SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 24, 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 APRIL 24, 2026

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

958

KA 22-00992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK BREDT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 20, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), stemming from allegations that, during a domestic dispute, he doused his girlfriend with gasoline and set her on fire, causing her death. We affirm.

We reject defendant's contention that Supreme Court erred in denying his motion to substitute counsel when it did not give him an opportunity to state the grounds for his motion and failed to conduct a sufficient inquiry into his complaints about counsel. A court's duty to consider a motion to substitute counsel is invoked only when a defendant makes a "seemingly serious request[ ]" for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; *see People v Fredericks*, 43 NY3d 551, 557 [2025], *rearg denied* 43 NY3d 1014 [2025]; *People v Sides*, 75 NY2d 822, 824 [1990]). Only where a defendant makes "specific factual allegations of serious complaints about counsel" must the court make a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]; *see People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]), and the court is required to substitute counsel only where good cause is shown (*see Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 824; *Gibson*, 126 AD3d at 1302).

Here, although the court initially interrupted defendant when he began to explain his complaints about defense counsel, it thereafter allowed defendant to submit his pro se written motion requesting a substitution of counsel, and, in fact, permitted defendant to read out the contents of that written motion in open court. Thus, contrary to defendant's contention, we conclude that the record amply establishes that defendant was able to set forth the basis for his application for substitute counsel (*see People v Hubbert*, 227 AD3d 1547, 1548 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Konovalchuk*, 148 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *cf. People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]). Further, inasmuch as defendant's stated grounds were wholly without merit, there was no reason for the court to conduct any further inquiry. Defendant made no "specific factual allegations that would indicate a serious conflict with counsel" (*Porto*, 16 NY3d at 100-101; *see Fredericks*, 43 NY3d at 558; *Konovalchuk*, 148 AD3d at 1516). Indeed, we note that defendant's stated "loss of confidence in counsel arising from defense counsel's recommendation to accept a plea offer" is an "insufficient basis for substitution of counsel" (*People v Schojan*, 272 AD2d 932, 933 [4th Dept 2000], *lv denied* 95 NY2d 871 [2000]; *see People v Linares*, 302 AD2d 256, 256 [1st Dept 2003], *affd* 2 NY3d 507 [2004]).

Defendant's contention that the court deprived him of his constitutional right to present a defense when it excluded certain witness testimony suggesting that the victim started the fire that led to her death is unpreserved for our review inasmuch as he never objected to the court's determination at trial on that particular ground (*see People v Harris*, 229 AD3d 1055, 1056 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; *see generally* CPL 470.05 [2]; *People v Lane*, 7 NY3d 888, 889 [2006]), 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]). To the extent that defendant contends that the court erred in precluding him from eliciting such testimony on the basis that it constituted appropriate lay witness opinion testimony—a contention that is preserved—we conclude that it is without merit. "Generally, lay witnesses must testify only to the facts and not their opinions and conclusions drawn from the facts, as it is the jury's province to draw the appropriate inferences arising from the facts" (*People v Reddick*, 164 AD3d 526, 527 [2d Dept 2018], *lv denied* 32 NY3d 1114 [2018] [internal quotation marks omitted]; *see People v Vizzini*, 183 AD2d 302, 307 [4th Dept 1992]). Nevertheless, a lay witness may give opinion testimony when, inter alia, "the subject matter of that testimony is such that it is impossible to accurately describe certain facts without including some opinion or impression" (*People v Dax*, 233 AD2d 177, 178 [1st Dept 1996], *lv denied* 89 NY2d 986 [1997]; *see generally* Guide to NY Evid rule 7.03, Opinion of Lay Witness, http://www.nycourts.gov/judges/evidence/7-OPINION/7.03_OPINION%20OF%20LAY%20WITNESS.pdf [last accessed Mar. 23, 2026]). Here, the court properly precluded defendant from eliciting witness opinion testimony suggesting that the victim may have set defendant on fire based on the witness's observations of the manner in which defendant was on fire and how quickly his clothes had burned inasmuch as defendant failed to set forth any factual experiential

foundation from which it could show that the witness had "sufficient experience" to offer such an opinion (*People v Gozdalski*, 239 AD2d 896, 897 [4th Dept 1997], *lv denied* 90 NY2d 858 [1997]; *see generally People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995], *lv denied* 86 NY2d 780 [1995]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct is, for the most part, unpreserved for our review inasmuch as defendant failed to object to all but one of the statements he now challenges on appeal (*see People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]), and we decline to exercise our power to review the unpreserved part of that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to his preserved challenge, although it was improper for the prosecutor to sarcastically comment about agreeing to stipulate to "whatever other speculative statements that may have been made about this or Santa Claus or the Easter bunny," reversal is not required inasmuch as the court effectively "sustained [defendant's] prompt objection[ ] to the improper [comment], and defense counsel did not request [a] curative instruction[ ] [or] move for a mistrial" (*People v Evans*, 242 AD2d 948, 949 [4th Dept 1997], *lv denied* 91 NY2d 834 [1997]; *see People v Peck*, 272 AD2d 946, 947 [4th Dept 2000]; *see generally People v Gaffney*, 232 AD3d 1228, 1230 [4th Dept 2024], *lv denied* 43 NY3d 963 [2025]; *People v Mencel*, 206 AD3d 1550, 1554 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]). Regardless, that one isolated comment was not so egregious that it deprived defendant of a fair trial (*see People v Soto*, 242 AD3d 1613, 1615 [4th Dept 2025], *lv denied* 44 NY3d 1068 [2026]; *People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]; *People v Burke*, 197 AD3d 967, 968 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]).

Defendant's contention that the People violated his statutory right to timely disclosure pursuant to CPL article 245 when the court admitted in evidence at trial several photographic exhibits created during trial is unpreserved for our review inasmuch as defendant never specifically objected to that evidence on that basis (*see generally* CPL 470.05 [2]; *People v Phillips*, 239 AD3d 1421, 1423 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Jones*, 90 AD3d 1516, 1517 [4th Dept 2011], *lv denied* 19 NY3d 864 [2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also contends that he was deprived of a fair trial by the prosecutor's alleged creation of those new exhibits during trial. We reject that contention. Here, the new exhibits at issue were not merely created in a manner that deprived defendant of the opportunity to contest their evidentiary foundation (*cf. People v Myles*, 232 AD3d 1295, 1297 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025], *cert denied* — US —, — S Ct — [2026]). Rather, they were close-up photographs of physical items already in evidence, and defendant was afforded an opportunity to confront the admissibility of the photographs at trial.

Regardless, we nevertheless conclude that any improper use of those exhibits did not deprive defendant of a fair trial (*see id.*; *People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *see generally People v Williams*, 29 NY3d 84, 89 [2017]). Defendant's further contention that he was deprived of a fair trial when the court improperly permitted a prosecution witness to give lay opinion testimony, thereby usurping the factfinding function of the jury, is unpreserved for our review inasmuch as defendant did not object on that specific basis at trial (*see* CPL 470.05 [2]; *Harris*, 229 AD3d at 1056), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that there is legally insufficient evidence to establish that he started the fire that resulted in the victim's death. We reject that contention. Based on the evidence adduced at trial, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found, beyond a reasonable doubt, that defendant set the fire that caused the victim's death. Although the People did not present evidence directly establishing that defendant started the fatal fire, the circumstantial evidence adduced at trial amply supported that conclusion. For example, the People presented evidence of defendant's motive to set the victim on fire (*see generally People v Gardner*, 26 AD3d 741, 741-742 [4th Dept 2006], *lv denied* 6 NY3d 848 [2006]). Specifically, the People presented evidence that defendant and the victim had recently broken up as a couple, and that, on the day of the fire, they had been arguing about what the victim was doing with property of defendant's that was still in her home. Text messages between defendant and the victim in the hours leading up to the fire show defendant threatening the victim with fire, and stating that she would regret losing his belongings. Indeed, the victim's responses to defendant's text messages are best understood as responses to defendant threatening to burn her.

Additional evidence supported the reasonable inference that defendant arrived at the victim's home for the sole purpose of setting her on fire. Specifically, a witness testified at trial that, on the night in question, defendant suddenly entered the victim's home and proceeded straight upstairs to the victim's bedroom, whereupon the witness heard banging. Defendant was upstairs for about five minutes, during which time the fire started. Shortly thereafter, defendant left, himself on fire, and went to hide in a closet in a neighboring house, which is evidence of his consciousness of guilt. Further supporting a finding that defendant set the victim on fire—and not the other way around—is forensic evidence establishing that: the victim was the "fuel package," i.e., that the victim, when covered in gasoline, was the combustible material that would sustain a fire; the fire started on her bed; and that no lighter or other ignition source was found close to her bed or body. Under these circumstances, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found beyond a reasonable doubt that defendant started the fire that killed the victim (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]).

Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude "that the jury failed to give the evidence the weight it should be accorded" (*People v Maull*, 167 AD3d 1465, 1467 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019] [internal quotation marks omitted]; *see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that defense counsel was ineffective in failing to argue, on summation, that his severe back burns were inconsistent with the People's theory that he had started the fire and was burned as a result of a vapor flash. He further contends that counsel, in failing to pursue the aforementioned theory of the case, was ineffective in not calling either defendant's treating physician or another medical expert to testify about the severity of the burns defendant sustained as a result of the fire. We reject those contentions and conclude that defendant failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" in that regard (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). With respect to defense counsel's failure to argue defendant's theory that his burns were inconsistent with the People's theory of the case, we note that defendant's proposed theory was supported by an isolated statement made by one witness, who almost immediately hedged on that statement and thereafter offered other reasonable explanations for defendant's burns that were, in fact, consistent with the People's theory. Thus, it was perfectly reasonable for defense counsel to decide to primarily focus the summation on the theory that the People failed to prove beyond a reasonable doubt that *defendant* rather than the victim started the fire, rather than to rely on a theory that had, at best, dubious support in the record. Furthermore, to the extent that defendant contends that defense counsel was ineffective in failing to call a particular witness at trial, that contention is based on matters outside the record, and we note that a CPL 440.10 proceeding is the appropriate forum for reviewing that claim (*see People v Reeder*, 221 AD3d 1592, 1593 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; *People v Belton*, 199 AD3d 1373, 1374-1375 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]).

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

966

CA 25-00216

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

SHAWN BROTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, WILLIAM J. FITZPATRICK, INDIVIDUALLY AND IN HIS CAPACITY AS ONONDAGA COUNTY DISTRICT ATTORNEY, ROBERT DURR, INDIVIDUALLY AND IN HIS CAPACITY AS ONONDAGA COUNTY ATTORNEY, DUANE OWENS, INDIVIDUALLY AND IN HIS CAPACITY AS ONONDAGA COUNTY COMMISSIONER OF PERSONNEL, AND STEVEN WILLIAMS, INDIVIDUALLY AND IN HIS CAPACITY AS INVESTIGATIVE CONSULTANT TO ONONDAGA COUNTY BOARD OF ETHICS, DEFENDANTS-RESPONDENTS.

GARY J. LAVINE, SYRACUSE, FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANT-RESPONDENT WILLIAM J. FITZPATRICK, INDIVIDUALLY AND IN HIS CAPACITY AS ONONDAGA COUNTY DISTRICT ATTORNEY.

MACKENZIE HUGHES LLP, SYRACUSE (CHRISTOPHER A. POWERS OF COUNSEL), FOR DEFENDANT-RESPONDENT DUANE OWENS, INDIVIDUALLY AND IN HIS CAPACITY AS ONONDAGA COUNTY COMMISSIONER OF PERSONNEL.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANT-RESPONDENT STEVEN WILLIAMS, INDIVIDUALLY AND IN HIS CAPACITY AS INVESTIGATIVE CONSULTANT TO ONONDAGA COUNTY BOARD OF ETHICS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 30, 2024. The order granted the motions for summary judgment of defendants William J. Fitzpatrick, individually and in his capacity as Onondaga County District Attorney, Duane Owens, individually and in his capacity as Onondaga County Commissioner of Personnel, and Steven Williams, individually and in his capacity as Investigative Consultant to Onondaga County Board of Ethics, and dismissed the second amended complaint in its entirety.

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

Memorandum: In this action asserting, among other things, state and federal constitutional tort claims, plaintiff appeals from an order that granted the motions of defendants William J. Fitzpatrick,

individually and in his capacity as Onondaga County District Attorney, Duane Owens, individually and in his capacity as Onondaga County Commissioner of Personnel, and Steven Williams, individually and in his capacity as investigative consultant to the Onondaga County Board of Ethics, for summary judgment dismissing the second amended complaint against them, and also granted summary judgment dismissing the second amended complaint against defendants County of Onondaga (County) and Robert Durr, individually and in his capacity as Onondaga County Attorney. We affirm.

Plaintiff was appointed Deputy Chief of Police by the former Mayor of the City of Syracuse. When a new mayor was elected in 2017, plaintiff was removed as Deputy Chief and requested to be reinstated as a rank-and-file member of the Syracuse Police Department. Owens denied that request on or about December 18, 2017. In July 2019, plaintiff made a complaint to the Onondaga County Board of Ethics (BOE), alleging that Fitzpatrick had improperly influenced Owens to deny plaintiff's request for reinstatement. In January 2020, Williams, the outside counsel hired by the BOE to conduct the investigation into plaintiff's complaint, determined that plaintiff's allegations were unfounded.

Plaintiff commenced this action in January 2022, and in his second amended complaint, he asserts 12 causes of action. Following discovery, Fitzpatrick, Owens, and Williams (moving defendants) separately moved for summary judgment dismissing the second amended complaint against them. Supreme Court determined that, as a threshold issue, all causes of action are untimely and barred by the statute of limitations. The court further concluded in the alternative that the moving defendants are entitled to summary judgment on the merits, and also granted summary judgment dismissing the second amended complaint against the nonmoving defendants, i.e., the County and Durr, with prejudice.

At the outset, we note that on appeal plaintiff has not raised any challenge to the court's determination to dismiss the second amended complaint against Durr or the County, and he has therefore abandoned any such contention (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We further note that, inasmuch as plaintiff does not contend that the 7th, 8th, 9th, 10th, and 11th causes of action were timely commenced, he has thus abandoned any challenge to the dismissal of those causes of action on statute of limitations grounds (*see id.*), and his contention that he raised issues of fact with respect to those causes of action is academic (*see generally Matter of Sportsmen's Tavern LLC v New York State Liq. Auth.*, 195 AD3d 1557, 1558 [4th Dept 2021]).

On appeal, plaintiff contends that his causes of action against the moving defendants arising under the New York Constitution and 42 USC § 1983 are timely. Plaintiff's state constitutional tort claims, the 1st through 6th causes of action, are subject to a three-year statute of limitations (*see* CPLR 214 [5]; *Brown v State of New York*, 250 AD2d 314, 318 [3d Dept 1998]), as is plaintiff's 12th cause of action, asserting various 42 USC § 1983 claims (*see* CPLR 214 [5]; *BL*

Doe 3 v Female Academy of the Sacred Heart, 199 AD3d 1419, 1420-1421 [4th Dept 2021]). The moving defendants established that those causes of action accrued on December 18, 2017, when Owens denied plaintiff's request for reinstatement. Thus, taking into account tolling of the statute of limitations pursuant to executive orders during the COVID-19 pandemic, the statute of limitations expired on August 3, 2021—228 days after December 18, 2020 (*see generally* 9 NYCRR 8.202.8 *et seq.*; *State of New York v Williams*, 224 AD3d 1356, 1357 [4th Dept 2024]). Plaintiff commenced this action in January 2022, which was after the expiration of the limitations period.

Plaintiff contends that his action was timely based on the continuing wrong doctrine. We reject that contention because the continuing wrong doctrine "does not apply where . . . [the] plaintiff's allegation of damages is predicated on a single specific act" (*Fang v Town of Amherst*, 238 AD3d 1473, 1475 [4th Dept 2025]) and, here, the damages are predicated on a single act, i.e., Owens' denial of plaintiff's request to be reinstated. Moreover, that doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct" (*Coe v Village of Waterloo*, 229 AD3d 1119, 1121 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025] [internal quotation marks omitted]), and there are no continuing unlawful acts.

