SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 27, 2026

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. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MARCH 27, 2026

_____	880	KA 19 02184	PEOPLE V JOE WASHINGTON
_____	885	CA 24 00772	MELISSA HUTCHINS V RENEE E. MESTAD, M.D.
_____	950	CA 25 00047	KENNETH R. ZATYKO V CAROLINE F. ZATYKO
_____	951	CA 24 01702	MANOEL C.D. ARRUDA V NEW YORK CENTRAL MUTUAL FIRE
_____	956	KA 24 01050	PEOPLE V JOHN R. LITOLFF
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_____	960	CAF 24 01021	Mtr of JONAH M.
_____	962	TP 25 00862	CASHEENA WILLIAMS V BARBARA GUINN
_____	1015	CA 24 01405	JONATHAN T. FOGEL, M.D. V KALEIDA HEALTH
_____	1020	CA 24 01316	DENNIS M. ANKROM V WILLIAMSON FLYING CLUB, INC.
_____	6	CAF 24 02045	Mtr of HANALISE S.
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_____	11	CA 25 00089	LILIAN C. V STATE OF NEW YORK
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_____	145	CAF 24 01135	DAVID CHEUNG V KIM NGYEN THI TRAN
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_____	181	KA 23 00649	PEOPLE V JAFARY BROWN
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAF 24-02045

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

IN THE MATTER OF HANALISE S., MOSES B., AND SOPHIA B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EZRA B.B., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR RESPONDENT-APPELLANT.

BRENDON S. FLEMING, ACTING COUNTY ATTORNEY, ROCHESTER (MARY M. WHITESIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered December 2, 2024. The order granted the oldest child an order of protection.

It is hereby ORDERED that the case is held and the decision is reserved.

Same memorandum as in *Matter of Hanalise S. (Ezra B.B., Jr.)* ([appeal No. 2] — AD3d — [Mar. 27, 2026] [4th Dept 2026]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CAF 24-02050

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

IN THE MATTER OF HANALISE S., MOSES B., AND SOPHIA B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EZRA B.B., JR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR RESPONDENT-APPELLANT.

BRENDON S. FLEMING, ACTING COUNTY ATTORNEY, ROCHESTER (MARY M. WHITESIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered December 2, 2024. The order granted the two youngest children an order of protection.

It is hereby ORDERED that the case is held, the decision is reserved, counsel for the subject children is relieved of his assignment, and new counsel is to be assigned in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order of protection issued in favor of the oldest subject child. In appeal No. 2, respondent appeals from an order of protection issued in favor of the youngest subject children. We note at the outset that children in article 10 proceedings are entitled to effective assistance of counsel, including on appeal (*see Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]; *see also Matter of Jennifer VV. v Lawrence WW.*, 182 AD3d 652, 655 [3d Dept 2020]). Inasmuch as the attorney assigned to represent the youngest children in appeal No. 2 failed to file a brief, we conclude that, under the circumstances of this case, the attorney for the youngest children failed to fulfill an essential obligation related to his representation and the youngest children therefore did not receive effective assistance of appellate counsel (*see Jennifer VV.*, 182 AD3d at 655; *Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1094-1095 [3d Dept 2009]). Therefore, in appeal No. 2, we hold the case, reserve decision, relieve counsel of his assignment, and direct the assignment of new counsel to represent the subject youngest children and file a brief on their behalf. In light of our determination in appeal No. 2 and in the interest of judicial economy, we hold the case in appeal No. 1 and reserve

decision pending the assignment of new counsel and the filing of a brief in appeal No. 2.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 25-00089

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

LILIAN C., INDIVIDUALLY AND AS GUARDIAN
OF STEFANIE C., CLAIMANT-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT-APPELLANT.
(CLAIM NO. 127148.)

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR CLAIMANT-APPELLANT-RESPONDENT.

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

Appeal and cross-appeal from an interlocutory judgment of the Court of Claims (J. Scott Odorisi, J.), entered January 3, 2025. The interlocutory judgment apportioned liability 20% to defendant.

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

Memorandum: Claimant commenced this action on behalf of herself and her daughter seeking damages for injuries that they sustained as passengers in a motor vehicle accident that occurred when the driver of another vehicle (nonparty driver) failed to yield the right-of-way and turned left in front of the vehicle that claimant and her daughter were in. Following a bifurcated nonjury trial on liability, the Court of Claims determined that defendant, State of New York (State), was 20% responsible and the nonparty driver was 80% responsible for the happening of the accident. Claimant appeals, and the State cross-appeals. We affirm.

The court concluded that the State failed to remedy a dangerous intersection condition, but the primary fault for the accident was the nonparty driver's failure to exercise enough caution under the circumstances. Contrary to the contentions of both claimant and the State, the court's apportionment of liability is supported by a fair interpretation of the evidence (*see Destino v State of New York*, 203 AD3d 1598, 1599-1600 [4th Dept 2022]; *Johnson v State of New York*, 151 AD3d 1672, 1673-1674 [4th Dept 2017]). We have considered the

parties' remaining contentions and conclude that they are without merit.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 24-01622

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

JOHN HAGERTY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL J. KLEIN, M.D., ET AL., DEFENDANTS,
AND TRAVIS L. BOAZ, M.D., DEFENDANT-RESPONDENT.

RICHARD P. VALENTINE, ESQ., P.C., BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 15, 2024, in a medical malpractice action. The order granted the motion of defendant Travis L. Boaz, M.D., to dismiss the complaint against him.

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

Memorandum: Plaintiff timely commenced this action against a number of defendants by filing a summons and complaint in May 2022. Plaintiff's injuries as alleged in the complaint stemmed from purported medical malpractice commencing in November 2019. The complaint named Travis L. Boaz, M.D. as a defendant and alleged a distinct cause of action against only Boaz. Plaintiff timely served the other named defendants in August and September 2022, but he did not serve Boaz until March 2024. On Boaz's motion, Supreme Court dismissed the complaint against him based on the untimely service (*see generally* CPLR 306-b). Plaintiff appeals, and we affirm.

Contrary to plaintiff's contention, the relation back doctrine does not apply to the circumstances of this case. The relation back doctrine pertains to "claims against a party mistakenly omitted from the initial filing and then added after the expiration of the limitations period" and has the specific effect of "treat[ing] [the claims] as interposed when the action was timely commenced against the originally named [defendants]" (*Matter of Nemeth v K-Tooling*, 40 NY3d 405, 407 [2023]). Thus, the relation back doctrine "enables a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired" (*Buran v Coupal*, 87 NY2d 173, 177 [1995]). Here, however, given that Boaz was correctly named in the original complaint in an action that was

timely commenced against him, plaintiff is not seeking to correct a pleading error. Instead, plaintiff is attempting to cure an omission of service as required under CPLR 306-b, and the relation back doctrine is thus inapplicable.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 24-01126

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS JONES, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CASEY S. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Theodore H. Limpert, J.), rendered June 28, 2024. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, and a new trial is granted on counts 6 and 7 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count of criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [1]) and one count of CPCS in the fourth degree (§ 220.09 [1]).

Defendant was tried with his codefendant and contends that County Court erred in permitting the codefendant to unilaterally exercise peremptory challenges. We agree. The court's process of allowing defendant and codefendant to each unilaterally exercise their shared peremptory challenges was in violation of CPL 270.25 former (3) and resulted in defendant and codefendant exhausting their shared peremptory challenges before all jurors were selected (*see Ruzas v Sullivan*, 1988 WL 83377, *5 [SD NY, Aug. 2, 1988, No. 85 CIV. 4801 (CBM)]; *see also People v Wilkins*, 175 AD3d 867, 868 [4th Dept 2019], *affd* 37 NY3d 371 [2021]). A court's mistaken denial of a defendant's peremptory challenge "under New York law mandates automatic reversal" (*People v Hecker*, 15 NY3d 625, 661 [2010], *cert denied* 563 US 947 [2011]; *see People v Viera*, 164 AD3d 1277, 1279 [2d Dept 2018]; *lv denied* 32 NY3d 1179 [2019], *reconsideration denied* 33 NY3d 982 [2019]; *People v Parrales*, 105 AD3d 871, 872 [2d Dept 2013]).

We further agree with defendant that reversal is required on the

additional ground that the court erred in denying his request to subpoena records regarding the latent print examiner. To obtain a third-party subpoena, a "defendant[ ] must proffer a good faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory" (*People v Kozlowski*, 11 NY3d 223, 241 [2008], *rearg denied* 11 NY3d 904 [2009], *cert denied* 556 US 1282 [2009]). The subpoena request should have been granted because the additional materials sought by defendant related to the examiner's previous errors and bore on the reliability of her identification of defendant's fingerprints in this case (*cf. People v Gissendanner*, 48 NY2d 543, 550 [1979]). That error is not harmless because the proof of guilt is not overwhelming (*see People v Wildrick*, 83 AD3d 1455, 1457 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]; *see generally People v Myers*, 22 NY3d 1010, 1011 [2013]).

Contrary to defendant's contention, the court did not abuse its discretion in denying that part of defendant's motion seeking severance of his trial from that of the codefendant. The defenses of defendant and codefendant were not in irreconcilable conflict, nor was there a significant danger that any alleged conflict led the jury to infer either defendant's guilt (*see People v Isaac*, 195 AD3d 1410, 1411 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]). We also conclude that the court "properly refused to suppress the physical evidence" (*People v Davis*, 199 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]).

To the extent that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence of possession, we conclude that it lacks merit (*see People v Chourb*, 232 AD3d 1272, 1273 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *People v Tulloch*, 83 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 17 NY3d 802 [2011]). Although defendant failed to preserve any further challenge to the legal sufficiency of the evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we necessarily review the evidence adduced as to each of the elements of the crimes in the context of his contention that the verdict is against the weight of the evidence (*see People v Exford*, 234 AD3d 1252, 1253 [4th Dept 2025]). 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, although 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 generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: March 27, 2026 Ann Dillon Flynn
Clerk of the Court

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

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CA 24-01650

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

DANIEL CHARCHOLLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHANNEL 13 NEWS, ALSO KNOWN AS 13 WHAM, AND DEERFIELD MEDIA (ROCHESTER), INC., DEFENDANTS-RESPONDENTS.

VIVEK J. THIAGARAJAN, WEBSTER, FOR PLAINTIFF-APPELLANT.

BALLARD SPAHR LLP, NEW YORK CITY (JACQUELYN N. SCHELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered August 26, 2024, in a defamation action. The order granted in part the motion of defendants for attorney's fees.

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

Memorandum: Plaintiff appeals from an order that granted in part defendants' motion for attorney's fees and costs pursuant to Civil Rights Law § 70-a following an inquest. We reverse.

We agree with plaintiff that Supreme Court erred in granting the motion in part and awarding an amount of attorney's fees and costs to defendants. Civil Rights Law § 70-a (1) provides, in relevant part, that "[a] defendant in an action involving public petition and participation . . . , may maintain an action, claim, cross claim or counterclaim to recover *damages*, including costs and attorney's fees, from any person who commenced or continued such action" (emphasis added). Here, the record establishes that the attorney's fees and costs were billed to and paid by a nonparty entity and not defendants. Although defendants' counsel alleged that a corporate relationship existed between defendants and the nonparty entity, defendants established no contractual obligation between them and the nonparty from which to conclude that defendants suffered damages by the imposition of attorney's fees and costs as contemplated by the statute.

Plaintiff's remaining contentions need not be reached in light of our determination. We note that the record does not contain a notice of cross-appeal and, therefore, the purported cross-appeal of defendants was deemed dismissed inasmuch as it was not timely

perfected pursuant to the six-month rule (*see* 22 NYCRR 1250.7 [b] [4]; 1250.10 [a]; *Porschia C. v Sodus Cent. Sch. Dist.*, 231 AD3d 1520, 1521 [4th Dept 2024]; *see generally Bryden v Hankins*, 124 AD3d 1263, 1263-1264 [4th Dept 2015]). Consequently, the contentions of defendants pertaining to the order are not properly before us (*see Porschia C.*, 231 AD3d at 1521; *Perri v Case*, 208 AD3d 1046, 1047 [4th Dept 2022]).

All concur except OGDEN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. I disagree with the majority that Supreme Court erred in granting, in part, defendants' motion for attorney's fees and costs pursuant to Civil Rights Law § 70-a.

Civil Rights Law § 70-a (1) provides, in relevant part, that "[a] defendant in an action involving public petition and participation . . . , may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action." The majority's rationale in reversing the order is that the attorney's fees and costs were billed to and paid by a nonparty entity and not defendants. The majority places a burden on defendants to establish the existence of any legal or contractual relationship between defendants and the nonparty entity that served as the payor. That burden is not appropriate here. The court properly found that Civil Rights Law § 70-a (1) does not require that the fees be paid by the named defendant. As a remedial statute (*see Gottwald v Sebert*, 40 NY3d 240, 264 [2023]; *Hoi Trinh v Nguyen*, 211 AD3d 1623, 1625 [4th Dept 2022]), Civil Rights Law § 70-a (1) should be "liberally construed to carry out the reforms intended and to promote justice . . . , and interpreted broadly to accomplish [its] goals" (*Kimmel v State of New York*, 29 NY3d 386, 396 [2017] [internal quotation marks omitted]; *see generally Graham Ct. Owners Corp. v Taylor*, 24 NY3d 742, 750-751 [2015]). There is no express prohibition on the recovery of attorney's fees and costs that have been advanced or paid by a nonparty for the benefit of the prevailing party, and "[i]t is not for this Court to engraft limitations onto the plain language of the statute" (*Kimmel*, 29 NY3d at 401; *cf. Cardo v Board of Mgrs., Jefferson Vil. Condo 3*, 67 AD3d 945, 946 [2d Dept 2009]). At this juncture, defendants—by virtue of being *the named defendants* in this action involving public petition and participation—are entitled to recover from plaintiff their attorney's fees and costs (*see* § 70-a [1]; *Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10, 25 [1st Dept 2024], *lv dismissed* 44 NY3d 990 [2025]; *see generally Centennial Contrs. Enters. v East N.Y. Renovation Corp.*, 79 AD3d 690, 693 [2d Dept 2010]).

Finally, none of the other contentions raised on plaintiff's appeal warrant reversal or modification of the order and, inasmuch as defendants failed to perfect the cross-appeal, their contentions with respect to the order are not properly before this Court (*see* 22 NYCRR

1250.10 [a]; *see generally Bryden v Hankins*, 124 AD3d 1263, 1263-1264 [4th Dept 2015]). I would therefore affirm the order.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 25-00147

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON DENNIS, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Niagara County Court (John James Ottaviano, J.), entered January 3, 2025. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Memorandum: Defendant appeals, by permission of this Court, from an order that denied without a hearing his motion pursuant to CPL 440.10 to vacate the judgment convicting him upon a jury verdict of, inter alia, three counts each of murder in the second degree (Penal Law § 125.25 [1], [3]) and robbery in the first degree (§ 160.15 [2] - [4]). We previously modified the judgment of conviction (*People v Dennis*, 91 AD3d 1277 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]), and we now conclude that County Court did not err in denying defendant's motion without conducting a hearing.

Defendant failed to establish entitlement to a hearing on his CPL 440.10 motion inasmuch as he failed to demonstrate that "the nonrecord facts sought to be established are material and would entitle him . . . to relief" (*People v Streeter*, 194 AD3d 1407, 1408 [4th Dept 2021], *lv denied* 37 NY3d 974 [2021], *reconsideration denied* 37 NY3d 1029 [2021] [internal quotation marks omitted]; *see People v Kellum*, 233 AD3d 1374, 1379 [3d Dept 2024], *lv denied* 44 NY3d 983 [2025]). Defendant moved to vacate the judgment on the ground that the People violated their *Brady* obligation by failing to disclose that a prosecution witness had two arrests pending at the time of his trial testimony and that the witness had a personal relationship with an officer involved in the case. "To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the

defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material" (*People v Fuentes*, 12 NY3d 259, 263 [2009], *rearg denied* 13 NY3d 766 [2009]; *see People v Garrett*, 23 NY3d 878, 885 [2014], *rearg denied* 25 NY3d 1215 [2015]). "[W]here a defendant makes a specific request for a document, the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceeding. Absent a specific request by defendant for the document, materiality can only be demonstrated by a showing that there is a 'reasonable probability' that it would have changed the outcome of the proceedings" (*Fuentes*, 12 NY3d at 263; *see People v Lorenzo*, 230 AD3d 1564, 1566 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]; *People v Hanes*, 218 AD3d 1175, 1177 [4th Dept 2023], *lv denied* 40 NY3d 1092 [2024]).

We agree with defendant that the information regarding the witness's arrests and his relationship with the officer constituted *Brady* material (*see People v Valentin*, 1 AD3d 982, 982-983 [4th Dept 2003], *lv denied* 1 NY3d 602 [2004]). However, even assuming, arguendo, that the information was available to the People (*see id.* at 983), we conclude, under the circumstances of this case, that defendant failed to establish materiality under *Brady* inasmuch as there is neither a reasonable probability nor a reasonable possibility that, had the information been disclosed to the defense, it would have changed the result of the trial (*see Hanes*, 218 AD3d at 1177; *People v Reed*, 115 AD3d 1334, 1335 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]). Here, the verdict did not turn solely on the witness's testimony. Other evidence, including other eyewitness testimony, DNA evidence from the codefendant, and cell phone data, "established defendant's responsibility for the shooting" (*People v Smith*, 138 AD3d 1418, 1420 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]; *see People v Boykins*, 160 AD3d 1348, 1350 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 25-00046

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

LAZARUS CONSTRUCTION CORP., PLAINTIFF,

V MEMORANDUM AND ORDER

SKYLINE CENTRO, LLC, DEFENDANT-RESPONDENT.

SKYLINE CENTRO, LLC, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

LAZARUS INDUSTRIES, LLC, THIRD-PARTY DEFENDANT-APPELLANT.

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

ROSSI & DEMARCO, PLLC, TONAWANDA (NICHOLAS P. DEMARCO OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 11, 2024, in a breach of contract action. The judgment awarded defendant-third-party plaintiff money damages against plaintiff and third-party defendant, jointly and severally.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking from the decretal paragraph the phrase "and Counterclaim Defendant, Lazarus Industries, LLC, operating at 382 High Street, Buffalo, New York 14204, jointly and severally" and the phrase "and Lazarus Industries, LLC," and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of contract based on the failure of defendant-third-party plaintiff (defendant) to pay plaintiff amounts allegedly due under a construction contract. Defendant counterclaimed for, inter alia, breach of the contract against plaintiff and asserted, inter alia, a claim for breach of contract against third-party defendant Lazarus Industries, LLC (Lazarus Industries). After trial, the jury found that plaintiff breached the contract and that defendant sustained damages as a result of that breach. The jury also found that Lazarus Industries breached the contract, but it determined that defendant sustained no damages as a result of that breach. Lazarus Industries now appeals from an order and judgment (order) that, inter alia, directs that a judgment be entered in favor of defendant and

against plaintiff and Lazarus Industries, jointly and severally, for breach of the contract.

