal contains an inaccurate description of the judgment inasmuch as its statement of the crimes of conviction is incomplete (*see People v Carter*, 200 AD3d 1312, 1313 n [3d Dept 2021]; *People v Delgado*, 183 AD3d 1236, 1236 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]). The notice of appeal is otherwise accurate, however, and we therefore exercise our discretion, in the interest of justice, and treat the notice of appeal as valid (*see* CPL 460.10 [6]; *Delgado*, 183 AD3d at 1236).

Defendant contends that County Court erred in granting his request to proceed pro se because the court failed to conduct a

sufficient inquiry to ensure that his waiver of the right to counsel was knowing, intelligent, and voluntary. We reject that contention.

"It is well settled that a criminal defendant's constitutional right to counsel concomitantly includes the right to refuse appointed counsel" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 384-385 [2011]; *see* US Const Amend VI; NY Const, art I, § 6; *Faretta v California*, 422 US 806, 817 [1975]; *People v McIntyre*, 36 NY2d 10, 15 [1974]). In other words, there is a constitutional right "to self-representation at trial, . . . and [a] corresponding—and sometimes competing—requirement that the state provide [a] defendant competent counsel to conduct [their] defense" (*People v Stone*, 22 NY3d 520, 525 [2014]). Indeed, the Court of Appeals has recognized that there is an "inherent conflict between a defendant's right to counsel and the right of self-representation" (*People v Arroyo*, 98 NY2d 101, 102 [2002]). "In light of the multifaceted problems generated by a motion to proceed pro se, the task of the trial court is exceedingly difficult" (*McIntyre*, 36 NY2d at 14). The right to self-representation is therefore "subject to certain restrictions," which serve "to promote the orderly administration of justice and to prevent subsequent attack on a verdict claiming a denial of fundamental fairness" (*id.* at 17). Consequently, "[a] defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*id.*).

"If a timely and unequivocal request has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary" (*Kathleen K.*, 17 NY3d at 385; *see People v Crampe*, 17 NY3d 469, 481-482 [2011], *cert denied* 565 US 1261 [2012]). The inquiry must be "aimed at insuring that the defendant '[is] aware of the dangers and disadvantages of proceeding without counsel' " (*People v Providence*, 2 NY3d 579, 582 [2004], quoting *People v Slaughter*, 78 NY2d 485, 492 [1991]; *see People v Blue*, 42 NY3d 584, 591 [2024], *rearg denied* 42 NY3d 1073 [2025]). "Additionally, a searching inquiry encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity" (*Crampe*, 17 NY3d at 482; *see Blue*, 42 NY3d at 591; *Providence*, 2 NY3d at 582-583). Nonetheless, "[m]indful that there is simply no one-size-fits-all format for a searching inquiry . . . , [the Court of Appeals] ha[s] eschewed application of any rigid formula and endorsed the use of a nonformalistic, flexible inquiry" (*Blue*, 42 NY3d at 592 [internal quotation marks omitted]; *see Providence*, 2 NY3d at 583).

"When a defendant challenges the validity of their waiver on appeal, 'a reviewing court may look to the whole record, not simply to the questions asked and answers given during a waiver colloquy,' to determine whether the defendant effectively waived counsel" (*Blue*, 42 NY3d at 592, quoting *Providence*, 2 NY3d at 581). "In reviewing the

record, '[t]he critical consideration is defendant's knowledge at the point in time when he first waived his right to counsel' " (*id.*, quoting *Crampe*, 17 NY3d at 483). "Although post-colloquy proceedings cannot retrospectively cur[e] an invalid waiver, the record as a whole may . . . be considered when a court assesses whether the accused [was] aware of the dangers of self-representation at the time of the waiver colloquy" (*id.* [internal quotation marks omitted]).

Here, we note initially that defendant "does not dispute that his request to represent himself was unequivocal" under the first prong of the *McIntyre* test (*People v Chandler*, 109 AD3d 1202, 1203 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]). In any event, the record demonstrates that defendant's request to proceed pro se was unequivocal inasmuch as defendant, from his first appearance through trial, repeatedly and steadfastly "declined to accept assigned counsel" or to retain an attorney and "adhered to his desire to represent and speak for himself" (*People v Yu-Jen Chang*, 92 AD3d 1132, 1133 [3d Dept 2012]; *see People v Dixon*, 42 NY3d 609, 618-619 [2024]). "[A] request for self-representation does not require the recitation of '[a] talismanic formula' to alert a trial court" and, here, defendant's statements "reflect[ed] a purposeful decision to relinquish the benefit of counsel and proceed singularly" (*Kathleen K.*, 17 NY3d at 386; *see People v Barksdale*, 191 AD3d 1370, 1372 [4th Dept 2021], *lv denied* 36 NY3d 1118 [2021]).

We reject defendant's assertion that he did not effectively waive his right to counsel under the second prong of *McIntyre*. Upon our review of "the whole record, not simply . . . the questions asked and answers given during [the] waiver colloquy" (*Providence*, 2 NY3d at 581; *see Blue*, 42 NY3d at 592), we conclude that defendant made a knowing, voluntary and intelligent waiver of his right to counsel (*see e.g. People v Abdullah*, 194 AD3d 1346, 1346-1347 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]; *People v Robinson*, 193 AD3d 1393, 1394 [4th Dept 2021], *lv denied* 37 NY3d 968 [2021]). The record establishes that the court conducted a sufficiently searching inquiry to ensure that defendant was " 'aware of the dangers and disadvantages of self-representation' " (*Providence*, 2 NY3d at 582; *see Abdullah*, 194 AD3d at 1347). In particular, the court repeatedly and strongly implored defendant prior to the waiver colloquy to avail himself of the right to counsel through which he would have the assistance of a highly trained legal professional and, during the colloquy itself, the court explained at length, based on language from the model colloquy (*see* NY Model Colloquies, Waiver of Counsel), among other things, that a person untrained in the law such as defendant would be at a disadvantage in defending themselves, that defendant ran the risk of making evidentiary mistakes, and that defendant would be held to the same standard of conduct as an attorney (*see People v Vivenzio*, 62 NY2d 775, 776 [1984]).

Defendant nonetheless asserts that the court's inquiry was deficient because the court failed to specifically ask him pedigree questions. That assertion lacks merit. "[A]lthough the 'better practice' is for the trial judge to interrogate the defendant about

various topics relevant to self-representation in a criminal case—such as the defendant's age, education, occupation, and prior experience with the criminal justice system—the Court of Appeals in *Providence* nevertheless reiterated that 'a waiver of the right to counsel will *not* be deemed ineffective simply because a trial judge does not ask questions designed to elicit each of the [various] specific items of information' " (*People v Rogers*, 186 AD3d 1046, 1047-1048 [4th Dept 2020], *lv denied* 36 NY3d 931 [2020], quoting *Providence*, 2 NY3d at 583). Moreover, even in the absence of specific pedigree questions during the colloquy, the record establishes that the court " 'had numerous opportunities to see and hear . . . defendant firsthand, and, thus, had general knowledge of defendant's age, literacy and familiarity with the criminal justice system' " (*Chandler*, 109 AD3d at 1203; *see Providence*, 2 NY3d at 583-584; *Abdullah*, 194 AD3d at 1346-1347).

To the extent that defendant further asserts that the court's inquiry was insufficient because it did not delve into defendant's capacity to represent himself, we conclude that the court did not "abuse[ ] its discretion in failing to undertake a particularized assessment of defendant's mental capacity when resolving [his] request to proceed pro se" (*Stone*, 22 NY3d at 529). Here, "when defendant expressed a desire to represent himself, the trial court had no reason to question his mental health, much less a basis to believe that defendant suffered from an illness severe enough to impact his ability to waive counsel and proceed pro se" (*id.* at 528). Moreover, defendant's "expression of strange beliefs about law did not disqualify him from exercising his right of self-representation" (*People v Herbin*, 187 AD3d 520, 521 [1st Dept 2020], *lv denied* 36 NY3d 1051 [2021]; *see People v Stamps*, 296 AD2d 325, 326 [1st Dept 2002], *lv denied* 99 NY2d 540 [2002], *reconsideration denied* 100 NY2d 543 [2003]; *see generally Stone*, 22 NY3d at 528-529). Defendant nevertheless proposes that we reward his recalcitrant adherence to fringe theories by faulting the court for failing to receive sufficiently responsive answers from defendant regarding his awareness of the dangers and disadvantages of proceeding without counsel. We reject defendant's attempt to "pervert the system" of criminal justice in that manner (*McIntyre*, 36 NY2d at 17). Although defendant frequently replied to the court's questions with nonresponsive legal arguments, including that he did not "understand" how the prosecution on ostensibly illegal charges could proceed, "the record supports the conclusion that [defendant's] replies did not demonstrate a genuine lack of comprehension[of the court's warnings], but instead indicated recalcitrance and attempts to repeatedly assert [his] bizarre legal claims" (*Herbin*, 187 AD3d at 521).

To the extent that defendant asserts that the court should have denied his request to proceed pro se under the third prong of *McIntyre*, we conclude on the record before us that defendant's assertion lacks merit because, "while he made the proceedings exceedingly difficult, he did not engage in conduct that prevented 'the fair and orderly' disposition of the charges" (*Yu-Jen Chang*, 92 AD3d at 1134; *cf. People v Williams*, 203 AD3d 1571, 1572 [4th Dept 2022], *lv denied* 38 NY3d 1075 [2022]).

Lastly on this issue, defendant asserts that his alleged poor performance while proceeding pro se, including his failure to file certain motions, demonstrates that the court erred in granting his request to represent himself. That assertion lacks merit. "Regardless of his lack of expertise and the rashness of his choice, defendant could choose to waive counsel [where, as here, the record reflects that] he did so knowingly and voluntarily" (*Vivenzio*, 62 NY2d at 776; *see Barksdale*, 191 AD3d at 1372; *People v Malone*, 119 AD3d 1352, 1355 [4th Dept 2014], *lv denied* 24 NY3d 1003 [2014]). It is well settled that, "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open" (*McIntyre*, 36 NY2d at 14 [internal quotation marks omitted]; *see Barksdale*, 191 AD3d at 1372; *Malone*, 119 AD3d at 1355).

Defendant further contends that the court violated his constitutional and statutory rights by failing to provide adequate accommodations for his purported hearing impairment. We conclude that defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Robles*, 86 NY2d 763, 765 [1995]; *People v Garcia-Cruz*, 138 AD3d 1414, 1414 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *People v Oxman*, 74 Misc 3d 130[A], 2022 NY Slip Op 50131[U], *1 [App Term, 1st Dept 2022]). In any event, defendant's contention lacks merit inasmuch as the record establishes that the court "adequately addressed the isolated occasions whe[n] defendant indicated that he had not heard what was said and 'there was no obvious impairment necessitating the provision by the court, *sua sponte*, of' further assistance" (*People v Thomas*, 169 AD3d 1255, 1256 [3d Dept 2019], *lv denied* 33 NY3d 1036 [2019]; *see People v Phillips*, 265 AD2d 237, 237 [1st Dept 1999], *lv denied* 94 NY2d 906 [2000]).