To the extent that plaintiff's causes of action against Williams may have been timely filed, we conclude that, contrary to plaintiff's contention, Williams is entitled to summary judgment dismissing the second amended complaint against him. In support of his motion, Williams submitted admissible evidence establishing that he is not liable under any of the causes of action asserted against him inasmuch as he merely investigated the BOE ethics complaint, did not take any adverse action against plaintiff, and was uninvolved in the decision to terminate plaintiff which occurred some three years before Williams' involvement (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In opposition to Williams' motion, plaintiff has not shown that he was injured by any act or omission of Williams during the course of the BOE investigation, or that the BOE investigation impacted plaintiff's termination some three years earlier. We conclude that "[t]he proof submitted by [plaintiff] in opposition to the motion consisted of unsubstantiated allegations and mere conclusions that were lacking in evidentiary support and thus insufficient to defeat summary judgment" (*I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029 [4th Dept 1994]).

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

972

KA 23-02018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN C., DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered March 15, 2023. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following his guilty plea of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Bundscho*, 239 AD3d 1261, 1261 [4th Dept 2025], *lv dismissed* 44 NY3d 1064 [2026]; *People v Simpson*, 232 AD3d 1266, 1266 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]). The valid waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lollie*, 204 AD3d 1430, 1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]).

Defendant also contends that he was denied effective assistance of counsel because defense counsel did not request a hearing to determine whether defendant should receive an alternative sentence as a victim of domestic violence pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* Penal Law § 60.12). Defendant's conviction stems from an argument between defendant and the victim, his boyfriend, during which defendant stabbed the victim. The record contains indications, primarily in the presentence report, that if substantiated support the conclusion that defendant was subjected to domestic violence inflicted by the victim during the course of their relationship. We nonetheless respectfully disagree with our dissenting colleagues' view that the record is sufficiently developed

to permit resolution of defendant's contention that defense counsel's failure to seek an alternative DVSJA sentence amounted to the failure to raise an argument that was "so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it" (*People v Watkins*, 42 NY3d 635, 640 [2024], *cert denied* — US —, 145 S Ct 459 [2024] [internal quotation marks omitted]; *see People v Turner*, 5 NY3d 476, 480-481 [2005]). Here, the record is silent with respect to, among other things, whether defense counsel discussed the possibility of an alternative DVSJA sentence with defendant or raised the issue during plea negotiations with the prosecution (*cf. People v Linda R.M.*, 236 AD3d 1488, 1488-1489 [4th Dept 2025], *lv denied* 43 NY3d 1047 [2025]). Defendant's contention therefore involves matters outside the record and must be raised by means of a CPL article 440 motion (*see generally People v Ubanwa*, 242 AD3d 1520, 1522 [4th Dept 2025]; *People v Houle*, 236 AD3d 1296, 1297 [4th Dept 2025]).

All concur except OGDEN and NOWAK, JJ., who dissent and vote to modify in accordance with the following memorandum: We agree with the majority that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent, and that defendant's valid waiver encompasses his challenge to the severity of his sentence. However, we conclude that, on this record, defendant established that he was denied effective assistance of counsel based on defense counsel's failure to request a Penal Law § 60.12 hearing seeking alternative sentencing under the Domestic Violence Survivors Justice Act (DVSJA) (*see* § 60.12). Thus, we respectfully dissent.

Defendant and his boyfriend, the victim, engaged in an argument as defendant was dropping the victim off at work, during which defendant stabbed the victim in the chest with a knife. The victim collapsed in the front vestibule of the office building and died at the scene. Defendant stayed at the scene and called 911; he also called the victim's mother and sister to tell them what had happened. He was arrested at the scene shortly thereafter. Defendant and the victim were in a dating relationship at the time of the altercation.

At sentencing, defense counsel acknowledged that she and her cocounsel had reviewed the presentence investigation report and found it to contain no errors or omissions. The presentence investigation report reflects that defendant and the victim had "a history of domestic disputes" and that defendant previously had a stay-away order of protection in his favor against the victim. The author of the presentence investigation report, notably, referred to police records documenting that history of domestic disputes and found it "important to note that the victim was the aggressor in some of those past reports." While the majority implies that defendant and defense counsel may have discussed the possibility of DVSJA sentencing, in our view, the record affirmatively establishes that they did not. Defendant expressed no understanding that he could receive a lesser sentence under the DVSJA; quite the contrary, he repeatedly stated at the presentence interview that he believed that his negotiated prison term of 15 years was "harsh."

Defendant pleaded guilty and was sentenced without any inquiry

into the possibility of DVSJA sentencing, and the sole live issue in this case was (or should have been) defendant's possible entitlement to DVSJA sentencing. Defendant did not dispute that he committed the offense, having called both 911 and the victim's mother and sister after stabbing the victim, yet defense counsel filed just a single omnibus motion before the plea and made no request for a Penal Law § 60.12 hearing between the time of the plea and sentencing.

Ineffective assistance may be predicated upon " '[a] single error . . . but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial' " (*People v Watkins*, 42 NY3d 635, 640 [2024], *cert denied* — US —, 145 S Ct 459 [2024], quoting *People v Caban*, 5 NY3d 143, 152 [2005]). "Such cases are rare . . . and typically involve the failure to raise a defense so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" (*id.* [internal quotation marks omitted]; *see People v Turner*, 5 NY3d 476, 480-481 [2005]).

Under the DVSJA, a court may apply an alternative sentencing scheme if it determines, upon a preponderance of the evidence following a hearing (*see People v Addimando*, 197 AD3d 106, 112 [2d Dept 2021]), "that (a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" (Penal Law § 60.12 [1]; *see People v Nateonna R.*, 236 AD3d 1491, 1491-1492 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]; *People v Wendy B.-S.*, 229 AD3d 1317, 1319 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]).

In our view, defense counsel's failure to pursue the possibility of alternate sentencing under the DVSJA amounted to a failure to raise an argument that was "so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it" (*Watkins*, 42 NY3d at 640 [internal quotation marks omitted]; *see People v Evans*, 243 AD3d 1338, 1339 [4th Dept 2025]; *People v Allen*, 184 AD3d 1076, 1079 [4th Dept 2020]). We do not mean to suggest that defendant would necessarily have been entitled to DVSJA sentencing following a hearing (*see generally People v Wilson*, 164 AD3d 1012, 1020 [3d Dept 2018]). However, in our view, it is equally clear, given the details outlined in the presentence investigation report, that defendant would have been entitled to a *hearing* had it been requested, because defense counsel could have presented a colorable argument at such a hearing in favor of sentencing under Penal Law § 60.12 (*see* CPL 530.11 [1] [e]; *cf. People v Willis*, 105 AD3d 1397, 1397 [4th Dept 2013], *lv denied* 22 NY3d 960 [2013]; *see generally People v Wyatt*, 246 AD3d 1448, 1449-1450 [4th Dept 2026]). In other words, regardless of defendant's

ultimate success at such a hearing, we conclude that his entitlement to that hearing was "so clear-cut and dispositive that no reasonable defense counsel would have failed to [request] it" (*Watkins*, 42 NY3d at 640 [internal quotation marks omitted]). Nor can we conclude that defense counsel's failure to seek a Penal Law § 60.12 hearing was part of a legitimate trial strategy (*see generally Wyatt*, 246 AD3d at 1449-1450); indeed, we can discern no possible reason for counsel to have failed to request such a hearing other than an erroneous belief that Penal Law § 60.12 did not apply because defendant and the victim were both men.

We would therefore modify the judgment by vacating the sentence, and we would remit the matter for a Penal Law § 60.12 hearing.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

1004

CA 25-00829

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

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR AMERIQUEST MORTGAGE
SECURITIES, INC., ASSET-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2006-R1,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL J. MERCURE, ALSO KNOWN AS
MICHAEL JEREMY MERCURE, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

MCGLINCHEY STAFFORD PLLC, NEW YORK CITY (MATTHEW J. GORDON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SANDRA POLAND DEMARS, ALBANY, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Washington County (Robert J. Muller, J.), entered February 14, 2024, in a foreclosure action. The order denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Washington County, for further proceedings in accordance with the following memorandum: In 2005, defendants executed a note and mortgage in favor of nonparty Ameriquest Mortgage Company (Ameriquest). In 2006, Ameriquest, nonparty Ameriquest Mortgage Securities, Inc. (Ameriquest Securities), and Deutsche Bank National Trust Company (Deutsche Bank) entered into a pooling and servicing agreement (PSA), which created a trust, appointed Deutsche Bank as trustee for Ameriquest Securities, asset-backed pass-through certificates, series 2006-R1 (plaintiff), and provided that the note and mortgage would be assigned to plaintiff. In 2007, Ameriquest appointed nonparty Citi Residential Lending Inc. (Citi Residential), the prior loan servicer, as its attorney-in-fact pursuant to a limited power of attorney. Pursuant to the limited power of attorney, Ameriquest granted Citi Residential authority to substitute plaintiff as the mortgagee in accordance with the PSA. In 2009, Citi Residential executed the assignment of the note and mortgage to plaintiff.

Defendants later defaulted, and plaintiff commenced this action seeking to foreclose on the mortgage. Defendants served an answer

that, inter alia, asserted an affirmative defense based upon plaintiff's purported lack of standing. Plaintiff moved for, inter alia, summary judgment on the complaint and the appointment of a referee, and Supreme Court denied the motion, concluding that plaintiff failed to meet its initial burden on the issue of standing. Plaintiff appeals, and we reverse.

"Generally, in moving for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683, 684 [2d Dept 2016] [internal quotation marks omitted]; *see Bank of N.Y. Mellon v Anderson*, 151 AD3d 1926, 1927 [4th Dept 2017]; *HSBC Bank USA, N.A. v Spitzer*, 131 AD3d 1206, 1206-1207 [2d Dept 2015]). Where, as here, "the plaintiff's standing has been placed in issue by reason of the defendant's answer, the plaintiff additionally must prove its standing as part of its prima facie showing" (*HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773, 774 [2d Dept 2015]; *see Bank of N.Y. Mellon*, 151 AD3d at 1927).

We agree with plaintiff that the court erred in determining that it failed to meet its burden on the motion of establishing standing to foreclose on the mortgage. " 'In an action to foreclose a mortgage, the plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note' " (*JPMorgan Chase Bank, N.A. v Kobee*, 140 AD3d 1622, 1623-1624 [4th Dept 2016]; *see NNPL Trust Series 2012-1 v Lunn*, 149 AD3d 1552, 1553 [4th Dept 2017]), " 'either by physical delivery or execution of a written assignment prior to the commencement of the action' " (*Sanfilippo v Bohme*, 217 AD3d 1498, 1499 [4th Dept 2023]). Here, by submitting on its motion the 2009 assignment of the note and mortgage to plaintiff, plaintiff established that it had standing to foreclose on the mortgage (*see Wells Fargo Bank, N.A. v Newhouse*, 218 AD3d 1117, 1120 [4th Dept 2023], *lv dismissed* 41 NY3d 977 [2024]; *U.S. Bank N.A. v Liebel*, 154 AD3d 1302, 1302-1303 [4th Dept 2017]). In opposition, defendants failed to raise an issue of fact with respect to plaintiff's standing (*see U.S. Bank N.A.*, 154 AD3d at 1303; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore reverse the order, grant the motion, and remit the matter to Supreme Court for the appointment of a referee to compute the amount owed by defendants to plaintiff.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

74

CA 25-00248

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

ANTHONY M. MOCK, PLAINTIFF,

V MEMORANDUM AND ORDER

NEW YORK ATHLETIC CLUB OF CITY OF NEW YORK,
DEFENDANT-APPELLANT,
AND NEXT LEVEL CONSTRUCTION & MAINTENANCE, INC.,
DEFENDANT.

NEW YORK ATHLETIC CLUB OF CITY OF NEW YORK,
THIRD-PARTY PLAINTIFF-APPELLANT,

V

NEXT LEVEL CONSTRUCTION & MAINTENANCE, INC.,
AND ANDERSON COURTS AND SPORTS SURFACES, INC.,
THIRD-PARTY DEFENDANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (GLENN A. KAMINSKA OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

SMITH MAZURE, P.C., NEW YORK CITY (LOUISE M. CHERKIS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT NEXT LEVEL CONSTRUCTION & MAINTENANCE, INC.

RICHARD S. POVEROMO, BUFFALO, FOR THIRD-PARTY DEFENDANT-RESPONDENT ANDERSON COURTS AND SPORTS SURFACES, INC.

Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered January 14, 2025. The order, inter alia, granted the cross-motion of third-party defendant Anderson Courts and Sports Surfaces, Inc. for summary judgment dismissing the amended third-party complaint against it.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a scaffold at defendant-third-party plaintiff New York Athletic Club of City of New York (NYAC). NYAC appeals from an order that, inter alia, granted the motion of defendant-third-party defendant Next Level Construction & Maintenance, Inc. (Next Level)

insofar as it sought summary judgment dismissing NYAC's cross-claim against it for contractual indemnification, granted the cross-motion of third-party defendant Anderson Courts and Sports Surfaces, Inc. (Anderson) insofar as it sought summary judgment dismissing the amended third-party complaint against it, and denied NYAC's motion for summary judgment on its contractual indemnification cause of action against Anderson. We affirm.

Initially, we conclude that Supreme Court properly granted Next Level's motion insofar as it sought summary judgment dismissing NYAC's contractual indemnification cross-claim against it. "[I]t is elementary that the right to contractual indemnification depends upon the specific language of the contract" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [4th Dept 1995]; *see Miller v Rerob, LLC*, 197 AD3d 979, 981 [4th Dept 2021]). Thus, "[t]he language of an indemnity provision should be construed so as to encompass only that . . . which reasonably appear[s] to have been within the intent of the parties" (*Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453 [4th Dept 1985], *affd* 65 NY2d 1038 [1985]). Here, the indemnification agreement between NYAC and Next Level, by its terms, pertained to "claims . . . actually or allegedly arising out of or relating to [Next Level's] work or the work of any subcontractor retained by [Next Level]." Next Level established on its motion that Anderson, plaintiff's employer, did not work for Next Level, and that plaintiff's injuries did not arise out of and were not related to Next Level's work (*cf. Olivieri v Barnes & Noble, Inc.*, 208 AD3d 1001, 1005 [4th Dept 2022]; *see generally Orellana v 5541-1274 Fifth Ave. Manhattan LLC*, 234 AD3d 527, 528 [1st Dept 2025]). In opposition, NYAC failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to NYAC's further contentions, we conclude that the court properly granted Anderson's cross-motion insofar as it sought summary judgment dismissing NYAC's contractual indemnification and breach of contract causes of action against it. There is no dispute that the indemnification agreement between NYAC and Anderson was executed after plaintiff's accident. "An indemnification agreement that is executed after a plaintiff's accident . . . may only be applied retroactively where it is established that (1) the agreement was made as of a date prior to the accident and (2) the parties intended the agreement to apply as of that prior date" (*Freas v John W. Danforth Co.*, 236 AD3d 1371, 1372 [4th Dept 2025] [internal quotation marks omitted]; *see Carpentieri v 1438 S. Park Ave. Co., LLC*, 215 AD3d 1236, 1238 [4th Dept 2023]; *Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1039 [4th Dept 2021]). With respect to the contractual indemnification cause of action, Anderson met its initial burden on its cross-motion by establishing that it did not sign the agreement before the accident (*see generally Tanksley*, 196 AD3d at 1039), and that the agreement was not made "as of" a date prior to the accident (*Manns v Norstar Bldg. Corp.*, 4 AD3d 799, 800 [4th Dept 2004]), thus establishing that the agreement was not intended to be applied retroactively. In opposition, NYAC failed to raise a triable issue of fact. Indeed, NYAC submitted no evidence that Anderson and NYAC made

the agreement as of a prior date, or that "the *parties* intended the agreement to apply as of [a] prior date" (*Freas*, 236 AD3d at 1372 [emphasis added & internal quotation marks omitted]; *see Meabon v Town of Poland*, 108 AD3d 1183, 1185 [4th Dept 2013]). For the same reasons, the court properly determined that Anderson is entitled to summary judgment dismissing NYAC's cause of action for breach of contract for failure to procure insurance (*see Contreras v Mall 1-Bay Plaza, LLC*, 213 AD3d 601, 601 [1st Dept 2023]; *cf. Freas*, 236 AD3d at 1373).