As a preliminary matter, we note that the order was subsumed in the final judgment (*see Counsel Fin. II LLC v Bortnick* [appeal No. 2], 214 AD3d 1388, 1389 [4th Dept 2023]) entered shortly after entry of the order, and thus the proper appealable paper is the judgment, not the order (*see* CPLR 5501 [a] [1]; 5512 [a]; *LPCiminelli, Inc. v JPW Structural Contr., Inc.*, 217 AD3d 1380, 1380 [4th Dept 2023]; *see generally Matter of Aho*, 39 NY2d 241, 248 [1976]). Although Lazarus Industries, by notice of appeal served and filed after entry of the judgment, has taken an appeal from the order, the appeal "must be deemed taken from the judgment inasmuch as the appeal is timely, no prejudice has resulted, and the judgment has been furnished to us" (*Tomaselli v Malagese*, 242 AD3d 1562, 1563 [4th Dept 2025]).

Lazarus Industries contends that the judgment erroneously states that Lazarus Industries is jointly and severally liable with plaintiff and that it should be modified to conform to the jury verdict. We agree, and we therefore modify the judgment accordingly. To establish liability against Lazarus Industries for breach of contract, defendant had to establish the existence of a contract, defendant's performance pursuant to the contract, a breach by Lazarus Industries of its contractual obligations, and damages resulting from the breach (*see Marinaccio v Town of Clarence*, 215 AD3d 1289, 1290 [4th Dept 2023]; *see generally Howlett Farms, Inc. v Fessner*, 78 AD3d 1681, 1683 [4th Dept 2010], *lv denied* 17 NY3d 710 [2011]). Here, the jury determined that Lazarus Industries was not liable for its breach of contractual obligations inasmuch as defendant failed to establish the damages element. We conclude therefore that Supreme Court erred in entering the judgment against Lazarus Industries (*see generally Howlett Farms, Inc.*, 78 AD3d at 1683). Moreover, the court erred in holding Lazarus Industries jointly and severally liable with plaintiff for the damages due and owing to defendant (*see generally On Time Constr., Inc. v 329 E. 58, LLC*, 216 AD3d 431, 433 [1st Dept 2023]). Although all parties who induce a breach of contract are jointly and severally liable for the breach (*see Hornstein v Podwitz*, 254 NY 443, 449 [1930]), defendant did not allege that Lazarus Industries induced plaintiff's breach of contract, the court did not instruct the jury on such a charge, the jury was never presented with that interrogatory, and the court did not offer any other rationale for imposing joint and several liability (*see generally Perfectly Reliable Constr., Inc. v 21 E. 26, LLC*, 216 AD3d 580, 582 [1st Dept 2023]).

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

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 25-00175

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

LEONARD MAZURKIEWICZ AND JENNYLU MAZURKIEWICZ,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MERCY HOSPITAL OF BUFFALO,
WILLIAM M. COPLIN, M.D., DEFENDANTS,
NATHANIEL P. BILLINGS, M.D., AND
NICOLE WEDZINA, N.P., DEFENDANTS-RESPONDENTS.

STAMM LAW FIRM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RICOTTA, MATTREY, CALLOCCHIA, MARKEL & CASSERT, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR DEFENDANT-RESPONDENT NATHANIEL P. BILLINGS, M.D.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANT-RESPONDENT NICOLE WEDZINA, N.P.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 23, 2024, in a medical malpractice action. The order, among other things, granted the motion of defendant Nathaniel P. Billings, M.D. for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the appeal from that part of the order granting in part the motion of defendants Mercy Hospital of Buffalo, William M. Coplin, M.D., and Nicole Wedzina, N.P., is unanimously dismissed and the order is modified on the law by denying the motion of defendant Nathaniel P. Billings, M.D. and reinstating the complaint against him, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries Leonard Mazurkiewicz (plaintiff) allegedly sustained as a result of defendants' delay in detecting and properly treating plaintiff's stroke following his admission to defendant Mercy Hospital of Buffalo (Mercy Hospital). Defendant Nathaniel P. Billings, M.D. moved for summary judgment dismissing the complaint against him. Mercy Hospital and defendants William M. Coplin, M.D., and Nicole Wedzina, N.P. (Mercy defendants), also moved for summary judgment dismissing the complaint against them. Supreme Court granted Billings's motion in its entirety and granted the Mercy defendants' motion in part by, inter alia, dismissing the complaint

against Wedzina. Plaintiffs appeal.

Initially, we dismiss the appeal from that part of the order granting in part the Mercy defendants' motion inasmuch as plaintiffs failed to provide an adequate record to permit meaningful appellate review thereof (*see Walker v County of Monroe*, 216 AD3d 1429, 1429 [4th Dept 2023]; *O'Neill v O'Neill*, 174 AD3d 1526, 1527 [4th Dept 2019]; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). "It is the obligation of the appellant to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the [c]ourt" (*Woodman v Woodman*, 162 AD3d 1650, 1650-1651 [4th Dept 2018] [internal quotation marks omitted]; *see* CPLR 5526). Here, the record does not contain the Mercy defendants' answer or their motion papers and exhibits. Also notably absent from the record is plaintiffs' bill of particulars detailing their allegations of negligence against Wedzina.

We agree with plaintiffs that the court erred in granting Billings's motion, and we therefore modify the order accordingly. "[A] defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]). Once the defendant meets the initial burden, the burden shifts to the plaintiff to raise a triable issue of fact, but "only as to the elements on which the defendant met the prima facie burden" (*Bubar*, 177 AD3d at 1359 [internal quotation marks omitted]; *see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]). Here, although the court properly determined that Billings met his initial burden on his motion with respect to the issues of deviation from the accepted standard of medical care and causation, we conclude that plaintiffs raised triable issues of fact in opposition as to both issues through the submission of the affidavit of an expert neurologist and the affirmation of an expert in emergency medicine (*see Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021]; *Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]). Indeed, plaintiffs' experts raised issues of fact with respect to whether plaintiff was still within the period of efficacy for certain treatments, including tissue plasminogen activator and treatment with the neurological care team, such that Billings should have promptly ordered those treatments. Inasmuch as plaintiffs' expert submissions "squarely oppose[d]" the moving party's expert submissions, the result is "a classic battle of the experts that is properly left to a jury for resolution" (*Cully v Ricottone*, 228 AD3d 1240, 1240 [4th Dept 2024] [internal quotation marks omitted]; *see Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018]). This is not a case in which plaintiffs' expert submissions are " 'vague, conclusory, speculative, and unsupported by the medical evidence in the record before us' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *see also Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]).

Entered: March 27, 2026 Ann Dillon Flynn
Clerk of the Court

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

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KA 22-01206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELMARIOUS HONEYCUTT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Suzanne Maxwell Barnes, J.), rendered June 13, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]).

Viewing the evidence in the light most favorable to the People, as we must when reviewing the legal sufficiency of the evidence (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude, contrary to defendant's contention, that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Even assuming, arguendo, that the video evidence was not sufficiently authenticated and that County Court thus erred in admitting it in evidence, we conclude that "the admission of such evidence was harmless [inasmuch] as the evidence of . . . defendant's guilt was overwhelming, and there was no significant probability that the [alleged] error contributed to . . . defendant's conviction[ ]" (*People v Upson*, 186 AD3d 1270, 1271 [2d Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *see People v Cardoza*, 218 AD3d 1291, 1293 [4th Dept 2023], *lv denied* 40 NY3d 996 [2023]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to object to many of the alleged instances of prosecutorial misconduct that he raises on appeal, and thus he failed to preserve his contentions for our review with respect to those instances (*see* CPL 470.05 [2]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Regardless, with respect to the alleged instances of prosecutorial misconduct that are preserved, we conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015] [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial (*see People v Mohamed*, 224 AD3d 1271, 1271-1272 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]). In any event, that contention lacks merit. "The imposition of a more severe sentence after trial than that offered to defendant pursuant to a plea offer that he rejected, without more, does not support the contention of defendant that he was penalized for exercising his right to go to trial" (*People v Taplin*, 1 AD3d 1044, 1046 [4th Dept 2003], *lv denied* 1 NY3d 635 [2004] [internal quotation marks omitted]; *see People v Tetro*, 181 AD3d 1286, 1290 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]). Finally, defendant's sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 25-00120

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

HEATHER J. AND ANTONIO T., AS PARENTS AND NATURAL GUARDIANS OF CHASE T., A MINOR, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROCHESTER REGIONAL HEALTH, UNITY HOSPITAL AND GENEA I. HASKIN, R.N., DEFENDANTS-APPELLANTS.

BROWN, GRUTTADARO & PRATO, PLLC., ROCHESTER (HALI S. BUCKLEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS ROCHESTER REGIONAL HEALTH AND UNITY HOSPITAL.

REBAR KELLY LLC, NEW YORK CITY (JAYNE L. BRAYER OF COUNSEL), FOR DEFENDANT-APPELLANT GENEA I. HASKIN, R.N.

JANET, JANET & SUGGS, LLC, BALTIMORE, MARYLAND (ANDREW JANET OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered August 5, 2024, in a medical malpractice action. The order denied the motion of defendant Genea I. Haskin, R.N., for summary judgment and denied in part the motion of defendants Rochester Regional Health and Unity Hospital for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Rochester Regional Health and Unity Hospital and striking the allegations against those defendants of lack of informed consent from plaintiffs' amended bill of particulars and by dismissing the claims of medical malpractice against those defendants to the extent that they are not based on the alleged medical malpractice of defendant Genea I. Haskin, R.N., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by their son during his birth as a result of the alleged medical malpractice of defendants Rochester Regional Health and Unity Hospital (collectively, Hospital defendants) and Genea I. Haskin, R.N., in failing to timely diagnose, respond to, and treat a uterine rupture. Following discovery, the Hospital defendants and Haskin separately moved for summary judgment dismissing the complaint against them. Supreme Court denied the Hospital defendants' motion in part and denied Haskin's motion in its entirety.

The Hospital defendants and Haskin separately appeal.

We agree with the Hospital defendants that the court erred in denying that part of their motion seeking, in effect, to strike the allegations of lack of informed consent from plaintiffs' amended bill of particulars to the Hospital defendants, and we modify the order accordingly. "[A] bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial . . . Whatever the pleading pleads, the bill must particularize since the bill is intended to [afford] the adverse party a more detailed picture of the claim . . . being particularized . . . A bill of particulars may not be used to allege a new theory not originally asserted in the complaint" (*Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011] [internal quotation marks omitted]; *see Sebring v Wheatfield Props. Co.*, 255 AD2d 927, 928 [4th Dept 1998]). For those purposes, "[l]ack of informed consent is a distinct theory of medical malpractice liability rooted in a specific professional duty to reasonably inform and obtain consent from the patient," and claims for traditional medical malpractice and lack of informed consent " 'comprise[ ] different elements' " (*SanMiguel v Grimaldi*, — NY3d —, —, 2025 NY Slip Op 05780, *3 [2025]; *see Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]). Here, we conclude that "[t]he complaint is based solely on [traditional] medical malpractice and does not contain a separate cause of action for lack of informed consent" (*Connelly v Warner*, 248 AD2d 941, 942 [4th Dept 1998]) and that a review of the allegations in the complaint does not support the conclusion that the distinct theory of lack of informed consent was " 'sufficiently pleaded to avoid surprise and prejudice to [the Hospital] defendants' " (*Clark v Cucinotta*, 229 AD3d 1106, 1107 [4th Dept 2024]; *see Connelly*, 248 AD2d at 942-943). Inasmuch as plaintiffs' complaint does not presently plead a cause of action for lack of informed consent, the allegations in plaintiffs' amended bill of particulars relating to lack of informed consent must be stricken (*see Connelly*, 248 AD2d at 942-943).

Contrary to Haskin's contention, we conclude that the court properly denied her motion for summary judgment. Haskin met her initial burden of establishing her entitlement to judgment as a matter of law on deviation from the accepted standard of care through the submission of an expert affidavit that was "detailed, specific and factual in nature[,] . . . addressed each negligence claim raised in [plaintiffs' amended] bill of particulars" relating to her (*Kristie M. v Mercy Hosp. of Buffalo*, 240 AD3d 1228, 1229 [4th Dept 2025] [internal quotation marks omitted]), and opined that Haskin did not deviate from good and accepted medical practice (*see Nesterenko v Hall*, 239 AD3d 1314, 1315 [4th Dept 2025]; *Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]; *Webb v Scanlon*, 133 AD3d 1385, 1386 [4th Dept 2015]). The burden then shifted to plaintiffs "to raise triable issues of fact by submitting an expert's affidavit . . . attesting to a departure from the accepted standard of care" (*Nesterenko*, 239 AD3d at 1315 [internal quotation marks omitted]; *see Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]). In opposition, plaintiffs submitted an expert affidavit of an obstetrician/gynecologist opining that Haskin deviated from the accepted standard of care by, inter

alia, failing to properly monitor the fetal heart rate, with the result that the attending obstetrician received untimely notice of the uterine rupture, which " 'squarely opposes' " the affidavit of Haskin's expert and results in " 'a classic battle of the experts that is properly left to a jury for resolution' " (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).

Contrary to the Hospital defendants' contention, plaintiffs' assertion that Haskin was acting as their agent is not raised for the first time on appeal. We further agree with plaintiffs that the Hospital defendants failed to meet their initial burden of establishing as a matter of law that, because Haskin was a traveling nurse contracted to work at Unity Hospital and not an employee, Unity Hospital did not " 'maintain[ ] control over the manner and means of [her] work' " and plaintiffs did not " 'reasonably believe[ ] that [she was] provided by the hospital or acted on the hospital's behalf' " (*Pasek v Catholic Health Sys., Inc.*, 195 AD3d 1381, 1382 [4th Dept 2021]; *see Torns v Samaritan Hosp.*, 305 AD2d 965, 966-967 [3d Dept 2003]). Thus, inasmuch as the court properly found triable issues of fact with respect to the malpractice claim against Haskin, summary judgment dismissing the related vicarious liability claim against the Hospital defendants based upon the alleged malpractice of Haskin was properly denied (*see Pezulich v Grecco*, 206 AD3d 827, 829 [2d Dept 2022]; *Wilk v James*, 107 AD3d 1480, 1484-1485 [4th Dept 2013]).

However, we agree with the Hospital defendants that the court erred in not dismissing the remaining claims against them. The Hospital defendants met their initial burden of establishing their entitlement to judgment as a matter of law on deviation, with respect to plaintiffs' claims of direct liability against the Hospital defendants and vicarious liability of the Hospital defendants for the alleged malpractice of three of their employees, through the submission of an expert affidavit that was "detailed, specific and factual in nature[,] . . . addressed each negligence claim raised in [plaintiffs' amended] bill of particulars" relating to them (*Kristie M.*, 240 AD3d at 1229), and opined that the Hospital defendants and the three employees did not deviate from good and accepted medical practice (*see Nesterenko*, 239 AD3d at 1315; *Wicks*, 198 AD3d at 1315; *Webb*, 133 AD3d at 1386). The burden then shifted to plaintiffs (*see Nesterenko*, 239 AD3d at 1315; *Ziemendorf*, 207 AD3d at 1157-1158). The affidavit of plaintiffs' expert obstetrician/gynecologist addressed the Hospital defendants' conduct only with respect to the claim arising from Haskin's alleged failure to properly monitor the fetal heart rate. By not submitting the requisite expert medical response in opposition to the motion on the claims of direct liability against the Hospital defendants and their vicarious liability regarding the actions or omissions of the three employees, plaintiff failed to raise a triable issue of fact as to those claims (*see Nesterenko*, 239 AD3d at 1315; *Webb*, 133 AD3d at 1387). The court thus erred in denying the Hospital defendants' motion insofar as it sought to dismiss plaintiffs' claims for medical malpractice against them to the extent that they are not based on the alleged medical malpractice of Haskin,

and we further modify the order accordingly.

In light of our determination, we do not reach the remaining contentions of the Hospital defendants.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 24-00439

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHALA WILLIAMS, DEFENDANT-APPELLANT.

JOHN R. LEWIS, SLEEPY HOLLOW, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Theodore H. Limpert, J.), rendered October 12, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant was previously convicted after a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [2]). He appealed, and this Court affirmed the judgment (*People v Williams* [appeal No. 1], 175 AD3d 980, 980 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]). However, in a separate appeal, this Court remitted to County Court for a hearing pursuant to CPL 440.30 (5) (*People v Williams* [appeal No. 2], 175 AD3d 980, 980 [4th Dept 2019]). After a hearing on defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction on the ground of ineffective assistance of counsel, the court (Dougherty, J.) denied the motion, but we reversed the order, granted the motion, vacated the judgment, and granted defendant a new trial (*People v Williams*, 206 AD3d 1625, 1625 [4th Dept 2022], *lv denied* 38 NY3d 1154 [2022]). Defendant was tried and convicted again of, inter alia, one count each of murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [2]), and he now appeals. We agree with defendant that the court (Limpert, J.) erred in refusing to admit in evidence, as a statement against penal interest, the testimony from the CPL article 440 hearing of a witness unavailable to testify at the second trial.

This case arises from an incident in which a male victim and a female victim were shot with bullets matching a .38 or .357 caliber firearm through a closed window of the male victim's residence,

killing the male victim. The shooting took place several hours after defendant had attended a gathering at the residence, during which defendant and the male victim had a physical altercation. It was the People's theory of the case that defendant returned to the residence later that night and, in retaliation for the earlier altercation, shot the victims through a rear window in the residence. In support of that theory, the People offered, among other things, the testimony of a male neighbor who asserted that he observed the same male in a dark hoodie who had fought with the male victim earlier in the evening banging on the front door of the residence before disappearing around the side of the residence just prior to the shooting.

At the CPL article 440 hearing, however, a witness testified, against the advice of his counsel, that on the night of the shooting he and a third party committed a string of crimes, including an armed robbery of another residence with a .22 caliber firearm. The witness explained that he and the third party then retrieved a second firearm, a .38 caliber handgun, and proceeded to the male victim's residence to undertake another robbery. He further testified that, while he and the third party were standing outside the male victim's residence, someone inside turned on a light and startled the third party, who then fired shots into the residence from the backyard through a closed window. The witness was unequivocal that defendant was not present during the shooting and did not fire the shots. The witness acknowledged that he might incur legal penalties, including a potential charge of felony murder, should defendant be successful in vacating the judgment of conviction as a result of the witness's testimony.

Defense counsel intended to call that witness to testify at defendant's second trial. The witness, however, when questioned outside the presence of the jury, invoked his Fifth Amendment privilege against self-incrimination. The court denied defense counsel's request that the witness's testimony from the CPL article 440 hearing be admitted in evidence as a statement against penal interest and read to the jury. We agree with defendant that the court erred.

"A court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense" (*People v Carroll*, 95 NY2d 375, 385 [2000]). Hearsay evidence is admissible as a declaration against penal interest where "four elements are met: (1) the declarant is unavailable to testify as a witness; (2) when the statement was made, the declarant was aware that it was adverse to [their] penal interest; (3) the declarant has competent knowledge of the facts underlying the statement; and (4) supporting circumstances independent of the statement itself attest to its trustworthiness and reliability" (*People v Soto*, 26 NY3d 455, 461 [2015]; *see People v Shabazz*, 22 NY3d 896, 898 [2013]; *People v Shortridge*, 65 NY2d 309, 312 [1985], *rearg dismissed* 73 NY2d 995 [1989]). Here, the court expressly determined that the witness's testimony met the requirements of the first three elements in that the witness's invocation of his Fifth Amendment rights rendered him unavailable (*see People v Ennis*, 11 NY3d 403, 412-

413 [2008], *cert denied* 556 US 1240 [2009]), the witness's testimony was against his penal interest at the time he testified, and the witness had sufficient knowledge of the relevant facts (*see Soto*, 26 NY3d at 461).