Next, to the extent that defendant contends that he was penalized for exercising his right to trial, that contention is not preserved for our review (*see People v Hurley*, 75 NY2d 887, 888 [1990]; *People v Vanwuyckhuyse*, 224 AD3d 1315, 1317 [4th Dept 2024], *lv denied* 41 NY3d 967 [2024]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Elmore*, 195 AD3d 1575, 1577 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. We conclude, however, that the discrepancy between the sentencing minutes and the court's fine, fee and surcharge order together with the certificate of disposition requires vacatur of the sentence imposed on the conviction of reckless driving under count 3 of the indictment (*see People v Caldwell*, 211 AD3d 1491, 1492-1493 [4th Dept 2022]; *People v Settles*, 192 AD3d 1510, 1512-1513 [4th Dept 2021], *lv denied* 37 NY3d 960 [2021]; *People v Mohammed*, 151 AD2d 1018, 1018-1019 [4th Dept 1989], *lv denied* 74 NY2d 815 [1989]). In relevant part, the minutes from the sentencing proceeding indicate that the court imposed a definite term of 30 days of imprisonment and "no fine" on the conviction of reckless driving, but the fine, fee and surcharge

order signed by the court the same day, together with the certificate of disposition, indicate that the court imposed a definite term of 30 days of imprisonment and a $100 fine on that count. Inasmuch as the court may have erred in imposing the fine in its written order, and because it is well settled that courts have the " 'inherent power to correct their records, where the correction relates to mistakes, or errors, which may be termed clerical in their nature, or where it is made in order to conform the record to the truth' " (*People v Minaya*, 54 NY2d 360, 364 [1981], *cert denied* 455 US 1024 [1982]; *see People v Gammon*, 19 NY3d 893, 895 [2012]), we modify the judgment by vacating the sentence imposed on count 3 of the indictment and remit the matter to County Court for resentencing on that count so that the court may correct the record by indicating whether the sentence on that count is to include a fine (*see Caldwell*, 211 AD3d at 1493; *Mohammed*, 151 AD2d at 1018-1019).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

231
CA 24-00660
PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

TODD G. MONAHAN, LITTLE FALLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered April 16, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued petitioner's confinement in a secure treatment facility.

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

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

Contrary to petitioner's contention, respondent, State of New York (State), met its burden of proving by clear and convincing evidence that he requires continued confinement. The State presented the opinions of its own expert and the independent psychologist appointed by Supreme Court, who unanimously recommended that petitioner continues to require confinement in a secure facility, with each expert citing, among other things, petitioner's "varied" or "moderate" progress in treatment, his recent behavior reflecting the need for further treatment before he could be considered a candidate for release, and his relative risk of reoffending (*see Matter of State of New York v Mahwee S.*, 232 AD3d 1325, 1325-1326 [4th Dept 2024], *lv denied* — NY3d — [2025]; *Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585-1586 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]; *Matter of State of New York v Treat*, 100 AD3d 1513, 1513 [4th Dept 2012]; *see generally Matter of Daniel J. v State of New York*, 229 AD3d 1147, 1148 [4th Dept 2024], *lv denied* 42 NY3d 910 [2025]).

Petitioner further contends that he received ineffective

assistance of counsel. Petitioner, however, failed to meet his burden of establishing the "absence of strategic or other legitimate explanations for his attorney's alleged deficiencies" (*Matter of State of New York v Leslie L.*, 174 AD3d 1326, 1327 [4th Dept 2019], *lv denied* 34 NY3d 903 [2019]).

All concur except DELCONTE, J., who concurs in the result in the following memorandum: I concur with my colleagues that respondent, State of New York (State), met its burden of proving by clear and convincing evidence that petitioner continues to suffer from a mental abnormality and remains a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]; *see generally Matter of State of New York v Mahwee S.*, 232 AD3d 1325, 1325-1326 [4th Dept 2024], *lv denied* — NY3d — [2025]; *Matter of State of New York v Treat*, 100 AD3d 1513, 1513 [4th Dept 2012]).

I write separately to emphasize my view that a court's role in an annual review hearing is to determine whether the State has met its burden of proof, and not—contrary to petitioner's contention—to exercise independent psychological judgment and disregard the unanimous opinions of the psychiatric experts (*see generally Matter of Doy S. v State of New York*, 196 AD3d 1165, 1168 [4th Dept 2021]; *Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340 [4th Dept 2020]).

Here, at the annual review hearing, petitioner stipulated: (1) that he suffered from a mental abnormality (*see* Mental Hygiene Law § 10.03 [i]); (2) that both the State's expert and the independent psychiatric examiner assigned by the court qualified as expert witnesses (*see* § 10.09 [b]); and (3) to the admission in evidence of both experts' forensic reports (*see id.*), which uniformly concluded, inter alia, that petitioner remains a dangerous sex offender requiring confinement (*see* § 10.09 [d], [h]). Petitioner did not call any witnesses and did not testify and, although petitioner's counsel strenuously cross-examined the State's expert, the State's expert testified—consistent with the unanimous reports—that petitioner remains a dangerous sex offender requiring confinement. Nevertheless, petitioner contends that, through sex offender therapy while confined, he has gained insight and self-awareness into his "struggles with sexual attraction to children" and, on that basis alone, we should conclude that he is not so dangerous as to require continuing confinement. Inasmuch as petitioner did not contest the legal sufficiency of the experts' opinions and failed to effectively challenge the credibility of both experts, the court concluded, correctly in my view, that there was no legal basis for it to "substitute[ ] its own psychological judgment for that of the parties' experts" and disregard their uncontroverted opinions (*Doy S.*, 196 AD3d at 1168; *see generally Richard F.*, 180 AD3d at 1340).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

239
KA 20-00368
PRESENT: WHALEN, P.J., CURRAN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK CASSATA, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered March 7, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree, aggravated vehicular homicide, vehicular manslaughter in the first degree, leaving the scene of an incident resulting in injury or death, aggravated driving while intoxicated, and driving while intoxicated (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [2]), aggravated vehicular homicide (§ 125.14 [1]), vehicular manslaughter in the first degree (§ 125.13 [1]), and aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]) as a result of an incident in which defendant, after arguing with a group of people on a sidewalk, got into his vehicle and drove onto the sidewalk and a front lawn, where he struck and killed a three-year-old child and seriously injured another victim. Defendant continued driving, hitting a fire hydrant as he swerved the vehicle back onto the road, and drove down the road at a high rate of speed through at least one intersection controlled by a stop sign before crashing into another vehicle.

Defendant contends that his conviction of murder in the second degree is not supported by legally sufficient evidence that he acted with depraved indifference to human life. We reject that contention. A person commits depraved indifference murder when, "[u]nder circumstances evincing a depraved indifference to human life, [the person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another

person” (Penal Law § 125.25 [2]). Depraved indifference is a mental state that “ ‘is best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn’t care whether grievous harm results or not’ ” (*People v Heidgen*, 22 NY3d 259, 274 [2013], *cert denied* 574 US 1063 [2014], quoting *People v Feingold*, 7 NY3d 288, 296 [2006]; *see People v Archie*, 118 AD3d 1292, 1293 [4th Dept 2014], *lv denied* 26 NY3d 965 [2015]). Here, the evidence establishes that, although defendant may have initially aimed his vehicle at one of the people with whom he had been arguing, he continued driving along a crowded sidewalk after that person jumped out of the way. [D]riving an automobile along a crowded sidewalk at high speed” is a “[q]uintessential example[ ]” of depraved indifference (*People v Suarez*, 6 NY3d 202, 214 [2005]; *cf. People v Parris*, 173 AD3d 1745, 1746-1747 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]). Thus, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to establish that defendant acted with depraved indifference within the meaning of section 125.25 (2) (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that his conviction of aggravated vehicular homicide is not supported by legally sufficient evidence. The elements of aggravated vehicular homicide are statutorily defined as including two existing crimes, i.e., reckless driving (*see* Vehicle and Traffic Law § 1212) and vehicular manslaughter in the second degree (*see* Penal Law §§ 125.12, 125.14; *People v Goldblatt*, 98 AD3d 817, 818 [3d Dept 2012], *lv denied* 20 NY3d 932 [2012]). Here, defendant contends that, because the vehicle he was driving was on the lawn at the moment he struck the child with the vehicle, the People failed to prove that he operated a motor vehicle upon a public highway “in a manner which unreasonably interfered with the free and proper use of the *public highway* . . . , or unreasonably endangered users of the *public highway*” (Vehicle and Traffic Law § 1212 [a] [emphasis added]; *see* Penal Law § 125.14).

We reject that contention. Initially, we note that the Vehicle and Traffic Law broadly defines a public highway as “[a]ny highway, road, street, avenue, alley, public place, public driveway or any other public way” (Vehicle and Traffic Law § 134; *see People v Beyer*, 21 AD3d 592, 594 [3d Dept 2005], *lv denied* 6 NY3d 752 [2005]), and that term includes a sidewalk, inasmuch as a sidewalk is a “way ‘over which the public have a general right of passage’ ” (*People v Thew*, 44 NY2d 681, 682 [1978]; *see People v Marcus*, 19 AD2d 813, 813 [1st Dept 1963], *affd* 14 NY2d 505 [1964]; *Matter of County of Westchester v Winstead*, 231 AD2d 630, 630 [2d Dept 1996]; *see generally Hart v City of Buffalo*, 218 AD3d 1140, 1144-1145 [4th Dept 2023]). Here, defendant’s conduct in swerving the vehicle off and on the road, crossing over the sidewalk, and then traveling down the road and through an intersection at a high rate of speed unreasonably interfered with the use of both the road and the sidewalk, as well as endangered the pedestrians on the sidewalk. It was during the course of that conduct that defendant “cause[d] the death” of the child

(Penal Law § 125.12). We therefore conclude that there is a valid line of reasoning and permissible inferences that could lead a jury to conclude that the prosecution sustained its burden of proof with respect to the challenged element of aggravated vehicular homicide even if the vehicle had completely left the sidewalk at the precise moment of impact. Contrary to defendant's further contention, the evidence is also legally sufficient to establish that he operated a motor vehicle while having .18 of one per centum or more by weight of alcohol in his blood (*see* Penal Law §§ 125.13 [1]; 125.14 [1]; Vehicle and Traffic Law § 1192 [2-a] [a]).

Viewing the evidence in light of the elements of the crimes of murder in the second degree, aggravated vehicular homicide, vehicular manslaughter in the first degree, and aggravated driving while intoxicated as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: May 2, 2025 Ann Dillon Flynn
Clerk of the Court

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

254

KA 24-00056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD H. TAFT, JR., DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK 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 (John B. Nesbitt, J.), entered January 11, 2022. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, assault in the second degree and intimidating a victim or witness in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [1] [b]), assault in the second degree (§ 120.05 [1]), and intimidating a victim or witness in the third degree (§ 215.15 [1]). Defendant contends that the conviction with respect to burglary in the second degree is not supported by legally sufficient evidence that he intended to commit a crime when he entered or remained within the building (*see* § 140.25). Contrary to defendant's contention, the People presented legally sufficient evidence from which the jury could infer defendant's intent to commit a crime at the time of entry (*see People v Mercado-Ramos*, 161 AD3d 1516, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]; *see also People v Thompson*, 206 AD3d 1708, 1709 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that the conviction with respect to assault in the second degree is not supported by legally sufficient evidence (*see People v Tomion*, 174

AD3d 1495, 1496 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]). Viewing the evidence in light of the elements of the crime of assault in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence on the issues of his intent and whether he caused "serious physical injury" (Penal Law § 120.05 [1]) to the victim (*see generally Bleakley*, 69 NY2d at 495). At trial, the People presented evidence that defendant picked the victim up and slammed him onto the ground multiple times, causing a forearm fracture. Specific to the element of serious physical injury, the People also presented evidence that the victim experienced significant pain, was in a cast for six weeks, and was unable to seek timely physical therapy due to the COVID-19 pandemic; that untreated fractures can result in deformity and decreased mobility; and that, as of the time of trial, the victim still experienced pain and was unable to work outside in cold weather because his wrist would "lock up and start hurting," requiring him to "go inside to where [he could] move it," all of which supported the conclusion that the victim continued to experience pain and disability over a year and a half after the initial injury (*cf. People v Stewart*, 18 NY3d 831, 832-833 [2011]; *see generally People v Garland*, 32 NY3d 1094, 1096 [2018], *rearg denied* 33 NY3d 970 [2019], *cert denied* — US —, 140 S Ct 2525 [2020]). Thus, even if a different finding would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that County Court erred in holding portions of the trial in his absence. We note that defendant's contention presents a "mode of proceedings" error that is "immune from the requirement of preservation" (*People v Rivera*, 23 NY3d 827, 831 [2014] [internal quotation marks omitted]; *see People v Kelly*, 5 NY3d 116, 119-120 [2005]). Here, although defendant appeared during jury selection, he failed to reappear later that day following a break. Because defendant initially appeared for trial, the court was required to determine that his absence was deliberate in order to find that he had forfeited his right to be present (*see People v Sanchez*, 65 NY2d 436, 443-444 [1985]; *cf. People v Parker*, 57 NY2d 136, 140 [1982]). In making such a determination, a court should "inquire[ ] into the surrounding circumstances" and "recite[ ] on the record the facts and reasons it relied upon in determining that defendant's absence was deliberate" (*People v Brooks*, 75 NY2d 898, 899 [1990], *mot to amend remittitur granted* 76 NY2d 746 [1990]; *see People v Jenkins*, 45 AD3d 864, 865 [2d Dept 2007], *lv denied* 10 NY3d 766 [2008]; *People v Dugan*, 210 AD2d 971, 971 [4th Dept 1994], *lv denied* 85 NY2d 972 [1995]). Even if the court fails to recite those facts and reasons on the record, no error will be found so long as the court found the absence to be deliberate and the record contains sufficient facts to support that determination, such as where the court granted a brief adjournment to attempt to locate the defendant to no avail (*see e.g. People v Reed*, 197 AD2d 844, 845 [4th Dept 1993], *affd* 84 NY2d 945 [1994]).