Finally, we have considered NYAC's remaining contentions and conclude that they do not warrant reversal or modification of the order.

Entered: April 24, 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 25-00425

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

COR VETERANS MEMORIAL DRIVE COMPANY, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAELS STORES, INC., DEFENDANT-RESPONDENT.

CULLEN AND DYKMAN LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH MURTHA CULLINA PLLC, SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered September 23, 2024. The order granted plaintiff's motion for leave to reargue and, upon reargument, adhered to a prior order granting defendant's motion to dismiss certain causes of action.

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

Memorandum: Defendant rented a commercial property from plaintiff in a shopping center. The parties executed a lease that, inter alia, subjected plaintiff to an ongoing cotenancy requirement. Under the terms of the lease, if the ongoing cotenancy requirement was not satisfied for a period of six months, the minimum rent would be abated until such time as the ongoing cotenancy requirement was satisfied, and, in lieu thereof, defendant would pay "[a]lternative [r]ent."

The parties thereafter executed several amendments to the lease. In November 2018, after the parties executed the first amendment, but before the lease term under that amendment took effect, one cotenant (cotenant) closed its store. In June 2021, more than two years after the cotenant closed its store, defendant executed an estoppel certificate in which it declared that plaintiff was not in default on any provision of the lease.

Nevertheless, defendant thereafter informed plaintiff that plaintiff had not complied with the ongoing cotenancy requirement because the lease required the premises in question to be occupied by one anchor tenant, but, after the cotenant closed its store and vacated the premises, plaintiff filled the premises with two tenants.

Defendant then advised that it was entitled to pay the alternative rent under the terms of the original lease upon the conclusion of the third amendment term. Plaintiff thereafter sent defendant a notice of default, terminated defendant's right of possession to the premises and commenced this action seeking, inter alia, back rent and continuing damages for defendant's alleged failure to make payments under the lease.

Subsequently, defendant moved to dismiss certain causes of action in the amended complaint and Supreme Court, upon converting defendant's motion to one for summary judgment, granted the motion and ordered defendant to pay to plaintiff all unpaid alternative rent due. Plaintiff now appeals from an order that, inter alia, granted plaintiff's motion for leave to reargue its opposition to the converted motion and, upon reargument, adhered to the court's prior determination. We affirm.

Plaintiff contends that the estoppel certificate bars defendant from claiming a rent offset under the relevant terms of the lease. We reject that contention. Assuming, arguendo, that plaintiff's failure to abide by the cotenancy requirement could be considered a default in the performance of a duty under the lease, we conclude that defendant's rights pursuant to the cotenancy requirement were not in effect at the time of the execution of the estoppel certificate (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *Linzy v Christa Constr.*, 238 AD2d 936, 936 [4th Dept 1997]). Instead, the parties were operating during the relevant time period under the second amendment to the lease wherein they agreed to a separate rental scheme (*see generally W.W.W. Assoc.*, 77 NY2d at 162). We further conclude that the lease did not provide plaintiff with any entitlement to rely upon the estoppel certificate (*cf. JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 393 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]). Moreover, contrary to plaintiff's further contention, it failed to satisfy the ongoing cotenancy requirement inasmuch as it filled the premises in question with two tenants instead of one as unambiguously required by the terms of the lease.

We have considered plaintiff's remaining contentions and conclude that they lack merit.

Entered: April 24, 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 23-00676

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH D. AYER, ALSO KNOWN AS
JOSEPH DAVID AYER, ALSO KNOWN AS
JOSEPH AYER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered August 9, 2022. The judgment convicted defendant upon a jury verdict of burglary in the second degree and petit larceny.

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 burglary in the second degree (Penal Law § 140.25 [2]), and petit larceny (§ 155.25). We affirm.

Contrary to defendant's contention, we conclude that County Court properly refused to suppress tangible evidence and statements he made to the police (*see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]; *People v Harvey*, 170 AD3d 1675, 1677 [4th Dept 2019], *lv denied* 33 NY3d 1031 [2019]). Indeed, we conclude that the police conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest (*see People v Pettiford*, 173 AD3d 1716, 1716 [4th Dept 2019], *lv denied* 34 NY3d 936 [2019]; *People v Bradley*, 137 AD3d 1611, 1611 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016]).

Specifically, inasmuch as defendant was found at the start of the encounter in close physical and temporal proximity to the scene of the reported incident and defendant's physical characteristics and clothing matched the description of one of the individuals involved in the incident, we conclude that the officers had a founded suspicion that criminal activity was afoot, thereby justifying their initial common-law inquiry of defendant (*see People v Gayden*, 126 AD3d 1518,

1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]; *People v Atkinson*, 185 AD3d 1438, 1439 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; *see generally De Bour*, 40 NY2d at 223), which included asking defendant if he had any weapons (*see People v Stevenson*, 7 AD3d 820, 821 [2d Dept 2004]; *People v Park*, 294 AD2d 887, 888 [4th Dept 2002], *lv denied* 98 NY2d 679 [2002]). In response, defendant told the police that he possessed a knife, providing the police with reasonable suspicion that he was armed, and therefore the police were, at the start of the encounter, permitted to conduct a brief pat-down frisk to ensure officer safety (*see People v Batista*, 88 NY2d 650, 654 [1996]; *People v Ginty*, 204 AD3d 1487, 1488-1489 [4th Dept 2022]; *see also People v Muhammed*, 196 AD3d 1151, 1152-1153 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]).

Furthermore, we conclude that, during the course of their conversation with defendant and the codefendant, the police had reasonable suspicion that defendant had committed a crime sufficient to detain him in their patrol vehicle (*see People v Henry*, 207 AD3d 1062, 1063 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *Pettiford*, 173 AD3d at 1717; *People v Santiago*, 142 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 28 NY3d 1127 [2016]). In addition to defendant having been found near the scene of the reported incident and matching the description of one of the suspects, defendant admitted to the police that he had trespassed on someone's property, and the codefendant told the police that she and defendant had broken into a home and stolen property from inside. Thus, under the totality of the circumstances, the police clearly had a reasonable suspicion of a crime to justify detention of defendant while they investigated further (*see Henry*, 207 AD3d at 1063; *Santiago*, 142 AD3d at 1391; *see generally People v Hicks*, 68 NY2d 234, 238-242 [1986]).

We reject defendant's contention that, during the police encounter, the police unlawfully searched a lunch box that was in his possession inasmuch as the totality of the circumstances establishes that he expressly and voluntarily consented to the police search (*see People v Fioretti*, 155 AD3d 1662, 1663 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]). To the extent that defendant also contends that the court erred in refusing to suppress statements made by the codefendant, we reject that contention and note that he lacks standing to seek suppression of her statements (*see People v Davis*, 103 AD3d 810, 812 [2d Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *People v Hamilton*, 232 AD2d 899, 900-901 [3d Dept 1996], *lv denied* 89 NY2d 942 [1997]; *see generally People v Henley*, 53 NY2d 403, 407-408 [1981]).

We reject defendant's contention that the conviction is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence provides a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that defendant committed the offense of burglary in the second degree. Specifically, there was evidence at trial—i.e., body-worn camera footage from immediately after the

incident—that contained statements from the codefendant admitting that she and defendant had just broken into a residence and stolen property from inside. Moreover, the evidence at trial established that defendant was found in the vicinity of the broken-in home shortly after the burglary allegedly occurred, and was found in possession of property that came from the house. We further conclude that, viewing the evidence in light of the elements of all 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]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that "the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Dillard*, 227 AD3d 1501, 1502 [4th Dept 2024], *lv denied* 42 NY3d 926 [2024] [internal quotation marks omitted]; *see People v Wilcox*, 192 AD3d 1540, 1541 [4th Dept 2021], *lv denied* 37 NY3d 961 [2021]; *People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]).

We reject defendant's contention that the court erred in accepting his waiver of a conflict of interest stemming from defense counsel's representation of both defendant and the codefendant. Specifically, we conclude that the record establishes that the court, upon learning of the potential conflict of interest, conducted an inquiry "to ascertain, on the record, [that defendant] had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation" (*People v Lombardo*, 61 NY2d 97, 102 [1984]; *see People v Magee*, 182 AD3d 996, 997 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]; *see generally People v Gomberg*, 38 NY2d 307, 313 [1975]). To the extent that defendant contends that defense counsel was ineffective in continuing to represent defendant despite the potential conflict of interest, we reject that contention inasmuch as defendant validly waived the conflict and "knowingly chose to have defense counsel represent him after being fully apprised of the potential conflict" (*People v Kopp*, 33 AD3d 153, 158 [4th Dept 2006], *lv denied* 7 NY3d 849 [2006], *cert denied* 549 US 1227 [2007]; *see Magee*, 182 AD3d at 997).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct is, for the most part, unpreserved for our review inasmuch as defendant failed to object to all but one of the statements he now challenges on appeal (*see People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the preserved challenge, the prosecutor's comment on summation regarding inferences one would have to make to conclude that defendant had no involvement in the burglary did not constitute improper burden shifting inasmuch as the comment did not suggest to

the jury that defendant had to prove anything to avoid conviction (*cf. People v Griffin*, 125 AD3d 1509, 1510 [4th Dept 2015]). Regardless, even assuming that the aforementioned comment was improper (*see People v Derby*, 242 AD3d 1627, 1628 [4th Dept 2025], *lv denied* 45 NY3d 936 [2026]), that one isolated comment was not so egregious that it deprived defendant of a fair trial and warrants reversal (*see People v Soto*, 242 AD3d 1613, 1615 [4th Dept 2025], *lv denied* 44 NY3d 1068 [2026]; *People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]; *see generally People v Wright*, 25 NY3d 769, 780 [2015]).

Defendant also contends that the court erred in denying his request to instruct the jury, in connection with the burglary charge, on the lesser included offense of trespass. We reject that contention. We note that defense counsel did not actually request that the court instruct the jury on trespass as a lesser included offense of *burglary in the second degree* in connection with defendant's alleged entry into a home. Rather, defense counsel requested the instruction in connection with defendant's trespass on another person's land—an offense that was not related to the alleged burglary, was uncharged, and was not before the jury. Further, we reject defendant's contention that defense counsel was ineffective in failing to request any additional instructions on lesser included offenses. With respect to a claim of ineffective assistance of counsel, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). The determination whether to seek a jury charge on a lesser included offense is a quintessentially tactical determination (*see People v McGee*, 20 NY3d 513, 519 [2013]; *People v Baez*, 175 AD3d 982, 985 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]), and defendant failed to show the absence of a strategic basis for defense counsel's choice not to demand additional instructions regarding the lesser charges (*see People v Collins*, 167 AD3d 1493, 1498 [4th Dept 2018], *lv denied* 32 NY3d 1202 [2019]; *see generally People v Trotman*, 154 AD3d 1332, 1333 [4th Dept 2017], *lv denied* 30 NY3d 1109 [2018]). Indeed, defense counsel's strategy not to request additional lesser included offense charges was reasonable inasmuch as, without a request for a charge on lesser included offenses of attempted burglary in the second degree or burglary in the third degree, "the chances of defendant being acquitted outright with respect to [burglary in the second degree] were increased" (*People v Wright*, 235 AD3d 1248, 1249 [4th Dept 2025], *lv denied* 43 NY3d 947 [2025]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: April 24, 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 25-01023

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BOUNLEAUNG THANTHIMA, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Theodore H. Limpert, J.), rendered May 14, 2024. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law former § 130.96) and endangering the welfare of a child (§ 260.10 [1]). Defendant contends that reversal is required because at trial the People introduced evidence of two acts of oral sexual conduct that the grand jury did not consider, which created the possibility that he was convicted of a crime upon a different theory from the one charged in the indictment. Defendant's contention is not preserved for our review (*see generally People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]), and is without merit in any event. The indictment, as limited by the bill of particulars, charged defendant with committing predatory sexual assault against a child by engaging in two or more acts of sexual conduct, including at least one act of oral sexual conduct. Thus, "[t]he language in the indictment and bill of particulars was . . . broad enough to encompass all the [oral] sexual [conduct] as testified to by the victim" (*People v Hymes*, 174 AD3d 1295, 1297 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *see People v Myers*, 194 AD3d 1426, 1427 [4th Dept 2021], *lv denied* 37 NY3d 967 [2021]; *People v Colsrud*, 144 AD3d 1639, 1640 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]), and there was no possibility that defendant was convicted of a crime based on an uncharged theory.

Defendant next contends that he was deprived of a fair trial based on alleged prosecutorial misconduct and ineffective assistance

of counsel. Defendant failed to preserve for our review his contention with respect to the alleged instances of prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Smith*, 224 AD3d 1221, 1222 [4th Dept 2024], *lv denied* 41 NY3d 985 [2024]; *People v Crumpler*, 163 AD3d 1457, 1460 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018], *reconsideration denied* 32 NY3d 1125 [2018]). In any event, his contention is without merit. The prosecutor's remarks in the opening statement and during summation were primarily fair response to defense counsel's summation and fair comment on the evidence (*see Smith*, 224 AD3d at 1222; *Crumpler*, 163 AD3d at 1460). We agree with defendant that it was improper for the prosecutor to ask an investigator whether he believed that defendant was being truthful with him during his interview with the investigator (*see People v Pabon*, 28 NY3d 147, 157 [2016]), but we conclude that it did not deprive defendant of a fair trial. The investigator's testimony was cumulative inasmuch as the jury also listened to the recording of defendant's interview with the investigators, during which the investigators repeatedly expressed their disbelief in defendant's statements (*see generally Crumpler*, 163 AD3d at 1458-1459). We have considered the remaining instances of alleged prosecutorial misconduct and conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Bubis*, 204 AD3d 1492, 1495 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022] [internal quotation marks omitted]).

With respect to defendant's contention that defense counsel was ineffective, it was proper for the prosecutor to elicit testimony and comment on all the instances of oral sexual conduct, and therefore defense counsels' failure to object to that testimony does not constitute ineffective assistance of counsel (*see generally People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Defense counsels' cross-examination of the investigator and comments about the victim were matters of strategy and insufficient to establish ineffective assistance (*see People v Flores*, 84 NY2d 184, 187 [1994]). We have examined defendant's remaining allegations of ineffective assistance and conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality, and as of the time of the representation, reveal that the attorney[s] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: April 24, 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 25-00114

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

IN THE MATTER OF ANTHONY FLOWERS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Melissa Lightcap Cianfrini, A.J.), entered January 7, 2025, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying him parole release. We conclude that " '[t]his appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release' " (*Matter of Porter v Annucci*, 148 AD3d 1779, 1779 [4th Dept 2017]). The exception to the mootness doctrine does not apply here (*see Matter of Bethea v Annucci*, 151 AD3d 1674, 1675 [4th Dept 2017]; *Matter of Brunner v Speckard*, 214 AD2d 1040, 1040 [4th Dept 1995], *lv denied* 86 NY2d 707 [1995]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: April 24, 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 24-01652

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

IN THE MATTER OF NEW YORK STATE ASSEMBLY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
NICOLE GOLIAS, RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.

HARTER SECREST & EMERY LLP, BUFFALO (ROBERT C. WEISSFLACH OF COUNSEL), FOR PETITIONER-APPELLANT.

MELISSA FRANCO, GENERAL COUNSEL, NEW YORK STATE DIVISION OF HUMAN RIGHTS, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

SANDERS & SANDERS, BUFFALO (HARVEY P. SANDERS OF COUNSEL), FOR RESPONDENT-RESPONDENT NICOLE GOLIAS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 23, 2024, in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition.

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

Memorandum: Respondent Nicole Golias, an employee of petitioner, New York State Assembly, filed a complaint with respondent New York State Division of Human Rights (DHR) alleging that a state assembly member discriminated against her based on her sex and sexually harassed her during her employment. DHR found probable cause to proceed and amended the discrimination complaint to add petitioner as a respondent in the DHR proceeding. Petitioner subsequently commenced this CPLR article 78 proceeding seeking to prohibit DHR from proceeding with the discrimination claim to the extent such complaint is directed at petitioner. Supreme Court, inter alia, denied the petition, and we affirm.