The court nonetheless concluded that the testimony failed on the fourth factor, i.e., whether "supporting circumstances independent of the statement itself attest to its trustworthiness and reliability" (*id.*). "The fourth factor is the 'most important' aspect of the exception" (*Shabazz*, 22 NY3d at 898, quoting *People v Thomas*, 68 NY2d 194, 200 [1986], *cert denied* 480 US 948 [1987]; *see People v Settles*, 46 NY2d 154, 167, 168-170 [1978]). "When considering the reliability of a declaration, courts should also consider the circumstances of the statement, such as, among other things, the declarant's motive in making the statement—i.e., whether the declarant exculpated a loved one or inculpated someone else, the declarant's personality and mental state, and 'the internal consistency and coherence of the declaration' " (*People v DiPippo*, 27 NY3d 127, 137 [2016], quoting *Shortridge*, 65 NY2d at 313). "[D]eclarations that exculpate the defendant, as here, are subject to a more lenient standard" (*Soto*, 26 NY3d at 462). "Assuming that the other elements are satisfied, such statements can be admissible if there is 'a reasonable possibility that the statement might be true' " (*Shabazz*, 22 NY3d at 898), and "even [c]ircumstances of seeming indifference that harmonize the statement may be sufficient to furnish the necessary link" (*Soto*, 26 NY3d at 462 [internal quotation marks omitted]; *see Settles*, 46 NY2d at 169-170). "[U]nder this lesser standard, . . . the proffered evidence must still provide 'persuasive assurances of trustworthiness' " (*People v Thibodeau*, 31 NY3d 1155, 1159 [2018]). However, "[i]f the proponent of the statement is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt" (*Settles*, 46 NY2d at 170).

Here, we conclude, based on the circumstances of the witness's CPL article 440 testimony and the trial record, from which that testimony was absent, that "there is 'a reasonable possibility that the [testimony] might be true' " (*Shabazz*, 22 NY3d at 898). Initially, the witness's description of the third party shooting at the window from the backyard when the light went on is consistent with the female victim's testimony that she was shot immediately after she turned on the light and the physical evidence that the shots were fired through the rear window. The witness testified that the third party picked up a .38 firearm, which is consistent with the projectiles recovered from the shooting, from a nearby location just prior to the shooting. The witness's description of running down the driveway with the third party immediately following the shots, across the street, and then over a backyard fence coincides with a female neighbor's description in her trial testimony of two men jumping over her back fence. The testimony of a law enforcement witness also corroborated the witness's account of the two prior robberies described by the witness during his CPL article 440 testimony. Further, there is no evidence that the witness had a familial or close relationship with defendant or other "obvious motive for [the witness]

to falsely implicate himself" (*DiPippo*, 27 NY3d at 137).

In light of the more lenient standard applied to exculpatory statements, we conclude that the initial threshold of reliability is met, i.e., that there is a "reasonable possibility that the statement might be true" (*Settles*, 46 NY2d at 169-170). In concluding to the contrary, the dissent highlights certain inconsistencies between the witness's CPL article 440 testimony and the evidence presented by the prosecution at trial. Initially, we note that evidence that tends to exculpate a defendant will, by its nature, likely be inconsistent with at least some of the People's proof. Further, inconsistencies in a witness's testimony, either internally or with other evidence presented at trial, merely present credibility issues for a jury to resolve (*see People v Fricke*, 216 AD3d 1446, 1447 [4th Dept 2023], *lv denied* 40 NY3d 928 [2023]; *People v Savery*, 209 AD3d 1268, 1269-1270 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]). Here, none of the purported failings of the witness's testimony highlighted by the dissent rendered his testimony any less reliable than that of the prosecution witnesses. Indeed, the jury was already called upon to resolve inconsistencies in, among other things, the male neighbor's trial testimony, on which the People relied heavily. Notably, the male neighbor's testimony regarding his observations of the initial physical altercation and the subsequent shooting, both of which, according to the male neighbor, involved the same male in a dark hoodie, is inconsistent with the testimony of the female victim—with which the witness's CPL article 440 testimony *is* consistent—as well as the male neighbor's own prior statements to law enforcement officers. Thus, because defendant "establish[ed] th[e] possibility of trustworthiness [of the witness's CPL article 440 testimony], it [was] the function of the jury alone to determine whether the [testimony] is sufficient to create reasonable doubt of guilt" (*Settles*, 46 NY2d at 170).

The court therefore abused its discretion in refusing to admit the witness's CPL article 440 testimony as a statement against penal interest in light of the exculpatory nature of the excluded testimony and the circumstantial nature of the prosecution's case. Indeed, given the inconsistent testimony of the prosecution's own witnesses, we cannot say that "the proof of guilt was overwhelming" and thus we conclude that the error was not harmless (*People v Grant*, 7 NY3d 421, 424 [2006]; *see People v Crimmins*, 36 NY2d 230, 241-242 [1975]). We therefore reverse the judgment and grant defendant a new trial on the indictment.

All concur except LINDLEY and GREENWOOD, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. This Court previously affirmed a judgment convicting defendant of, inter alia, murder in the second degree (*People v Williams* [appeal No. 1], 175 AD3d 980 [4th Dept 2019], *lv denied* 34 NY3d 1020 [2019]) but thereafter vacated the judgment following a CPL article 440 hearing and granted him a new trial on the ground of ineffective assistance of counsel (*People v Williams*, 206 AD3d 1625 [4th Dept 2022], *lv denied* 38 NY3d 1154 [2022]). At defendant's second trial, he called to testify a man (the witness) who had testified at the CPL article

440 hearing, but the witness invoked his Fifth Amendment privilege against self-incrimination. Defendant requested that the witness's testimony be admitted as a statement against penal interest, but County Court denied the request.

We disagree with the majority that the court abused its discretion in refusing to admit the witness's testimony as a declaration against penal interest (*see People v Smith*, 214 AD3d 1424, 1425 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023]). "A statement qualifies as a declaration against interest if four elements are met: (1) the declarant is unavailable to testify as a witness; (2) when the statement was made, the declarant was aware that it was adverse to [their] penal interest; (3) the declarant has competent knowledge of the facts underlying the statement; and (4) supporting circumstances independent of the statement itself attest to its trustworthiness and reliability" (*People v Soto*, 26 NY3d 455, 460-461 [2015]; *see People v Settles*, 46 NY2d 154, 167 [1978]). Only the fourth requirement is at issue here.

The rationale for allowing in evidence a statement against penal interest "stems from the assumption that a person would not ordinarily make a statement which jeopardizes [their] interest by subjecting [themselves] to criminal prosecution and incarceration. As with all generalizations, however, human motivation and personality renders the stated reason for permitting these declarations immediately suspect" (*Settles*, 46 NY2d at 168). Where, as here, defendant is seeking to introduce the hearsay statements in his own defense, the reliability of the witness's statements is demonstrated "if the supportive evidence 'establishes a reasonable possibility that the statement might be true' " (*People v DiPippo*, 27 NY3d 127, 137 [2016], quoting *Settles*, 46 NY2d at 169-170; *see People v Shabazz*, 22 NY3d 896, 898 [2013]). In other words, " 'there must be some evidence, independent of the declaration itself, which fairly tends to support the facts asserted therein' " (*DiPippo*, 27 NY3d at 137). "[T]he proffered evidence must . . . provide 'persuasive assurances of trustworthiness' " (*People v Thibodeau*, 31 NY3d 1155, 1159 [2018], quoting *Chambers v Mississippi*, 410 US 284, 302 [1973]).

Here, the record supports the court's determination that the independent corroboration necessary for admissibility of the declaration against penal interest was not sufficient. The "determination of the reliability of proffered declarations against penal interest 'involves a delicate balance of diverse factors and is entrusted to the sound judgment of the trial court, which is aptly suited to weigh the circumstances surrounding the declaration and the evidence used to bolster its reliability' " (*Thibodeau*, 31 NY3d at 1159-1160).

At trial, the evidence established that defendant and a friend had attended a gathering in the late evening at a residence where a man (male victim) was house-sitting (residence). Defendant and the male victim had a physical altercation after defendant refused to leave the residence. After the fight, defendant ran from the residence, and defendant's friend left several minutes later. The

friend later returned to the residence and remained there while the male victim and a woman (female victim) went to a bedroom. The female victim could not sleep so she got up and turned on the light in the bedroom, and bullets came through a closed window, killing the male victim and injuring the female victim. Defendant's friend fled the residence.

At the CPL article 440 hearing, the witness testified that, after committing a home invasion robbery earlier that evening, he and another man (purported shooter) went to the residence and walked to the back of the house. The lights inside the home flicked on, the purported shooter fired shots, and they both ran away.

We conclude that the witness's testimony was not corroborated by independent evidence at trial and indeed was at odds with the evidence. A male neighbor testified that he saw the same man who had been fighting with the male victim earlier that evening go down the driveway of the residence just 30 seconds before the neighbor heard shots and glass breaking. Further, although the witness testified that he and the purported shooter ran away and jumped over a fence into a backyard, a female neighbor testified that a man with dreadlocks was one of two men who had jumped over a fence into a backyard, and her description matched the appearance of defendant's friend. The female neighbor also testified that the man with the dreadlocks (i.e., the friend) asked the other man why he shot "the girl," which the witness and the purported shooter would have had no way of knowing had occurred.

Further, the witness's testimony was essentially that he and the purported shooter intended to engage in a random robbery that was completely unlike the home invasion robbery they committed earlier that evening, when they went to a home where they knew a resident had marihuana, robbed the people inside the home, fired shots, and then left. The witness testified that the purported shooter then acquired a different caliber gun and proceeded to a residence of unknown occupants, did not enter the residence but proceeded to the back of it, and simply fired shots inside the residence when a light turned on. Under all the circumstances, we conclude that the witness's testimony did not bear " 'persuasive assurances of trustworthiness' " (*Thibodeau*, 31 NY3d at 1159), and we would affirm the judgment.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00114

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TARKEEM L. JONES, DEFENDANT-APPELLANT.

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

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered July 8, 2021. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the first degree, criminal sexual act in the first degree (two counts), and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing those parts convicting defendant of predatory sexual assault against a child under count 1 of the indictment and criminal sexual act in the first degree under count 5 of the indictment and dismissing those counts, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96), rape in the first degree (former § 130.35 [1]), two counts of criminal sexual act in the first degree (former § 130.50 [1], [4]), and assault in the third degree (§ 120.00 [1]).

We agree with defendant that the evidence is legally insufficient to establish that defendant was 18 years old or more at the time of the crimes. Although defendant failed to preserve that contention for our review (*see People v VanGorden*, 147 AD3d 1436, 1438 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]; *People v Castro*, 286 AD2d 989, 989 [4th Dept 2001], *lv denied* 97 NY2d 680 [2001]), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Here, two counts in the indictment include an age element that required the People to establish that defendant was at least 18 years old at the time of the crimes in June 2020 (*see* Penal Law former § 130.96; former § 130.50 [4]). Defendant was in fact 33 years old in June 2020, and the jury naturally had the

opportunity to observe his appearance during the trial in 2021, but that opportunity "does not, by itself, satisfy the People's obligation to prove defendant's age" (*Castro*, 286 AD2d at 990; *see People v Blodgett*, 160 AD2d 1105, 1106 [3d Dept 1990], *lv denied* 76 NY2d 731 [1990]), and there was no evidence at trial bearing on his age (*cf. People v Kessler*, 122 AD3d 1402, 1403 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]; *People v Perryman*, 178 AD2d 916, 917-918 [4th Dept 1991], *lv denied* 79 NY2d 1005 [1992]). We therefore modify the judgment by reversing those parts convicting defendant of predatory sexual assault against a child under count 1 of the indictment and criminal sexual act in the first degree under count 5 of the indictment and dismissing those counts of the indictment.

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to defendant's identity as the perpetrator (*see People v Renaldo*, 239 AD3d 1470, 1471 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025]; *People v Thomas*, 176 AD3d 1639, 1640 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), particularly in light of the overwhelming circumstantial evidence presented by the People establishing defendant's identity as the perpetrator (*see People v Lacey*, 229 AD3d 1270, 1273 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; *People v Malone*, 196 AD3d 1054, 1054-1055 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]).

We also reject defendant's contention that he was denied effective assistance of counsel. A defendant has not been deprived of effective assistance of counsel when "the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). The focus is on whether defense counsel's acts or omissions were such that defendant did not receive a fair trial (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]) and, for a defendant to prevail on an ineffective assistance claim, defense counsel's conduct must be "egregious and prejudicial" (*People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000] [internal quotation marks omitted]).

Contrary to defendant's contention, the record before us does not establish that defense counsel's comments during his opening statement improperly shifted the burden of proof onto defendant (*see generally People v Kohmescher*, 228 AD3d 1334, 1335 [4th Dept 2024]). Contrary to defendant's additional contentions, we conclude that he was not deprived of effective assistance by defense counsel's failure to call defendant to testify or by defense counsel's questioning of a witness inasmuch as those decisions were " 'a matter of trial strategy and cannot be characterized as ineffective assistance of counsel' " (*People v Atkins*, 107 AD3d 1465, 1465 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]; *see People v Keane*, 221 AD3d 1586, 1588 [4th Dept

2023]; *People v Irvine*, 197 AD3d 988, 991 [4th Dept 2021], *lv denied* 37 NY3d 1060 [2021]). Nor was defense counsel ineffective in failing to object to alleged hearsay testimony. Even assuming, arguendo, that the testimony at issue constituted inadmissible hearsay, we conclude that "the single error by defense counsel in failing to object to its admission was not so egregious as to deprive defendant of a fair trial" (*People v Escobar*, 181 AD3d 1194, 1198 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020] [internal quotation marks omitted]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see Baldi*, 54 NY2d at 147).

Finally, the sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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CA 25-00732

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

EUGENE LAUN, JR., INDIVIDUALLY,
AND DERIVATIVELY ON BEHALF OF 5 & 20 MARINE, LLC,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN STEWART, ROBERT STIVERS AND DONNA STIVERS,
DEFENDANTS-RESPONDENTS-APPELLANTS.

GREGORY L. SILVERMAN, ESQ., PLLC, GENEVA (GREGORY L. SILVERMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SCHIARO LAW OFFICE P.C., ROCHESTER (CHRISTOPHER A. SCHIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT JOHN STEWART.

SANTIAGO BURGER LLP, ROCHESTER (FERNANDO SANTIAGO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS ROBERT STIVERS AND DONNA STIVERS.

Appeal and cross-appeals from an order of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered October 10, 2024. The order denied the motions of the parties for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion of defendants Robert Stivers and Donna Stivers seeking summary judgment on their fifth counterclaim and seeking summary judgment dismissing the fourth, fifth, and sixth causes of action against them, and by granting those parts of the motion of defendant John Stewart seeking summary judgment dismissing the first, third, fifth, sixth, and eighteenth causes of action against him, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, individually and derivatively on behalf of 5 & 20 Marine, LLC (the LLC), commenced this action against defendants, John Stewart, Robert Stivers, and Donna Stivers, seeking damages for, inter alia, breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. Plaintiff and Robert Stivers (Stivers) started a business flipping houses and opened joint accounts to further that venture. Stewart owned a marina that was in a deteriorated condition, and Stivers approached him seeking to purchase it. Stewart agreed to lease the marina to Stivers and Donna Stivers (collectively, Stivers defendants) and plaintiff for a period of five years, with an option to purchase. Approximately a year and half before the five-year period expired, plaintiff and the

Stivers defendants had a falling out and effectively ended their business relationship. When the end of the five-year lease period approached, plaintiff's attorney reached out to Stewart's attorney to indicate that plaintiff was prepared to exercise the purchase option in his sole name or with the Stivers defendants. The Stivers defendants also reached out to Stewart to express their interest in purchasing the property from him, without plaintiff. The option was not exercised before the end of the five-year lease period and, shortly thereafter, the Stivers defendants purchased the property from Stewart.

Plaintiff commenced this action and asserted the following relevant causes of action: breach of contract by Stewart (first); breach of the covenant of good faith and fair dealing by Stewart (third); tortious interference with contract by the Stivers defendants (fourth); determination of claims to real property (fifth); cancellation of the deed (sixth); breach of fiduciary duty by the Stivers defendants (twelfth and seventeenth); and aiding and abetting breach of fiduciary duty by Stewart (eighteenth). The Stivers defendants moved for summary judgment dismissing the fourth, fifth, sixth, and seventeenth causes of action against them and for summary judgment on their counterclaim seeking reformation of the lease. Stewart moved for, inter alia, summary judgment dismissing the first, third, fifth, sixth, and eighteenth causes of action against him and joined in that part of the Stivers defendants' motion seeking to reform the lease. Plaintiff moved for partial summary judgment on the third and eighteenth causes of action against Stewart and the twelfth and seventeenth causes of action against the Stivers defendants. Supreme Court denied all motions in their entirety. Plaintiff now appeals and Stewart and the Stivers defendants separately cross-appeal.

We agree with defendants in their cross-appeals that the court erred in denying those parts of their motions seeking to reform the lease, and we therefore modify the order by dismissing the first, fourth, fifth, and sixth causes of action. There is a "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]), and "a correspondingly high order of evidence is required to overcome that presumption" (*Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]). However, "[i]n the proper circumstances, mutual mistake or fraud may furnish the basis for reforming a written agreement" (*id.* at 573; *see George Backer Mgt. Corp.*, 46 NY2d at 218-219). "In a case of mutual mistake, the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Chimart Assoc.*, 66 NY2d at 573; *see Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]; *Stache Invs. Corp. v Ciolek*, 174 AD3d 1393, 1394 [4th Dept 2019]). Thus, " '[w]here there is no mistake about the agreement and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected' " (*Harris*, 24 NY2d at 467; *see George Backer Mgt. Corp.*, 46 NY2d at 219). "Because the thrust of a reformation claim is that a writing does not set forth the actual

agreement of the parties, generally neither the parol evidence rule nor the Statute of Frauds applies to bar proof" (*Chimart Assoc.*, 66 NY2d at 573; *see Stache Invs. Corp.*, 174 AD3d at 1394).

The lease entered into by the parties, drafted by Stivers, was for a term of one year, from October 15, 2016 to October 14, 2017, with the option to renew "on an annual basis for five (5) separate, annual one (1) year periods of time." Thus, a plain reading of the contract shows that the term of the lease plus the option years would be a total of six years. However, the Stivers defendants submitted in support of their motion the deposition testimony of Stewart and plaintiff and the affidavits of the Stivers defendants. All the parties testified or stated that, at the time they signed the lease, they intended the term of the lease to be five years. We therefore conclude that defendants established their entitlement to reformation of the lease to a total period of five years, including the term of the lease and the option years.

Contrary to plaintiff's contention, his deposition testimony and statement in his affirmation in opposition to the motion did not raise a triable issue of fact. He testified that, after the parties signed the lease, he looked it over and recognized the error and told Stivers how it read. He testified that Stivers looked at him and said "Okay. That's our ace in the hole." He gave a similar recounting of the conversation in his affirmation, adding that he asked Stivers whether they should tell Stewart that the lease read as a six-year term, and Stivers responded no. In a reply affidavit in support of the Stivers defendants' motion, Stivers denied that this conversation ever occurred. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we conclude that Stivers's statements showed, at most, that he learned of the mistake *after* the lease was signed, and plaintiff's contention that Stivers's statements showed an intention at the time of signing for the lease period to be six years is based on mere speculation. There was no statement by Stivers that he was aware that the lease read as a six-year lease at the time the lease was executed. In addition, there was no evidence of the parties' conduct after execution by which we could reasonably infer that any party believed the lease term was six years. To the contrary, all parties acted with urgency shortly before five years after the lease was signed to address the option deadline.