Here, the court proceeded in defendant's absence without making a finding on the record that defendant's absence was deliberate, without

stating facts and reasons that would support a finding of deliberateness, and without granting an adjournment or taking other steps to locate defendant. Under these circumstances, the court committed reversible error and a new trial is required (*see Brooks*, 75 NY2d at 899; *Dugan*, 210 AD2d at 972). We note that, although defendant ultimately reappeared, "[b]ecause this defendant was absent during a material part of his trial, harmless error analysis is not appropriate" (*People v Mehmedi*, 69 NY2d 759, 760 [1987], *rearg denied* 69 NY2d 985 [1987]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

285
CA 24-00818
PRESENT: WHALEN, P.J., CURRAN, SMITH, NOWAK, AND DELCONTE, JJ.

MARK W. TIEDEMANN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANN MARIE SALERNO, DEFENDANT-RESPONDENT.

DIPASQUALE CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Michael Siragusa, A.J.), entered February 6, 2024. The order granted defendant's motion for summary judgment dismissing plaintiff's amended complaint.

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

Memorandum: In this action to rescind a postnuptial agreement that was incorporated but not merged in the parties' judgment of divorce, plaintiff appeals from an order that granted defendant's motion for summary judgment dismissing the amended complaint.

Preliminarily, we note that although defendant's motion for summary judgment pursuant to CPLR 3212 (b) was predicated on grounds that included, inter alia, CPLR 3211 (a) (1) and (7), it was nonetheless a post-note of issue motion for summary judgment, not a motion to dismiss (*see Meisner v Hamilton*, *Fulton*, *Montgomery Bd. of Coop. Educ. Servs.*, 175 AD3d 1653, 1654 [3d Dept 2019]; *see generally* David D. Siegel & Patrick M. Connors, New York Practice § 283 at 538 [6th ed 2018]). Thus, Supreme Court properly considered the affidavits and attached exhibits submitted by the parties in reaching its determination on the merits (*see generally* CPLR 3212 [b]), and plaintiff's contentions that the amended complaint should not have been dismissed pursuant to CPLR 3211 (a) (1) and (7) are academic (*see Blake v City of New York*, 148 AD3d 1101, 1105 [2d Dept 2017]; *see generally Cohen & Lombardo*, *P.C. v Connors*, 169 AD3d 1399, 1401 [4th Dept 2019]).

Plaintiff does not contend on appeal that the court erred in granting defendant's motion for summary judgment with respect to the cause of action for breach of contract and, thus, "plaintiff has abandoned any contention with respect to that determination" (*Guite v*

Burnison, 26 AD3d 824, 824 [4th Dept 2006]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to plaintiff’s contention, the court did not err in granting defendant’s motion for summary judgment with respect to the three causes of action seeking to rescind the postnuptial agreement on the grounds of fraudulent inducement (first cause of action), unconscionability (second cause of action), and the failure to disclose information (third cause of action). “In general, postnuptial agreements are subject to ordinary principles of contract law . . . [and] New York has a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements” (*Campbell v Campbell*, 208 AD3d 1050, 1051 [4th Dept 2022] [internal quotation marks omitted]). “Thus, ‘there is a heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties’ ” (*id.*). “Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that [i]f the execution of the agreement . . . [is] fair, no further inquiry will be made . . . Nevertheless, [a postnuptial] agreement may be vacated if it is manifestly unfair to one party because of the other’s overreaching or where its terms are unconscionable, or there exists fraud, collusion, mistake, or accident” (*Elliott v Elliott*, 235 AD3d 1283, 1284-1285 [4th Dept 2025] [internal quotation marks omitted]).

With respect to plaintiff’s first cause of action, alleging fraud in the inducement of the agreement, we note that such a cause of action “requires a promise made with the undisclosed intention not to perform [it]” (*Colello v Colello*, 9 AD3d 855, 858 [4th Dept 2004] [internal quotation marks omitted]). Defendant met her initial burden on the motion by demonstrating that she did not make a promise with the undisclosed intention not to perform it (*see id.*; *see generally Wagner Trading Co. v Walker Retail Mgt. Co.*, 307 AD2d 701, 705 [4th Dept 2003]). Contrary to plaintiff’s contention, his “mere surmise, suspicion, speculation, and conjecture” that defendant was having an extramarital affair at the time the postnuptial agreement was executed is insufficient to raise a triable issue of fact whether she fraudulently induced him to sign the agreement by representing that she would work on the marriage without the present intent to do so (*Nerey v Greenpoint Mtge. Funding, Inc.*, 144 AD3d 646, 648 [2d Dept 2016]; *see Matter of Kotick v Shvachko*, 130 AD3d 472, 473 [1st Dept 2015]; *see generally DiPizio v DiPizio*, 81 AD3d 1369, 1370 [4th Dept 2011]).

With respect to plaintiff’s second cause of action, alleging unconscionability, defendant “met h[er] initial burden on the motion by demonstrating that the [postnuptial agreement] was ‘not unfair on its face’ ” (*Elliott*, 235 AD3d at 1285; *see Colello*, 9 AD3d at 859; *see generally Gottlieb v Gottlieb*, 138 AD3d 30, 35-36 [1st Dept 2016], *lv dismissed* 27 NY3d 1125 [2016]). We reject plaintiff’s contention that he raised a triable issue of fact in opposition as to unconscionability. “ ‘An agreement is unconscionable if it is one

which no person in [their] senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense' " (*Campbell*, 208 AD3d at 1052; *see Skotnicki v Skotnicki*, 237 AD2d 974, 975 [4th Dept 1997]). "[C]onclusory allegations that an agreement was unfair are insufficient" (*Skotnicki*, 237 AD2d at 975), and an agreement will not be found unconscionable "merely because, in retrospect, [it might have been] improvident or one-sided" (*Sanfilippo v Sanfilippo*, 137 AD3d 773, 774 [2d Dept 2016] [internal quotation marks omitted]) or because one spouse "gave away more than [that spouse] might legally have been compelled to give" (*Skotnicki*, 237 AD2d at 975). Plaintiff argues that he raised a triable issue of fact whether the postnuptial agreement was unconscionable inasmuch as he submitted evidence demonstrating that it provided for a maintenance payment to defendant in excess of what she would have been awarded during a divorce proceeding. However, the agreement also provided that plaintiff would receive all assets that were acquired by the parties during the course of their marriage, including his business interests and the marital residence. Thus, "it cannot be said that the . . . agreement was such that it would 'shock the conscience and confound the judgment of any [person] of common sense' " (*Campbell*, 208 AD3d at 1052; *see Sanfilippo*, 137 AD3d at 774; *Skotnicki*, 237 AD2d at 975).

With respect to plaintiff's third cause of action, alleging a failure to disclose the existence of two retirement accounts, defendant met her initial burden on the motion of establishing that any such alleged failure to disclose does not warrant rescinding the postnuptial agreement inasmuch as the parties were represented by counsel and waived their right to financial disclosure in the postnuptial agreement (*see Markovitz v Markovitz*, 29 AD3d 460, 461 [1st Dept 2006]; *Genovese v Genovese*, 243 AD2d 679, 679 [2d Dept 1997]), and plaintiff failed to raise a triable issue of fact in opposition whether "the nondisclosure resulted in an inequitable or unfair division of the marital property" (*Elliott*, 235 AD3d at 1285).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

286
CAF 23-02033
PRESENT: WHALEN, P.J., CURRAN, SMITH, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF HANALISE S.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIEL S.S., RESPONDENT-APPELLANT.

LAW OFFICES OF RANDALL S. CARMEL, JERICHO (RANDALL S. CARMEL OF COUNSEL), FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MARY WHITESIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered June 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, petitioner moved by order to show cause to revoke a suspended judgment entered upon, inter alia, the admission of respondent father that he had permanently neglected the subject child. The father appeals from an order by which Family Court, inter alia, effectively granted petitioner's motion and terminated the father's parental rights with respect to the subject child. We affirm.

As a preliminary matter, we reject petitioner's contention that the appeal should be dismissed as untimely. Inasmuch as there is no evidence in the record of when the order was served on the father, "we cannot determine on this record when, if ever, the time to take the appeal[ ] began to run, and thus it cannot be said" that the father's appeal is untimely (*Matter of Bukowski v Florentino*, 210 AD3d 1520, 1521 [4th Dept 2022]; *see also Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1310-1311 [4th Dept 2022]).

With respect to the merits, it is well settled that, "[w]here petitioner establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate

parental rights" (*Matter of Ramel H. [Tenese T.]*, 134 AD3d 1590, 1592 [4th Dept 2015] [internal quotation marks omitted]; *see* Family Ct Act § 633 [f]; *Matter of Ronald O.*, 43 AD3d 1351, 1352 [4th Dept 2007]). "[L]iteral compliance with the terms of the suspended judgment will not suffice to prevent a finding of a violation. A parent must [also] show that progress has been made to overcome the specific problems which led to the removal of the child[ ]" (*Matter of Joseph M., Jr. [Joseph M., Sr.]*, 150 AD3d 1647, 1648 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017] [internal quotation marks omitted]; *see Matter of Maykayla FF. [Eugene FF.]*, 141 AD3d 898, 899 [3d Dept 2016]). Further, "a hearing on a [motion] alleging that the terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and . . . the disposition shall be based on the best interests of the child" (*Matter of Jenna D. [Paula D.]*, 165 AD3d 1617, 1619 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019] [internal quotation marks omitted]). Contrary to the father's contention, the record establishes that he violated the suspended judgment order by, inter alia, failing to undergo a mental health evaluation within 30 days of the order, failing to maintain stable and suitable housing, and violating the prohibition on discussing "the instant case, the [c]hild's caretakers, [p]etitioner, or any other legal matter" in front of the subject child. Again, the failure to comply with " 'any of the terms of the suspended judgment' " permits the court to revoke the suspended judgment (*Joseph M., Jr.*, 150 AD3d at 1648).

Finally, a preponderance of the evidence supports the court's determination that it was in the child's best interests to terminate the father's parental rights (*see Jenna D.*, 165 AD3d at 1619; *Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1349 [4th Dept 2014]). "Although [the father's] breach of the express conditions of the suspended judgment does not compel the termination of [his] parental rights, [it] is strong evidence that termination is, in fact, in the best interests of the child[ ]" (*Jenna D.*, 165 AD3d at 1619 [internal quotation marks omitted]; *see Matter of Michael HH. [Michael II.]*, 124 AD3d 944, 945-946 [3d Dept 2015]). Here, "any progress that [the father] made was not sufficient to warrant any further prolongation of the child['s] unsettled familial status" (*Matter of Brendan S.*, 39 AD3d 1189, 1190 [4th Dept 2007] [internal quotation marks omitted]).