"The extraordinary writ of prohibition is available to address 'whether [a] body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction' " (*Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786 [1993], quoting CPLR 7803 [2]; *see Matter of Niagara Frontier Transp.*

Auth. v Nevins, 295 AD2d 887, 887 [4th Dept 2002]). Prohibition will not lie where the party has access to another adequate legal remedy (*see Town of Huntington*, 82 NY2d at 786; *Niagara Frontier Transp. Auth.*, 295 AD2d at 887). "[E]rrors of law, which of course may be verbalized, but incorrectly, as excesses of jurisdiction or power, are not to be confused with a proper basis for using the extraordinary writ" (*Matter of State of New York v King*, 36 NY2d 59, 62 [1975]).

Petitioner contends that DHR did not give petitioner constitutional due process notice of the charges against it because there are no specific allegations of wrongdoing on its part. It therefore contends that DHR is acting in excess of its jurisdiction and thus petitioner does not need to exhaust its administrative remedies. We reject that contention, however, because the "[r]emedy for asserted error of law in the exercise of [DHR's] jurisdiction or authority lies first in administrative review and following exhaustion of that remedy in subsequent judicial review pursuant to section 298 of the Executive Law" (*Matter of Tessy Plastics Corp. v State Div. of Human Rights*, 47 NY2d 789, 791 [1979]; *see Matter of Diocese of Rochester v New York State Div. of Human Rights*, 305 AD2d 1000, 1001 [4th Dept 2003]). Petitioner "will suffer no irreparable harm . . . by waiting to challenge [DHR's] findings, if necessary, on the merits after [DHR] investigates [Golias's] complaint" (*Town of Huntington*, 82 NY2d at 786; *see Diocese of Rochester*, 305 AD2d at 1001; *Niagara Frontier Transp. Auth.*, 295 AD2d at 888).

Entered: April 24, 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 22-01564

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH NIXON, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (BRIDGET FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered August 24, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and menacing a police officer or peace officer (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and two counts of menacing a police officer or peace officer (§ 120.18). County Court initially imposed a term of interim probation supervision (*see* CPL 390.30 [6]), but the court subsequently revoked the interim probation and sentenced defendant to concurrent terms of incarceration. We affirm.

Preliminarily, we agree with defendant that, under "the totality of the circumstances" presented here, his waiver of the right to appeal is invalid (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]; *see People v Magee*, 191 AD3d 1323, 1323-1324 [4th Dept 2021]). Consistent with our "responsibility to oversee the [plea] process and to review the record to ensure that the defendant's waiver of the right to appeal reflects a knowing and voluntary choice" (*People v Callahan*, 80 NY2d 273, 280 [1992]; *see Thomas*, 34 NY3d at 559), we must look at "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement" (*Thomas*, 34 NY3d at 559-560 [internal quotation marks omitted]).

Here, the court stated on the record, after refusing to suppress certain statements made by defendant, that, although the People opposed a youthful offender adjudication and were unwilling to make a plea offer, it would extend a plea offer. The court then set forth the details of its proposed plea agreement and sentencing commitment, advising defendant that if he pleaded guilty to the indictment, in exchange the court would commit to imposing a one-year term of interim probation. Additionally, if defendant was successful, the court would further commit to grant him youthful offender status and sentence him to four years of probation; however, if defendant failed to abide by the terms and conditions of interim probation, the court would impose a sentence of up to five years of incarceration, followed by five years of postrelease supervision. Notably, the court's plea offer did not require defendant to waive his right to appeal in exchange for the court's sentencing commitment. Defendant stated that he understood the terms of the court's offer, and the court set a deadline of two weeks for defendant to accept the offer or proceed to trial.

Two weeks later, defendant appeared for a plea proceeding, at the outset of which defense counsel notified the court that defendant wanted to accept the court's offer. In response, the court once again stated the terms of its plea offer and sentencing commitment. At no time did the court state in its reiteration that its plea offer was conditioned on defendant's waiver of his right to appeal. Defendant responded that he accepted the court's offer, and the court immediately began conducting the plea colloquy, closely following the model language. During the plea colloquy, after having advised defendant of his *Boykin* rights (*see Boykin v Alabama*, 395 US 238, 243 [1969]), the court stated, without explanation, that the waiver of defendant's right to appeal was a condition of the court's plea agreement. The court then conducted the waiver of the right to appeal colloquy, closely following the model language, and, at one point, asked defendant if he was willing to waive his right to appeal "in exchange for the plea and sentence agreement," to which the defendant responded affirmatively. The court thereafter continued with the remainder of the plea colloquy, at the conclusion of which defendant was placed on interim probation and released on his own recognizance.

While "a defendant has a fundamental right to appellate review of a criminal conviction" (*People v Yavru-Sakuk*, 98 NY2d 56, 59 [2002]), including one rendered upon a plea of guilty (*see* NY Const, art VI, § 4 [k]; CPL 450.10 [1]; *Callahan*, 80 NY2d at 284), there is generally "no public policy precluding defendants from waiving their rights to appeal as a condition of the plea and sentence bargains" (*People v Seaberg*, 74 NY2d 1, 10 [1989]). A public policy concern arises, however, where, as here, a court proposes a plea agreement predicated upon the defendant's plea of guilty to unreduced charges on the basis of the defendant's understanding as to the court's anticipated sentence. In that circumstance, the consent of the People is not required because the charges remain as presented (*see* CPL 220.10 [2]) and the sentencing responsibility remains exclusively with the court, which has the obligation and discretion to impose sentence in light of the information obtained from the presentence report or other sources

(*see People v Farrar*, 52 NY2d 302, 306 [1981]). Therefore, the People are not in a position to demand a waiver of the defendant's right to appeal, nor is such a waiver—or any other plea condition—necessary to secure the People's consent.

It follows, then, that a court's demand of an appeal waiver as a condition of such a plea agreement gives rise to the appearance that the court is seeking to shield its decisions from appellate review or otherwise act as an advocate for the People (*see United States v Gonzalez-Melchor*, 648 F3d 959, 964 [9th Cir 2011]) and has thereby "assum[ed] the function of an interested party and deviat[ed] from its own role as a neutral arbiter" (*People v Towns*, 33 NY3d 326, 333 [2019]; *see People v Sutton*, 184 AD3d 236, 242-244 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]). Thus, pursuant to the long-standing principle that "[n]ot only must judges actually be neutral, they must appear so as well" (*People v Novak*, 30 NY3d 222, 226 [2017]), and consistent with our "responsibility to oversee the [plea] process and to review the record" (*Callahan*, 80 NY2d at 280; *see Thomas*, 34 NY3d at 559), where a waiver of the defendant's right to appeal is a condition of a court-initiated plea agreement that does not require the People's consent, the waiver is invalid and unenforceable unless it is apparent from the record that the court had a distinct and proper reason to demand the waiver and foreclose judicial review at the time the demand was made (*see Sutton*, 184 AD3d at 244-245). In applying that principle, we note that we have not adopted, and we do not now adopt, the requirement of *Sutton* that courts must "articulate a reason for requiring a[n appeal] waiver in a . . . plea proceeding" (*People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *see People v Williams*, 246 AD3d 1370, 1370 [4th Dept 2026]). Instead, we must look to the record as a whole to determine whether there is a distinct and proper reason for the court's demand that a defendant waive their right to appeal. In our view, that review of the record is necessary to address our concern "that trial judges may encourage the use of appeal waivers in order to insulate their decisions from appellate review and thus avoid reversals" (*Sutton*, 184 AD3d at 242-243; *see Thomas*, 34 NY3d at 559).

Upon our review of the record here, including the court's recitation of its plea offer after denying suppression and its subsequent reiteration of the offer at the outset of the plea proceeding, we conclude that it is not apparent that the court had a distinct and proper reason to demand the waiver of defendant's right to appeal as a condition of the plea agreement when the demand was made here during the plea colloquy. Therefore, the waiver of the right to appeal is invalid.

With respect to the merits, defendant contends that the court failed to conduct a sufficient inquiry before determining that he violated the conditions of his interim probation and thereby abused its discretion and violated his statutory and due process rights in revoking his interim probation. While that contention would survive even a valid waiver of the right to appeal (*see People v Butler*, 151 AD3d 1959, 1959-1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017];

People v Rodas, 131 AD3d 1181, 1181-1182 [2d Dept 2015], *lv denied* 26 NY3d 1111 [2016]; *People v Streeter*, 71 AD3d 1463, 1464 [4th Dept 2010], *lv denied* 14 NY3d 893 [2010]), we conclude that, even assuming, arguendo, that the contention is preserved for our review (*see* CPL 470.05 [2]; *see generally People v Albergotti*, 17 NY3d 748, 750 [2011]), it lacks merit.

The record establishes that, in accordance with the procedure set forth in CPL 400.10 (3), the court confirmed that defendant had been advised of "the factual contents of any report or memorandum [the court] ha[d] received" regarding the alleged violations of interim probation (*id.*), allowed defendant to respond to those allegations, and conducted a summary hearing that "was of sufficient depth to enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation supervision" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008] [internal quotation marks omitted]; *see People v Wheeler*, 242 AD3d 1630, 1631-1632 [4th Dept 2025]; *People v Alsaaidi*, 173 AD3d 1836, 1837 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]). The summary hearing "was sufficient pursuant to CPL 400.10 (3) to enable the court to 'assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate' " (*Rollins*, 50 AD3d at 1536, quoting *People v Outley*, 80 NY2d 702, 712 [1993]; *see People v McIntosh*, 213 AD3d 1266, 1267 [4th Dept 2023]; *People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). Indeed, upon conducting the summary hearing, the court possessed sufficient reliable and accurate information to support its conclusion that defendant violated the conditions of his interim probation by failing to adhere to his curfew and by failing to report to his probation officer as directed (*see People v Bolster*, 210 AD3d 1205, 1206-1207 [3d Dept 2022]; *People v Waite*, 119 AD3d 1086, 1087-1088 [3d Dept 2014]; *see generally McIntosh*, 213 AD3d at 1267; *People v Lynn*, 144 AD3d 1491, 1492-1493 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]). Moreover, defendant did not dispute that he was aware of the conditions of his interim probation; rather, defendant acknowledged that he violated those conditions by failing to adhere to his curfew and failing to report to his probation officer as directed (*see People v Butler*, 151 AD3d 1959, 1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]; *Waite*, 119 AD3d at 1087-1088; *see also Wheeler*, 242 AD3d at 1632).

We reject defendant's contention that the court, having resolved the threshold issue of youthful offender status eligibility in defendant's favor (*see* CPL 720.10 [2], [3]), abused its discretion in refusing to grant him youthful offender status, and we decline to grant his request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Lewis*, 128 AD3d 1400, 1400-1401 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]).

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

Entered: April 24, 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 22-01359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE EVERSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRADLEY E. KEEM 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 July 15, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Defendant pleaded guilty mid-trial, after the People had presented the testimony of several witnesses.

Contrary to defendant's contention, we conclude that he validly waived his right to appeal (*see People v Johnson*, 229 AD3d 1300, 1301 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]). Defendant's valid waiver of the right to appeal precludes our review of his contention that he was denied his statutory right to a speedy trial (*see People v Rouse*, 244 AD3d 1783, 1783 [4th Dept 2025]; *People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *cf. People v Banks*, 240 AD3d 1307, 1308 [4th Dept 2025]) as well as his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Defendant contends that his guilty plea was not knowingly, intelligently, and voluntarily entered. Although defendant's challenge to the voluntariness of the plea survives the valid waiver of the right to appeal, it is not preserved for our review because defendant "did not move to withdraw the plea or to vacate the judgment of conviction" (*People v Lacey*, 225 AD3d 1276, 1276 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]). Defendant's challenge does not fall within the narrow exception to the preservation requirement (*see*

People v Lopez, 71 NY2d 662, 666 [1988]).

To the extent that defendant contends that he received inadequate notice of the grand jury proceedings, that contention was forfeited by his guilty plea (*see People v Vanvleet*, 126 AD3d 1359, 1360 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]). Further, defendant waived that contention inasmuch as he "did not move to dismiss the indictment on that ground within five days after he was arraigned" (*People v Crosby*, 215 AD3d 1225, 1226 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023] [internal quotation marks omitted]; *see* CPL 190.50 [5] [c]; *People v Linder*, 170 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]).

By pleading guilty, defendant forfeited his contention that County Court erred in denying his motion for a mistrial (*see People v Adams*, 201 AD3d 1311, 1312 [4th Dept 2022], *lv denied* 38 NY3d 1007 [2022]). To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea and valid waiver of the right to appeal, that contention involves matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL article 440 (*see People v Rausch*, 126 AD3d 1535, 1535-1536 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). Defendant also contends that the court erred in failing to provide substitute counsel at sentencing. To the extent that defendant's contention survives the plea and valid waiver of the right to appeal (*see People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]), we conclude that it lacks merit inasmuch as defendant's "nonspecific complaint [about] defense counsel [at sentencing] did not constitute a request for substitution of counsel and thus did not trigger the need for an inquiry into whether good cause existed for substitution" (*People v Matthews*, 142 AD3d 1354, 1355 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

107

KA 22-01049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. MOORE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (BRIDGET FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion dated February 7, 2022, seeking to suppress physical evidence is granted, and count 4 of the indictment is dismissed.

Memorandum: Defendant appeals in appeal No. 1 from a judgment convicting him, upon a guilty plea, of criminal possession of a weapon in the second degree (§ 265.03 [3]). In appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of three counts of sexual abuse in the first degree (Penal Law § 130.65 [4]) and one count of escape in the second degree (§ 205.10 [2]).

Initially, in appeal No. 1, we agree with defendant that Supreme Court (Renzi, J.) erred in refusing to suppress the handgun underlying his conviction and that the judgment must be reversed. Testimony at a suppression hearing reflected that, after receiving the allegations of sexual abuse underlying defendant's conviction in appeal No. 2, an investigator with the Rochester Police Department attended defendant's scheduled probation meeting in order to question defendant regarding the allegations. The investigator testified that defendant was not under arrest at the outset of the interview. At the conclusion of the interview, the investigator called a second officer into the room to assist him in transporting defendant to the Public Safety Building (PSB) for further questioning, to which defendant had agreed. When the second officer entered the room, he asked defendant to stand and immediately searched defendant's person, revealing, among other

things, a key fob. Probation officers, who were present in the room and were aware that defendant did not have a valid driver's license, then took the key fob, exited the building, and began activating the fob while they walked around the surrounding area. Probation officers ultimately found a vehicle that was activated by the fob parked in a nearby parking garage. Upon searching the vehicle, a probation officer discovered a firearm.

At the suppression hearing, although the police investigator testified that he believed defendant was under arrest at the time of the search of his person, the investigator testified that he did not inform defendant that he was under arrest, nor was he the officer who actually arrested defendant. Instead, the investigator testified that the officer who had performed the search had arrested defendant. Although that officer was unavailable to testify at the hearing, his body camera footage was introduced. That footage reflected that, at the time of the search of his person, defendant asked the searching officer whether he was under arrest, and the searching officer responded that he was not under arrest and was merely being detained and brought to the PSB for a continued investigation.

Even assuming, arguendo, that either the investigator or the searching officer *could have* arrested defendant prior to or contemporaneously with the search of his person, we note that "[a] search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not" (*People v Reid*, 24 NY3d 615, 619 [2014]). A lawful search incident to arrest "requires proof that, at the time of the search, an arrest has already occurred or is about to occur" (*id.* at 620). The search must be "substantially contemporaneous" to an actual arrest "so as to constitute one event" (*People v White*, 228 AD3d 1317, 1318 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024] [internal quotation marks omitted]; *see People v Lamberty*, 233 AD3d 627, 627 [1st Dept 2024]). Under the circumstances of this case, we conclude that there was no actual arrest of defendant justifying the search, inasmuch as the only officer who was purported to have actually placed defendant under arrest prior to or contemporaneously with the search explicitly informed defendant that he was not under arrest at that time (*see People v Huggins*, 187 AD3d 484, 484 [1st Dept 2020], *lv denied* 36 NY3d 973 [2020]). The court upheld the search as a lawful search incident to an arrest, and thus we are precluded from affirming on any alternative basis (*see White*, 228 AD3d at 1318, citing, inter alia, *People v Concepcion*, 17 NY3d 192, 197-198 [2011]).