We reject plaintiff's contention in his appeal that he is entitled to partial summary judgment on the third and eighteenth causes of action against Stewart, and we agree with Stewart in his cross-appeal that the court erred in denying that part of his motion seeking dismissal of those causes of action. We therefore further modify the order accordingly. "[A]ll contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). The "covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*511 W. 232nd*

Owners Corp., 98 NY2d at 153; *see Dalton*, 87 NY2d at 389; *Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 940-941 [4th Dept 2019]).

Plaintiff alleges that Stewart breached the covenant of good faith and fair dealing as well as aided and abetted the Stivers defendants' alleged breach of fiduciary duty, by agreeing before the option deadline to sell the property to the Stivers defendants after the deadline expired. In support of his motion, Stewart submitted evidence establishing that the business and personal relationship between plaintiff and the Stivers defendants ended in May 2020 and that *both* plaintiff and the Stivers defendants reached out to him before the option deadline to express interest in exercising the option without the other party. Stewart submitted further evidence, including his deposition testimony and letters sent to the parties, establishing that he would not agree to allow just one party to exercise the option. It was not until the lease, and thus the option, expired that he sold the property to the Stivers defendants. Stewart thus established that nothing he did had " 'the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*511 W. 232nd Owners Corp.*, 98 NY2d at 153). Contrary to plaintiff's contention, Stewart's testimony regarding the conversations he had with the Stivers defendants about selling the marina did not establish that he hindered or prevented plaintiff and the Stivers defendants from exercising the option together. When the Stivers defendants asked Stewart whether he would be willing to sell the marina to them if the option was not exercised, he simply told them that it would depend on whether the terms of the sale were similar to those set forth in the lease and that he would consider it. His testimony therefore did not show that an agreement had been made with the Stivers defendants prior to the lease period and the option expiring.

Contrary to the contentions of plaintiff in his appeal and the Stivers defendants in their cross-appeal, respectively, plaintiff was not entitled to summary judgment on the breach of fiduciary duty cause of action as stated in the seventeenth cause of action, and the Stivers defendants were not entitled to summary judgment dismissing that cause of action. We note that, although plaintiff moved for partial summary judgment on the twelfth cause of action, which also alleged breach of fiduciary duty, he makes no argument in his brief regarding it. Plaintiff alleges that the Stivers defendants breached their fiduciary duties by excluding him from their purchase of the marina. The elements of a cause of action for breach of fiduciary duty are " '(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct' " (*Golobe v Mielnicki*, 44 NY3d 86, 93 [2025], *rearg denied* 43 NY3d 1013 [2025]; *see South Shore Eye Care, LLP v Lane*, 242 AD3d 792, 796 [2d Dept 2025]; *Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1400-1401 [4th Dept 2019]; *McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420 [4th Dept 2011], *lv denied* 17 NY3d 712 [2011]). "[A] 'fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' " (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-593 [2012],

rearg denied 19 NY3d 1065 [2012]).

Plaintiff alleges, inter alia, that the Stivers defendants owed him a fiduciary duty as either a joint venturer or as a member of the LLC. "A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge" (*IPA Asset Mgt., LLC v Schuman*, 239 AD3d 619, 621 [2d Dept 2025] [internal quotation marks omitted]). "The essential elements of a joint venture are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill or knowledge), some degree of joint proprietorship and control over the enterprise[,] and a provision for the sharing of profits and losses" (*id.* at 621-622 [internal quotation marks omitted]; *see Alper Rest., Inc. v Catamount Dev. Corp.*, 137 AD3d 1559, 1561 [3d Dept 2016]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]). " 'An agreement to enter into a joint venture may be oral and may be inferred from the totality of the parties' conduct in performance of the joint venture' " (*IPA Asset Mgt., LLC*, 239 AD3d at 622).

Although we agree with the Stivers defendants that plaintiff did not plead the existence of a joint venture in the amended complaint, he pleaded facts from which a joint venture can be inferred. Plaintiff alleges that he and the Stivers defendants formed the LLC to make improvements to and operate their business at the marina. He further alleges that he and the Stivers defendants contributed capital from the proceeds of their business flipping houses into the LLC and contributed labor to make improvements to the marina.

Contrary to the contentions of the parties, there is an issue of fact whether the joint venture was terminated at the time the Stivers defendants purchased the property. In general, if there is no written agreement setting forth the duration of a joint venture agreement, it is terminable at will by either party (*see Weisman v Awnair Corp. of Am.*, 3 NY2d 444, 450 [1957]; *Rutecki v Gow & Co.*, 289 AD2d 1066, 1067 [4th Dept 2001]). However, " 'where a partnership has for its object the completion of a specified piece of work, or the effecting of a specified result, it will be presumed that the parties intended the relation to continue until the object has been accomplished' " (*Hooker Chems. & Plastics Corp. v International Mins. & Chem. Corp.*, 90 AD2d 991, 991 [4th Dept 1982]; *see generally Meinhard v Salmon*, 249 NY 458, 463-464 [1928]; *Mendelovitz v Cohen*, 66 AD3d 849, 850 [2d Dept 2009]). "Whether the relationship is at will or for a fixed term or until the accomplishment of a particular undertaking is a question of fact" (*Hooker Chems. & Plastics Corp.*, 90 AD2d at 991-992). We further conclude that there are issues of fact whether the LLC was terminated at the time the Stivers defendants purchased the property and whether the Stivers defendants breached their fiduciary duty to plaintiff as either joint venturers or members of the LLC by not exercising the option with plaintiff and thereafter purchasing the property from Stewart.

We have reviewed plaintiff's remaining contention and conclude that it lacks merit.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00566

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GIOVONNI WILLIAMS, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered December 23, 2022. The judgment convicted defendant upon his plea of guilty of aggravated vehicular homicide.

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 aggravated vehicular homicide (Penal Law § 125.14 [3]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Harrison*, 242 AD3d 1540, 1541 [4th Dept 2025]; *People v Swiderski*, 217 AD3d 1416, 1417 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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KA 23-00669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY STUDER, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered January 27, 2023. The judgment convicted defendant, upon a guilty plea, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of rape in the first degree (Penal Law § 130.35 [former (4)]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Simmonds*, 239 AD3d 1326, 1326 [4th Dept 2025]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* 589 US 1302 [2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Mendoza*, 37 NY3d 1075, 1076 [2021]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

141

KA 25-00087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON MITCHELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered September 3, 2024. The judgment convicted defendant upon a jury verdict of burglary in the first degree (two counts), criminal contempt in the first degree (two counts), criminal contempt in the second degree (three counts) and endangering the welfare of a child (three 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, two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]), arising out of an incident in which defendant, in violation of a stay-away order of protection, cut off the power to his wife's residence, broke into the residence using a sledgehammer and, during the course of the break-in, caused his wife to sustain physical injury. We affirm.

Defendant contends that he was deprived of a fair trial because Supreme Court made a predetermination concerning defendant's guilt, which purportedly tainted subsequent evidentiary determinations with respect to the trial. Defendant's contention that he was denied a fair trial by the court's alleged misconduct is unpreserved for our review (*see People v Tohafijian*, 216 AD3d 1410, 1413 [4th Dept 2023], *lv denied* 40 NY3d 937 [2023]; *People v Price*, 129 AD3d 1484, 1484 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015]; *see generally* CPL 470.05 [2]). 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]).

Although defendant preserved his specific challenges to the court's evidentiary rulings (*see generally* CPL 470.05 [2]), we

conclude that none of those challenges warrants modification or reversal of the judgment. Contrary to defendant's contention, the court did not abuse its discretion in precluding defendant from cross-examining his wife about an alleged extramarital affair inasmuch as defendant's proposed cross-examination of his wife on that topic "was too speculative to establish a motive for fabrication" (*People v Poole*, 55 AD3d 1349, 1350 [4th Dept 2008], *lv denied* 11 NY3d 929 [2009]; *see People v Hamm*, 96 AD3d 1482, 1483 [4th Dept 2012], *affd* 21 NY3d 708 [2013]; *see generally People v Carroll*, 95 NY2d 375, 385 [2000]). Similarly, we conclude that the court did not abuse its discretion in precluding defendant from offering evidence about his military training and experience for purposes of establishing that, during the alleged burglary, he could have harmed the occupants of his wife's house had he really wanted to do so; that evidence was irrelevant (*see generally Carroll*, 95 NY2d at 385). We further conclude that any error in limiting defendant's use of that evidence was harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant further contends that the court erred in precluding him from cross-examining one of the People's witnesses about a prior inconsistent statement. Even assuming, arguendo, that the court erred in limiting defendant's cross-examination of that witness (*see People v Bishop*, 206 AD2d 884, 885 [4th Dept 1994], *lv denied* 84 NY2d 933 [1994]; *see generally People v Savage*, 50 NY2d 673, 679 [1980], *cert denied* 449 US 1016 [1980]), we conclude that any such error was harmless inasmuch as "the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant otherwise would have been acquitted" (*People v Robinson*, 111 AD3d 1358, 1359 [4th Dept 2013], *lv denied* 22 NY3d 1141 [2014] [internal quotation marks omitted]; *see generally Crimmins*, 36 NY2d at 241-242).

We reject defendant's contention that the court erred in precluding him from presenting a psychiatric defense at trial. Defendant did not move for permission to file a late notice of his intent to introduce psychiatric evidence until about a week before trial, which—as defendant correctly concedes—was well after the 30-day statutory deadline for filing a notice of intention to present such evidence (*see* CPL 250.10 [2]). We conclude that the court did not abuse its discretion in denying defendant's request based on its determination that defendant failed to show good cause to allow the late filing (*see id.*; *People v Sidbury*, 42 NY3d 497, 507 [2024]; *People v Silburn*, 31 NY3d 144, 160 [2018]; *People v Berk*, 88 NY2d 257, 265-266 [1996], *cert denied* 519 US 859 [1996]). In making its determination, the court properly balanced the prejudice to the People against defendant's constitutional right to present a defense (*see Sidbury*, 42 NY3d at 508; *Berk*, 88 NY2d at 266), particularly in light of the prejudice that the People would have sustained given that the matter was to proceed to trial within a week. Indeed, we note that defendant had several years in which to serve a CPL 250.10 notice, yet failed to do so until the eve of trial. Moreover, inasmuch as defendant was initially evaluated by several mental health providers who determined that he was competent to stand trial, it cannot be said

that the People were aware that defendant's mental health would be an issue in this case (*cf. People v Gracius*, 6 AD3d 222, 225 [1st Dept 2004], *lv denied* 2 NY3d 800 [2004]). We further note that, although the court did not permit defendant to introduce psychiatric evidence, it did allow him, in presenting his defense, to testify about his feelings on the date of the underlying offenses and to explain his conduct.

Defendant further contends that the court erred in denying his request to charge criminal trespass in the second degree as a lesser included offense of burglary in the first degree. We reject that contention. To establish entitlement to a charge on a lesser included offense, "a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that [the defendant] committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]; *see People v Van Norstrand*, 85 NY2d 131, 135 [1995]; *People v Glover*, 57 NY2d 61, 63 [1982]; *see also* CPL 1.20 [37]; 300.50 [1]). Although there is no dispute that criminal trespass in the second degree (Penal Law § 140.15 [1]) is a lesser included offense of burglary in the first degree (§ 140.30) (*see People v Logan*, 198 AD2d 439, 440 [2d Dept 1993]; *see also People v Lugo*, 87 AD3d 1403, 1404 [4th Dept 2011], *lv denied* 18 NY3d 860 [2011]; *see generally People v Green*, 56 NY2d 427, 430-431 [1982], *rearg denied* 57 NY2d 775 [1982]), the court properly refused to charge the requested lesser included offense inasmuch as no reasonable view of the evidence would support a finding that defendant committed the lesser but not the greater offense.

"In assessing whether there is a 'reasonable view of the evidence,' the proof must be looked at 'in the light most favorable to [the] defendant' " (*People v Rivera*, 23 NY3d 112, 120-121 [2014], quoting *People v Martin*, 59 NY2d 704, 705 [1983]). The "inquiry is not directed at whether persuasive evidence of guilt of the greater crime exists . . . but whether, under any reasonable view of the evidence, it is possible for the trier of fact[ ] to acquit [the] defendant on the higher count and still find [the defendant] guilty of the lesser one" (*Van Norstrand*, 85 NY2d at 136; *see People v Hull*, 27 NY3d 1056, 1058 [2016]). Under that standard, "when an instruction on a lesser-included offense would direct the jury to resort to sheer speculation, it should not be given" (*People v Butler*, 84 NY2d 627, 632 [1994], *rearg denied* 85 NY2d 858 [1995] [internal quotation marks omitted]).

Here, viewing the evidence at trial in the light most favorable to defendant (*see Rivera*, 23 NY3d 120-121), we conclude that there is no reasonable view of the evidence that defendant had a noncriminal purpose when he entered his wife's residence inasmuch as he had just jumped the fence to the residence's backyard, cut the power to the residence, and used a sledgehammer to repeatedly pound on the residence's steel door until it caved in, allowing him to enter (*see People v Haynes*, 177 AD3d 1194, 1198 [3d Dept 2019], *lv denied* 34 NY3d 1128 [2020]; *People v Sterina*, 108 AD3d 1088, 1089 [4th Dept 2013];

cf. Logan, 198 AD2d at 440). Further, to the extent defendant asserts that his lack of criminal purpose in entering the residence was demonstrated by evidence that, upon entering, he essentially surrendered and did not try to force his way further into the home, we note the undisputed evidence that defendant stopped only because his father-in-law hit him on the head with a pipe and because he knew the police were on their way. In other words, there is no reasonable view of the evidence that, in this case, defendant "entered the [dwelling] unlawfully but for an innocent purpose" and, to the extent that he committed any crime inside, that he "developed the intent to commit a crime therein [only] after his entry" (*People v Lynch*, 191 AD3d 1476, 1477 [4th Dept 2021], *lv denied* 37 NY3d 958 [2021] [internal quotation marks omitted]; *see People v Mercado*, 294 AD2d 805, 805 [4th Dept 2002], *lv denied* 98 NY2d 731 [2002]).

Finally, the sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

142

CAF 24-01489

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

IN THE MATTER OF MATTHEW J., MYLES J., MAX J.,
MATTALYEN J. AND MICHAEL J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAMEIKA M., RESPONDENT-APPELLANT,
AND JEFFREY J., RESPONDENT.

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

MATTHEW SCHWARTZ, COUNTY ATTORNEY, ROCHESTER (MARY WHITESIDE OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered August 12, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Shameika M. 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 mother appeals from an order that, inter alia, determined that she neglected the subject children. At the outset, we note that, contrary to the assertion of petitioner and the Attorney for the Children, this appeal was not rendered moot by the mother's consent to a subsequent finding of permanent neglect inasmuch as "the finding of neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings" (*Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1573 [4th Dept 2014] [internal quotation marks omitted]) and the mother's admission to permanent neglect has not, at this time, resulted in the termination of her parental rights (*cf. Matter of John D., Jr. [John D.]*, 199 AD3d 1412, 1414 [4th Dept 2021], *lv denied* 38 NY3d 903 [2022]).

Contrary to the mother's contention, however, a sound and substantial basis in the record supports Family Court's determination that petitioner met its burden of establishing by a preponderance of the evidence that the mother neglected the subject children by failing to provide them with adequate shelter (*see* Family Ct Act §§ 1012 [f]

[i] [A]; 1046 [b] [i]). " 'In reviewing a determination of neglect, we must accord great weight and deference to the determination of [the court], including its drawing of inferences and assessment of credibility, and we should not disturb its determination unless clearly unsupported by the record' " (*Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]). The evidence at the fact-finding hearing established that the children were living in unsafe and unsanitary conditions in a basement area that was, inter alia, infested by rats. Although petitioner provided the mother with assistance to obtain alternative living arrangements for the children, the evidence established that the children continued to reside in the basement. Under these circumstances, the court's finding of neglect was supported by a sound and substantial basis in the record (*see Matter of Justice G. [Candice G.]*, 243 AD3d 1318, 1319 [4th Dept 2025]; *Matter of Mollie W. [Corinne W.]*, 214 AD3d 1463, 1463-1464 [4th Dept 2023]).

Contrary to the mother's further contention, there is likewise a sound and substantial basis in the record for the court's conclusion that the mother neglected two of the subject children by inflicting excessive corporal punishment on them (*see* Family Ct Act § 1012 [f] [i] [B]). The court's determination was supported by, inter alia, testimony regarding statements the children made to their caseworker indicating that the mother had struck them multiple times in the face and head, as well as testimony of witnesses who observed the children's injuries (*see Matter of Vashti M. [Carolette M.]*, 214 AD3d 1335, 1336 [4th Dept 2023], *appeal dismissed* 39 NY3d 1177 [2023]). We further conclude that a sound and substantial basis in the record supports the court's determination that the remaining children were derivatively neglected based on the mother's use of excessive corporal punishment on the two injured children (*see* Family Ct Act § 1046 [a] [i]). Here, the mother's use of excessive corporal punishment on the two children demonstrated a fundamental defect in her understanding of her duties as a parent and an impaired level of parental judgment sufficient to support a determination that the remaining children had been derivatively neglected (*see Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1396 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

145

CAF 24-01135

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

IN THE MATTER OF DAVID CHEUNG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KIM NGYEN THI TRAN, RESPONDENT-APPELLANT.

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

THOMAS L. PELYCH, HORNELL, FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered April 16, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and primary physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that modified the parties' prior order of custody and parenting time by, inter alia, granting petitioner father sole legal and primary physical custody of the parties' child. Initially, we note that the mother "failed to preserve for our review her contention that the father failed to establish a change of circumstances warranting review of the prior order" (*Matter of Tisdale v Anderson*, 100 AD3d 1517, 1517 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Torres v Burchell*, 228 AD3d 1303, 1303 [4th Dept 2024], *lv denied* 42 NY3d 908 [2024]; *Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]).

In any event, the mother's contention lacks merit inasmuch as the father met his burden of establishing "a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child[ ]" (*Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022] [internal quotation marks omitted]; *see Torres*, 228 AD3d at 1303). The evidence at the hearing established "that the parties' relationship had become acrimonious" and had deteriorated since entry of the prior order (*Torres*, 228 AD3d at 1303; *see Matter of Fowler v Rothman*, 198 AD3d

1374, 1375 [4th Dept 2021], *lv dismissed* 38 NY3d 995 [2022]; *Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]). Moreover, the father established "that the mother, in violation of [the] existing order," failed to provide the father with the current address of the child or any educational and medical information for the child (*Matter of Moreno v Elliott*, 170 AD3d 1610, 1611 [4th Dept 2019]; *see generally Matter of Green v Bontzolakes*, 111 AD3d 1282, 1283-1284 [4th Dept 2013]) and also interfered with his telephone access with the child (*see Moreno*, 170 AD3d at 1611).

Affording "great deference to the determination of the hearing court with its superior ability to evaluate the credibility of the testifying witnesses" (*Matter of Miner v Torres*, 179 AD3d 1490, 1491 [4th Dept 2020]; *see Matter of Ceravolo v Lefebvre*, 217 AD3d 1523, 1524 [4th Dept 2023], *lv dismissed in part & denied in part* 41 NY3d 926 [2024], *rearg denied* 41 NY3d 1007 [2024]), we further conclude that, contrary to the mother's contention, a sound and substantial basis in the record supports Family Court's determination that an award to the father of sole legal and primary physical custody was in the child's best interests (*see Matter of Dickes v Johnston*, 213 AD3d 1247, 1248 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

146

CA 25-00009

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

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DEBORAH A. BUCZEK, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

DEBORAH A. BUCZEK, DEFENDANT-APPELLANT PRO SE.