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

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

295

CA 24-00797

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

U.S. BANK NATIONAL ASSOCIATION, AS SUCCESSOR
IN INTEREST TO BANK OF AMERICA NATIONAL ASSOCIATION,
SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL
ASSOCIATION, AS TRUSTEE FOR THE GSAMP TRUST
2006-HE4, MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2006-HE4, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GUARDIAN PRESERVATION, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SANDRA POLAND DEMARS, ALBANY, FOR DEFENDANT-APPELLANT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (CLAIRE A. STANDISH OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (Judith A. Sinclair, J.), entered April 18, 2024. The amended order, inter alia, granted the motion of plaintiff seeking, among other things, summary judgment.

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

Memorandum: In this residential foreclosure action, Guardian Preservation, LLC (defendant) appeals from an amended order granting plaintiff's motion for, inter alia, summary judgment on the amended complaint against defendant, an order of reference, and a caption amendment. We dismiss the appeal.

Inasmuch as the "amended order merely corrected . . . clerical error[s] in the [original] order" by revising the recitation of the papers used on the motion and correcting the ordered amendment to the caption while otherwise retaining the remainder of the original order, the amended order "did not effect a substantive change" and the appeal therefore properly lies from the original order, from which defendant has not appealed (*Moody v Sorokina*, 56 AD3d 1246, 1247 [4th Dept 2008]; *see Reading v Fabiano* [appeal No. 2], 126 AD3d 1523, 1524 [4th Dept 2015]; *Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [3d Dept 1978]; *see generally Robert Martin Co. v Town of Greenburgh*, 74 NY2d 701, 701 [1989]). Moreover, a final judgment of foreclosure and sale was subsequently entered in this action, and an appeal from that judgment is not presently before us (*see Lakeview Loan Servicing, LLC*

v Finn, 176 AD3d 1599, 1599 [4th Dept 2019]; *US Bank Trust*, *N.A. v Lynch*, 168 AD3d 1242, 1243 [3d Dept 2019]; *cf.* CPLR 5501 [c]). Inasmuch as " '[t]he right to appeal from an intermediate order terminates with the entry of a final judgment,' " defendant's "appeal from the intermediate order must be dismissed" for that additional reason (*Lakeview Loan Servicing*, *LLC*, 176 AD3d at 1599; *see Matter of Aho*, 39 NY2d 241, 248 [1976]; *see also Norwest Mtge. v Clifford*, 271 AD2d 721, 721 [3d Dept 2000]; *see generally* CPLR 5501 [a] [1]). Defendant may raise its contentions in an appeal from the final judgment (*see Cianci v University of Rochester*, 231 AD3d 1536, 1537 [4th Dept 2024]; *Ford v Chahfe*, 227 AD3d 1519, 1519 [4th Dept 2024]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

297
CA 24-01420
PRESENT: WHALEN, P.J., CURRAN, SMITH, NOWAK, AND DELCONTE, JJ.

TIARA R. SANABRIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SJ TRANS, INC., BULLDOG FREIGHTWAY, INC.,
AND LOVEPREET S. CHANDI, DEFENDANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BRAFF, HARRIS & SUKONECK, NEW YORK CITY (KEITH HARRIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered August 22, 2024. The order, among other things, granted the motion of defendants to compel plaintiff to appear at defense medical examinations.

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

Memorandum: In this action arising out of a motor vehicle accident, plaintiff appeals from an order that, inter alia, granted defendants' motion to compel her to submit to orthopedic, neurological and neuropsychological examinations with physicians designated by defendants, contending that Supreme Court abused its discretion. We affirm.

"[T]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Nikel v 5287 Tr. Rd., LLC*, 215 AD3d 1230, 1230 [4th Dept 2023] [internal quotation marks omitted]; *see Zuley v Elizabeth Wende Breast Care, LLC*, 144 AD3d 1585, 1586 [4th Dept 2016]; *Hann v Black*, 96 AD3d 1503, 1504 [4th Dept 2012]). "[I]t is within the trial court's discretion to require a plaintiff to submit to more than one physical examination . . . However, the party seeking the examination must demonstrate the necessity for it" (*Chaudhary v Gold*, 83 AD3d 477, 478 [1st Dept 2011]).

Here, in response to a notice of physical examination of the plaintiff served by plaintiff, defendants timely submitted "the name[s] of the medical providers who will conduct the examination" (22 NYCRR 202.17 [a]; *see generally* CPLR 3121 [a]). When plaintiff

objected, defendants filed a motion to compel (*see* CPLR 3124).

Preliminarily, inasmuch as plaintiff did not oppose those parts of defendants' motion that sought to compel examinations with an orthopedist and a neurologist, she has "failed to preserve for our review [her] contention that [the c]ourt erred in granting that relief" (*Sharma v Udwadia*, 309 AD2d 1250, 1250 [4th Dept 2003]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Contrary to plaintiff's contention, defendants demonstrated the necessity for the neuropsychological examination through the submission of plaintiff's verified bill of particulars and deposition transcript, in which plaintiff asserts that she sustained a traumatic brain injury and cognitive impairment in the subject accident (*see generally Chaudhary*, 83 AD3d at 478; *Radigan v Radigan*, 115 AD2d 466, 467-468 [2d Dept 1985]). Thus, the court did not abuse its discretion in directing plaintiff to submit to a neuropsychological examination (*cf. Pokoroski v FDA Logistics, LLC*, 195 AD3d 1470, 1471 [4th Dept 2021]; *Parsons v Hytech Tool & Die*, 227 AD2d 896, 896 [4th Dept 1996]; *see generally Sims v Reyes*, 195 AD3d 133, 137 [4th Dept 2021]). Although we may substitute our discretion for that of the trial court, even in the absence of an abuse of discretion (*see Zuley*, 144 AD3d at 1586; *Smalley v Harley-Davidson Motor Co., Inc.*, 115 AD3d 1369, 1370 [4th Dept 2014]), we decline to do so here.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

302
KA 24-00312
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

VICTORIA TANDLE, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DANIEL HUGHES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered January 10, 2024. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree.

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

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

Contrary to defendant's contention, the record establishes that she knowingly, voluntarily, and intelligently waived her right to appeal (*see People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). County Court's oral colloquy did not, as asserted by defendant, mischaracterize the waiver of the right to appeal as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; *see People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). To the extent that defendant contends that the written waiver form she executed was defective, the oral colloquy, which followed the appropriate model colloquy, "cured that [alleged] defect" (*People v Hoose*, — AD3d —, 2025 NY Slip Op 01436, *1 [4th Dept 2025] [internal quotation marks omitted]).

Defendant's valid waiver of the right to appeal precludes our review of her challenge to the severity of the sentence (*see Lopez*, 6

NY3d at 255-256; *People v Foumakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

303
KA 22-01434
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREA LIPTON, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered June 30, 2022. The judgment convicted defendant upon a jury verdict of manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress the statements made by defendant after 12:03 a.m. on August 19, 2020, after she invoked her right to remain silent is granted, and a new trial is granted.

Memorandum: Defendant was convicted following a jury trial of manslaughter in the second degree (Penal Law § 125.15 [1]) for recklessly causing the death of her infant son. The child had been beaten by defendant's boyfriend, who was convicted of manslaughter in the first degree in a separate trial. On appeal, defendant contends that the evidence is legally insufficient to establish her guilt and the verdict is against the weight of the evidence. We reject those contentions. Defendant's challenge to the sufficiency of the evidence is not preserved for our review inasmuch as defendant's motions for a trial order of dismissal were not "specifically directed at the grounds advanced on appeal" (*People v Moore*, 232 AD3d 1299, 1300 [4th Dept 2024], *lv denied* — NY3d — [2025]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that "there is a valid line of reasoning and permissible inferences from which a rational jury 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]). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), 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 People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that Supreme Court erred in refusing to suppress statements she made during a videotaped interrogation after she repeatedly told the investigators that she had nothing more to say and was done talking. "A suspect's right to remain silent, once unequivocally and unqualifiedly invoked, must be 'scrupulously honored' " (*People v Brown*, 266 AD2d 838, 838 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], quoting *Miranda v Arizona*, 384 US 436, 479 [1966]; *see People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]; *People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). If such an unequivocal and unqualified invocation of the right to remain silent is made, " 'interrogation must cease' " (*People v Gary*, 31 NY2d 68, 70 [1972]; *see People v Marrero*, 199 AD3d 1471, 1473 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022]). "Whether a defendant's assertion of that right was 'unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding [that assertion,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' " (*People v Colon*, 185 AD3d 1510, 1511-1512 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020], quoting *People v Glover*, 87 NY2d 838, 839 [1995]; *see People v Johnston*, 192 AD3d 1516, 1518 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *Zacher*, 97 AD3d at 1101).

Here, while being interrogated at the police station, defendant stated to the investigators six separate times that she had "nothing else to . . . say" and that she was "done talking." Even if defendant's initial statement that she had nothing else to say may have been prompted by her "unwillingness to change [her] story" (*People v Lowin*, 36 AD3d 1153, 1155 [3d Dept 2007], *lv denied* 9 NY3d 847 [2007], *reconsideration denied* 9 NY3d 878 [2007]; *see People v Czternastek*, 174 AD3d 1522, 1522-1523 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]), she repeated her desire to stop talking even after the conversation shifted to another topic (*see People v Douglas*, 8 AD3d 980, 980-981 [4th Dept 2004], *lv denied* 3 NY3d 705 [2004]; *see also People v Johnson*, 150 AD3d 1390, 1396 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]). It is clear from a viewing of the interrogation video that defendant repeatedly stated in no uncertain terms that she no longer wished to answer any more questions from the investigators. There was nothing equivocal about defendant's invocations of the right to remain silent, which were not scrupulously honored by the investigators, who continued the interrogation as if they did not hear what defendant had said.

We thus conclude that the court erred in refusing to suppress any and all statements made by defendant on August 19, 2020 after 12:03 a.m. on the interrogation video. "Inasmuch as there is a reasonable possibility that the erroneous admission of defendant's inculpatory statements contributed to the verdict, the error in refusing to suppress all of those statements cannot be considered harmless, and

reversal is required" (*People v Brown*, 195 AD3d 1388, 1393 [4th Dept 2021]; *see People v Crimmins*, 36 NY2d 230, 237 [1975]).