We further conclude that the "discovery of the [weapon] in the vehicle was the direct result of, and not entirely free and distinct from, the . . . unlawful search of defendant and seizure of the key[fob]," and thus that the court erred in refusing to suppress the handgun (*People v Smith*, 202 AD3d 1492, 1495 [4th Dept 2022]). Inasmuch as our determination results in the suppression of all evidence supporting the crime charged in count 4 of the indictment, that count must be dismissed (*see id.* at 1497; *People v Lopez*, 149 AD3d 1545, 1548 [4th Dept 2017]).

In light of our determination, we do not address defendant's remaining contentions with respect to appeal No. 1.

In appeal No. 2, defendant contends that the court (Renzi, J.) denied him his right to hire counsel of his choosing and denied him a reasonable opportunity to find new counsel prior to trial. Contrary to defendant's contention, however, the record reflects that the court did not deny defendant the opportunity to find new counsel; rather, the court invited defendant to retain a new attorney but, the following week, defendant indicated that he had opted not to seek new counsel because, in his view, any newly retained attorney would not have had sufficient time to prepare for the upcoming trial. To the extent defendant contends that the court should have granted an adjournment of trial to have permitted sufficient time for a new attorney to become familiar with his case, we conclude, even assuming, arguendo, that defendant preserved that contention, that he failed to demonstrate that any requested adjournment was necessitated by factors outside of his control, and that the court did not abuse its discretion in refusing to adjourn the trial (*see People v DeValle*, 194 AD3d 1411, 1412 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]; *see generally People v Burney*, 204 AD3d 1473, 1476 [4th Dept 2022]).

Contrary to defendant's further contention in appeal No. 2, he was not deprived of a fair trial due to certain allegedly improper remarks made by the prosecutor during opening statements and on summation. Initially, we note that defendant preserved his contention for our review only with respect to one of the allegedly improper remarks (*see* CPL 470.05 [2]). In any event, we conclude with respect to both the preserved and unpreserved challenges that the remarks were either fair comment on the evidence and the reasonable inferences to be drawn therefrom or responsive to defense counsel's summation, or otherwise did not deprive defendant of a fair trial (*see People v Hawley*, 112 AD3d 968, 969 [2d Dept 2013], *lv denied* 23 NY3d 963 [2014]; *see generally People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).

Defendant further contends in appeal No. 2 that he received ineffective assistance of counsel because defense counsel filed a motion in which he made an untimely request to dismiss the indictment pursuant to CPL 30.30. We reject that contention. Although defendant contends that defense counsel's error rendered the motion insofar as it concerned that request subject to dismissal, the court (Walsh, Jr., J.) heard argument on the merits of the motion from both defense counsel and the People and denied the motion with respect to the CPL 30.30 request on the merits without regard to its timeliness. Thus, insofar as defendant asserts that defense counsel's error in filing an untimely motion precluded the trial court's review of the motion, under the circumstances here, "defendant has not shown prejudice under the state or federal standards" (*People v McCray*, 165 AD3d 595, 596 [1st Dept 2018], *lv denied* 32 NY3d 1175 [2019]; *see generally People v Jackson*, 140 AD3d 1771, 1771-1772 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]). We note that, under the New York standard, prejudice is "a significant but not indispensable element in assessing meaningful representation" (*People v Caban*, 5 NY3d 143, 155-156 [2005] [internal

quotation marks omitted]) and our focus is instead upon "the fairness of the proceedings as a whole" (*People v Stultz*, 2 NY3d 277, 284 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Watkins*, 42 NY3d 635, 639-640 [2024]). Here, however, defendant obtained the very review on the merits that he claimed was foreclosed by defense counsel's allegedly ineffective performance, and thus defendant has failed to show either prejudice or that he "was deprived of fair process" under the New York standard (*Watkins*, 42 NY3d at 640). In any event, had defendant shown some other basis for prejudice, defendant's claim of ineffective assistance would nevertheless rely, in part, on matters outside of the record insofar as the record does not establish the motion's likelihood of success (*see generally People v Heverly*, 230 AD3d 1534, 1534-1535 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]), and such claim would thus have to be raised by motion pursuant to CPL 440.10 (*see generally People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018]). Although defendant in his post-argument submission notes that this Court previously denied his motion seeking leave to appeal from the denial of his prior CPL 440.10 motion, that motion suffered from the same defect as the ineffective assistance of counsel contention articulated on the present appeal, i.e., the lack of a showing of prejudice or that he was "deprived of fair process" under the New York standard (*Watkins*, 42 NY3d at 640). Nothing in this memorandum would preclude defendant, however, from filing a successive CPL article 440 motion (*see generally* CPL 440.10 [3] [c]).

Contrary to defendant's related contention in appeal No. 2, we conclude that defendant did not receive ineffective assistance of counsel at trial based on other alleged deficiencies. As discussed above, defendant was not deprived of a fair trial by the prosecutor's allegedly improper remarks during opening statements and summation, and we therefore conclude that "defense counsel's failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel" (*People v Fick*, 167 AD3d 1484, 1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019] [internal quotation marks omitted]). Additionally, defense counsel was not ineffective for failing to prevent the jury from hearing that defendant invoked his right to counsel inasmuch as the record reflects that defendant, in fact, did not do so. Although defendant contends that defense counsel was ineffective for failing to request a limiting instruction with respect to certain testimony at trial, for delivering his closing argument prior to a conference regarding the jury charge, and for failing to challenge a prospective juror during jury selection, defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's decisions (*People v Maffei*, 35 NY3d 264, 269 [2020]; *see generally People v Piasta*, 207 AD3d 1054, 1055 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]). Lastly, although defendant contends that defense counsel was ineffective for failing to call an expert to address the victim's medical records at trial, defendant failed to establish that "opposing expert testimony was available, that it would have assisted [the factfinder] in its determination or that he was prejudiced by its

absence" (*People v McKnight*, 236 AD3d 1483, 1483 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

108

KA 23-01687

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. MOORE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (BRIDGET FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (James E. Walsh, Jr., J.), rendered June 3, 2022. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (three counts) and escape in the second degree.

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

Same memorandum as in *People v Moore* ([appeal No. 1] — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

109

CA 25-00442

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

IN THE MATTER OF NEW YORK STATE POLICE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MATHEW J. GALLIHER, RESPONDENT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH COCO OF COUNSEL), FOR PETITIONER-APPELLANT.

LUIBRAND LAW FIRM, PLLC, LATHAM (KEVIN A. LUIBRAND OF COUNSEL), FOR RESPONDENT-RESPONDENT.

FRESHFIELDS US LLP, WASHINGTON, DC (JENNIFER B. LOEB OF COUNSEL), FOR BRADY CENTER TO PREVENT GUN VIOLENCE AND GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, AMICI CURIAE.

Appeal from an order of the Supreme Court, Oneida County (Peter M. Rayhill, J.), entered February 25, 2025, in a proceeding pursuant to CPLR article 63-A. The order denied the petition for an extreme risk protection order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the application is reinstated, the application insofar as it seeks the issuance of a final extreme risk protection order is granted, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to the Extreme Risk Protection Act (*see* CPLR art 63-A), petitioner appeals from an order that, after a hearing, denied a final extreme risk protection order (ERPO) against respondent. We reverse.

Respondent and several other Department of Corrections and Community Supervision (DOCCS) correction officers participated in the gang assault of a restrained incarcerated individual (victim). Respondent and the other correction officers failed to activate their body-worn cameras during the assault in violation of DOCCS policy, but the Office of Special Investigations was able to retrieve "recall video" that depicted the assault without audio. The victim ultimately died as a result of the injuries he sustained.

Shortly thereafter, petitioner filed the instant application seeking a temporary and final ERPO based upon respondent's involvement in the victim's death. On the same day that the application was

filed, Supreme Court denied the temporary ERPO and scheduled a final ERPO hearing. At the hearing, the court heard testimony from a DOCCS investigator tasked with investigating misconduct within correctional facilities across the State and received the recall body-worn camera footage as exhibits. Respondent invoked his Fifth Amendment right against self-incrimination beginning with the first question, and continued to invoke that right on each question thereafter.

Following the hearing, the court issued a written decision and order in which it concluded that, "[a]s troubling as the evidence provided is, it does not demonstrate that [r]espondent is *likely* to engage in conduct that would result in serious harm to himself or others." The court thus denied the final ERPO.

At the outset, we note that respondent was criminally charged for his role in the victim's death, but was ultimately acquitted of all charges against him. Inasmuch as respondent was acquitted and is thus not prohibited as a result of that prosecution from possessing any firearms, rifles, or shotguns (*see* Penal Law § 400.00 [1] [c]), this appeal is not moot (*cf. Matter of New York State Police v Kingsley*, — AD3d —, —, 2026 NY Slip Op 01668, *1 [4th Dept 2026]).

On the merits, we agree with petitioner that the court erred as a matter of law in refusing to issue a final ERPO. At a hearing to determine whether a final ERPO should be issued, "the petitioner shall have the burden of proving, by clear and convincing evidence, that the respondent is likely to engage in conduct that would result in serious harm to himself . . . or others, as defined in paragraph one or two of subdivision (a) of section 9.39 of the mental hygiene law" (CPLR 6343 [2]). Pursuant to Mental Hygiene Law § 9.39 (a), " '[l]ikelihood to result in serious harm' . . . shall mean," as relevant here, "a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm" (§ 9.39 [a] [2]).

In determining whether the petitioner has met their burden, "[t]he court may consider," inter alia, "any evidence submitted by the petitioner, any evidence submitted by the respondent, [and] any testimony presented" (CPLR 6343 [2]), and "*shall* also consider the [eight] factors set forth in [CPLR 6342 (2) with respect to whether to issue a temporary ERPO]" (*id.* [emphasis added]). While those factors are non-exhaustive, the first factor is a prior "threat or act of violence or use of physical force directed toward self, the petitioner, or another person" (CPLR 6342 [2] [a]).

Here, at the outset of the hearing, the court recited the appropriate standard set forth in CPLR 6343 (2) and Mental Hygiene Law § 9.39 (a) (2), and expressly concluded following the hearing that the evidence established that respondent "participated with others in an act of violence against a New York State DOCCS inmate in restraints that caused serious physical harm and, ultimately, death to that individual." Nonetheless, the court held that respondent was not "likely" to engage in conduct that would result in serious harm to himself or others, relying upon the Merriam-Webster Dictionary's

definition of "likely," rather than the express statutory definition in Mental Hygiene Law § 9.39 (a) (2) as incorporated into the statutory scheme. That was error.

As set forth above, the burden was on petitioner under the circumstances here to establish, by clear and convincing evidence, that respondent posed "a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm" (Mental Hygiene Law § 9.39 [a] [2]; *see* CPLR 6343 [2]). Petitioner met that burden by establishing that respondent actively participated in the assault of a restrained incarcerated individual by grabbing the victim by the chest and holding him down while other officers kicked the victim in the abdomen and groin (*see* CPLR 6342 [2] [a]). Indeed, that conduct is particularly egregious in this case because "DOCCS regulations require correction officers to exercise '[t]he greatest caution and conservative judgment' in determining whether physical force against an inmate is necessary" (*Rivera v State of New York*, 34 NY3d 383, 391 [2019], quoting 7 NYCRR 251-1.2 [a]), inasmuch as "[c]orrection officers are tasked with the formidable and critical responsibility of protecting the safety of inmates and coworkers while maintaining order in correctional facilities" (*id.* at 385). Respondent adduced no evidence to the contrary at the hearing.

To the extent that the court appears to have implicitly concluded that it is inappropriate to issue an ERPO based upon past acts of violence as opposed to threats of future violence, we note that CPLR article 63-A does not require either an explicit threat or expert testimony to predict a respondent's future conduct (*see* CPLR 6342 [2]; *Matter of R.M. v C.M.*, 226 AD3d 153, 162 [2d Dept 2024]). To the contrary, each of the eight factors that the court "shall" consider in determining whether to issue a final ERPO (CPLR 6343 [2]) is based upon past conduct (*see* CPLR 6342 [2]). Likewise, the court's tacit conclusion that an ERPO should not be issued where the parties have other civil or criminal remedies is similarly without merit. Although a respondent may ultimately face criminal charges for their conduct, the mere prospect of criminal charges does not preclude the issuance of an ERPO. If that were the case, no ERPO could ever be issued against a perpetrator of domestic abuse who owned firearms, because the perpetrator could be prosecuted criminally. That is simply not the law in New York (*see Matter of Orangetown Police Dept. v Cashell*, 238 AD3d 1152, 1154-1155 [2d Dept 2025]; *see generally R.M.*, 226 AD3d at 163).

We therefore reverse the order, reinstate the application, grant the application insofar as it seeks the issuance of a final ERPO, and remit the matter to Supreme Court for further proceedings pursuant to CPLR 6343 (3).

Entered: April 24, 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 23-00556

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAHNISHA JOYNER-POUNDS, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 15, 2023. The judgment convicted defendant upon a jury verdict of aggravated driving while intoxicated (three counts) and driving while intoxicated.

It is hereby ORDERED that the case is held, decision is reserved, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of three counts of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [b]) and one count of driving while intoxicated (§ 1192 [3]), arising from an incident that took place while she was driving with three children present in the vehicle.

Defendant failed to preserve for our review her contention that the indictment was facially duplicitous (*see People v Becoats*, 17 NY3d 643, 650 [2011], *cert denied* 566 US 964 [2012]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the evidence is legally insufficient to establish that the children in her vehicle were 15 years of age or less, as required for the charges of aggravated driving while intoxicated (*see* Vehicle and Traffic Law § 1192 [2-a] [b]). Following the close of the People's proof, defendant did not challenge the sufficiency of the evidence as it related to the ages of the two eldest children, whose birth certificates were admitted in evidence. As a result, defendant's contention is preserved for our review only with respect to the age of the youngest child, who was an infant (*see People v Tomion*, 174 AD3d 1495, 1496 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, "[v]iewing the evidence in the light most

favorable to the People, and giving them the benefit of every reasonable inference" (*People v Bay*, 67 NY2d 787, 788 [1986]), we conclude that there is a valid line of reasoning and permissible inferences that could lead rational persons to conclude that all three children in defendant's vehicle were 15 years of age or younger (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that the verdict is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that she operated her vehicle in an intoxicated condition. The evidence at trial established that a police officer stopped defendant's vehicle after determining that it matched the description of a vehicle that had been reported for reckless driving. Upon observing defendant's vehicle, the officer noticed that, consistent with the vehicle in the reckless driving report, the vehicle's front bumper was partially detached and was scraping the road. After stopping the vehicle, the officer observed that defendant, its driver, had slurred speech and bloodshot eyes. The officer also noticed a strong odor of alcohol emanating from the vehicle. When a second responding officer asked defendant if she had had anything to drink, defendant answered, "Not enough."

Defendant refused the officers' requests to exit the vehicle and also refused to perform any field sobriety tests. According to the officers, defendant could barely stand and had to be supported while she walked to the police car. While detained in the back of the police car, defendant alternated between crying and yelling hysterically. Due to the level of her perceived intoxication, defendant was taken to the hospital, and she later refused to submit to a chemical test. Defendant did not testify at trial and offered no evidence.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the issue of intoxication (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*; *see People v McPherson*, 213 AD3d 1261, 1263 [4th Dept 2023], *lv denied* 39 NY3d 1112 [2023]).

Finally, defendant contends that Supreme Court erred in denying her motion seeking to dismiss the indictment pursuant to CPL 30.30 on the ground that the People failed to comply with their discovery obligations under CPL 245.20, thereby rendering any certificate of compliance invalid and any statement of readiness illusory. The court improperly denied the speedy trial motion on the ground that defendant would not be prejudiced by the belated discovery of the evidence in question (*see People v Bay*, 41 NY3d 200, 213 [2023]; *People v Young*, 243 AD3d 1303, 1307 [4th Dept 2025]). Moreover, the court rendered its decision before the People had an opportunity to respond to the motion, which was filed on the eve of trial, telling the prosecutor that it did not want to hear from him in opposition to the motion.