MCCALLA RAYMER LEIBERT PIERCE, LLP, NEW YORK CITY (HAROLD L. KOFMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), dated August 22, 2024. The order denied the motion of defendant Deborah A. Buczek to strike plaintiff's notice of entry and granted plaintiff's cross-motion to confirm the Referee's Report and for a judgment of foreclosure and sale.

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

Memorandum: HSBC Bank USA, NA (HSBC), the predecessor in interest of plaintiff Federal National Mortgage Association (FNMA) commenced this action to foreclose on a mortgage that was secured by property owned by Deborah A. Buczek (defendant). Supreme Court issued an order in which it granted HSBC's motion seeking, inter alia, summary judgment on the complaint, the appointment of a referee, and substitution of FNMA as plaintiff in the case. The court subsequently issued an amended order of reference, appointing a new referee. Defendant's appeals from those orders were administratively dismissed due to defendant's failure to timely perfect them (*see* 22 NYCRR 1250.10 [a]; *see generally Porschia C. v Sodus Cent. Sch. Dist.*, 231 AD3d 1520, 1521 [4th Dept 2024]). Thereafter, defendant moved to strike FNMA's notice of entry of the amended order of reference, and FNMA cross-moved for a judgment of foreclosure and sale. The court denied the motion and granted the cross-motion, and defendant now appeals. We dismiss the instant appeal.

"[A]n appeal that has been dismissed for failure to prosecute bars, on the merits, a subsequent appeal as to all questions that could have been raised on the earlier appeal had it been perfected" (*Dumond v New York Cent. Mut. Fire Ins. Co.*, 166 AD3d 1554, 1555 [4th Dept 2018] [internal quotation marks omitted]; *see generally Rubeo v*

National Grange Mut. Ins. Co., 93 NY2d 750, 753-757 [1999]; *Bray v Cox*, 38 NY2d 350, 352-355 [1976]). Here, all of defendant's substantive contentions on the instant appeal could have been raised in the prior appeals had those appeals been properly perfected. Consequently, dismissal of the instant appeal is warranted (*see Rubeo*, 93 NY2d at 756-757; *Bray*, 38 NY2d at 355; *Dumond*, 166 AD3d at 1555). We decline to exercise our discretion to review the merits of defendant's contentions (*see Faricelli v TSS Seedman's*, 94 NY2d 772, 774 [1999]; *Aridas v Caserta*, 41 NY2d 1059, 1061 [1977]; *Chiappone v William Penn Life Ins. Co. of N.Y.*, 96 AD3d 1627, 1628 [4th Dept 2012]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

147

TP 25-00684

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

IN THE MATTER OF DONYALE BELL, PETITIONER,

V MEMORANDUM AND ORDER

WILLIAM LONG, COUNTY OF ERIE, AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENTS.

SANDERS & SANDERS, BUFFALO (HARVEY P. SANDERS OF COUNSEL), FOR PETITIONER.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Edward Pace, J.], entered April 23, 2025) to review a determination of respondent New York State Division of Human Rights. The determination, among other things, dismissed petitioner's complaint in its entirety.

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

Memorandum: In this proceeding pursuant to Executive Law § 298, petitioner seeks to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing her complaint. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, "is limited to consideration of whether substantial evidence supports the agency determination" (*Matter of Osorio v New York State Div. of Human Rights*, 236 AD3d 1472, 1473 [4th Dept 2025], *lv denied* 44 NY3d 909 [2026] [internal quotation marks omitted]; *see Matter of Hirsch v New York State Div. of Human Rights*, 232 AD3d 1248, 1249 [4th Dept 2024]). " 'Although a contrary decision may be reasonable and also sustainable, a reviewing court may not substitute its judgment for that of the Commissioner [of SDHR] if [the Commissioner's determination] is supported by substantial evidence' " (*Osorio*, 236 AD3d at 1473, quoting *Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417 [1991], *rearg denied* 78 NY2d 909 [1991]).

Contrary to petitioner's contention, we conclude that the determination to dismiss her claim of quid pro quo sexual harassment was supported by substantial evidence (*see generally Matter of Jones v*

New York State Div. of Human Rights, 122 AD3d 1387, 1388 [4th Dept 2014]). Such a claim arises where unwelcome sexual conduct was used, "either explicitly or implicitly, as the basis for employment decisions affecting compensation, terms, conditions, or privileges of the complainant's employment" (*Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 50 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]). Although the testimony at the hearing established the existence of a sexual relationship between petitioner and respondent William Long, the ALJ concluded, based on his assessment of various witnesses and their credibility, that the relationship predated petitioner's complaint by a number of years, that it was entirely consensual, and that it was unrelated to petitioner's employment. We will not disturb the ALJ's determination that the testimony of certain witnesses was more credible than that of petitioner (*see Jones*, 122 AD3d at 1388; *Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381 [4th Dept 2010], *lv denied* 16 NY3d 709 [2011]). Deferring again to the credibility determinations of the ALJ, who declined to credit petitioner's testimony that the sexual relationship was nonconsensual or that Long subjected her to other workplace harassment, we similarly reject petitioner's contention that the determination to dismiss her claim of hostile work environment was not supported by substantial evidence (*see generally Osorio*, 236 AD3d at 1474; *Jones*, 122 AD3d at 1388; *Bowler*, 77 AD3d at 1381).

Contrary to petitioner's further contention, there is also substantial evidence to support the determination dismissing her claim for retaliation (*see generally Osorio*, 236 AD3d at 1473-1474). " 'In order to make out [a] claim [for unlawful retaliation], [a petitioner] must show that (1) [the petitioner] has engaged in protected activity, (2) [the] employer was aware that [the petitioner] participated in such activity, (3) [the petitioner] suffered an adverse employment action based upon [such] activity, and (4) there is a causal connection between the protected activity and the adverse action' " (*id.*, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). "Once that showing is made, the burden then shifts to [the employer] to present legitimate, independent and nondiscriminatory reasons to support [its] actions. Then, if [the employer] meet[s] this burden, [the petitioner] has the obligation to show that the reasons put forth by [the employer] were merely a pretext" (*Osorio*, 236 AD3d at 1474 [internal quotation marks omitted]). Consistent with the ALJ's determination after the hearing, we conclude that, although petitioner met her initial burden with respect to her retaliation claim, there is substantial evidence in the record to support the determination that respondent County of Erie presented legitimate, independent, and nondiscriminatory reasons to support its refusal to promote petitioner (*see id.*). Specifically, substantial evidence at the hearing established, as the ALJ found, that others were promoted over petitioner based on petitioner's lower scores during the interview process and various workplace performance concerns. We further conclude that petitioner failed to establish that the proffered reasons for the decision not to promote her were a pretext for unlawful retaliation (*see Matter of Mario v New York State*

Div. of Human Rights, 200 AD3d 1591, 1593 [4th Dept 2021], *lv denied* 38 NY3d 909 [2022]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

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TP 25-01429

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

IN THE MATTER OF CLIFFORD GAMBOA, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (TAYLOR A. SUTTON OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald G. O'Geen, A.J.], entered August 18, 2025) to review a determination of respondent. The determination withholds one year and four months of good time against petitioner's sentence.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination, upon the recommendation of the Time Allowance Committee (TAC), to withhold the entirety of petitioner's good time available based on, inter alia, his failure to complete alcohol and substance abuse training and aggression replacement training. Even assuming, arguendo, that the amended petition raised a substantial evidence issue and thus that the proceeding was properly transferred to this Court (*see Matter of White v Martuscello*, 242 AD3d 1546, 1547 [4th Dept 2025]), we conclude that it lacks merit.

"It is settled that any decision affecting good time allowances shall not be reviewed so long as it is made in accordance with the law" (*Matter of Pfeifer v Goord*, 272 AD2d 886, 886 [4th Dept 2000] [internal quotation marks omitted]; *see* Correction Law § 803 [4]). Here, we conclude that the TAC's determination was made in accordance with the law inasmuch as it was based on the undisputed ground that petitioner had failed to complete the indicated programs (*see Matter of McPherson v Goord*, 17 AD3d 750, 751 [3d Dept 2005], *lv denied* 5

NY3d 709 [2005]; *Pfeifer*, 272 AD2d at 886; *Matter of Staples v Goord*, 263 AD2d 943, 944 [3d Dept 1999], *lv denied* 94 NY2d 755 [1999], *rearg denied* 94 NY2d 900 [2000]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

175

KA 23-00791

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERNEST T. BURGESS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered April 19, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Inasmuch as defendant's contention that he was denied effective assistance of counsel, i.e., his sole substantive contention on appeal, would survive even a valid waiver of the right to appeal to the same extent that such contention survives his plea, we need not address the validity of the waiver of the right to appeal (*see People v Shaw*, 222 AD3d 1401, 1401, 1403 [4th Dept 2023], *lv denied* 42 NY3d 930 [2024]). Defendant's contention survives his plea "only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Miller*, 161 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018] [internal quotation marks omitted]). To the extent that defendant's contention survives his plea, we conclude that defendant received meaningful representation (*see Shaw*, 222 AD3d at 1403; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant received a favorable plea under which he procured the minimum sentence in light of his status as a second violent felony offender (*see* Penal Law §§ 70.04 [2], [3] [b]; 70.45 [2]), and defendant has not demonstrated "the absence of strategic or other legitimate explanations" for defense counsel's alleged shortcomings (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see Shaw*, 222 AD3d at 1403). Indeed, the record

establishes that defendant, after consulting with defense counsel about the terms of the plea offer and the likelihood of success on that part of his omnibus motion seeking to suppress evidence, made a strategic decision to forgo a suppression hearing and accept the plea offer in order to secure County Court's sentencing promise (*see Shaw*, 222 AD3d at 1403; *People v Granger*, 96 AD3d 1667, 1668 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]). We thus conclude that defendant was afforded meaningful representation inasmuch as he "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Phillips*, 221 AD3d 1501, 1502 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

179

KA 23-00585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. JACKSON, JR., ALSO KNOWN AS
MICHAEL L. JACKSON, ALSO KNOWN AS MICHAEL
LOREN JACKSON, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL 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 (Melissa Lightcap Cianfrini, J.), rendered March 8, 2023. The judgment convicted defendant upon a plea of guilty of bail jumping in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of bail jumping in the second degree (Penal Law § 215.56). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty in the same plea proceeding of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). We affirm in both appeals.

Defendant contends in each appeal that County Court erred in enhancing his sentence without conducting a sufficient inquiry into his alleged violation of the conditions of the plea agreement. Specifically, the court concluded that defendant violated the conditions of the plea when he was arrested for possessing contraband while detained in jail. Defendant's contention that the court did not conduct a proper inquiry before making that determination survives even a valid waiver of the right to appeal (*see People v Campbell*, 244 AD3d 1826, 1827 [4th Dept 2025]; *People v Huggins*, 45 AD3d 1380, 1380 [4th Dept 2007], *lv denied* 9 NY3d 1006 [2007]). On the merits, however, we reject defendant's contention. The record establishes that "there was a sufficient inquiry made to support 'the existence of a legitimate basis for the arrest' " (*People v Fumia*, 104 AD3d 1281, 1281 [4th Dept 2013], *lv denied* 21 NY3d 1004 [2013], quoting *People v*

Outley, 80 NY2d 702, 713 [1993]; *see People v Forest*, 148 AD3d 1585, 1586 [4th Dept 2017], *lv denied* 29 NY3d 1091 [2017]). Contrary to defendant's contention, under the circumstances of this case, the court was not required to conduct an evidentiary hearing, and we further note that "[b]oth defendant and [defense] counsel were given ample opportunity to refute the . . . assertions that defendant had violated the plea terms" (*People v Albergotti*, 17 NY3d 748, 750 [2011]; *see Campbell*, 244 AD3d at 1827; *People v Scott*, 200 AD3d 1729, 1730 [4th Dept 2021]).

Contrary to defendant's further contention in each appeal, we conclude that the record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]). We note at the outset that the court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally Thomas*, 34 NY3d at 567; *People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). Contrary to defendant's assertion, the court properly explained that defendant retained the right to take an appeal; that his conviction and sentence would "normally be final" because he was giving up the right to appellate review of "most claims of error," including the severity of the sentence; and that "a limited number of claims" would survive the appeal waiver, such as the voluntariness of the plea, the validity of the appeal waiver, the legality of the sentence, the jurisdiction of the court, defendant's competency to stand trial, and the constitutional right to a speedy trial (*see Thomas*, 34 NY3d at 567; *Edmonds*, 229 AD3d at 1277).

Additionally, the court's oral colloquy was supplemented by a detailed written waiver that, inter alia, accurately explained the rights waived and noted that some rights were retained despite the waiver and, in doing so, used the phrase "waiver of the right to raise issues on appeal," thereby employing language that "more precisely" reflected that the waiver merely represented "a narrowing of the issues for appellate review" (*Thomas*, 34 NY3d at 559; *see Edmonds*, 229 AD3d at 1277-1278). Furthermore, the record establishes that the court ascertained that defendant, "before signing the written waiver form, had reviewed the contents thereof with [his] attorney and understood the appellate rights [he] was giving up [and retaining] as a result of the waiver" (*People v Correia*, 240 AD3d 1440, 1441-1442 [4th Dept 2025], *lv denied* 44 NY3d 992 [2025]; *cf. People v Bradshaw*, 18 NY3d 257, 262 [2011]).

We also reject defendant's contention in each appeal that he did not validly waive his right to appeal inasmuch as he did not receive consideration for the waiver. To the contrary, the record establishes that defendant received consideration in exchange for the waiver inasmuch as the plea agreement resulted in, among other things, defendant pleading guilty to a reduced charge in full satisfaction of one of the indictments, and defendant also receiving a sentence promise (*see Campbell*, 244 AD3d at 1828-1829; *People v Allen*, 174 AD3d

1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *People v Frank*, 258 AD2d 900, 900 [4th Dept 1999], *lv denied* 93 NY2d 924 [1999]).

We thus conclude that "all the relevant circumstances reveal a knowing and voluntary waiver" (*Thomas*, 34 NY3d at 563; *see Edmonds*, 229 AD3d at 1278) and, because the court advised defendant of the maximum sentence that could be imposed if he violated the plea agreement, that waiver encompasses his further challenge in each appeal to the severity of the enhanced sentence (*see People v Durinko*, 239 AD3d 1347, 1348 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *People v Roberto*, 224 AD3d 1367, 1368 [4th Dept 2024]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

180

KA 24-01590

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. JACKSON, JR., ALSO KNOWN AS
MICHAEL JACKSON, JR., ALSO KNOWN AS MICHAEL
LOREN JACKSON, JR., ALSO KNOWN AS MICHAEL L. JACKSON,
ALSO KNOWN AS MICHAEL J. JACKSON, ALSO KNOWN AS
MICHAEL J. JACKSON, JR., ALSO KNOWN AS
MICHAEL JACKSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL 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 (Melissa Lightcap Cianfrini, J.), rendered March 8, 2023. The judgment convicted defendant upon a plea of guilty of attempted burglary in the first degree.

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

Same memorandum as in *People v Jackson* ([appeal No. 1] — AD3d — [Mar. 27, 2026] [4th Dept 2026]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

181

KA 23-00649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAFARY BROWN, DEFENDANT-APPELLANT.

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

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Julie M. Hahn, J.), rendered January 27, 2023. The judgment convicted defendant, upon a jury verdict, of unauthorized use of a vehicle in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of unauthorized use of a vehicle in the third degree (Penal Law § 165.05 [1]). We affirm.

Defendant contends that County Court committed reversible error in its *Sandoval* ruling by allowing the People, if defendant chose to testify, to cross-examine him fully regarding a prior felony conviction of criminal mischief in the third degree, including with respect to the underlying facts of that conviction. Initially, contrary to the People's assertion, we conclude that defendant's contention is preserved for our review, even in the absence of an objection after the court's "ultimate" *Sandoval* ruling. Defendant "expressly requested, without success on the ground now advanced on appeal, a ruling that the People not be permitted to cross-examine him regarding the prior conviction, and he 'is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule . . . accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered' " (*People v Fuller*, 174 AD3d 1335, 1336 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019], quoting CPL 470.05 [2]; *see People v Herman*, 217 AD3d 1469, 1471 [4th Dept 2023], *lv denied* 40 NY3d 997 [2023]; *see generally People v Jackson*, 29 NY3d 18, 23-24 [2017]). Defendant's contention, however, lacks merit. The prior conviction "showed the willingness of defendant to place his own

interests above those of society" (*People v Salsbery*, 78 AD3d 1624, 1626 [4th Dept 2010], *lv denied* 16 NY3d 836 [2011]), and defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of that conviction] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*People v Sandoval*, 34 NY2d 371, 378 [1974]; *see Herman*, 217 AD3d at 1471). Contrary to defendant's assertion, "[c]ross-examination of a defendant concerning a prior crime is not prohibited solely because of the similarity between that crime and the crime charged" (*People v Vanwuyckhuyse*, 224 AD3d 1315, 1316 [4th Dept 2024], *lv denied* 41 NY3d 967 [2024] [internal quotation marks omitted]; *see People v Hayes*, 97 NY2d 203, 208 [2002]).

Defendant did not preserve for our review his related contention that the court failed to adequately set forth its reasoning with respect to its balancing of the appropriate *Sandoval* factors (*see* CPL 470.05 [2]; *Herman*, 217 AD3d at 1471). In any event, "[o]ur law does not require 'the application of any particular balancing process' in *Sandoval* determinations," and "an exercise of a trial court's *Sandoval* discretion should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning . . . , particularly where, as here, the basis of the court's decision may be inferred from the parties' arguments" (*People v Walker*, 83 NY2d 455, 459 [1994]; *see Herman*, 217 AD3d at 1471).

Entered: March 27, 2026 Ann Dillon Flynn
Clerk of the Court

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

183

CAF 24-01884

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

IN THE MATTER OF MERCEDES B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICHOLAS B., RESPONDENT-APPELLANT.

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

JULIE VILJOEN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Shannon E. Filbert, J.), dated October 8, 2024, in a proceeding pursuant to Family Court Act article 10. The order found that respondent had abused the subject child.

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

Memorandum: In this Family Court Act article 10 proceeding, respondent father appeals from an order that, inter alia, determined that he abused the subject child. We affirm.

As relevant here, Family Court Act § 1012 (e) (i) provides that a child is abused when the parent or other legally responsible adult "inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ." A prima facie case of abuse may be established by adducing evidence "(1) [of such] an injury to a child which would ordinarily not occur absent an act or omission of respondent[ ], and (2) that respondent[was] the caretaker[ ] of the child at the time the injury occurred" (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *see* Family Ct Act § 1046 [a] [ii]).