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

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

304
KA 24-00394
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, GREENWOOD, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM T. MORRISSEY, III, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 4, 2024. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree, disseminating indecent material to minors in the first degree, official misconduct and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [1]), disseminating indecent material to minors in the first degree (former § 235.22), official misconduct (§ 195.00), and endangering the welfare of a child (§ 260.10 [1]). The conviction stems from defendant's abuse of a minor student at the high school at which defendant had been assigned as a school resource officer. Defendant contends that County Court erred in refusing to dismiss the indictment on the ground that it was secured using statements protected by *Garrity v New Jersey* (385 US 493 [1967]) at an interview. We reject that contention. Here, we conclude that the People met their "burden of establishing that any evidence used was derived from a source wholly independent of the statement[s]" (*People v Corrigan*, 80 NY2d 326, 329 [1992]). Specifically, the evidence at the suppression hearing established that, prior to defendant's interview, investigators possessed a detailed letter raising specific allegations of an improper relationship between defendant and the student, which provided an independent source for the information thereafter obtained from defendant. Although defendant contends that, upon the student's denial of such a relationship, the investigation would not have continued but for his statements during the interview, the record reflects that the investigation continued after defendant's interview based upon the previously obtained letter, independent from his

Garrity-protected statements. When considering defendant’s motion to dismiss the indictment, the court credited the suppression hearing testimony of investigators that the impetus for continuing the investigation was independent from defendant’s statements, and thus so too was the evidence ultimately obtained as a result. “[T]he credibility determinations of the suppression court are entitled to great deference on appeal” (*People v Archie*, 227 AD3d 1406, 1407 [4th Dept 2024], *lv denied* 42 NY3d 925 [2024] [internal quotation marks omitted]), and we perceive no abuse of that discretion here.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

318

KA 23-00978

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE D. BAKER, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE CALLANAN, DISTRICT ATTORNEY, LYONS (CATHERINE MENIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered April 5, 2023. The appeal was held by this Court by order entered July 26, 2024, decision was reserved and the matter was remitted to Wayne County Court for further proceedings (229 AD3d 1324 [4th Dept 2024]). The proceedings were held and completed.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: We previously held this case, reserved decision, and remitted the matter to County Court for a determination whether the People were ready for trial within the requisite time period (*People v Baker*, 229 AD3d 1324, 1327-1328 [4th Dept 2024]). Prior to defendant's conviction, the court had originally held that, other than a period between February 14, 2022 and March 14, 2022, "[t]here was no other excludable time, therefore, the People must [have been] ready for trial by September 1, 2022." The court further held, however, that in July 2022 the People had filed a valid certificate of compliance pursuant to CPL article 245 and declared ready for trial, which stopped the accrual of time for speedy trial purposes before September 1, 2022. On appeal, we determined, contrary to the court's finding, that the July 2022 certificate of compliance was invalid. Because the court had not explicitly ruled on the issue whether the time chargeable to the People exceeded the applicable CPL 30.30 period (*see People v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]), we remitted the matter to County Court to determine, consistent with our determination regarding the July 2022 certificate of compliance, whether the People were ready for trial within the requisite time period (*Baker*, 229 AD3d at 1328).

On remittal, however, the court amended its prior holdings and found that the People were not required to be ready by September 1,

2022 because there was additional excludable time for speedy trial purposes. The court thus concluded that there was no speedy trial violation regardless of whether the July certificate was valid, effectively rendering academic the primary basis for the court's original decision, and the primary basis for defendant's appeal and our decision thereon.

The intent of our prior decision was for the court to determine, in light of our determination that the July 2022 certificate of compliance was not valid, and in light of the court's original findings of fact and conclusions of law, including the determination that the People were required to be ready for trial by September 1, 2022, whether the People were ready for trial within the requisite time period. We therefore hold the case, reserve decision, and remit the matter to County Court for that determination.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

324
KA 23-00980
PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD BARNES, DEFENDANT-APPELLANT.

ROSENBERG LAW FIRM, BROOKLYN (MORGAN NAMIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (John James Ottaviano, J.), rendered May 18, 2023. The judgment convicted defendant upon his plea of guilty of attempted aggravated assault upon a police officer or a peace officer.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and as modified the judgment is affirmed and the matter is remitted to Niagara County Court for resentencing.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted aggravated assault upon a police officer (Penal Law §§ 110.00, 120.11), defendant contends that his plea was involuntary because he was misinformed of his maximum sentencing exposure. Although that contention would survive even a valid waiver of the right to appeal (*see People v Morse*, 233 AD3d 1470, 1470 [4th Dept 2024]), by "fail[ing] to move to withdraw his guilty plea or to vacate the judgment of conviction," defendant "failed to preserve for our review his contention that the plea was not knowingly, intelligently and voluntarily entered" (*People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]; *see People v Santos*, 230 AD3d 1586, 1586 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]; *see also People v Ablack*, 126 AD3d 1410, 1411 [4th Dept 2015], *lv denied* 25 NY3d 1197 [2015]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant's challenge to the voluntariness of his admission to a violation of probation with respect to a separate conviction is not properly before us because defendant did not appeal from the resentence imposed upon that violation of probation (*see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]; *People v Kuras*, 49 AD3d 1196, 1197 [4th Dept 2008], *lv denied* 10 NY3d 866

[2008]; *cf. People v Dexter*, 71 AD3d 1504, 1504 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]).

Defendant correctly notes that the 16-year determinate sentence of imprisonment imposed by County Court is illegal. Had defendant been sentenced as a first-time violent felony offender, the court could have imposed a determinate sentence between 7 and 20 years of imprisonment for the conviction of attempted aggravated assault upon a police officer (*see* Penal Law § 70.02 [3] [b] [ii]). As a second violent felony offender convicted of a class C violent felony, however, defendant faced a determinate sentence of between 7 and 15 years (§ 70.04 [3] [b]). Thus, although seemingly a statutory anomaly resulting from a drafting error (*see* William C. Donnino, Prac Commentaries, McKinney's Cons Laws of NY, Penal Law § 60.00; *see generally People v Talluto*, 39 NY3d 306, 315 [2022]), the 16-year sentence is illegal because it exceeds the maximum sentence permitted by the unambiguous statutory text based on defendant's predicate felony offender status. "Although [that] issue was not raised before the [sentencing] court . . . , we cannot allow an [illegal] sentence to stand" (*People v Hughes*, 112 AD3d 1380, 1381 [4th Dept 2013], *lv denied* 23 NY3d 1038 [2014] [internal quotation marks omitted]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (*see generally People v Simpson*, 231 AD3d 1525, 1528 [4th Dept 2024]; *People v Cruz-Ocasio*, 208 AD3d 1059, 1060 [4th Dept 2022]; *People v Bussom*, 125 AD3d 1331, 1332 [4th Dept 2015]). In light of our determination, defendant's remaining contentions are academic.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

326
CAF 23-00309
PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ALBERT S. AND STACEY S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALBERT S., AND CHERYL Z., RESPONDENTS-APPELLANTS.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT-APPELLANT CHERYL Z.

AMY R. INZINA, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated January 30, 2023, in proceedings pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents with respect to the subject children.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent father and respondent mother each appeal from an order of Family Court that terminated their parental rights with respect to the subject children on the ground of mental illness. We affirm.

To meet its burden on a petition seeking termination of parental rights on the ground of mental illness, the petitioner must establish by clear and convincing evidence that the parent is “presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year immediately prior to the date on which the petition is filed” (Social Services Law § 384-b [4] [c]; *see* § 384-b [3] [g] [i]; *Matter of Nereida S.*, 57 NY2d 636, 640 [1982], *rearg denied* 57 NY2d 775 [1982]; *Matter of Ashley L.*, 22 AD3d 915, 915-916 [3d Dept 2005]). For purposes of the statute, “ ‘mental illness’ means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent,

the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]). "[O]nly the totality of the mental illness need be proven by clear and convincing evidence" (*Matter of Dylan K.*, 269 AD2d 826, 827 [4th Dept 2000], *lv denied* 95 NY2d 766 [2000] [internal quotation marks omitted]). In any proceeding for termination of parental rights on the ground of mental illness, "the court is required to order the parent, alleged to be mentally ill, to be examined by a qualified psychiatrist or psychologist and shall take testimony from the appointed expert" (*Matter of Rahsaan I. [Simone J.]*, 180 AD3d 1162, 1163 [3d Dept 2020]; *see* § 384-b [6] [e]; *Matter of Hime Y.*, 52 NY2d 242, 247-248 [1981]). In sum, termination of parental rights on the ground of mental illness "requires a two-part determination at the fact-finding stage, first of the parent['s] condition and capacity, including consideration of measures on the part of the [s]tate to maintain the family setting, and second of the anticipated effect for the foreseeable future if the child is returned to the[parent's] care" (*Matter of Joyce T.*, 65 NY2d 39, 48 [1985]).

Here, contrary to respondents' contentions, we conclude that petitioner met its burden of establishing by clear and convincing evidence that both the mother and the father are presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the children, who had each been in the care of an authorized agency for over one year immediately prior to the filing of the respective petitions (*see* Social Services Law § 384-b [4] [c]).

Petitioner presented the testimony and two reports of a court-appointed psychologist who clinically observed respondents, both alone and with the children, and reviewed their history and test results. The court-appointed psychologist diagnosed the mother with depression accompanied by, among other things, a history of trauma, and further opined that the mother's resistence to taking her prescribed antidepressant medication was indicative of her lack of insight and motivation to address her condition (*see Matter of Charity A.*, 38 AD3d 1276, 1276 [4th Dept 2007]; *see also Matter of M.R.V. [B.V.]*, 224 AD3d 579, 580 [1st Dept 2024]; *Matter of William M.E. [Shaunette W.]*, 204 AD3d 532, 532 [1st Dept 2022]). The court-appointed psychologist also opined that the father, who does not dispute on appeal that he suffers from mental illness, had a mixed personality disorder characterized by antisocial, narcissistic, and borderline traits and maladaptive behavior (*see Matter of Steven M. [Scott M.]*, 221 AD3d 1518, 1518-1519 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *Matter of Evelyn B.*, 37 AD3d 991, 992-993 [3d Dept 2007]; *Matter of Dayjah Ann B.*, 13 AD3d 518, 519 [2d Dept 2004]). Additionally, petitioner presented the testimony of another psychologist who, after performing an independent evaluation at the request of counsel for respondents, agreed completely with the court-appointed psychologist and added that testing revealed that the mother also suffered from a personality disorder (*see Charity A.*, 38 AD3d at 1276; *see also Matter of Rosie Shameka S.R. [Tulip S.R.]*, 102 AD3d 480, 481 [1st Dept 2013]). Although the psychologists acknowledged that the mother's condition could theoretically improve with proper medication and therapy, "[t]he mere possibility that [her]

condition, with proper treatment, could improve in the future is insufficient to vitiate [the court's determination]" (*Matter of Steven M.*, 37 AD3d 1072, 1072 [4th Dept 2007] [internal quotation marks omitted]; *see Matter of Joseph E.K. [Lithia K.]*, 122 AD3d 1373, 1373-1374 [4th Dept 2014]).

The record further establishes that the psychologists agreed that respondents, whether alone or together, were, by reason of their respective mental illnesses, "unable to parent the children effectively, and that the children would be in danger of being neglected if they were returned to [their] care at the present time or in the foreseeable future" (*Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]; *see M.R.V.*, 224 AD3d at 580; *William M.E.*, 204 AD3d at 532; *Charity A.*, 38 AD3d at 1276). Although respondents' psychological expert disputed that respondents suffered from mental illness, he further testified that he was not retained to offer an opinion whether respondents could properly and adequately care for the children. To the extent that the opinion of respondents' psychological expert conflicts with the opinions of the psychologists relied upon by petitioner, it "merely raised a question of credibility for the court to determine" (*Matter of Damion S.*, 300 AD2d 1039, 1040 [4th Dept 2002]; *see Matter of Meyah F. [Shelby L.]*, 203 AD3d 1558, 1559 [4th Dept 2022]). The court's "determination regarding the credibility of witnesses is entitled to great weight on appeal[ ] and will not be disturbed if supported by the record," and we perceive no basis here for disturbing the court's credibility determinations (*Meyah F.*, 203 AD3d at 1559 [internal quotation marks omitted]; *see Matter of Shahida M.*, 59 AD3d 976, 976 [4th Dept 2009], *lv denied* 12 NY3d 708 [2009]; *Matter of Anthony M.*, 56 AD3d 1124, 1125 [4th Dept 2008], *lv denied* 12 NY3d 702 [2009]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

327
CAF 24-00693
PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF BENJAMIN H., LORENZO H., AND
MIA H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;
MEMORANDUM AND ORDER
ERMAL H., RESPONDENT-APPELLANT.

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

MYKALA L. PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), dated April 18, 2024, in a proceeding pursuant to Family Court Act article 10. The order determined, inter alia, that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudged that he neglected the subject children.