We therefore hold the case, reserve decision, and remit the matter to Supreme Court to afford the People an opportunity to file a response to the motion and then to determine the motion (*see People v Rojas-Aponte*, 224 AD3d 1264, 1266 [4th Dept 2024]; *see generally People v Brinson*, 246 AD3d 1435, 1436-1437 [4th Dept 2026]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

135

KA 24-00916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY N. MAULL, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (ASHLEY E. SMITH 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 Cattaraugus County Court (Ronald D. Ploetz, J.), dated May 24, 2024. 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 denying, after a hearing, his motion pursuant to CPL 440.10 seeking to vacate a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), arising from an incident in which the victim was killed by a single gunshot to the head (murder case). We affirm.

The shooting took place in August 2014. DNA evidence recovered from the crime scene was linked to defendant and the codefendant, Thomas Hall (Turtle). The People's theory of the victim's death was that defendant shot and killed the victim in retribution for the victim having purportedly informed on defendant. At the time of the killing, defendant already faced charges in connection with a June 2013 burglary and assault (2013 case). After the victim's death, but before defendant was indicted for killing the victim, he was arrested for bail jumping in connection with the 2013 case.

While defendant was being held at the Cattaraugus County Jail on the bail jumping charges, he spoke by phone with the attorney representing him in the 2013 case. Pursuant to a jail policy that recorded all outgoing phone conversations, several phone conversations between defendant and the attorney were recorded and were subsequently listened to by the Cattaraugus County Sheriff's Office, including by

the detective who was the lead investigator in the murder case and who later testified at defendant's trial. As relevant here, the detective prepared notes memorializing the contents of three calls between defendant and the attorney, which occurred on September 29, October 7, and October 16, 2014. The detective's written notes of the three calls listed the phone number of the person to whom the calls were made and identified that person as defendant's attorney. During those phone calls, defendant and his attorney seemingly discussed the murder case. Relevantly, there were instances during the calls in which defendant and the attorney discussed Turtle and his involvement in the murder case. By the time the first call occurred, Turtle and another individual had already provided law enforcement with statements implicating defendant in the murder case. Both Turtle and the other individual testified at trial.

Defendant was indicted in the murder case some time after law enforcement listened to the phone calls. At sentencing following his conviction, defendant informed County Court that law enforcement had listened to the recorded phone calls with his attorney in the 2013 case. Defendant's trial counsel in the murder case had received the detective's notes memorializing the phone calls as *Rosario* material. Trial counsel stated at sentencing that, because of the homicide investigation, "[t]here may have been a reason [for law enforcement] to listen to those calls," and explained that he chose not to use the issue of law enforcement's actions in listening to phone calls as part of the defense because he "didn't think it was relevant" to the murder case. In response, the prosecutor stated that law enforcement is "not even able to access legal phone calls, none of us are . . . We can't [access those calls] under the software." The court took no action with respect to defendant's allegations.

On direct appeal, we modified the judgment with respect to the sentence imposed and otherwise affirmed the judgment. As relevant here, we concluded that "[t]he record [was] insufficient to establish that defendant's trial was affected by an alleged violation of defendant's right to counsel on the ground that law enforcement officers listened to at least three phone calls between defendant and [his attorney], or that [trial] counsel was ineffective for failing to seek a hearing on that matter" (*People v Maull*, 167 AD3d 1465, 1468 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]). We characterized the allegations that law enforcement had listened to defendant's phone calls with the attorney as "alarming" but nonetheless noted that "the appropriate vehicle for challenging that conduct is a CPL 440.10 motion inasmuch as defendant's contention[s] concern[ ] matters outside the record on appeal" (*id.*).

Defendant thereafter moved—both pro se and, subsequently, through counsel—to vacate the judgment pursuant to CPL 440.10 on the grounds that, inter alia, he was deprived of his right to counsel by law enforcement's actions in listening to the recorded conversations with the attorney and that trial counsel was ineffective in failing to take action after learning about law enforcement's conduct. The court summarily denied defendant's motion, and on appeal we reversed that order and remitted the matter for a fact-finding hearing pursuant to

CPL 440.30 (5), concluding that the court abused its discretion in summarily denying the motion inasmuch as "ample evidence establish[ed] that a factfinding hearing [was] necessary to determine whether law enforcement's [conduct in listening to the three phone calls] violated defendant's right to counsel" (*People v Maull*, 218 AD3d 1236, 1240 [4th Dept 2023]), and "whether trial counsel was ineffective in failing to take any steps in response to learning about" law enforcement's conduct (*id.* at 1242). Pursuant to our remittal directive, the court conducted a full fact-finding hearing on the CPL 440.10 motion, and it thereafter denied the motion, prompting this appeal.

Defendant contends that the court erred in denying his motion insofar as it sought to vacate the judgment on the ground that law enforcement's conduct in listening to his phone conversations violated his right to counsel. We reject that contention. "[T]he fundamental right to counsel in a criminal case includes 'the right to consult counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to what has been said' " (*People v Gamble*, 18 NY3d 386, 396 [2012], *rearg denied* 19 NY3d 833 [2012], quoting *People v Cooper*, 307 NY 253, 259 [1954]; *see Maull*, 218 AD3d at 1240). To that end, the courts "have often condemned, without reservation, any intrusion into private communications between counsel and client" (*People v Pobliner*, 32 NY2d 356, 369 n 2 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; *see Glasser v United States*, 315 US 60, 76 [1942]; *Matter of Fusco v Moses*, 304 NY 424, 433 [1952]). The right to counsel, "based as it is on a fundamental principle of justice, must be protected by the trial judge" (*People v McLaughlin*, 291 NY 480, 482 [1944]; *see People v Hollmond*, 191 AD3d 120, 138 [2d Dept 2020]). Nonetheless, a court is not automatically required to grant a CPL article 440 motion and vacate the judgment of conviction where the court concludes that there has been an intrusion on a defendant's right to private consultation with defense counsel. To warrant vacatur of the judgment, the court must determine "whether the People's evidence on defendant's trial was 'tainted' " by the improper intrusion (*People v Morhouse*, 21 NY2d 66, 77 [1967]; *see also Pobliner*, 32 NY2d at 369; *see generally Weatherford v Bursey*, 429 US 545, 552 [1977]).

Here, there is no dispute that law enforcement listened to recordings of three of defendant's phone calls with the attorney who represented him in the 2013 case. There also is no dispute that, during those phone conversations, defendant and the attorney discussed certain aspects of the murder case at a time when defendant was already a suspect in that investigation. That conduct clearly constituted an intrusion on defendant's right to private communication with counsel. Indeed, having listened to the recordings of the phone calls, we note that, contrary to the testimony of the lead investigator at the fact-finding hearing, it is readily apparent from the beginning of the first phone call that defendant was speaking to an attorney. We adhere to our prior characterization of law enforcement's conduct in listening to defendant's conversations with the attorney as "alarming" (*Maull*, 218 AD3d at 1241; *see Maull*, 167 AD3d at 1468). We also note that, at oral argument, the People

correctly conceded that it was improper for law enforcement to listen to those conversations.

Nevertheless, as we previously stated, "the operative question for purposes of defendant's entitlement to vacatur of the judgment of conviction is whether [law enforcement's listening to the recordings of] defendant's conversations with his attorney 'tainted' the People's evidence at trial" (*Maull*, 218 AD3d at 1241; *see Pobliner*, 32 NY2d at 369; *Morhouse* 21 NY2d at 77). Despite the impropriety of law enforcements' behavior here, we conclude that the evidence at the fact-finding hearing supports the conclusion that the intrusion on defendant's right to private communication with the attorney did not taint the murder investigation or prosecution in this case (*see Weatherford*, 429 US at 558). The evidence established that, by the time of the recorded phone calls, law enforcement had already identified defendant as a prime suspect in the victim's death; indeed, two separate individuals (one of whom was Turtle) had already accused defendant of the killing. The evidence at the hearing thus established that the phone calls were not a significant factor causing law enforcement to focus on defendant as a suspect. Moreover, there was no evidence that, as a result of listening to the phone calls, law enforcement developed a new theory of the murder case or obtained any new leads or avenues of investigation. Further, to the extent defendant suggests that Turtle agreed to testify on the People's behalf only *after* he was provided with a copy of the lead investigator's notes summarizing the phone calls, we note that Turtle's testimony at trial somewhat contradicted his prior statements to law enforcement implicating defendant; indeed, his trial testimony cast doubt on whether defendant was the only person who could have killed the victim. Based on the record developed at the fact-finding hearing, we conclude that defendant's right to counsel was not violated by law enforcement's actions here and that the court thus did not err in denying defendant's motion insofar as it sought to vacate the judgment on that ground (*see generally Pobliner*, 32 NY2d at 369; *Morhouse*, 21 NY2d at 77).

In light of our conclusion that defendant's right to counsel was not violated when law enforcement listened to the recorded phone calls between him and the attorney, we further conclude that trial counsel was not ineffective in failing to take action when he learned about the recorded calls inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]; *see People v Perkins*, 160 AD3d 1455, 1457 [4th Dept 2018], *lv denied* 31 NY3d 1151 [2018]). In addition, to the extent that the record establishes that trial counsel did not diligently review the materials that revealed law enforcement's improper conduct and to the extent that trial counsel arguably took a position adverse to defendant at sentencing, those isolated errors were not "sufficiently egregious and prejudicial as to deprive . . . defendant of [the] constitutional right to effective legal representation" (*People v Hayward*, 42 NY3d 753, 755 [2024] [internal quotation marks omitted]). Thus, we reject defendant's contention that the court erred in denying his motion

insofar as it sought vacatur of the judgment on the ground that he was denied effective assistance of counsel.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

137

KA 23-00945

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP OWENS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KAMAN BERLOVE LLP, ROCHESTER (BRYANNE L. JONES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 8, 2023. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed, the judgment is modified as a matter of discretion in the interest of justice and on the law by vacating the order of protection, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and, in appeal No. 2, defendant appeals from a resentence on that conviction.

We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173 [4th Dept 2016], *lv denied* 28 NY3d 975 [2016]; *People v Primm*, 57 AD3d 1525, 1525 [4th Dept 2008], *lv denied* 12 NY3d 820 [2009]).

Defendant contends in appeal No. 1 that Supreme Court had no authority to issue an order of protection in favor of an individual who was neither a victim of nor a witness to the crime to which defendant pleaded guilty (*see* CPL 530.13 [4] [a]; *People v Campbell*, 231 AD3d 1168, 1169 [2d Dept 2024], *lv denied* 42 NY3d 1052 [2024]; *People v Farrell*, 201 AD3d 1367, 1368 [4th Dept 2022]). Although defendant failed to preserve that contention for our review inasmuch as he did not object to the order of protection on that ground when it

was issued (*see People v Shampine*, 31 AD3d 1163, 1164 [4th Dept 2006]), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Raduns*, 70 AD3d 1355, 1355 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010], *reconsideration denied* 15 NY3d 808 [2010]). We agree with defendant that the order of protection is invalid (*see Raduns*, 70 AD3d at 1355; *People v Creighton*, 298 AD2d 774, 776 [3d Dept 2002], *lv denied* 99 NY2d 613 [2003]), and we therefore modify the judgment in appeal No. 1 by vacating the order of protection (*see Raduns*, 70 AD3d at 1355).

We reject defendant's further contention that the court erred in refusing to entertain his pro se motion to withdraw his plea. Where, as here, a defendant is represented by defense counsel in a proceeding, "the decision to entertain [pro se] motions [filed by a represented defendant] lies within the sound discretion of the trial court" inasmuch as "a criminal defendant is not entitled to hybrid representation" (*People v Johnson*, 195 AD3d 1420, 1420-1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021] [internal quotation marks omitted]; *see People v Rodriguez*, 95 NY2d 497, 500 [2000]; *People v Fowler*, 136 AD3d 1395, 1395 [4th Dept 2016], *lv denied* 27 NY3d 996 [2016], *reconsideration denied* 27 NY3d 1132 [2016]). Here, we conclude that the court did not abuse its discretion in declining to hear defendant's pro se motion to withdraw his plea (*see Johnson*, 195 AD3d at 1421; *Fowler*, 136 AD3d at 1395).

In appeal No. 2, defendant contends, and the People correctly concede, that the court erred in resentencing defendant in absentia. A defendant has a right to be personally present at the time sentence is pronounced, including at resentencing (*see* CPL 380.40; *People v Estremera*, 30 NY3d 268, 271-273 [2017]; *People v Diefenbacher*, 21 AD3d 1293, 1295 [4th Dept 2005], *lv denied* 6 NY3d 775 [2006]). We therefore reverse the resentence, and we remit the matter to Supreme Court for further resentencing, at which time defendant must be afforded the opportunity to appear with counsel (*see Diefenbacher*, 21 AD3d at 1295).

We have considered defendant's remaining contentions in each appeal and conclude that they are without merit.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

138

KA 23-01170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP OWENS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KAMAN BERLOVE LLP, ROCHESTER (BRYANNE L. JONES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 14, 2023. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the resentence so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for resentencing.

Same memorandum as in *People v Owens* ([appeal No. 1] — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

139

KA 24-01249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAROL STEINAGLE, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (TABITHA R. SALONEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered June 25, 2024. The judgment convicted defendant upon her plea of guilty of kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of kidnapping in the second degree (Penal Law § 135.20). We affirm.

Defendant failed to preserve for our review her contention that her plea was not knowingly and voluntarily entered inasmuch as she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Council*, 234 AD3d 1361, 1362 [4th Dept 2025]; *People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *Council*, 234 AD3d at 1363).

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

140

KA 18-01412

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN BAXTER, JR., DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 27, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]).

We reject defendant's contention that the verdict is against the weight of the evidence. An eyewitness identified defendant as the shooter, and a person matching defendant's description was seen on video surveillance riding a bike to and from the scene of the shooting between 5:30 a.m. and 6:30 a.m.—i.e., right before and after the shooting—on a route that matched the likely route to and from defendant's residence. Moreover, around the time of the shooting, another witness observed defendant riding his bicycle in the area of the shooting, and that witness's description of defendant's clothing matched the description of the shooter's clothing given by witnesses to the shooting. Similarly, the witnesses' description of the physical appearance and clothing of the shooter matched the description and clothing of defendant given by those who observed him on his bicycle. In addition, the evidence at trial established that defendant had issues with the victim regarding a defective gun that the victim allegedly sold to defendant within weeks of the shooting. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although an acquittal would not have been unreasonable (*see Danielson*, 9 NY3d at 348-349; *Bleakley*, 69 NY2d at 495), we conclude, based on the

weight of the credible evidence, that "the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348).

Defendant further contends that evidentiary errors at trial warrant reversal. We reject that contention. Generally, "all relevant evidence is admissible unless its admission violates some exclusionary rule" (*People v Scarola*, 71 NY2d 769, 777 [1988]). Nevertheless, evidence "may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*id.*). Here, Supreme Court did not err in admitting in evidence photographs of the homicide victim inasmuch as that evidence was not admitted for the sole purpose of arousing emotions in the jury (*see People v Pobliner*, 32 NY2d 356, 369 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]; *see also People v Brooks*, 214 AD3d 1425, 1426-1427 [4th Dept 2023], *lv denied* 39 NY3d 1153 [2023]). Nor did the court err in admitting in evidence defendant's booking photograph, which depicted him sticking out his tongue. Defendant's appearance at the time of his arrest was relevant to the jury's determination of whether he was the person depicted in a surveillance video of the alleged shooter (*see People v Jones*, 228 AD3d 1359, 1361 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]). Although the photograph shows defendant sticking out his tongue, we cannot say that the probative value of the evidence was outweighed by any potential unfair prejudice.