The father contends that the child's injuries here were not of sufficient magnitude to sustain a finding of abuse pursuant to Family Court Act article 10. The father, however, failed to preserve that contention for our review inasmuch as he failed to raise that contention before Family Court (*see Matter of Daniel D. [Tara D.]*, 232

AD3d 1220, 1222 [4th Dept 2024]). In any event, we conclude that the father's contention lacks merit. Petitioner established that the child sustained bone fractures (*see Matter of Tyree B. [Christina H.]*, 160 AD3d 1389, 1389 [4th Dept 2018]; *Matter of Jaiden T.G. [Shavonna D.-F.]*, 89 AD3d 1021, 1022 [2d Dept 2011]; *Matter of Sharonda S.*, 301 AD2d 532, 533 [2d Dept 2003]), which were " 'clearly inflicted and not accidental' " (*Matter of Jonah B. [Ferida B.]*, 165 AD3d 787, 789 [2d Dept 2018]), and which "*create[d] a substantial risk*" of sufficiently serious injuries (Family Ct Act § 1012 [e] [i] [emphasis added]; *see Matter of Addison M. [Bridgette M.]*, 173 AD3d 1735, 1736-1737 [4th Dept 2019]; *Jonah B.*, 165 AD3d at 789). Contrary to the father's further contention, he failed to rebut the presumption that he was responsible for the child's injuries (*see Matter of Avianna M.-G. [Stephen G.]*, 167 AD3d 1523, 1524 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

189

TP 25-01430

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

IN THE MATTER OF IVAN GILBERT, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (WILLIAM M. HAYES OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald O'Geen, A.J.], entered August 18, 2025) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier III disciplinary hearing, that he violated incarcerated individual rules 101.10 (7 NYCRR 270.2 [B] [2] [i] [sex offense]) and 180.10 (7 NYCRR 270.2 [B] [26] [i] [facility visitation violation]). Contrary to petitioner's contention, the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Bottom v Annucci*, 26 NY3d 983, 984-985 [2015] [internal quotation marks omitted]; *see Matter of Derby v Annucci*, 227 AD3d 1413, 1414 [4th Dept 2024]). Specifically, the misbehavior report and video of the relevant incident reviewed by the hearing officer constitute substantial evidence to support the determination (*see generally Derby*, 227 AD3d at 1414; *Matter of Hood v Fischer*, 100 AD3d 1122, 1123-1124 [3d Dept 2012]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

237

KA 24-00486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS TIMMONS, DEFENDANT-APPELLANT.

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

VINCENT A. HEMMING, WARSAW (MATTHEW J. DILLON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Melissa Lightcap Cianfrini, A.J.), rendered January 24, 2024. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [7]). We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal (*see People v Chambers*, 243 AD3d 1289, 1289 [4th Dept 2025]). Although defendant's challenge to the voluntariness of the plea survives his unchallenged waiver of the right to appeal (*see People v McMurtry*, 224 AD3d 1310, 1310 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]), defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Fernandez*, 218 AD3d 1257, 1259 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *People v Toney*, 153 AD3d 1583, 1583-1584 [4th Dept 2017], *lv denied* 30 NY3d 1064 [2017]). Contrary to defendant's further contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]; *see People v Santos*, 230 AD3d 1586, 1586 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Lastly, defendant's contention that County Court made an insufficient inquiry into the circumstances of the offense, particularly the issue of intent, is actually a challenge addressed to the factual sufficiency of the plea allocution (*see People v*

Romanchik, 242 AD3d 1624, 1626 [4th Dept 2025]; *People v Clemons*, 201 AD3d 1355, 1355 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]). That contention is encompassed by defendant's unchallenged waiver of the right to appeal (*see People v Parsons*, 199 AD3d 1486, 1486 [4th Dept 2021], *lv denied* 37 NY3d 1163 [2022]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

880

KA 19-02184

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOE WASHINGTON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (John H. Crandall, A.J.), rendered September 30, 2019. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant's conviction stems from an argument between defendant and the victim, which led to defendant fatally stabbing the victim. Defendant admitted that he stabbed the victim but argued during trial that he acted in self-defense.

Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), including the charge on the defense of justification, we reject defendant's contention that the verdict is against the weight of the evidence with respect to the justification defense (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, the jury could reasonably have found based on the testimony of the People's witnesses that the victim was not using or attempting to use deadly physical force when defendant stabbed him (*see People v Schrader*, 232 AD3d 1293, 1295 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]; *People v Cruz*, 175 AD3d 1060, 1060 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *see generally People v Haynes*, 133 AD3d 1238, 1239 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]).

We reject defendant's contention that County Court erred in denying his pretrial request for a copy of the victim's entire criminal record to use in support of a justification defense (*see generally People v Wilson*, 71 AD3d 799, 800 [2d Dept 2010], *lv denied*

15 NY3d 779 [2010]). It is well settled that a court may permit a defendant who asserts a justification defense in a homicide trial to introduce evidence of specific acts of violence committed by the victim, provided that the defendant establishes that they had knowledge of the acts at the time of the homicide and that the acts are reasonably related to the crime of which the defendant stands charged (*see id.*; *see generally People v Miller*, 39 NY2d 543, 548-553 [1976]; *People v Santiago*, 211 AD2d 734, 734 [2d Dept 1995], *lv denied* 85 NY2d 942 [1995]). Here, we conclude that, with respect to the prior violent acts identified in defendant's request, he did not establish that the acts were "reasonably related, in time and quality," to the homicide charge and thus failed to show their relevancy to his justification defense (*Santiago*, 211 AD2d at 734; *see People v Every*, 146 AD3d 1157, 1163 [3d Dept 2017], *affd* 29 NY3d 1103 [2017]; *People v Rivera*, 206 AD3d 498, 499 [1st Dept 2022], *lv denied* 38 NY3d 1190 [2022]). Additionally, defendant did not establish that he was aware at the time of the homicide of any other prior violent acts reasonably related to that crime that made up the remainder of the victim's criminal record and thus did not establish a nexus between any of those acts and his justification defense (*see People v Reynoso*, 73 NY2d 816, 818 [1988]; *Wilson*, 71 AD3d at 800; *People v Grant*, 221 AD2d 901, 901 [4th Dept 1995], *lv denied* 88 NY2d 879 [1996]).

To the extent that defendant contends that he was deprived of the right to present a complete justification defense because the court denied his record request, we conclude that defendant failed to preserve that contention for our review (*see generally People v Ramsey*, 59 AD3d 1046, 1048 [4th Dept 2009], *lv denied* 12 NY3d 858 [2009]). In any event, defendant was permitted to testify at trial about the victim's short temper, about the victim showing defendant various weapons, including knives, in his possession years prior to the stabbing, and about defendant's awareness on the date of the incident that the victim had committed prior violent acts against others. Thus, evidence of the violent behavior of the victim and its effect on defendant's mental state was sufficiently before the jury to enable it to adequately consider the issue of justification (*see generally id.*; *People v Adams*, 272 AD2d 953, 953 [4th Dept 2000], *lv denied* 95 NY2d 831 [2000]).

We also reject defendant's alternative contention that he was denied effective assistance of counsel based on defense counsel's failure to obtain the victim's criminal record and related police reports. Defendant has "failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcoming[ ]" (*People v Rojas-Aponte*, 224 AD3d 1264, 1265 [4th Dept 2024] [internal quotation marks omitted]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that he was deprived of a fair trial by several instances of prosecutorial misconduct that occurred during the opening statement and summation, including allegations that the prosecutor vouched for the credibility of the witnesses, denigrated the defense, and misrepresented the trial evidence to mislead the jury about the facts and to garner sympathy for the victim. Defendant failed to preserve those contentions for our review because he failed to object to most of the alleged improprieties at trial (*see* CPL 470.05 [2]; *People v Moorhead*, 224 AD3d 1225, 1227 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]; *People v Tucker*, 195 AD3d 1547, 1548 [4th Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Atkinson*, 185 AD3d 1447, 1448 [4th Dept 2020], *lv denied* 35 NY3d 1111 [2020]), and the objections that he interposed were "on different grounds from those raised on appeal" (*Tucker*, 195 AD3d at 1548 [internal quotation marks omitted]). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Gaiter*, 224 AD3d 1384, 1385 [4th Dept 2024], *lv denied* 41 NY3d 1018 [2024], *reconsideration denied* 42 NY3d 970 [2024]).

Defendant's contention that the reasons that the prosecutor gave for striking a prospective juror in response to his *Batson* challenge were pretextual is also unpreserved inasmuch as defendant "failed to articulate . . . any reason why he believed that the prosecutor's explanations were pretextual" (*People v Massey*, 173 AD3d 1801, 1802 [4th Dept 2019] [internal quotation marks omitted]; *see People v Jackson*, 185 AD3d 1454, 1455 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

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

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

885

CA 24-00772

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

MELISSA HUTCHINS, FORMERLY KNOWN AS
MELISSA PANARESE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RENEE E. MESTAD, M.D., AND CROUSE HEALTH
HOSPITAL, INC., DEFENDANTS-RESPONDENTS.

DEFRANCISCO & FALGIATANO, LLP, SYRACUSE, D.J. & J.A. CIRANDO, PLLC (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT RENEE E. MESTAD, M.D.

GALE GALE & HUNT, LLC, FAYETTEVILLE (MATTHEW C. WALSH OF COUNSEL), FOR DEFENDANT-RESPONDENT CROUSE HEALTH HOSPITAL, INC.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered May 13, 2024. The order granted the motions of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion of defendant Renee E. Mestad, M.D. is denied, the second ordering paragraph is vacated, the complaint is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this medical malpractice action seeking damages for injuries plaintiff allegedly sustained during a cesarean section and bilateral salpingectomy performed by defendant Renee E. Mestad, M.D. at defendant Crouse Health Hospital, Inc. (Crouse), plaintiff alleges that her omentum was injured and started bleeding during the surgery and that Mestad was negligent in failing to see and address that bleeding before closing the surgical incision. Plaintiff appeals from an order that granted the motions of Mestad and Crouse for summary judgment dismissing the complaint. We reverse.

On a summary judgment motion in a medical malpractice action, a defendant has "the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]). "Once a defendant meets the initial burden, [t]he burden shifts to the plaintiff to demonstrate

the existence of a triable issue of fact . . . only as to the elements on which the defendant met the prima facie burden" (*Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023] [internal quotation marks omitted]).

Plaintiff does not dispute that Mestad satisfied her initial burden but contends that plaintiff's expert raised triable issues of fact sufficient to defeat Mestad's motion. We agree with plaintiff and conclude that plaintiff's expert, a board certified obstetrician and gynecologist, adequately raised a question of fact with respect to both deviation and causation. Plaintiff's expert opined that Mestad deviated from the standard of care by inspecting only that portion of the omentum that was in her visual field and by failing to inspect that portion of the omentum not in her visual field prior to closing plaintiff's abdomen. The expert further opined that Mestad deviated from the standard of care by making certain assumptions and by failing to take certain medical actions, such that Mestad caused plaintiff to actively bleed from her omentum, did not adequately obtain hemostasis, and never located the source of bleeding prior to completing the procedure. Where, as here, the opinion of a plaintiff's expert directly opposes the opinion of a defendant's expert, the result is a "classic battle of the experts that is properly left to a jury for resolution" (*Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021] [internal quotation marks omitted]; *see Peevey v Unity Health Sys.*, 196 AD3d 1139, 1140 [4th Dept 2021]; *Ferlito v Dara*, 306 AD2d 874, 874 [4th Dept 2003]). Contrary to defendants' contention, this is not a case where plaintiff's expert affidavit was " 'vague, conclusory, speculative, [or] unsupported by the medical evidence in the record' " (*Occhino*, 151 AD3d at 1871; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Inasmuch as Supreme Court did not address the alternative ground for summary judgment raised in Crouse's motion, we remit the matter to Supreme Court to consider that ground and determine the motion anew (*see Julius v County of Erie*, 196 AD3d 1058, 1059 [4th Dept 2021]; *Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

950

CA 25-00047

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

KENNETH R. ZATYKO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROLINE F. ZATYKO, DEFENDANT-RESPONDENT.

V. JULIA LUYSTER, P.A., EAST CONCORD (V. JULIA LUYSTER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LOTEMPIO LAW FIRM, LLC, BUFFALO (TERRI L. LOTEMPIO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 23, 2024, in a divorce action. The judgment, among other things, dissolved the marriage of the parties and distributed marital property.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the second decretal paragraph and by reducing the retroactive payment to be awarded to defendant of $46,402.71 to $39,157.71, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals from a judgment that, among other things, dissolved his marriage to defendant and distributed marital property.

We agree with plaintiff that Supreme Court abused its discretion in ordering the parties to annually exchange tax returns and recalculate spousal maintenance each year until both parties turn 70 (*see generally O'Brien v O'Brien*, 88 AD3d 775, 778 [2d Dept 2011]). Inasmuch as "[t]he amount of [a] maintenance award is a discretionary determination based upon a number of interrelated facts then in existence, . . . the parties' changing needs are best addressed in a future application for modification of the amount of maintenance" (*id.*; *see generally* § 236 [B] [9] [b] [1]; *Gahagan v Gahagan*, 172 AD3d 1007, 1008 [2d Dept 2019]; *Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015]). We thus modify the judgment by vacating the second decretal paragraph.

We further agree with plaintiff that the court abused its discretion in calculating the equitable distribution of the marital property by failing to credit him for payment of defendant's share of the 2019 income taxes. This Court will generally not disturb an

allocation of marital debts if the court "properly considered the factors set forth in Domestic Relations Law § 236 (B) (5) (d) and allocated marital debts in roughly the same proportion as it distributed the parties' . . . marital assets" (*Burns v Burns*, 70 AD3d 1501, 1503 [4th Dept 2010]). Here, however, the court abused its discretion in failing to provide plaintiff a credit for paying the 2019 income taxes in determining the equitable distribution of property (*see Morales v Carvajal*, 153 AD3d 514, 515 [2d Dept 2017]; *King v King*, 258 AD2d 717, 719 [3d Dept 1999]; *see generally Burns*, 70 AD3d at 1503). We therefore further modify the judgment by reducing the retroactive payment to be awarded to defendant of $46,402.71 to $39,157.71.

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

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

951

CA 24-01702

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

MANOEL C.D. ARRUDA AND LOUISE C.K. ARRUDA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

HURWITZ FINE P.C., BUFFALO (SCOTT D. STORM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAMARDO LAW FIRM, PC, AUBURN (JOSEPH A. CAMARDO, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered October 3, 2024. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross-motion of plaintiffs to compel defendant to respond to their discovery demands.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the cross-motion is denied, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action alleging that defendant breached its insurance contract with plaintiffs by failing to provide coverage beyond a limited payment of $10,000 for damage to their home when sewage backed up into their basement through a floor drain. Defendant moved for, inter alia, summary judgment dismissing the complaint, and plaintiffs cross-moved to compel defendant to respond to their discovery demands. Defendant appeals from an order that denied its motion and granted plaintiffs' cross-motion. We reverse.

We agree with defendant that plaintiffs' loss beyond $10,000 is excluded under the policy. An insurer moving for summary judgment "has the initial burden of coming forward with admissible evidence establishing that the loss was not a covered loss or that the loss was excluded from coverage" (*Blair v Allstate Indem. Co.*, 124 AD3d 1224, 1224 [4th Dept 2015]). "[T]o negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003] [internal quotation

marks omitted]). Here, the policy unambiguously provided that defendant did not insure "for loss caused directly or indirectly by" water, including water which "[b]acks up through sewers or drains." The loss therefore fell within the water exclusion (*see Platek v Town of Hamburg*, 24 NY3d 688, 694 [2015]; *Lattimore Rd. Surgicenter, Inc. v Merchants Group, Inc.*, 71 AD3d 1379, 1379-1380 [4th Dept 2010]). Moreover, the policy further provided that defendant did not insure "for loss caused directly or indirectly by" earth movement, including "earth sinking, rising or shifting." A report issued by an engineer hired by plaintiffs showed that the sewage backup was caused by erosion of the soil around the sewer pipe, which caused the pipe to settle below the proper slope of the sewer line and created a permanent backup. Inasmuch as the loss was caused directly or indirectly by earth movement, that exclusion also applied (*see Valente v Utica First Ins. Co.*, 173 AD3d 1642, 1643 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]; *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 417 [2d Dept 2007], *lv denied* 9 NY3d 818 [2008]).

Defendant therefore met its burden of establishing that exclusions under the policy applied, precluding coverage for the loss beyond a $10,000 limited water back-up coverage under the policy, which was paid by defendant (*see Lattimore Rd. Surgicenter, Inc.*, 71 AD3d at 1380). In opposition to the motion, plaintiffs failed to raise a triable issue of fact regarding the applicability of an exception to the exclusions (*see Copacabana Realty, LLC v Fireman's Fund Ins. Co.*, 130 AD3d 771, 772 [2d Dept 2015], *lv denied* 26 NY3d 911 [2015]; *see generally Platek*, 24 NY3d at 694). Plaintiffs' reliance on the "exception to paragraph 2.d" of the policy is misplaced. The exception states that "[u]nless the loss is otherwise excluded, we cover loss to property . . . resulting from an accidental discharge or overflow of water or steam from within a . . . [s]torm drain, or water, steam or sewer pipe, off the 'residence premises.' " The exception applied only to coverage excluded by paragraph 2.d. Plaintiffs, however, did not identify any provision of paragraph 2.d that would be applicable here, and defendant did not rely on any of those provisions in denying coverage. Moreover, the exception states that it applies "[u]nless the loss is otherwise excluded" and, as explained above, the loss is excluded under the policy.

We respectfully disagree with our dissenting colleagues that Supreme Court properly denied the motion on the ground that additional discovery was needed. Plaintiffs failed to show "that facts essential to justify opposition [to the motion] may exist but cannot then be stated" (CPLR 3212 [f]; *see Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1135 [4th Dept 2006]). The basis for defendant's motion was a report issued by an engineer hired by plaintiffs, which was further buttressed by the engineer's responding affidavit to the motion. Thus, defendant "accepted plaintiffs' version of the facts for the purpose of the summary judgment motion," leaving the only issue as the interpretation of the policy and its exclusions (*Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 18-19 [4th Dept 1995], *lv dismissed in part & denied in part* 87 NY2d 953 [1996]).

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

remaining contentions.

All concur except OGDEN and DELCONTE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm. Plaintiffs commenced this action alleging that defendant breached its insurance contract by failing to provide full coverage for extensive damage to their home from a raw sewage backup that was allegedly caused by a downstream blockage. Defendant now appeals from an order that denied without prejudice its motion for summary judgment dismissing the complaint, granted plaintiffs' cross-motion to compel defendant to respond to plaintiffs' outstanding discovery demands, and granted plaintiffs' "request for further discovery pursuant to CPLR [ ] 3212 (f)." Although the order purports to deny defendant's motion on the ground that "[d]efendant . . . failed to meet its burden of demonstrating the absence of material questions of fact," it is clear to us that Supreme Court, in effect, denied defendant's motion pursuant to CPLR 3212 (f).