The father contends that, in light of the evidence he presented, Family Court's determination that petitioner established his neglect of the subject children by a preponderance of the evidence is not supported by a sound and substantial basis in the record (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463 [4th Dept 2023]). We reject that contention. Although the father denied the allegations of neglect, "his denial[s] of the[ ] allegations, along with other contrary evidence, merely presented a credibility issue for [the court] to resolve" (*Matter of Zakiyyah T. [Lamar R.]*, 221 AD3d 1443, 1445 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]; *see Matter of Damiek TT. [Damiek UU.]*, 232 AD3d 1157, 1159 [3d Dept 2024]). Petitioner presented evidence of multiple instances in which the father engaged in acts of domestic violence against the mother in the presence of the subject children (*see Matter of Antonio S. [Rene G.]*, 227 AD3d 1532, 1532-1533 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]). Petitioner also presented evidence that

the father “repeatedly misuse[d] . . . alcoholic beverages, to the extent that it . . . produc[ed] in [him] a substantial state of . . . intoxication, . . . disorientation, . . . or a substantial impairment of judgment” (*Matter of Timothy B. [Paul K.]*, 138 AD3d 1460, 1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016], quoting § 1046 [a] [iii]) and evidence of an incident in which, although the father knew that the mother was intoxicated, he failed to stop her from driving her vehicle with one of the subject children inside (*see generally Matter of Alexia J. [Christopher W.]*, 126 AD3d 1547, 1548 [4th Dept 2015]). We accord great weight and deference to the court’s determinations, including its drawing of inferences and assessment of credibility, and we will not disturb those determinations where, as here, they are supported by the record (*see Matter of Lylly M.G. [Theodore T.]*, 121 AD3d 1586, 1587-1588 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

333
CA 24-00996
PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

MELINDA SCHWARTZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL A. SCHWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PAUL A. VANCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 17, 2023. The order, insofar as appealed from, directed the parties to destroy or delete any audio, digital, electronic or other similar media recording of any discussions between a minor child in the matter and her attorney and precluded the use of such information.

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

Same memorandum as in *Schwartz v Schwartz* ([appeal No. 2] — AD3d — [May 2, 2025] [4th Dept 2025]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

334
CA 24-01502
PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

MELINDA SCHWARTZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL A. SCHWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PAUL A. VANCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 23, 2023. The order, inter alia, granted the motion of plaintiff to compel certain discovery.

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

Memorandum: In this matrimonial action, defendant appeals in appeal No. 1 from an order insofar as it directed the parties to immediately destroy or delete any audio, digital, electronic or other similar media recording of any discussions between either of the parties’ minor children and her court-appointed attorney for the child (AFC) and precluded the use of any such recording in this or any other litigation. In appeal No. 2, defendant appeals from an order that, inter alia, granted plaintiff’s motion seeking, among other things, to require defendant to submit a more particularized affidavit regarding his involvement in and receipt of any recorded attorney-client conversations between the parties’ children and their AFCs. In appeal No. 3, defendant appeals from an order that, inter alia, granted in part his motion for judicial subpoenas duces tecum by directing that the responsive documents be reviewed in camera by Supreme Court and granted that part of plaintiff’s cross-motion seeking to quash subpoenas served on plaintiff and her attorney.

We note at the outset that the appeal from the order in appeal No. 1 must be dismissed. “Only an aggrieved party may appeal from an order” (*Alloway v Bowlmor AMF Corp.*, 188 AD3d 1716, 1717 [4th Dept

2020], *lv denied* 36 NY3d 911 [2021]; *see Matter of HSBC Bank USA, N.A. [Knox]* [appeal No. 2], 184 AD3d 1208, 1209 [4th Dept 2020]; *see generally* CPLR 5511), and defendant was not aggrieved inasmuch as he did not oppose the requested relief (*see Matter of Tariq S. v Ashlee B.*, 177 AD3d 1385, 1385 [4th Dept 2019], *lv dismissed* 38 NY3d 1167 [2022]).

With respect to appeal No. 2, we reject defendant's contention that the order directing him to provide a more particularized affidavit improperly allowed plaintiff to obtain additional discovery after the filing of the note of issue. We conclude that the order was properly designed to ensure that the parties were conducting themselves in a manner consistent with the best interests of the children, a matter that is of paramount importance in custody proceedings and with respect to which the court is vested with broad discretion (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548-550 [1976]; *Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145 [4th Dept 2013]).

In appeal No. 3, the appeal from the order insofar as it directed the in camera review of documents responsive to the subpoenas must be dismissed. Inasmuch as the order "effectively defe[rs] the determination of the . . . motion [until] the completion of [the court's] in camera review," it does not affect a substantial right of defendant, and thus no appeal lies as of right therefrom (*Matter of Joseph OO. [Joel OO.]*, 187 AD3d 1378, 1379 [3d Dept 2020]; *see* CPLR 5701 [a] [2] [v]; *Solomon v Meyer*, 103 AD3d 1025, 1026 [3d Dept 2013]).

Contrary to defendant's remaining contention in appeal No. 3, the court properly granted that part of plaintiff's cross-motion seeking to quash certain subpoenas inasmuch as the information defendant sought through those subpoenas consisted of communications between plaintiff, her counsel, and another attorney with whom they were consulting "to assist in analyzing or preparing the case" and thus constituted privileged attorney-client communications and non-discoverable attorney work product (*Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 170 [1st Dept 2012] [internal quotation marks omitted]; *see* CPLR 3101 [b], [c]; 4503 [a] [1]; *Banach v Dedalus Found., Inc.*, 132 AD3d 543, 544 [1st Dept 2015]; *Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1547 [4th Dept 2014], *lv denied* 24 NY3d 998 [2014]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

335
CA 24-01241
PRESENT: CURRAN, J.P., BANNISTER, SMITH, DELCONTE, AND HANNAH, JJ.

MELINDA SCHWARTZ, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

DANIEL A. SCHWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

BENNETT SCHECHTER ARCURI & WILL LLP, BUFFALO (PAUL A. VANCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PETER P. VASILION, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 7, 2024. The order, inter alia, directed an in camera review of certain documents and granted the cross-motion of plaintiff to quash certain subpoenas.

It is hereby ORDERED that the order so appealed from insofar as it directed an in camera review of documents is dismissed, and the order is unanimously affirmed without costs.

Same memorandum as in *Schwartz v Schwartz* ([appeal No. 2] — AD3d — [May 2, 2025] [4th Dept 2025]).

Entered: May 2, 2025   Ann Dillon Flynn
                                                        Clerk of the Court

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

338
KA 09-00318
PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESHEQUAN L. NATHAN, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Joseph D. Valentino, J.), rendered September 18, 2008. The appeal was held by this Court by order entered December 22, 2023, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (222 AD3d 1416 [4th Dept 2023]). The proceedings were held and completed.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). On a prior appeal, we affirmed the judgment (*People v Nathan*, 108 AD3d 1077 [4th Dept 2013], *lv denied* 23 NY3d 966 [2014]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel's representation was not constitutionally adequate (*People v Nathan*, 208 AD3d 1653 [4th Dept 2022]). Specifically, we concluded in relevant part that meaningful representation required that appellate counsel, after the Court of Appeals decided *People v Rudolph* (21 NY3d 497 [2013]) during the pendency of the prior appeal, seek to file an appropriate motion in this Court in order to raise the argument that *Rudolph* required that the matter be remitted for determination of defendant's youthful offender status (*Nathan*, 208 AD3d at 1653-1654).

Upon reviewing the appeal de novo, we concluded that Supreme Court erred in failing to determine whether defendant should be afforded youthful offender status (*People v Nathan*, 222 AD3d 1416 [4th Dept 2023]). We noted that, pursuant to CPL 720.20 (1), the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain"

(*Nathan*, 222 AD3d at 1416-1417 [internal quotation marks omitted]; *see Rudolph*, 21 NY3d at 501). We emphasized that "[w]hile eligible youths are not necessarily entitled to be sentenced as a [youthful offender], all eligible youths have the right to have a court decide whether such treatment is justified" (*Nathan*, 222 AD3d at 1417 [internal quotation marks omitted]; *see People v Minemier*, 29 NY3d 414, 419 [2017]; *Rudolph*, 21 NY3d at 501). We reasoned that, inasmuch as defendant was eligible for youthful offender status, the court was obligated to make a discretionary youthful offender determination before imposing sentence (*Nathan*, 222 AD3d at 1417). We therefore held the case, reserved decision, and remitted the matter for the court "to make and state for the record a determination whether defendant should be afforded youthful offender status" (*id.* at 1417). On remittal, the court (Renzi, J.) declined to adjudicate defendant a youthful offender.

Defendant now contends on resubmission that he was denied effective assistance of counsel because the entirety of defense counsel's representation on remittal was deficient. We agree.

Where, as here, a defendant contends that they received ineffective assistance of counsel under both the Federal and New York State Constitutions, "we evaluate the claim using the state standard, which affords greater protection than its federal counterpart" (*People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see People v Stultz*, 2 NY3d 277, 282 [2004], *rearg denied* 3 NY3d 702 [2004]). "In New York, the standard for effective assistance is 'meaningful representation' by counsel" (*People v Debellis*, 40 NY3d 431, 436 [2023]; *see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]). The " 'state standard . . . offers greater protection than the federal test' because, 'under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of [fair process]' " (*People v Honghirun*, 29 NY3d 284, 289 [2017], quoting *Caban*, 5 NY3d at 156; *see People v Alvarez*, 33 NY3d 286, 290 [2019]). Although our courts "remain 'skeptical' of ineffective assistance of counsel claims where the defendant is unable to demonstrate any prejudice at all" (*Alvarez*, 33 NY3d at 290), in applying our state standard, we consider prejudice to be " 'a significant but not indispensable element in assessing meaningful representation' " (*Caban*, 5 NY3d at 155-156, quoting *Stultz*, 2 NY3d at 284; *see Alvarez*, 33 NY3d at 289-290). Stated differently, "[w]hile the inquiry focuses on the quality of the representation provided to the [defendant], the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento*, 91 NY2d 708, 714 [1998]). "[T]he right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense . . . and who is familiar with, and able to employ[,] . . . basic principles of criminal law and procedure" (*People v Droz*, 39 NY2d 457, 462 [1976]). Inasmuch as the defendant "bears the burden of establishing [a] claim that counsel's

performance is constitutionally deficient[,] . . . [the] defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure" (*People v Pavone*, 26 NY3d 629, 646 [2015]; *see Benevento*, 91 NY2d at 712).

Here, we conclude that defendant has demonstrated that he was denied meaningful representation on remittal to determine whether he should be afforded youthful offender status (*see People v Barron*, 215 AD3d 1256, 1256 [4th Dept 2023]). The record establishes that, despite the specified purpose of the remittal, defense counsel submitted a memorandum riddled with spelling, grammatical, and syntax errors in which he requested that defendant be resentenced as an adult to a reduced determinate term of imprisonment and an unspecified period of postrelease supervision. Rather than providing an affirmative argument for adjudicating defendant a youthful offender based on the various factors to be considered (*see People v Cruickshank*, 105 AD2d 325, 334 [3d Dept 1985], *affd* 67 NY2d 625 [1986]; *People v Z.H.*, 192 AD3d 55, 58-59 [4th Dept 2020]), defense counsel merely mentioned youthful offender status in passing to note that which was already known, namely, that the sentencing court had originally failed to address whether defendant should receive youthful offender status and thus never considered certain circumstances related to defendant. Defense counsel thereafter proceeded to make arguments that were relevant to defendant's initial sentencing as an adult and the appellate challenges thereto but were unrelated to the factors applicable to determining upon remittal whether defendant should be afforded youthful offender status and, in doing so, defense counsel also occasionally misstated the issues considered on defendant's prior appeals (*see People v Arnold*, 85 AD3d 1330, 1334 [3d Dept 2011]; *see generally People v Bell*, 48 NY2d 933, 935 [1979], *rearg denied* 49 NY2d 802 [1980]). Despite the prosecutor's reminder at the remittal proceeding that the remittal related solely to determining whether defendant should be adjudicated a youthful offender, defense counsel continued to focus almost exclusively on seeking to have defendant resentenced as an adult and made only passing references to the issue of youthful offender status.