Defendant failed to preserve for our review his contention that the admission in evidence of a medical witness's "gruesome and gratuitous" testimony regarding the victim's death was improper given that the defense was not challenging the manner of death (*see People v Lee*, 214 AD3d 457, 458 [1st Dept 2023], *lv denied* 40 NY3d 929 [2023]; *see generally* CPL 470.05 [2]). He likewise failed to preserve for our review his contention that minor witnesses should have been precluded from testifying inasmuch as their testimony was offered solely to garner sympathy from the jury (*see People v Lindsay*, 213 AD3d 867, 868 [2d Dept 2023], *lv denied* 40 NY3d 929 [2023]; *see generally* CPL 470.05 [2]). Although defendant contends that testimony from one witness about defendant's flight from the scene should have been stricken and a curative instruction given, he requested no such relief from the court and, as a result, he failed to preserve that contention for our review (*see People v Kaufman*, 288 AD2d 895, 896 [4th Dept 2001], *lv denied* 97 NY2d 684 [2001]; *see generally* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to file an alibi notice, his handling of video surveillance evidence, his failure to appropriately challenge the prosecution's use of child witnesses, his failure to request a curative instruction regarding a particular statement of a witness, and his failure to make a sufficient motion for a trial order of dismissal. We reject that contention.

"To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*People v Flores*, 84 NY2d 184, 187 [1994]). It is defendant's burden " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Absent such a showing, it is presumed that counsel acted competently (*see Rivera*, 71 NY2d at 709; *People v Harvey*, 170 AD3d 1675, 1676-1677 [4th Dept 2019], *lv denied* 33 NY3d 1031 [2019]). Here, defendant failed to meet his burden. Moreover, we conclude that the evidence, the law, and the circumstances of this case, when "viewed in totality and as of the time of the representation," establish that defendant received meaningful representation (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: April 24, 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 24-01914

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

IN THE MATTER OF ANTHONY CRESPO,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

SHERIDAN D. WYNN,
RESPONDENT-PETITIONER-APPELLANT.

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

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Nicole E. Bayly, R.), entered October 15, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the parties joint custody of the subject children.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent-petitioner challenges the validity of her waiver of the right to counsel, the order is reversed on the law without costs, the petition of respondent-petitioner is reinstated, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner-respondent father commenced this proceeding pursuant to Family Court Act article 6 seeking sole custody of the parties' two children, and respondent-petitioner mother subsequently filed a petition seeking, among other things, sole custody of the children. At the mother's initial appearance, Family Court advised the mother that she had the right to counsel, and the mother indicated that she planned to represent herself. The court scheduled a hearing on the petitions and warned the parties that, if a party failed to appear, the court would dismiss that party's petition and proceed without the party. The mother failed to appear at the hearing, and the court noted her default and proceeded on the father's petition. The mother now appeals from an order that, inter alia, dismissed her petition and awarded the parties joint custody of the children.

The mother contends that the court erred in failing to ensure that her waiver of the right to counsel was knowing, voluntary, and intelligent. Initially, we note that the mother's contention is reviewable despite her default. In general, "[n]o appeal lies from an order [or judgment] entered upon an aggrieved party's default" (*Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1080 [4th Dept 2019] [internal

quotation marks omitted]; *see* CPLR 5511). Nevertheless, an appeal from an order or judgment entered upon the default of the appealing party "brings up for review those matters which were the subject of contest before the [court]" (*DiNunzio*, 175 AD3d at 1080 [internal quotation marks omitted]; *see Tun v Aw*, 10 AD3d 651, 652 [2d Dept 2004]). The "request by a party to waive the right to counsel and proceed pro se . . . places in issue whether the court fulfilled its obligation to ensure a valid waiver" and may be reviewed by this Court on an appeal by the subsequently defaulting pro se party (*DiNunzio*, 175 AD3d at 1081; *see Matter of Graham v Rawley*, 140 AD3d 765, 766-767 [2d Dept 2016], *lv dismissed in part & denied in part* 28 NY3d 955 [2016]).

With respect to the merits of the mother's contention, respondents in proceedings pursuant to Family Court Act article 6 "may face the infringements of fundamental interests and rights, including the loss of a child's society . . . , and therefore have a constitutional right to counsel in such proceedings" (*DiNunzio*, 175 AD3d at 1081 [internal quotation marks omitted]; *see* Family Ct Act § 262 [a] [iii]). "The deprivation of a party's fundamental right to counsel is a denial of due process and [therefore] requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Deon M. [Vernon B.]*, 68 AD3d 1740, 1741 [4th Dept 2009] [internal quotation marks omitted]; *see Matter of Evan F.*, 29 AD3d 905, 906 [2d Dept 2006]).

"[A] court's decision to permit a party who is entitled to counsel to proceed pro se must be supported by a showing on the record of a knowing, voluntary and intelligent waiver of [the right to counsel]" (*Deon M.*, 68 AD3d at 1741 [internal quotation marks omitted]; *see Matter of David VV.*, 25 AD3d 882, 884 [3d Dept 2006]). "If a timely and unequivocal request [to proceed pro se] has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the [party's] waiver is knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385 [2011]; *see DiNunzio*, 175 AD3d at 1081; *Matter of Girard v Neville*, 137 AD3d 1589, 1590 [4th Dept 2016]). Although "[a] 'searching inquiry' does not have to be made in a formulaic manner" (*Kathleen K.*, 17 NY3d at 386), "the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel" (*DiNunzio*, 175 AD3d at 1083 [internal quotation marks omitted]; *see Matter of Pitkanen v Huscher*, 167 AD3d 901, 902 [2d Dept 2018]).

Here, the record reflects that the court failed to conduct a searching inquiry to ensure that the mother's waiver of the right to counsel was a knowing, voluntary, and intelligent choice (*see Girard*, 137 AD3d at 1590; *Matter of Storelli v Storelli*, 101 AD3d 1787, 1788 [4th Dept 2012]). We therefore reverse the order, reinstate the

mother's petition, and remit the matter to Family Court for a new hearing on the petitions.

Entered: April 24, 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 24-01826

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

JULIE MORSE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BRADFORD MORSE, DEFENDANT-APPELLANT.

CATHERINE M. SULLIVAN, ESQ.,
ATTORNEY FOR THE CHILDREN, RESPONDENT.

ALDERMAN AND ALDERMAN PLLC, SYRACUSE (RICHARD B. ALDERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (CHRISTOPHER A. POWERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

CATHERINE M. SULLIVAN, LIVERPOOL, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered June 21, 2024. The order, among other things, approved compensation for the Attorney for the Children.

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

Memorandum: Defendant in this matrimonial action appeals from an order approving compensation for the Attorney for the Children. The appeal must be dismissed because no appeal lies as of right from an order that does not decide a motion made on notice (*see* CPLR 5701 [a]; *Sholes v Meagher*, 100 NY2d 333, 334 [2003]; *Deutsche Bank Natl. Trust Co. v Miller*, 172 AD3d 1890, 1890 [4th Dept 2019]). Although we have the power to treat the notice of appeal as an application for permission to appeal, we decline to do so here (*see Matter of Cor Van Rensselaer St. Co., III, Inc. v New York State Urban Dev. Corp.*, 197 AD3d 976, 977 [4th Dept 2021]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

148

CA 24-01791

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

FLOYD VAN HOOSER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BERNARD ARTHUR FINE, SYRACUSE UNIVERSITY, ETASAM, INC., SIGMA ALPHA MU FRATERNITY, INC., AND SIGMA ALPHA MU/ETA CHAPTER, DEFENDANTS-RESPONDENTS.

THE ZALKIN LAW FIRM, LLP, NEW YORK CITY (ELIZABETH A. CATE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SAUL EWING LLP, NEW YORK CITY (MICHAEL A. JACOBSON, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ETASAM, INC., SIGMA ALPHA MU FRATERNITY, INC., AND SIGMA ALPHA MU/ETA CHAPTER.

HANCOCK ESTABROOK, LLP, SYRACUSE (MARY D'AGOSTINO OF COUNSEL), FOR DEFENDANT-RESPONDENT SYRACUSE UNIVERSITY.

LAW OFFICE OF DANIEL M. SLEASMAN, ALBANY (DANIEL M. SLEASMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT BERNARD ARTHUR FINE.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 27, 2024. The order granted the motions of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended complaint is reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this personal injury action pursuant to the Adult Survivors Act (ASA) (*see* CPLR 214-j), alleging that he was sexually abused by an employee of defendant Syracuse University while plaintiff was employed at a fraternity house associated with the university. Defendants filed pre-answer motions to dismiss the amended complaint against them. Supreme Court granted the motions insofar as they sought dismissal of the amended complaint as untimely, and plaintiff appeals.

We agree with plaintiff that the court erred in granting the motions insofar as they sought dismissal of the amended complaint as untimely based on plaintiff's failure to sufficiently allege conduct constituting a sexual offense as defined in Penal Law article 130, as necessary to revive the claims under the ASA (*see generally* CPLR 3211

[a] [5], [7]). Although plaintiff was required to plead factual allegations related to his lack of consent in order to allege "conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law" (CPLR 214-j) and thereby "revive" the claims in the amended complaint for statute of limitations purposes, we conclude that the factual allegations in the amended complaint sufficiently assert plaintiff's lack of consent within the meaning of Penal Law § 130.05 (*see Shapiro v Syracuse Univ.*, 208 AD3d 958, 959 [4th Dept 2022]; *Druger v Syracuse Univ.*, 207 AD3d 1153, 1153 [4th Dept 2022]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Druger*, 207 AD3d at 1154).

Inasmuch as the court did not address the alternative grounds for dismissal raised in the motions, we remit the matter to Supreme Court to consider those contentions in the first instance (*see Lundy Dev. & Prop. Mgt., LLC v Cor Real Prop. Co., LLC*, 181 AD3d 1180, 1181 [4th Dept 2020]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

150

CA 24-01878

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

TARUNA VARMA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY AND WAYNE LEVAN,
DEFENDANTS-RESPONDENTS.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-APPELLANT.

CETRULO LLP, NEW YORK CITY (KEVIN C. MCCAFFREY OF COUNSEL), FOR DEFENDANT-RESPONDENT ALLSTATE INSURANCE COMPANY.

THE LAW OFFICE OF DAVID P. MARCUS, PLLC, WILLIAMSVILLE (DAVID P. MARCUS OF COUNSEL), FOR DEFENDANT-RESPONDENT WAYNE LEVAN.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered October 22, 2024. The order granted the motions of defendants insofar as they sought to dismiss the complaint.

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

Memorandum: In this action to recover damages for, inter alia, breach of contract, plaintiff appeals from an order granting those parts of defendants' respective motions seeking dismissal of the complaint against them, pursuant to CPLR 3211, on res judicata grounds. We affirm.

This action and a prior action between the same parties relate to plaintiff's purchase of an insurance agency from defendant Wayne LeVan and her execution of an exclusive agency agreement (Agency Agreement) with defendant Allstate Insurance Company (Allstate). Less than two years after plaintiff purchased the agency and executed the Agency Agreement, Allstate notified plaintiff that it was terminating the Agency Agreement pursuant to section XVII.B.2, which permitted either plaintiff or Allstate to terminate the Agency Agreement "with or without cause" on 90 days' written notice.

Plaintiff commenced the prior action to challenge the termination, asserting a cause of action for breach of contract, among other claims. Following the denial after a hearing of plaintiff's motion for a preliminary injunction, defendants moved to dismiss the amended complaint, and plaintiff cross-moved for leave to amend the amended complaint to add causes of action for discrimination, tortious

interference with contract, and tortious interference with prospective business. Supreme Court granted defendants' motions and denied plaintiff's cross-motion (2023 order).

Before the time to appeal the 2023 order had expired, plaintiff commenced this action against defendants, asserting causes of action for breach of contract, discrimination, tortious interference with contract, and tortious interference with prospective business. Defendants each moved to, inter alia, dismiss the complaint pursuant to CPLR 3211, contending that the complaint in this action was barred by res judicata.

"Res judicata, i.e., claim preclusion, bars the parties or their privies from relitigating issues that were or could have been raised in [a prior] action" (*City of Buffalo v Carr*, 242 AD3d 1581, 1581 [4th Dept 2025] [internal quotation marks omitted]). "[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, *even if based upon different theories or if seeking a different remedy*" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [emphasis added]; *see Carr*, 242 AD3d at 1581-1582; *see generally Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). What matters is not whether the claims were actually decided in the prior litigation but, rather, whether " 'they could have been decided in that action' " (*Knapp v Finger Lakes NY, Inc.*, 217 AD3d 1401, 1403 [4th Dept 2023], *lv denied* 41 NY3d 905 [2024]; *see Hunter*, 4 NY3d at 269).

Nevertheless, "where a claim could not have been raised in the prior litigation because it had not yet matured, res judicata does not apply" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 159 AD3d 512, 513 [1st Dept 2018], *lv dismissed* 32 NY3d 1080 [2018]; *see Pawling Lake Prop. Owners Assn., Inc. v Greiner*, 72 AD3d 665, 668 [2d Dept 2010]; *see also 1050 Tenants Corp. v Lapidus*, 118 AD3d 560, 560 [1st Dept 2014]).

Here, we conclude that plaintiff's claim for breach of contract in the instant action could have been raised in the prior litigation. In the amended complaint in the prior action, plaintiff alleged that defendants breached the Agency Agreement by terminating it. In the instant complaint, plaintiff alleges that defendants breached the Agency Agreement by attempting to enforce the Termination Payment Provision (TPP) of the Agency Agreement. The TPP was contained in the "Supplement for the R3001 Agreement" (Supplement), which was incorporated by reference into the Agency Agreement. In both the prior and instant actions, plaintiff has consistently contended that the Supplement was not a valid part of the Agency Agreement. Although plaintiff did not specifically challenge the enforcement of the TPP in the prior litigation, the TPP was a part of the Agency Agreement and, as a result, her current challenge to its enforceability could have been raised in the prior litigation (*see Hunter*, 4 NY3d at 269; *Knapp*, 217 AD3d at 1403).

Plaintiff further contends that the dismissal in the prior action under CPLR 3211 has no res judicata effect. We reject that contention. Although there are situations in which "a dismissal under CPLR 3211 (a) (7) for failure to state a claim is not a dismissal on the merits with res judicata effect" (*Wilder v Fresenius Med. Care Holdings, Inc.*, 215 AD3d 511, 513 [1st Dept 2023]; *see Hock v Cohen*, 125 AD3d 722, 723 [2d Dept 2015]), the Court of Appeals has stated that the dismissal of a complaint on that ground has preclusive effect with respect to a new complaint "for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint" (*175 E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1 [1980], citing *Linton v Perry Knitting Co.*, 295 NY 14, 17 [1945]; *see also Rosa v Triborough Bridge & Tunnel Auth.*, 218 AD3d 810, 812 [2d Dept 2023]). Moreover, a dismissal may be deemed on the merits where "the order [is] sufficiently clear that it included a dismissal on the merits, and it was not issued purely on the account of technical pleading deficiencies" (*SC Prop. Dev., LLC v MW Capital LLC*, 238 AD3d 470, 470 [1st Dept 2025]). Here, the court made it clear that its dismissal of the amended complaint in the prior action was a dismissal on the merits, and we therefore conclude that the dismissal precludes plaintiff's attempt to relitigate the breach of contract cause of action.

Contrary to plaintiff's further contention, the court properly determined that its denial of plaintiff's cross-motion for leave to amend the amended complaint in the prior action precluded plaintiff's attempt to assert those causes of action in the instant complaint inasmuch as the instant complaint is "essentially identical to the proposed amended complaint [plaintiff] submitted in support of [her] motion for leave to amend the [amended] complaint in the [prior] action" (*Pieroni v Phillips Lytle LLP*, 140 AD3d 1707, 1708 [4th Dept 2016], *lv denied* 28 NY3d 901 [2016]). Here, "[t]he proposed amended complaint in the [prior] action and the complaint in the present action raise identical issues, and the court decided those issues when it denied the motion for leave to amend" (*id.* at 1709; *cf. Condor Capital Corp. v CALS Invs., LLC*, 213 AD3d 433, 433 [1st Dept 2023]), having determined that the causes of action sought to be asserted were " 'palpably insufficient or patently devoid of merit' " (*Pieroni*, 140 AD3d at 1709).

In light of our determination, we do not reach plaintiff's remaining contentions.