In our view, the court properly denied the motion for summary judgment as premature because plaintiffs made the requisite evidentiary showing to support the conclusion that facts essential to justify opposition may exist but could not then be stated (*see Beck v City of Niagara Falls*, 169 AD3d 1528, 1529 [4th Dept 2019], *amended on rearg on other grounds* 171 AD3d 1573 [4th Dept 2019]; *cf. Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018]; *Resetarits Constr. Corp. v Elizabeth Pierce Olmstead, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014]). Specifically, plaintiffs' submissions in response to defendant's motion included an expert affidavit from an engineer, who opined that the "damage caused to the basement was a discharge from a defective sewer pipe that [wa]s located off the residential premises." Inasmuch as defendant has, as noted by the majority, "accepted plaintiffs' version of the facts for the purpose of the summary judgment motion" (*Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 18-19 [4th Dept 1995], *lv dismissed in part & denied in part* 87 NY2d 953 [1996]), the engineer's opinion establishes for purposes of the motion that the damage to the basement was not excluded from coverage under defendant's insurance policy. Plaintiffs have established that evidence regarding both the specific cause of the sewage backup and the specific location of an alleged blockage could be obtained through further discovery and thus that "facts essential to oppose the motion were in [the movant's] exclusive knowledge and possession and could be obtained by discovery" (*Resetarits Constr. Corp.*, 118 AD3d at 1456 [internal quotation marks omitted]). We would therefore conclude that the court properly exercised its discretion pursuant to CPLR 3212 (f) in denying, without prejudice, defendant's motion seeking summary judgment dismissing the complaint (*see Fellows v County of Onondaga*, 2 AD3d 1462, 1462 [4th Dept 2003]; *Freier v Amax, Inc.*, 217 AD2d 981,

981 [4th Dept 1995]; *cf. R.C.S. Farmers Mkts. Corp. v Great Am. Ins.*

Co., 56 NY2d 918, 920 [1982]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

956

KA 24-01050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. LITOLFF, DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO (VICTOR D. ROWCLIFFE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered February 15, 2024. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and sexual abuse in the first degree.

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

Memorandum: In this prosecution arising from allegations that defendant, inter alia, vaginally raped the 10-year-old daughter of his girlfriend, defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96) and sexual abuse in the first degree (§ 130.65 [4]).

Defendant failed to preserve for our review his contention that County Court should have recused itself (*see People v Pett*, 74 AD3d 1891, 1892 [4th Dept 2010]; *People v Lebron*, 305 AD2d 799, 800 [3d Dept 2003], *lv denied* 100 NY2d 583 [2003]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Although defendant made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Fowler*, 239 AD3d 1444, 1444 [4th Dept 2025], *lv denied* 44 NY3d 1011 [2025]), his contention that the People failed to present legally sufficient proof as to the counts of predatory sexual assault against a child and sexual abuse in the first degree is preserved inasmuch as " 'the question[s] now on appeal w[ere] expressly decided by the court' " in ruling on the motion (*People v Cleveland*, 217 AD3d 1346, 1348 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023], *lv denied* 41 NY3d 942 [2024]). Defendant's contention nonetheless lacks merit. "Legal sufficiency review requires that we view the evidence in the light

most favorable to the prosecution, and, when deciding whether a jury could logically conclude that the prosecution sustained its burden of proof, [w]e must assume that the jury credited the People's witnesses and gave the prosecution's evidence the full weight it might reasonably be accorded" (*People v Allen*, 36 NY3d 1033, 1034 [2021] [internal quotation marks omitted]). Viewed in that light, contrary to defendant's contention, evidence at trial establishing his age at the time of the rape and the testimony of the victim that he engaged in vaginal sexual contact with her are legally sufficient to support the count of predatory sexual assault against a child (Penal Law former § 130.96). Similarly, contrary to defendant's contention, evidence that he touched the intimate part of the non-relative victim child gave rise to an "inference that defendant was seeking sexual gratification" (*People v Owens*, 149 AD3d 1561, 1563 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]) and was thus legally sufficient to support the count of sexual abuse in the first degree (Penal Law § 130.65 [4]; *see* § 130.00 [3]). The victim's inability to identify in precisely which month the sexual assault occurred did not render the evidence legally insufficient inasmuch as " '[t]he time of the offense is not a material element of the offense and the [potential] variance is relatively minor' " (*People v Jones*, 37 AD3d 1111, 1112 [4th Dept 2007], *lv denied* 8 NY3d 986 [2007]; *see People v Coapman*, 90 AD3d 1681, 1682 [4th Dept 2011], *lv denied* 18 NY3d 956 [2012]).

Contrary to defendant's contention, although "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim" (*People v Zeitz*, 148 AD3d 1636, 1637 [4th Dept 2017], *lv denied* 29 NY3d 1089 [2017] [internal quotation marks omitted]), we nevertheless conclude that, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's contention is based on the credibility of the victim, and we conclude that the issues of credibility were " 'properly considered by the jury and there is no basis for disturbing its determinations' " (*People v Baez*, 175 AD3d 982, 986 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]; *see People v Harrell*, 235 AD3d 1294, 1298 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025]; *People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]).

Defendant's contention that he was denied his right to a trial by jury under *Apprendi v New Jersey* (530 US 466 [2000]) because the prosecutor, and not the jury, decided that he should be subjected to a greater penalty by prosecuting him for predatory sexual assault against a child (Penal Law former § 130.96) rather than rape in the first degree (former § 130.35), is not preserved for our review (*see People v Lawrence*, 81 AD3d 1326, 1326 [4th Dept 2011], *lv denied* 17 NY3d 797 [2011]; *People v Phillips*, 56 AD3d 1168, 1169 [4th Dept 2008], *lv denied* 11 NY3d 928 [2009]). In any event, that contention is without merit inasmuch as defendant's conviction under Penal Law former § 130.96 "did not increase the penalty for the crime of which defendant had been convicted based upon facts that [the jury] did not

find" (*People v Collins*, 85 AD3d 1678, 1679 [4th Dept 2011], *lv denied* 18 NY3d 993 [2012] [internal quotation marks omitted]; *see Lawrence*, 81 AD3d at 1327).

Contrary to defendant's further contention that he was denied his right to a trial by jury based on the testimony of an expert with respect to child sexual abuse accommodation syndrome (CSAAS), "expert testimony concerning CSAAS is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Lathrop*, 171 AD3d 1473, 1473 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019] [internal quotation marks omitted]; *see People v Ashton*, 229 AD3d 1322, 1324 [4th Dept 2024], *lv denied* 42 NY3d 1018 [2024]). Here, the expert's generalized testimony regarding the scientifically recognized pattern of secrecy, helplessness, entrapment and accommodation experienced by child victims did not exceed the permissible bounds (*see Ashton*, 229 AD3d at 1324; *People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; *see generally People v Nicholson*, 26 NY3d 813, 828 [2016]).

Contrary to defendant's contention, we conclude that the evidence, the law, and the circumstances of the case, viewed in totality and as of the time of the representation, reveal that defense counsel provided meaningful representation *(see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Assuming, arguendo, that any of the prosecutor's comments during summation were improper, we conclude that such improprieties "were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Holmes*, 210 AD3d 1510, 1512 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023] [internal quotation marks omitted]; *see People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]), and that defense counsel's failure to object to those comments did not constitute ineffective assistance of counsel (*see Elmore*, 175 AD3d at 1005). We also reject defendant's claims that his original defense counsel and substitute defense counsel were ineffective for failing to make certain motions and preserve specific objections inasmuch as "it is well settled that [a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Harris*, 147 AD3d 1328, 1330 [4th Dept 2017] [internal quotation marks omitted]; *see People v Williams*, 163 AD3d 1422, 1423 [4th Dept 2018]; *People v Williams*, 150 AD3d 1684, 1685 [4th Dept 2017], *lv denied* 29 NY3d 1095 [2017], *reconsideration denied* 30 NY3d 954 [2017]). The remaining claims of ineffective assistance set forth by defendant "are based largely on his hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Vicks*, 232 AD3d 1255, 1256 [4th Dept 2024], *lv denied* 43 NY3d 947 [2025]; *see People v Avilez*, 56 AD3d 1176, 1177 [4th Dept 2008], *lv denied* 12 NY3d 755 [2009]).

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

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

957

KA 23-00046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM HEFFERNAN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 17, 2020. The judgment convicted defendant upon a nonjury verdict of assault in the second degree, criminal possession of a weapon in the third degree (two counts), unlawful imprisonment in the first degree, criminal obstruction of breathing or blood circulation and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), and one count each of assault in the second degree (§ 120.05 [12]), unlawful imprisonment in the first degree (§ 135.10), criminal obstruction of breathing or blood circulation (§ 121.11) and resisting arrest (§ 205.30). The conviction arises out of an incident in which defendant allegedly, inter alia, pushed and kicked the victim down a staircase in her home, dragged her to defendant's basement apartment, threatened her with a knife, choked her, tied her up, and beat her with a chair.

We reject defendant's contention that County Court erred when it denied his motion pursuant to CPL 245.30 (2) seeking access to the premises to inspect and photograph the stairs. Upon a motion pursuant to CPL 245.30 (2), the "court may deny access to the premises when the probative value of access to such location has been or will be preserved by specified alternative means." Here, we conclude that the condition of the stairs was sufficiently preserved by alternative means, including crime scene photographs and body camera footage recorded by officers when they arrived at the crime scene.

Defendant contends that his conviction is not supported by legally sufficient evidence. Defendant failed to preserve that contention for our review with respect to the crime of resisting arrest (*see People v Gray*, 86 NY2d 10, 19 [1995]), and we reject defendant's contention with respect to the remaining crimes (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). With respect to the crime of assault in the second degree under Penal Law § 120.05 (12), a person is guilty of that offense when, "with intent to cause physical injury to a person who is [65] years of age or older, [they] cause[ ] such injury, and [are] more than [10] years younger than such person." Here, the People presented evidence that the 66-year-old defendant struck the 82-year-old victim, bound her wrists and ankles with wires, and pressed very hard between her jawbone and her neck and throat, which caused the victim to suffer physical injuries including bruising, a subdural hematoma, and a small nose fracture.

With respect to the two counts of criminal possession of a weapon in the third degree, a person is guilty of that offense when, as relevant here, they "possess[ ] any dagger, dangerous knife . . . or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another" (Penal Law § 265.01 [2]) and that person has been previously convicted of any crime (§ 265.02 [1]). The element of possession may be satisfied by eyewitness testimony that defendant possessed the weapon (*see People v Miller*, 137 AD3d 1712, 1712-1713 [4th Dept 2016], *lv denied* 27 NY3d 1153 [2016]), and intent can "be established by defendant's conduct and the circumstances" (*People v Gordon*, 23 NY3d 643, 650 [2014]). Here, the People presented testimony and photographs demonstrating that defendant used a knife to threaten the victim.

With respect to unlawful imprisonment in the first degree, a person is guilty of that offense when they restrain another person under circumstances which expose the latter to a risk of serious physical injury (*see* Penal Law § 135.10). Here, the People presented evidence that defendant bound and restrained the victim with wires, which prevented her from leaving the basement and, given the 82-year-old victim's physical condition, exposed her to a risk of serious physical injury (*see People v Parham*, 156 AD2d 946, 946 [4th Dept 1989]). With respect to criminal obstruction of breathing or blood circulation, a person is guilty of that offense when, with intent to impede the normal breathing or blood circulation of another person, they: (a) apply pressure on the throat or neck of such person; or (b) block the nose or mouth of such person (*see* § 121.11). The People presented evidence establishing that defendant used his hand to cover the victim's face and pressed very hard against the victim's throat, which caused the victim to choke.

Thus, to the extent that defendant preserved his challenge to the sufficiency of the evidence, 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 [factfinder] could have found the elements of [those] crime[s] 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 crimes in this nonjury trial (*see id.*), we conclude that the verdict is not against the weight of the evidence with respect to all of the crimes of which defendant was convicted (*see generally Bleakley*, 69 NY2d at 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v O'Neill*, 169 AD3d 1515, 1515 [4th Dept 2019] [internal quotation marks omitted]). While the police body camera footage showing many items present on the staircase contradicts the victim's account of the events on the staircase, the victim's testimony with respect to the assault in defendant's apartment was not "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]), and we see no basis for disturbing the court's credibility determinations regarding that testimony.

Finally, the sentence is not unduly harsh or severe.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

960

CAF 24-01021

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

IN THE MATTER OF JONAH M.

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

MEMORANDUM AND ORDER

DAVION D., RESPONDENT-APPELLANT.

THOMAS L. PELYCH, HORNELL, FOR RESPONDENT-APPELLANT.

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

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered July 1, 2024, 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 affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. We affirm.

Contrary to the father's contention, we conclude that petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child (*see* Social Services Law § 384-b [7] [a]; *Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1667-1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]). A permanently neglected child means, in relevant part, "a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of . . . at least one year or [15] out of the most recent [22] months following the date such child came into the care of an authorized agency . . . [to] plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship" (§ 384-b [7] [a]; *see Matter of K.Y.Z. [W.Z.]*, — NY3d —, —, 2025 NY Slip Op 05781, *5 [2025]). "Thus, in a permanent neglect proceeding,

the petitioner bears the burden of proving by clear and convincing evidence, first, that it made such diligent efforts, and, second, that the respondent failed to plan for the child's future" (*Matter of Jack V. [Jack U.]*, 243 AD3d 1174, 1176 [3d Dept 2025] [internal quotation marks omitted]; *see* Social Services Law § 384-b [7] [a]; *K.Y.Z.*, — NY3d at —, 2025 NY Slip Op 05781, *5).

" '[D]iligent efforts' . . . mean[s] *reasonable* attempts . . . to assist, develop and encourage a meaningful relationship between the parent and the child" (Social Services Law § 384-b [7] [f] [emphasis added]), and they " 'include reasonable attempts at providing counseling, scheduling regular visitation with the child[ ], providing services to the parent[ ] to overcome problems that prevent the discharge of the child[ ] into [the parent's] care, and informing the parent[ ] of [the child's] progress' " (*Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341 [4th Dept 2010]; *see Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]). "Petitioner is not required, however, to guarantee that the parent succeed in overcoming [the parent's] predicaments . . . but, rather, the parent must assume a measure of initiative and responsibility" (*Whytnei B.*, 77 AD3d at 1341 [internal quotation marks omitted]). "While an agency's obligation to exercise diligent efforts is not obviated by a parent's incarceration . . . , it does create[ ] some impediments, both to the agency and to the parent, leading courts to conclude that diligent efforts in such circumstances may be established by the agency apprising the incarcerated parent of the child's well-being, developing an appropriate service plan, investigating possible placement of the child with relatives suggested by the parent, responding to the parent's inquiries and facilitating telephone contact between the parent and child" (*Caidence M.*, 162 AD3d at 1539 [internal quotation marks omitted]; *see* § 384-b [7] [f]; *Matter of Callie H. [Taleena W.]*, 170 AD3d 1612, 1613 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]).

Here, the record establishes that the father was incarcerated at the time petitioner learned of his paternity and he remained incarcerated for approximately six months thereafter. At the fact-finding hearing, the first caseworker assigned to the father's case testified that she contacted the correctional facility where the father was housed to determine the process for the father to have visitations with the child. While the father faults the caseworker for the lack of visitation with the child during the time that he was incarcerated, the inability of the father to meet with the child was due primarily to the father's behavior while incarcerated, resulting in his placement in the special housing unit, which had significant restrictions on visitations (*see generally Matter of Ty'Keith R.*, 45 AD3d 1397, 1397 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]). Additionally, the case file submitted into evidence by petitioner at the fact-finding hearing establishes that a caseworker repeatedly inquired with the correctional facility about opportunities for the child to visit the father, attempted to locate family members who were willing to facilitate the visitations, and sought a court order seeking video/telephone visits. While the father was incarcerated, caseworkers responded to the father's inquiries about the child and,

upon his transfer from the special housing unit to the general population of the correctional facility, caseworkers successfully set up a telephone visit for the father and the child, with the assistance of the father's correctional facility counselor. The record also demonstrates that petitioner developed a service plan for the father, which included substance abuse counseling, mental health counseling, parenting classes and anger management classes, none of which the father fully completed. The caseworkers assigned to the father's case sent monthly letters to him, with the exception of two months, updating him on the child's well-being and outlining petitioner's expectations regarding the service plan and informing him of court dates.

After the father's release from prison, a caseworker provided the father with information about services as well as a bus pass to facilitate the completion of some of the counseling requirements, which the father declined to use. The caseworker also arranged for biweekly in-person visitations with the father and the child. After he was released from prison, however, the father violated the terms of his parole, resulting in at least one reincarceration. Thus, we conclude that the record establishes, by clear and convincing evidence, that petitioner made affirmative, repeated and meaningful efforts to strengthen and encourage the parental relationship, and there is no basis to disturb Family Court's finding that the threshold diligent efforts requirement was satisfied (*see Matter of Jaxon S. [Jason S.]*, 170 AD3d 1687, 1688-1689 [4th Dept 2019]; *see generally Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012]).

We further conclude that, contrary to the father's contention, given the need for permanency and the father's lack of a realistic solution for the child's future, the court's determination that it was in the child's best interests to terminate the father's parental rights and to free the child for adoption has a sound and substantial basis in the record (*see Matter of Jemma M. [Ashley M.]*, 237 AD3d 1569, 1570 [4th Dept 2025], *lv denied* 44 NY3d 908 [2025]). To the extent the father contends that he should have been awarded a suspended judgment, we conclude that one is not warranted under the circumstances of this case, including, inter alia, the fact that, at the time of the dispositional hearing, the father had been reincarcerated (*see Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023]).

All concur except NOWAK and HANNAH, JJ., who dissent and vote to reverse in accordance with the following memorandum: We disagree with the majority's conclusion that petitioner established that it made diligent efforts to encourage and strengthen the relationship between respondent father and the subject child. Thus, we respectfully dissent.

In late February 2021, a neglect petition was filed in a separate proceeding against the nonparty mother with respect to the subject child and his half-sibling; that same day, both children were placed in the temporary care of the maternal grandmother. At the time of the initial neglect petition against the mother, the father had never met

the child and was incarcerated. Nonetheless, in April 2021—while he was still incarcerated, and during the pendency of the neglect proceeding against the mother—the father filed a petition seeking an order of filiation, which was granted in December 2021 following an inquest. The father also filed a petition seeking visitation and video calls with the child; at some point, the father was made a party to the neglect proceeding against the mother as a non-respondent parent.

In March 2022, Family Court issued an order in the separate proceeding finding that the mother neglected the subject child. At the time the order of neglect was issued, the father remained incarcerated and had never met the child. One year later—in March 2023—petitioner filed the instant petition seeking to terminate the father's newly-obtained parental rights, alleging that the father failed to plan for the care of the child for the period of February 1, 2022 through February 28, 2023. The father was incarcerated at two different facilities for the majority of that time, from February through December of 2022. Petitioner does not contend—either in the proceedings in Family Court or now on appeal—that the father failed on more than one occasion while he was incarcerated to cooperate with petitioner's efforts to plan and arrange visits with the child and that petitioner was therefore not required to engage in diligent efforts (*see* Social Services Law § 384-b [7] [e] [ii]), and the court made no such finding in the order on appeal. Petitioner thus had the burden to establish, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the parental relationship between the father and the child during that time period (*see* § 384-b [7] [a]).

That is "a demanding standard . . . for good reason. Every parent has a constitutional right to the care and custody of their child—an interest 'far more precious than any property'—and any lesser standard risks erroneous termination and irreparable damage to the family" (*Matter of K.Y.Z. [W.Z]*, — NY3d —, —, 2025 NY Slip Op 05781, *9 [2025], quoting *Santosky v Kramer*, 455 US 745, 758-759 [1982]). In our view, the evidence adduced by petitioner established not only that its efforts were minimal and perfunctory, but that it actively inhibited the father's relationship with the subject child, rather than encouraging and fostering that relationship as required.

Indeed, we disagree with the majority's conclusion that petitioner appropriately responded to the father's inquiries while he was incarcerated. During that time, petitioner's efforts to encourage and strengthen the parental relationship effectively consisted of sending the father nearly identical form letters approximately once a month, though there were several months where the caseworker simply neglected to send a letter because she was too busy. The form letters hardly served to foster the father's relationship with the child; in fact, they primarily set forth the services required for the nonparty mother following the finding in the separate proceeding that she neglected the child.