The People nonetheless assert that, given the purported difficulty in obtaining a youthful offender adjudication on the facts of the case, defense counsel had a strategic or legitimate reason to forgo addressing the factors applicable to a youthful offender determination and to instead focus on seeking a reduction of defendant's sentence as an adult. That assertion is devoid of merit. Without vacating the sentence, we previously held the case, reserved decision, and remitted the matter for the specified purpose of having the court "make and state for the record a determination whether defendant should be afforded youthful offender status" (*Nathan*, 222 AD3d at 1417). Contrary to the People's assertion, defense counsel had no strategic or legitimate basis for raising sentencing contentions that exceeded the scope of the remittal and that, if accepted, would have required the court to disobey the mandate of this Court on remittal (*see People v Mitchell*, — AD3d —, — , 2025 NY Slip Op 01456, *2 [4th Dept 2025]; *People v Barr*, 170 AD3d 1189, 1190 [2d Dept 2019]; *cf. People v Jones*, 233 AD3d 1205, 1206-1207 [3d Dept

2024]). Defense counsel's failure to appropriately address the sole issue for which the matter was remitted deprived defendant of meaningful representation on remittal (*see Barron*, 215 AD3d at 1256; *People v Vauss*, 149 AD2d 924, 924 [4th Dept 1989]).

We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state on the record a new determination whether defendant should be afforded youthful offender status.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

362
KA 19-01796
PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN SANTANA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMY N. WALENDZIAK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 9, 2019. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts) and robbery in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the determinate term of imprisonment imposed for each of the two counts of robbery in the first degree to a term of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of robbery in the first degree (Penal Law § 160.15 [4]) and three counts of robbery in the second degree (§ 160.10 [1], [3]). The conviction stems from the armed robbery of four individuals during which defendant and an accomplice took cell phones, cash, jewelry, and a vehicle.

Although defendant failed to preserve for our review his contention that his conviction for robbery in the second degree related to the vehicle is based on legally insufficient evidence of larcenous intent, because his motion for a trial order of dismissal was not specifically directed at the alleged error raised on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Piasta*, 207 AD3d 1054, 1057-1058 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]), we "necessarily review the evidence adduced as to each of the elements of the crime[ ] in the context of our review of defendant's challenge [to] the weight of the evidence" (*People v McGuire*, 227 AD3d 1499, 1500 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024] [internal quotation marks omitted]). Here, the evidence established that defendant approached the victims with a gun, removed car keys from the person of one of the victims, and fled from the crime scene in that victim's

car. We conclude that the verdict on the charge of robbery in the second degree related to the vehicle is not against the weight of the evidence with respect to the element of defendant's "intent to deprive the [victim] of [his] vehicle within the meaning of Penal Law § 155.00 (3)" (*People v Hickey*, 171 AD3d 1465, 1465 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019] [internal quotation marks omitted]; *see* Penal Law § 160.00; *People v Rolle*, 41 AD3d 320, 320 [1st Dept 2007], *lv denied* 9 NY3d 964 [2007]). The fact that defendant soon abandoned the vehicle "does not vitiate the evidence of defendant's intent" (*People v Banchs*, 129 AD3d 466, 466 [1st Dept 2015], *lv denied* 26 NY3d 965 [2015]; *see generally People v Barbeau*, 198 AD2d 855, 855-856 [4th Dept 1993], *lv denied* 82 NY2d 921 [1994]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We also reject defendant's contention that the verdict is against the weight of the evidence with respect to the remaining counts. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contention that Supreme Court committed reversible error by failing to instruct the jury on the statutory definitions of the words "deprive" and "appropriate" (*see* Penal Law § 155.00 [3], [4]) is unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defendant received meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *Baldi*, 54 NY2d at 147).

We further reject defendant's contention that the court erred by failing to make a sufficient inquiry into his request for substitute counsel and denying his request. Contrary to defendant's contention, the record establishes that the court made more than the requisite minimal inquiry into defendant's objections before properly determining that there was no good cause for the substitution of counsel (*see People v Pinkard*, 191 AD3d 1333, 1335 [4th Dept 2021], *lv denied* 36 NY3d 1123 [2021], *reconsideration denied* 37 NY3d 967 [2021]; *see generally People v Porto*, 16 NY3d 93, 99-100 [2010]).

Finally, defendant contends that the sentence is unduly harsh and severe. It is well settled that this Court's "sentence-review power

may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]), and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]). Here, the record establishes that defendant, who was 20 years old at the time of the crimes, had a traumatic upbringing and struggled with depression. In addition, we note that the People made a final pretrial plea offer to defendant that included an aggregate sentence of four years' imprisonment. While we recognize the seriousness of the crimes committed by defendant, under the circumstances of this case, we conclude that the sentence imposed is unduly harsh and severe and that a reduction of the aggregate sentence of incarceration is appropriate. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the determinate term of imprisonment imposed for each of the two counts of robbery in the first degree to a determinate term of 10 years, to be followed by the five-year period of postrelease supervision previously imposed by the court (*see* CPL 470.15 [6] [b]).

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

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

377

KA 21-01819

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PLUSH DOZIER, ALSO KNOWN AS PLUSH KEVIN DOZIER,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KERRY A. CONNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered December 13, 2021. The judgment convicted defendant upon a jury verdict of arson in the first degree and attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of arson in the first degree (Penal Law § 150.20 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), arising from an incident where defendant allegedly set fire to both his romantic partner (victim) and her residence in an unsuccessful attempt to kill her. We affirm.

Defendant contends that County Court erred in refusing to suppress certain statements he made to the police at the scene of the fire prior to his arrest because he was in custody and had not yet been administered *Miranda* warnings. We reject that contention. As the court properly determined, at the time in question, "a reasonable person in defendant's position, innocent of any crime, would not have believed that [they were] in custody, and thus *Miranda* warnings were not required" (*People v Gladney*, 235 AD3d 1255, 1256 [4th Dept 2025] [internal quotation marks omitted]; *see People v Thomas*, 166 AD3d 1499, 1500 [4th Dept 2018], *lv denied* 32 NY3d 1178 [2019]; *see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Specifically, at the time he made the inculpatory statements, defendant would not have reasonably believed that he was in custody inasmuch as he initiated contact with the police on the street, requested a pat-frisk, explained that he thought he should go to the police station, and responded to questions of an investigatory

nature (*see People v Duda*, 45 AD3d 1464, 1466 [4th Dept 2007], *lv denied* 10 NY3d 764 [2008]; *see also People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* 580 US 920 [2016]).

We also reject defendant's contention that the court erred in refusing to suppress certain statements he subsequently made to the police during the booking process. Initially, defendant's contention that the illegality of his initial statements to the police tainted the statements made during booking is unpreserved for our review (*see* CPL 470.05 [2]; *People v DiLenola*, 245 AD2d 1132, 1133 [4th Dept 1997]). In any event, we conclude that our determination regarding defendant's pre-*Miranda* statements—i.e., the ones made prior to his arrest—disposes of that contention (*see People v Waggoner*, 218 AD3d 1221, 1225 [4th Dept 2023], *lv denied* 40 NY3d 1082 [2023], *reconsideration denied* 41 NY3d 967 [2024]; *People v Robinson*, 174 AD3d 1490, 1491 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *Spirles*, 136 AD3d at 1316).

We further reject defendant's preserved contention that the statements made at booking should have been suppressed because they were allegedly made in response to a question that was reasonably likely to elicit an incriminating response. We note that, by the time the challenged statements were made, defendant had been advised of and waived his *Miranda* rights, and there is nothing in the record to suggest that the statements were involuntary (*see People v Williams*, 214 AD3d 1395, 1397 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023]). Moreover, defendant initiated the conversation in question, and the statements and questions asked by the police in response were not reasonably likely to "induce, provoke, or encourage defendant to make an incriminating statement" (*Waggoner*, 218 AD3d at 1225).

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]). An acquittal would have been unreasonable on this record given defendant's confession to the underlying crimes, which consisted of statements establishing both that he started the fire in the victim's home and that, in doing so, he intended to kill the victim (*see People v Ramos-Carrasquillo*, 197 AD3d 1000, 1002 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]; *People v Quinones*, 174 AD3d 1514, 1515 [4th Dept 2019], *lv denied* 34 NY3d 983 [2019]). Additionally, other evidence at trial corroborated the relevant statements in defendant's confession, particularly with respect to whether he was the person who set fire to the victim's residence. Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; *see Ramos-Carrasquillo*, 197 AD3d at 1002). To the extent that defendant asserts that the verdict is against the weight of the evidence because in her statements the victim denied that defendant started the fire, we note that the victim also stated that she did not know what happened or even how the fire

started.

Defendant contends that he was denied his right to a public trial when the court closed the courtroom due to protocols imposed during the COVID-19 pandemic because those protocols were not narrowly tailored to ensure his right to a public trial and because the court did not execute a proper alternative to the closure of the courtroom. We conclude that those contentions are not preserved inasmuch as defendant did not raise them before the trial court and he did not request a *Hinton* hearing on the issue (*see People v Everson*, 158 AD3d 1119, 1123 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018], *reconsideration denied* 31 NY3d 1147 [2018], *cert denied* 586 US 1198 [2019]; *People v Legere*, 81 AD3d 746, 751 [2d Dept 2011]; *see generally People v Hinton*, 31 NY2d 71, 73-76 [1972], *cert denied* 410 US 911 [1973]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

As defendant correctly concedes, his contention that he was deprived of a fair trial due to instances of prosecutorial misconduct during the prosecutor's opening statement and summation is unpreserved because defense counsel did not object to any of the purportedly improper comments (*see* CPL 470.05 [2]; *People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Miller*, 115 AD3d 1302, 1303 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014]). 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]). Contrary to defendant's further contention, defense counsel's failure to object to the prosecutor's remarks did not deprive defendant of effective assistance of counsel (*see People v Williams*, 228 AD3d 1249, 1250 [4th Dept 2024]; *People v Fick*, 167 AD3d 1484, 1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]).

Defendant also contends that he was deprived of effective assistance of counsel because defense counsel failed to pursue a psychiatric defense at trial. We reject that contention. Contrary to defendant's assertion, this case is not like *People v Oliveras* (21 NY3d 339 [2013]) inasmuch as here the record is devoid of evidence that defense counsel failed to investigate the facts of the case as they pertained to defendant's psychiatric condition. Instead, we conclude that such assertion is "based on matters outside the record on appeal, [and] must be raised by way of a motion pursuant to CPL article 440" (*People v Lane*, 160 AD3d 1363, 1365 [4th Dept 2018] [internal quotation marks omitted]; *see also People v Greenfield*, 167 AD3d 1060, 1063-1064 [3d Dept 2018], *lv denied* 32 NY3d 1204 [2019]).

Defendant also contends that defense counsel was ineffective in deciding not to pursue a psychiatric defense before the completion of court-ordered CPL article 730 evaluations. The purpose of an article 730 evaluation is to determine whether the defendant, "as a result of mental disease or defect[,] lacks capacity to understand *the proceedings against [them] or to assist in [their] own defense*" (CPL 730.10 [1] [emphasis added]). In other words, CPL article 730

evaluations assess defendant's *current competency* to proceed to trial, not defendant's mental state *at the time he committed the underlying crimes*. Consequently, any psychiatric defense predicated on the results of article 730 evaluations had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v King*, 229 AD3d 1173, 1173 [4th Dept 2024], *lv denied* 42 NY3d 1080 [2025]).

To the extent defendant contends that defense counsel was otherwise ineffective in declining to pursue a psychiatric defense at trial, we conclude that defendant failed to establish the absence of strategic or other legitimate explanations for those alleged shortcomings (*see generally People v Baker*, 14 NY3d 266, 270-271 [2010]; *People v Benevento*, 91 NY2d 708, 712 [1998]). In any event, "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defendant's] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: May 2, 2025 Ann Dillon Flynn
Clerk of the Court

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

386

CA 24-00754

PRESENT: LINDLEY, J.P., OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF DANIEL T. WARREN,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ZONING BOARD OF APPEALS OF TOWN OF WEST SENECA,
TOWN OF WEST SENECA, CODE ENFORCEMENT OFFICER
OF TOWN OF WEST SENECA AND CANISIUS HIGH SCHOOL
OF BUFFALO, BY AND THROUGH FR. DAVID CIANCIMINO,
S.J., AS ITS PRESIDENT, RESPONDENTS-DEFENDANTS-RESPONDENTS.