In point of fact, none of the letters sent to the father in

prison directed him to participate in any services that may have been offered at the facilities, nor could they have—the caseworker admitted on cross-examination that she never checked what services, if any, were available to the father in prison. Rather, the letters merely advised the father, as a non-respondent parent, of the services petitioner "will be expecting [him] to enroll in upon [his] release from prison."

Of the letters that the caseworker did not forget to send, one was written to an entirely different person regarding that person's child, another requested that the father stop attempting to contact the caseworker, and another was written for the father but referred to a different child entirely. In fact, these form letters indicate that, as early as September 2022 and essentially every month thereafter, petitioner was not seeking to reunify the father with the child but, rather, was preparing to terminate the father's parental rights.

Other than sending the father form letters, petitioner's caseworkers did little else to encourage and strengthen the parental relationship between the father and the child. Petitioner facilitated only one brief phone call with the child over the span of the father's incarceration. After that single phone call, the father's counselor at Cayuga Correctional Facility repeatedly asked the father's caseworker—an employee of petitioner—to "please send in the request for visitation . . . on [petitioner's] letterhead" in order to allow the father to have in-person visitation with his child on weekdays during the caseworker's regular work hours. The caseworker never prepared the necessary letter, and the father was never able to obtain in-person visitation during his incarceration.

In August 2022, the court directed that the father receive "bi-monthly phone/video contact" with the child for the remaining four months of his incarceration. Petitioner failed to set up those calls, either by phone or video, blaming the father's counsel, who was representing him in conjunction with his petition seeking visitation with the child, for failing to draft a court order consistent with the court's direction. The caseworker's testimony while being cross-examined by the father's attorney speaks volumes:

"Q: [W]hen the information from the attorney wasn't forthcoming, what did you do about this?
A: I waited for that to be submitted. . . .
Q: And you never made any efforts to obtain the information, would that be fair to say?
A: It wasn't ordered for the [petitioner] to submit that information.
Q: All I'm asking for ma'am, is whether you in fact made that effort or not?
A: No, I did not . . .
Q: . . . Did you ever discuss my client not having visits with any supervisor in the department?
A: We debriefed about the situation, what had to happen in order for visits.

Q: Okay. And what was your plan for that, ma'am?
A: I was directed to -- that his counsel had to submit the order to the facility.
Q: Okay?
A: For visits to be set up and it had not happened at that point.
Q: And what did you do with regard to the directions you were given in that regard?
A: Waited.
Q: You just waited."

Consistent with the caseworker's testimony, petitioner continued to simply wait for the father's attorney to draft an order, despite its caseworker's note in September 2022 that Cayuga Correctional Facility permitted one phone call per month without an order. As a result, the father had no contact whatsoever with his child from August of 2022 until he was released from incarceration in mid-December 2022.

Thus, petitioner's efforts to encourage and strengthen the parental relationship did not begin until after the father's release from prison, over 10 months into the relevant time period. When petitioner finally attempted to assist the father, he did not reject those efforts; in fact, he had 12 visits with his child, and asked for more visits in addition to the visits that petitioner was providing. Petitioner's caseworker testified that the father "brought toys for [the child and] tried to connect," and even when visits had to be rescheduled due to petitioner's error, the father "showed up to all of those visits." Petitioner confirmed with the father's parole officer that the father completed a substance abuse evaluation, and therefore the father did not need to separately complete substance abuse classes as petitioner requested. The father also completed intake, orientation, and three classes in domestic violence counseling.

While the father did not complete the domestic violence program or anger management classes by the end of the period at issue in February 2023, "the degree to which a parent has upheld his or her obligations to such children cannot be meaningfully measured when the agency itself has not undertaken diligent efforts on behalf of reuniting parent and child" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]). "A child services agency has the burden to submit sufficient proof on the record that, if credited, demonstrates under the applicable clear and convincing evidence standard that it made 'affirmative, repeated, and meaningful efforts to assist the parent in overcoming [particular obstacles]' to reunification" (*K.Y.Z.*, — NY3d at —, 2025 NY Slip Op 05781 at *2, quoting *Sheila G.*, 61 NY2d at 385). Here, the record shows that petitioner failed to make the required diligent efforts from February 1, 2022 to December 9, 2022—for most of the time period at issue—and actually frustrated the father's ability to meaningfully connect with his child during that time.

In short, the evidence adduced by petitioner established little more than that it performed minimal, perfunctory, and generic acts aimed more toward ensuring that the father's parental rights were terminated—as evidenced by petitioner's six letters essentially admitting as much—than ensuring that the father could meaningfully

reunite with the child. Therefore, we would reverse the order and dismiss the petition. If the minimal efforts taken here are sufficient, we struggle to see what efforts would not be.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

962

TP 25-00862

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

IN THE MATTER OF CASHEENA WILLIAMS, PETITIONER,

V MEMORANDUM AND ORDER

BARBARA GUINN, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (LARRY E. WATERS, JR., OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Catherine R. Nugent Panepinto, J.], entered May 16, 2025) to review a determination of respondent. The determination, among other things, imposed a 12-month disqualification penalty on petitioner's eligibility for Supplemental Nutrition Assistance Program benefits.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks, inter alia, to annul a determination following a fair hearing finding that she committed an intentional program violation of the Supplemental Nutrition Assistance Program (SNAP) by failing to report her daughter's employment income when she applied for recertification, which resulted in petitioner receiving an overissuance of SNAP benefits and disqualified her from receiving SNAP benefits for twelve months. We confirm the determination.

"[T]he role of a court reviewing an administrative determination is limited to ensuring that the determination arrived at following an adversarial hearing is supported by substantial evidence" (*Matter of Bello v New York State Off. of Temporary & Disability Assistance*, 90 AD3d 1706, 1706 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012] [internal quotation marks omitted]; *see* CPLR 7803 [4]; *Faber v Merrifield*, 11 AD3d 1009, 1010 [4th Dept 2004]), and not, as petitioner contends, by clear and convincing evidence. Substantial evidence is "such relevant proof as a reasonable mind may accept as

adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). We conclude that the determination that petitioner intentionally failed to disclose her daughter's income is supported by substantial evidence (*see Matter of Smith v Wing*, 1 AD3d 933, 934 [4th Dept 2003]; *Matter of Williams v Perales*, 156 AD2d 697, 698 [2d Dept 1989]). It was established at the administrative hearing that petitioner, knowing that she was required to disclose the income of everyone living with her, disclosed her own income but not the income of her daughter and, contrary to petitioner's contention, it is "readily inferable therefrom that she acted intentionally" (*Smith*, 1 AD3d at 934). Additionally, although respondent was presented with conflicting evidence with respect to whether the daughter's income was disclosed, "[i]t is for the administrative tribunal, not the courts, to weigh conflicting evidence, assess the credibility of witnesses, and determine which [evidence] to accept and which to reject . . . This Court may not substitute its judgment for that of respondent" in rejecting petitioner's position that her daughter's income was disclosed (*Bello*, 90 AD3d at 1707 [internal quotation marks omitted]; *see Smith*, 1 AD3d at 934; *see generally Matter of Czerwiak v Wing*, 245 AD2d 1098, 1098 [4th Dept 1997]).

We reject petitioner's further contention that supplemental evidence was allowed at the administrative hearing and therefore respondent's determination was affected by an error of law inasmuch as we conclude that respondent complied with the regulations (*see* 18 NYCRR 359.5, 359.7). Petitioner's remaining contention, that she is entitled to attorneys' fees, is without merit (*see generally* CPLR 8601 [a]).

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

1015

CA 24-01405

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, AND NOWAK, JJ.

JONATHAN T. FOGEL, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (CYNTHIA G. LUDWIG OF COUNSEL), FOR DEFENDANT-APPELLANT.

ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO (GERALD T. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John J. DelMonte, J.), entered August 2, 2024. The order denied the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint except to the extent that it asserts a claim for improper practices under Public Health Law § 2801-b (1) seeking injunctive relief and as modified the order is affirmed without costs.

Memorandum: Defendant, Kaleida Health (Kaleida), appeals from an order denying its pre-answer motion to dismiss the complaint. We modify.

Plaintiff is a physician whose medical privileges with Kaleida were suspended in January 2017 and terminated a year later based on allegations that he subjected a radiology technician to unwanted physical contact in the operating room at Buffalo General Medical Center while a patient was undergoing surgery. In a prior appeal, we converted plaintiff's CPLR article 78 proceeding into an action for injunctive relief and granted the motion of Kaleida, among others, seeking to dismiss the petition, as converted to a complaint, challenging his termination. We concluded that we lacked jurisdiction to consider the complaint because plaintiff had not yet filed a complaint with the Public Health Council, as required by Public Health Law § 2801-b (2) (*Matter of Fogel v Kaleida Health*, 175 AD3d 1102, 1103 [4th Dept 2019]). We therefore dismissed the "complaint without prejudice to refile following review of this matter by the Public Health Council" (*id.*).

After we dismissed the complaint, the Public Health and Health Planning Council (PHHPC) determined following an investigation that

Kaleida, in revoking plaintiff's medical privileges, had not engaged in improper practices within the meaning of Public Health Law § 2801-b. Two years later, plaintiff commenced this action seeking declaratory and injunctive relief. The gravamen of the complaint is that Kaleida violated its bylaws by suspending and then terminating plaintiff's privileges. The complaint alleged that Kaleida's board of directors, which made the decision to revoke plaintiff's privileges, had no authority under the bylaws to ignore the recommendation of the Hearing Officer, who determined following a hearing that, although plaintiff engaged in misconduct, a revocation of his medical privileges would be arbitrary and "exceedingly harsh." According to the complaint, the board of directors also had no authority to ignore the recommendation of the Medical Executive Board (MEC), which adopted the Hearing Officer's report.

As relief, the complaint sought a declaration that Kaleida violated its bylaws and wrongly revoked plaintiff's privileges and sought reinstatement of those privileges, along with expungement of his disciplinary record and reports filed with the National Practitioner Data Bank (NPDB) regarding his alleged misconduct. In response, Kaleida filed a pre-answer motion to dismiss the complaint on a variety of grounds, and Supreme Court denied the motion in its entirety.

As a preliminary matter, we agree with Kaleida that plaintiff cannot seek declaratory relief. "The primary purpose of declaratory judgments is to adjudicate the parties' rights *before* a 'wrong' actually occurs in the hope that later litigation will be unnecessary" (*Klostermann v Cuomo*, 61 NY2d 525, 538 [1984] [emphasis added]; *see Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679 [1st Dept 2017]). A declaratory judgment action " 'only provides a declaration of rights between parties' and 'cannot be executed upon so as to compel a party to perform an act' " (*Matter of Hyde Park Landing, Ltd. v Town of Hyde Park*, 130 AD3d 730, 731 [2d Dept 2015], quoting *Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]).

Here, in addition to seeking a declaration that Kaleida, in the past, violated its bylaws and wrongly revoked his privileges, plaintiff is also seeking to compel Kaleida to perform an act, i.e., expunge his disciplinary records and reports to the NPDB. "This is not the function of a declaratory judgment action" (*Hesse v Speece*, 204 AD2d 514, 515 [2d Dept 1994]). We therefore modify the order by granting the motion insofar as it seeks dismissal of the request for declaratory relief.

We also agree with Kaleida that plaintiff has stated no viable cause of action for breach of contract arising from Kaleida's alleged violation of its bylaws. A hospital's bylaws are not a contract entitling staff members to sue for relief in the event of failure to comply with the bylaws unless the bylaws clearly delineate such a right (*see Mason v Central Suffolk Hosp.*, 3 NY3d 343, 348-349 [2004]). Because "[n]ot a word in the bylaws that are now before us says or implies that doctors have a vested right to hospital privileges" (*id.*), the complaint in this case fails to state a cause of action for

breach of contract based on allegations that Kaleida violated its bylaws in suspending and then terminating plaintiff's privileges (*see Ali-Hasan v St. Peter's Health Partners Med. Assoc., P.C.*, 226 AD3d 1199, 1203 [3d Dept 2024], *lv denied* 42 NY3d 906 [2024]; *Meyer v North Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016], *lv denied* 28 NY3d 909 [2016]; *Lobel v Maimonides Med. Ctr.*, 39 AD3d 275, 277 [1st Dept 2007]). Thus, to the extent that the complaint asserts a claim for breach of contract, we further modify the order by granting the motion with respect to any such claim.

Contrary to Kaleida's further contention, however, we conclude that plaintiff has a cause of action for improper practices and may seek an injunction under Public Health Law § 2801-c. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction," and we must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]). "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Where, however, "evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether [they have] stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*id.* [emphasis added]; *see Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1401 [4th Dept 2019]; *McCarthy v Shah*, 162 AD3d 1727, 1728 [4th Dept 2018]).

Here, while most of the allegations in the complaint relate to plaintiff's claim that Kaleida violated its bylaws and are therefore nonactionable, we conclude that other allegations, liberally construed, establish that plaintiff has stated a cause of action for improper practices pursuant to Public Health Law § 2801-b (1) and can seek injunctive relief under Public Health Law § 2801-c. The legislature enacted section 2801-b "to create an avenue of redress for physicians whom hospitals discriminated against or unjustly denied staff membership or professional privileges" (*Indemini v Beth Israel Med. Ctr.*, 4 NY3d 63, 67 [2005]; *see also Matter of Chong-Hwan Wee v City of Rome*, 233 AD2d 876, 876 [4th Dept 1996]). Although the complaint filed by plaintiff does not explicitly assert a cause of action for improper practices and does not reference Public Health Law § 2801-b, some of its allegations, accepted as true, state a claim against Kaleida for improper practices arising from its suspension and revocation of plaintiff's privileges.

Specifically, the complaint alleges that "both the precautionary suspension and the revocation of [p]laintiff's privileges were based on false statements, as found by the Hearing Officer." The complaint further alleges that the reports of his conduct sent to the NPDB "were

premised on statements manipulated and exaggerated by . . . Kaleida's Chief Medical Officer, to persuade the MEC to recommend revocation of Plaintiff's privileges." In our view, those allegations could support a cause of action for improper practices under Public Health Law § 2801-b, even though plaintiff failed "to specifically cite that statute" (*Oliver Chevrolet v Mobil Oil Corp.*, 249 AD2d 793, 795 [3d Dept 1998]), to the extent they assert "that the hospital acted in bad faith or gave one of the statutory reasons as a pretense for the true reason that the privileges were terminated" (*Gelbard v Genesee Hosp.*, 211 AD2d 159, 164 [4th Dept 1995], *affd* 87 NY2d 691 [1996]; *see Fried v Straussman*, 41 NY2d 376, 382 [1977], *rearg denied* 41 NY2d 1009 [1977]; *see also Jackaway v Northern Dutchess Hosp.*, 139 AD2d 496, 497 [2d Dept 1988]).

Contrary to Kaleida's further contention, the fact that the PHHPC determined that it did not engage in improper practices does not preclude such a claim here. Although the negative PHHPC determination is significant and constitutes "prima facie evidence of the fact or facts found therein" (Public Health Law § 2801-c), "threshold [PHHPC] review does not impair or affect *any right or remedy*" of the physician (*Gelbard v Genesee Hosp.*, 87 NY2d 691, 698 [1996] [emphasis added]; *see* § 2801-b [4]), and the physician "is thereafter free to bring a section 2801-c injunction action or any other valid claim" (*Gelbard*, 87 NY2d at 698; *see Matter of Cohoes Mem. Hosp. v Department of Health of State of N.Y.*, 48 NY2d 583, 588-589 [1979]).

Finally, even assuming, arguendo, that the immunity provisions of the Health Care Quality Improvement Act of 1986 (HCQIA) (42 USC § 11101 *et seq.*; *see* 42 USC § 11137 [c]) or Public Health Law § 2803-e (2) (b) apply where, as here, there is no request for monetary damages, we conclude that Kaleida failed to demonstrate that it is entitled to immunity under either the HCQIA or Public Health Law § 2803-e (2) (b). Where, as here, a physician seeks relief with respect to allegedly false reports, a reporting entity is immune under the HCQIA only if the reports were made "without knowledge of the falsity of the information caused in the report" (42 USC § 11137 [c]). The Public Health Law provides a level of immunity, but not if the information provided is "untrue and communicated with malicious intent" (Public Health Law § 2805-m [3]; *see also* Education Law § 6527 [5]). Here, based on the allegations of the complaint, liberally construed, we conclude that Kaleida failed to establish, on this CPLR 3211 motion, that it is entitled to immunity.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court

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

1020

CA 24-01316

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

DENNIS M. ANKROM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAMSON FLYING CLUB, INC., DEFENDANT-RESPONDENT.

DREW & CARR P.C., BUFFALO (DEAN M. DREW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIONEL HECTOR, PAISLEY, FLORIDA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered July 25, 2024, in breach of contract actions. The order, insofar as appealed from, granted the motions of defendant for summary judgment and dismissed the complaints.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendant's motions for summary judgment dismissing the first complaint and second complaint are denied, and the complaints are reinstated.

Memorandum: Plaintiff commenced a breach of contract action alleging, inter alia, that defendant breached two 2017 airport access agreements (2017 Agreements) by improperly increasing the access fees. As relevant on this appeal, the 2017 Agreements prevented defendant from raising such fees beyond what defendant charged to its tenants using hangars on the airport property. Plaintiff subsequently commenced another breach of contract action alleging, inter alia, that defendant had improperly terminated the 2017 Agreements and seeking, inter alia, lost income. Defendant separately moved for summary judgment dismissing the complaint in each action, contending, inter alia, that defendant did not breach the 2017 Agreements inasmuch as it did not charge plaintiff improper access fees and that plaintiff was not entitled to lost income when defendant prohibited plaintiff's use of its facilities because plaintiff had terminated the 2017 Agreements. Plaintiff appeals, as limited by his brief, from an order to the extent that it granted defendant's motions and dismissed both complaints. We reverse the order insofar as appealed from, deny the motions, and reinstate the complaints.

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law . . . demonstrat[ing] the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). When evaluating the motion,

the court "must view the evidence in the light most favorable to the party opposing the motion" and "giv[e] that party the benefit of every reasonable inference" (*Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]). If the movant does not make a prima facie showing of entitlement to judgment as a matter of law, the motion must be denied, regardless of the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324). Conversely, if the movant makes that prima facie showing, the burden shifts to the opponent to establish that a triable issue of fact remains (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to the first action, defendant failed to meet its initial burden on the motion inasmuch as it failed to establish that any of its on-airport tenants or operators were charged or paid the increased rates that defendant charged to plaintiff and, consequently, we do not consider the sufficiency of plaintiff's opposing papers (*see generally Alvarez*, 68 NY2d at 324). We conclude that Supreme Court should have denied defendant's motion in the first action.

With respect to the second action, we conclude that defendant failed to meet its initial burden on its motion of establishing that plaintiff terminated the 2017 Agreements when he filed a complaint in the first action. In any event, even assuming, arguendo, that defendant met its initial burden, we conclude that plaintiff raised a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562). The complaint sought alternative forms of relief, including damages for breach of contract, and thus did not restrict the requested relief to a declaration that the 2017 Agreements are null and void. Plaintiff also stated in his affirmation that at all times he intended to, and acted in every way he believed necessary to, continue the 2017 Agreements in effect. We thus conclude that a triable issue of fact exists whether plaintiff terminated the 2017 Agreements (*see Goldin Real Estate, LLC v Shukla*, 227 AD3d 674, 677 [2d Dept 2024]) and that the court should have denied defendant's motion in the second action.

Entered: March 27, 2026

Ann Dillon Flynn
Clerk of the Court