DANIEL T. WARREN, PETITIONER-PLAINTIFF-APPELLANT PRO SE.

GRECO TRAPP LLC, BUFFALO (CHRIS G. TRAPP OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS ZONING BOARD OF APPEALS OF TOWN OF WEST SENECA, TOWN OF WEST SENECA, CODE ENFORCEMENT OFFICER OF TOWN OF WEST SENECA.

COSGROVE LAW FIRM, BUFFALO (JAMES C. COSGROVE OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT CANISIUS HIGH SCHOOL OF BUFFALO, BY AND THROUGH FR. DAVID CIANCIMINO, S.J., AS ITS PRESIDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Craig D. Hannah, J.), entered April 5, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, dismissed the petition-complaint.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul the determination of respondent-defendant Zoning Board of Appeals of the Town of West Seneca (ZBA), which had dismissed for lack of standing his administrative appeal challenging the issuance of a building permit by respondent-defendant Code Enforcement Officer of the Town of West Seneca to respondent-defendant Canisius High School for the further development of student athletic facilities. Petitioner appeals from a judgment that, inter alia, granted respondents' motion to dismiss the petition-complaint. We affirm.

Contrary to petitioner's contention, the ZBA properly determined that petitioner was not an aggrieved person pursuant to Town Law § 267-a (4) and, thus, lacked standing to prosecute an administrative

appeal inasmuch as petitioner was not a party to the issuance of the building permit, nor an officer, department, board or bureau of the Town of West Seneca, and failed to establish that he "sustained special damage, different in kind and degree from the community generally" from the issuance of the permit (*Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413 [1987], *rearg denied* 70 NY2d 694 [1987]; *see Matter of Nunnally v Zoning Bd. of Appeals of the Town of New Windsor*, 217 AD3d 950, 952 [2d Dept 2023]; *Matter of Hadland v Zoning Bd. of Appeals of Town of Southampton*, 94 AD3d 1001, 1001-1002 [2d Dept 2012]).

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

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

389
CAF 24-00914
PRESENT: LINDLEY, J.P., CURRAN, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF ARIELLE L., RICHARD L.,
AND LARRY L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

CASSANDRA B., RESPONDENT-APPELLANT.

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated June 11, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding and disposition that, inter alia, adjudged the subject children to be neglected. The mother failed to appear at the fact-finding hearing, and her attorney, who had just withdrawn from the representation, did not participate in the hearing. Under those circumstances, we conclude that the mother's failure to appear constituted a default, and we therefore dismiss the appeal (*see Matter of Josaph M. [Wanda A.]* [appeal No. 3], 221 AD3d 1458, 1459 [4th Dept 2023], *lv denied* 42 NY3d 903 [2024]; *Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]; *see generally* CPLR 5511). We note that, on appeal, the mother does not contend that Family Court erred in allowing the mother's attorney to withdraw as counsel and that the entry of a default order was thus improper (*cf. Matter of Calvin L.W. [Dominique H.]*, 196 AD3d 1181, 1182 [4th Dept 2021]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

394
CAF 24-00915
PRESENT: LINDLEY, J.P., CURRAN, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF ARIELLE L., ALSO KNOWN AS ARIEL L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

JAMES M. CHERNETSKY, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (HANNAH WEBSTER OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), dated May 14, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals in appeal Nos. 1 through 3 from orders that, inter alia, terminated her parental rights with respect to the subject children on the ground of abandonment. We affirm in each appeal.

The mother contends that petitioner failed to prove by clear and convincing evidence that she abandoned the subject children. We reject that contention. An order terminating parental rights may be granted where the parent has abandoned the child "for the period of six months immediately prior to the date on which the petition [for termination of parental rights] is filed" (Social Services Law § 384-b [4] [b]). A child is abandoned by their parent if that parent "evinces an intent to forego [their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency" (§ 384-b [5] [a]). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (*id.*) and it is the parent's burden "to establish that circumstances existed that prevented [the parent's] contact with the child or agency or that the agency discouraged such

contact” (*Matter of Najuan W. [Stephon W.]*, 184 AD3d 1111, 1112 [4th Dept 2020]; *see Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785 [4th Dept 2017]).

Here, the mother does not dispute that she failed to maintain contact with the children for the statutory period; rather, she asserts that she maintained sufficient contact with petitioner to refute the claim of abandonment. Although the record supports the assertion that the mother maintained some contact with petitioner, we conclude that the contact was “minimal, sporadic [and] insubstantial” and thus was insufficient to preclude a finding of abandonment (*Matter of Dennym K.J. [Ronnie O.]*, 215 AD3d 1254, 1255 [4th Dept 2023] [internal quotation marks omitted]; *see Matter of Azaleayanna S.G.-B. [Quaneesha S.G.]*, 141 AD3d 1105, 1105 [4th Dept 2016]). The mother failed to demonstrate that there were circumstances rendering contact with the children or petitioner infeasible or that petitioner prevented or discouraged her from maintaining contact (*see Matter of Armani W. [Adifah W.]*, 167 AD3d 1569, 1570 [4th Dept 2018]; *see generally Matter of Annette B.*, 4 NY3d 509, 514 [2005], *rearg denied* 5 NY3d 783 [2005]).

Contrary to the mother’s further contention, we conclude that the evidence supports Family Court’s determination that termination of the mother’s parental rights is in the best interests of the children (*see Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Among other things, the steps taken by the mother to address the issues that led to the removal of the children were “not sufficient to warrant any further prolongation of [their] unsettled familial status” (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Zackery S. [Christa P.]*, 224 AD3d 1336, 1337 [4th Dept 2024], *lv denied* 41 NY3d 909 [2024]; *see generally Matter of Philip D.*, 266 AD2d 909, 909 [4th Dept 1999]). We also reject the mother’s contention that a suspended judgment was warranted; “[a] suspended judgment is not a permissible disposition in a proceeding pursuant to Social Services Law § 384-b (4) (b)” (*Matter of Dayyan J.L. [Dayyan L.]*, 145 AD3d 1007, 1008 [2d Dept 2016]; *see Matter of Micah L. [Rachel L.]*, 192 AD3d 1344, 1347 [3d Dept 2021]; *cf.* Family Ct Act § 631).

We have reviewed the mother’s remaining contention and conclude that it does not warrant reversal or modification of the orders on appeal.

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

395
CAF 24-00918
PRESENT: LINDLEY, J.P., CURRAN, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF LARRY L., III.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

JAMES M. CHERNETSKY, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (HANNAH WEBSTER OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), dated May 14, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Arielle L. (Cassandra B.)* ([appeal No. 1] — AD3d — [May 2, 2025] [4th Dept 2025]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

396
CAF 24-00919
PRESENT: LINDLEY, J.P., CURRAN, OGDEN, DELCONTE, AND KEANE, JJ.

IN THE MATTER OF RICHARD L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

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

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

JAMES M. CHERNETSKY, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (HANNAH WEBSTER OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), dated May 14, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Arielle L. (Cassandra B.)* ([appeal No. 1] — AD3d — [May 2, 2025] [4th Dept 2025]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

404
KA 22-00337
PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM B. COLLIER, III, DEFENDANT-APPELLANT.

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

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered December 7, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and unlawful fleeing a police officer in a motor vehicle 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 unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25), defendant contends that County Court erred in refusing to suppress physical evidence obtained as a result of a warrantless search without conducting a hearing with respect to the legality of the arrest and search. We reject that contention.

"A court is required to grant a suppression hearing if the defendant raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue of whether evidence was obtained in a constitutionally permissible manner" (*People v Howard*, 210 AD3d 1383, 1383 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023] [internal quotation marks omitted]; *see People v White*, 192 AD3d 1539, 1539 [4th Dept 2021]). However, a motion to suppress may be summarily denied if the defendant does not allege a proper "legal basis" for suppression or if "[t]he sworn allegations of fact do not as a matter of law support the ground alleged" (CPL 710.60 [3] [a], [b]; *see People v Mendoza*, 82 NY2d 415, 421 [1993]; *People v Davis*, 142 AD3d 1387, 1387 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]). "Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, . . . factual sufficiency

[is to] be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*Mendoza*, 82 NY2d at 422; *see Howard*, 210 AD3d at 1383). Here, the court did not abuse its discretion in denying, without an evidentiary hearing, that part of defendant's omnibus motion seeking to suppress the physical evidence recovered upon the search of the vehicle, because the allegations in the motion papers were insufficient to warrant a hearing (*see People v Ibarguen*, 37 NY3d 1107, 1108 [2021], *cert denied* — US —, 142 S Ct 2650 [2022]). In particular, the attorney affirmation submitted in support of the motion alleged no factual disputes and instead relied on boilerplate legal conclusions (*see Mendoza*, 82 NY2d at 426; *Davis*, 142 AD3d at 1388). Defendant did not specifically controvert the basis of his stop and arrest as articulated in the indictment and by the People at his arraignment (*see generally People v Sanford*, 48 AD3d 221, 221 [1st Dept 2008], *lv denied* 10 NY3d 869 [2008]; *People v McDowell*, 30 AD3d 160, 160 [1st Dept 2006], *lv denied* 7 NY3d 850 [2006]).

Defendant's further contention that the second felony offender statement proffered by the People and entered into the record did not substantially comply with CPL 400.21 (2) is unpreserved for our review. Here, inasmuch as defendant challenges the procedures employed under CPL 400.21 and not whether he qualifies as a predicate offender, his contention is not preserved for our review, due to his failure to object at sentencing to any alleged error with respect to the procedure by which he was adjudicated a second felony offender (*see People v Pellegrino*, 60 NY2d 636, 637 [1983]; *People v Quinones*, 162 AD3d 1402, 1402-1403 [3d Dept 2018]; *People v Perez*, 85 AD3d 1538, 1541 [4th Dept 2011]). In any event, we conclude that defendant, "by admitting in open court that he had been convicted of a prior felony offense in New York within the past 10 years, . . . waived strict compliance with CPL 400.21" (*People v Guillory*, 98 AD3d 835, 836 [4th Dept 2012], *lv denied* 20 NY3d 932 [2012]; *see Perez*, 85 AD3d at 1541; *People v Vega*, 49 AD3d 1185, 1186 [4th Dept 2008], *lv denied* 10 NY3d 965 [2008]).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court

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

411
CA 24-01519
PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF ROBERT H., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, RESPONDENT-RESPONDENT.

TODD G. MONAHAN, LITTLE FALLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered August 27, 2024, in a proceeding pursuant to Mental Hygiene Law article 10. The order continued petitioner's confinement to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). Petitioner contends that he was denied effective assistance of counsel at the hearing. Inasmuch as petitioner " 'is subject to civil confinement, the standard for determining whether effective assistance of counsel was provided in criminal matters is applicable here' " (*Matter of State of New York v Robert T.*, 214 AD3d 1405, 1406 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]). Contrary to his contention, however, we conclude that petitioner failed to meet "his burden on appeal to demonstrate the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies" (*Matter of State of New York v Steven A.*, 193 AD3d 1344, 1345 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *see Matter of State of New York v Juan U.*, 187 AD3d 1606, 1608 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]). Rather, "viewing the evidence, the law, and the circumstances of this case as a whole and at the time of the representation," we conclude that petitioner received effective assistance of counsel (*Matter of State of New York

v Parrott, 125 AD3d 1438, 1440 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]; *see Juan U.*, 187 AD3d at 1609).

Entered: May 2, 2025

Ann Dillon Flynn
Clerk of the Court