Entered: April 24, 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 25-01360

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

IN THE MATTER OF JEFFREY KOTARY, PETITIONER,

V MEMORANDUM AND ORDER

TOWN OF FLOYD ZONING BOARD OF APPEALS AND TIM BEJIAN, TOWN OF FLOYD ZONING BOARD OF APPEALS CHAIRPERSON, RESPONDENTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PETITIONER.

FESTINE NELSON LLP, UTICA (KATHRYN M. FESTINE OF COUNSEL), FOR RESPONDENTS.

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, Oneida County [William F. Ramseier, J.], entered August 7, 2025) to review a determination of respondent Town of Floyd Zoning Board of Appeals. The determination denied the application of petitioner for three variances.

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

Memorandum: Petitioner, the owner of real property in the Town of Floyd (Town), commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town of Floyd Zoning Board of Appeals (ZBA) denying his application for three variances in connection with his proposed construction of a vehicle maintenance and storage unit facility on his property. We confirm the determination and dismiss the petition.

In 2019, petitioner sought and received a special use permit to construct storage units and a vehicle service garage on the property, a .95-acre parcel located in the Town. Petitioner thereafter received zoning approval to place a shipping container on the property to serve as a storage unit. Subsequently, he purchased a second shipping container to install on the property. Petitioner did not request or receive any zoning approval before installing the second container on the site.

Between the approval of the first shipping container and petitioner's installation of the second one, the Town passed a shipping container law, which, as relevant here, permits the use of

shipping containers on a property only as an accessory use and limits the density of shipping containers to one container per acre, with no containers permitted on property of less than one acre. Thus, after petitioner installed the second container, the zoning code enforcement officer informed him that *only* the first shipping container was lawfully present on the property.

In an attempt to avoid the limitations imposed by the Town's shipping container law, petitioner applied for a building permit to erect a wooden storage building (barn) that would incorporate both shipping containers in its structure. Petitioner began construction of the barn without having received a building permit, and there is no indication that a building permit was ever issued. Petitioner subsequently applied for a zoning permit to approve construction of the barn. That application was denied by the zoning code enforcement officer, who directed petitioner to seek variances from the ZBA with respect to the second shipping container. Based on the presence of two shipping containers on the property, in violation of the shipping container law, petitioner was issued a notice of violation by the zoning code enforcement officer.

Following additional discussions with the ZBA, among others, petitioner again applied for a zoning permit with respect to the construction of the barn. As relevant here, petitioner sought four variances from the ZBA with respect to his construction of the barn and the incorporation into its structure of the two shipping containers. Specifically, he requested variances (1) allowing the proposed structure to exceed the maximum allowable height by five feet, (2) allowing a reduction of the required setback from an adjacent state highway from 100 feet to 70 feet, (3) allowing the second shipping container to function as a proper accessory structure, and (4) allowing a second shipping container to be used on a property of less than one acre. Meanwhile, pursuant to General Municipal Law § 239-m, petitioner's project was referred to the Oneida County Planning Department, which ultimately disapproved the project, noting, among other things, that petitioner was seeking substantial variances that were the result of what appeared to be "self-created hardships" and that there were alternative available solutions that would not require variances. The Planning Board of the Town of Floyd also reviewed petitioner's application and similarly recommended that it be denied.

Following a public hearing, the ZBA applied the balancing test provided for in Town Law § 267-b (3) (b) and thereafter granted petitioner's request for a height variance and denied his application for the remaining variances. Petitioner commenced this proceeding seeking to annul the ZBA's determination with respect to the denied variances. Supreme Court transferred the matter to this Court. As a preliminary matter, we agree with respondents that this proceeding was improperly transferred to this Court inasmuch as petitioner does not challenge a determination made as a result of an evidentiary hearing directed by law (*see* CPLR 7803 [4]; 7804 [g]; *Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*, 159 AD3d 1561, 1561 [4th Dept 2018]; *Matter of Little v Town of Fabius Zoning*

Bd. of Appeals, 87 AD3d 1363, 1364 [4th Dept 2011]). Nevertheless, we review petitioner's contentions in the interest of judicial economy (*see Little*, 87 AD3d at 1364; *Matter of W.K.J. Young Group v Zoning Bd. of Appeals of Vil. of Lancaster*, 16 AD3d 1021, 1021 [4th Dept 2005]).

We conclude that petitioner's challenge to the ZBA's determination to deny three of the variances is without merit. A ZBA is afforded broad discretion in determining whether to grant or deny variances, and our review is limited to whether its determination was illegal, arbitrary, or an abuse of discretion (*see Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280 [4th Dept 2007]). Where there is substantial evidence in the record to support the rationality of the ZBA's determination, the determination should be affirmed upon judicial review (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308 [2002]; *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2 [1995]; *Matter of Expressview Dev., Inc. v Town of Gates Zoning Bd. of Appeals*, 147 AD3d 1427, 1428-1429 [4th Dept 2017]).

Pursuant to Town Law § 267-b (3), when determining whether to grant a variance, the ZBA must weigh "the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 612 [2004]; *see Matter of Freck v Town of Porter*, 158 AD3d 1163, 1165 [4th Dept 2018], *lv denied* 32 NY3d 903 [2018]; *Matter of Mimassi v Town of Whitestown Zoning Bd. of Appeals*, 124 AD3d 1329, 1330 [4th Dept 2015]) and must consider "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created" (§ 267-b [3] [b]; *see Matter of Qing Dong v Mammina*, 84 AD3d 820, 821 [2d Dept 2011]). Although the fifth factor "shall be relevant to the decision of the [zoning] board of appeals, [it] shall not necessarily preclude the granting of the area variance" (§ 267-b [3] [b]). A zoning board of appeals is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations [is] rational" (*Matter of Merlotto v Town of Patterson Zoning Bd. of Appeals*, 43 AD3d 926, 929 [2d Dept 2007]; *see Matter of Feinberg-Smith Assoc., Inc. v Town of Vestal Zoning Bd. of Appeals*, 167 AD3d 1350, 1352 [3d Dept 2018]).

Here, we conclude that the ZBA "rendered its determination after considering the appropriate factors and properly weighing the benefit to petitioner against the detriment to the health, safety and welfare of the neighborhood or community" if the variances were granted (*Matter of DeGroote v Town of Greece Bd. of Zoning Appeals*, 35 AD3d

1177, 1178 [4th Dept 2006]; *see Sasso*, 86 NY2d at 382). Further, although the ZBA did not articulate its findings, its determination to deny the variances was supported by a rational basis (*see Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93 [2001]; *Matter of Gasparino v Town of Brighton Zoning Bd. of Appeals*, 199 AD3d 1351, 1353 [4th Dept 2021]; *see generally Matter of Kaye v Zoning Bd. of Appeals of the Vil. of N. Haven*, 185 AD3d 820, 821 [2d Dept 2020]). The record demonstrates that the ZBA considered the five statutory factors, focusing particularly on safety considerations, the availability of feasible alternatives to the requested variances, and whether the alleged difficulty that gave rise to the need for variances was self-created (*see Gasparino*, 199 AD3d at 1353). Critically, we note that petitioner's need for variances with respect to the use of the second shipping container was almost entirely self-created and that feasible alternatives existed inasmuch as petitioner could have constructed a barn without incorporating the shipping containers into the structure, which would have obviated the need for some of the requested variances. Indeed, the record establishes that petitioner installed the second shipping container *after* the Town enacted the law prohibiting its installation and that petitioner began constructing the barn before he obtained the necessary approvals (*see generally Matter of Christian Airmen, Inc. v Town of Newstead Zoning Bd. of Appeals*, 115 AD3d 1319, 1321 [4th Dept 2014]; *Matter of Carrier v Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1036-1038 [4th Dept 2006], *lv denied* 8 NY3d 807 [2007]). Thus, it was rational for the ZBA to conclude, in denying the variances, that petitioner sought to circumvent his violation of the shipping container law by building a barn that incorporated the two containers into its structure, which petitioner did not need to do. To the extent that there may be substantial evidence in the record to support the rationality of a contrary determination with respect to the requested variances, we note that we may not substitute our own judgment for that of the ZBA (*see Matter of Socha v Town of Starkey*, 239 AD3d 1298, 1302 [4th Dept 2025]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

153

CA 24-01509

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

CITY OF ROME, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GHD CONSULTING SERVICES, INC.,
C.O. FALTER CONSTRUCTION CORP.,
BEKEN CONTRACTING SERVICES, L.L.C., AND
PATRICK HEATING OF THE MOHAWK VALLEY, INC.,
DEFENDANTS-RESPONDENTS.

HARRIS BEACH MURTHA CULLINA PLLC, SYRACUSE (DAVID CAPRIOTTI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C., TARRYTOWN (DANIEL D. FLYNN OF COUNSEL), FOR DEFENDANT-RESPONDENT C.O. FALTER CONSTRUCTION CORP.

BARCLAY DAMON LLP, SYRACUSE (NICHOLAS DICESARE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BEKEN CONTRACTING SERVICES, L.L.C., AND PATRICK HEATING OF THE MOHAWK VALLEY, INC.

Appeal from an order of the Supreme Court, Oneida County (William F. Ramseier, J.), entered August 19, 2024. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are denied, and the amended complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking, among other things, damages for injuries resulting from a chlorine gas leak at its newly constructed ultraviolet water filtration facility. The leak occurred during the transition from the old water filtration facility to the new water filtration facility, at which time the water supply was being treated by an emergency chlorination system in the new facility. That system, which used two chlorine gas tanks in alternation, was housed in a room that was deliberately separated from the rest of the facility and, pursuant to the construction plan for the new facility, was designed to be sealed in a manner that would prevent the escape of chlorine gas in the event of a leak. Hours

after the emergency chlorination system was put into use, a worker discovered that the temperature of the room was lower than required for operation of the system and that one of the system's two chlorine gas tanks had frost forming on it. The chief operator for the water filtration plant, an employee of plaintiff, switched the chlorine gas feed from the frosted tank to the second tank. The chief operator then sought to replace the frosted tank, which was partially depleted, with a new one. The chief operator used a wrench to close the valve on the top of the tank and, believing that valve to be closed, started to disconnect the frosted tank from a regulator that connected the tank to the emergency chlorination system. Chlorine gas leaked into the room from the frosted tank, necessitating the evacuation of the chief operator and the other persons present. Inasmuch as the room had not been completely sealed before the emergency chlorination system was put into use, the chlorine gas leaked into the larger facility, resulting in property damage to the new facility.

In its amended complaint against defendants, who were involved in the design and construction of the new facility, plaintiff asserted causes of action for, among other things, negligence and breach of contract. Plaintiff now appeals from an order granting defendants' respective motions for summary judgment dismissing the amended complaint against them. In granting the motions, Supreme Court concluded that, even assuming, arguendo, that defendants' alleged negligence and breaches of contract were causative factors in plaintiff's damages, the conduct of the chief operator in removing the frosted chlorine tank "was an unforeseeable superseding event that absolved defendants of liability." We agree with plaintiff that this was error, and we therefore reverse.

Contrary to the court's conclusion, defendants failed to meet their initial burden on their respective motions to establish as a matter of law that the chief operator's act of disconnecting the frosted tank was a superseding cause that interrupted the link between defendants' alleged failures and the damages incurred by plaintiff (*see Hain v Jamison*, 28 NY3d 524, 529 [2016]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315-316 [1980], *rearg denied* 52 NY2d 784 [1980]; *see generally Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008], *rearg denied* 10 NY3d 890 [2008]). A superseding act of a third party will break the chain of causation only when the act is not a "normal or foreseeable consequence of the situation created by the defendant's [actions or inactions]," and "questions concerning what is foreseeable and what is normal . . . generally are for the fact finder to resolve" (*Derdiarian*, 51 NY2d at 315; *see Pomeroy v Buccina*, 289 AD2d 944, 945 [4th Dept 2001]). Here, plaintiff alleged that defendants were negligent and breached their respective contracts with plaintiff by, among other things, using the emergency chlorination system while the room was not at the appropriate temperature and failing to properly seal the room in order to contain corrosive chlorine gas in the event that a leak occurred. In his deposition testimony, which was submitted in support of each motion, the chief operator explained that he attempted to replace the frosted tank because he was concerned that the tank was damaged from the frost and would not work properly once the alternative, nonfrosted

tank emptied, in which case untreated water might leave the facility. Although the chief operator admitted that, at the time he began to disconnect the frosted tank, a rotameter in the regulator indicated that chlorine gas was still flowing from it, he also explained that he believed that chlorine gas was no longer flowing from the frosted tank because he closed the valve with a wrench to the point where it would not move any further, he thought the rotameter might also be freezing over or damaged from the frost, and the indicator ball in the rotameter would occasionally "stick" and give a false reading. Under the circumstances, the chief operator's actions were not "extraordinary . . . , unforeseeable in the normal course of events, different in kind from the foreseeable risks associated with the original negligence, or independent or far removed from the defendant[s'] conduct" (*Rodriguez v Pro Cable Servs. Co. Ltd. Partnership*, 266 AD2d 894, 895 [4th Dept 1999]; *see Mazella v Beals*, 27 NY3d 694, 706 [2016]; *Derdiarian*, 51 NY2d at 315-316).

We have reviewed the contention raised by defendant GHD Consulting Services, Inc. (GHD) as an alternative ground for partial affirmance and conclude that it is without merit inasmuch as GHD failed to meet its initial burden of establishing its entitlement to summary judgment on that issue (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

154

KA 21-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL L. WALKER, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 26, 2021. The appeal was held by this Court by order entered June 14, 2024, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (228 AD3d 1318 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]). We previously held this case, reserved decision, and remitted the matter to County Court to determine defendant's motion to dismiss the indictment on statutory speedy trial grounds by ruling on the outstanding issues whether the People were required, pursuant to CPL 245.20 (2), to exercise due diligence to obtain transcripts or recordings from the refusal hearing of the Department of Motor Vehicles that were not in their possession and, if so, whether the People made reasonable efforts to comply with the statutory directives and made reasonable inquiries to ascertain the existence of material and information subject to discovery, as well as whether defendant's motion to dismiss was untimely (*People v Walker*, 228 AD3d 1318, 1320 [4th Dept 2024]). Upon remittal, the court denied the motion. We affirm.

We reject defendant's contention on resubmission that the court erred in denying his motion to dismiss the indictment. Here, the transcripts or recordings in question were not "in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20 [1]; *see Walker*, 228 AD3d at 1320) and did not qualify as "items and information related to

the prosecution of a charge in the possession of any New York state or local police or law enforcement agency" that must be "deemed to be in the possession of the prosecution" (CPL 245.20 [2]). Thus, they were not part of the "discovery required by [CPL 245.20 (1)]" to be provided by the People as a predicate for filing a proper certificate of compliance (COC) (CPL 245.50 [1]), and the People were not required to "make a diligent, good faith effort to ascertain the existence" of the transcripts or recordings and cause them to be made available for discovery (CPL 245.20 [2]). Inasmuch as the People's failure to provide the transcripts or recordings at the time they served and filed their COC or to exercise due diligence to obtain them did not render the COC improper, the People's statement of trial readiness pursuant to CPL 30.30 was not illusory, and defendant's statutory right to a speedy trial was not violated on that ground (*see People v Radford*, 237 AD3d 1511, 1512 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Walker*, 232 AD3d 1214, 1217 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]).

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

156

KA 22-00780

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY J. JONES, ALSO KNOWN AS KYMBERLY SMITH,
DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 20, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), kidnapping in the first degree, robbery in the first degree, robbery in the second degree (two counts) and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the concurrent sentences imposed on counts 5 and 6 of the indictment shall run concurrently with the concurrent sentences imposed on counts 1 and 4 of the indictment, and as modified the judgment is affirmed.

Memorandum: In this prosecution arising out of the disappearance and death of the victim, whose naked, decomposing body was located approximately one week after his disappearance in a vacant residential garage in Rochester and bound with restraints in various ways including to a post, defendant appeals from a judgment convicting her, following a joint trial with a codefendant before separate juries, of two counts of murder in the second degree (Penal Law §§ 20.20, 125.25 [2], [3] [depraved indifference and felony murder, respectively]), one count of kidnapping in the first degree (§§ 20.00, 135.25 [3]), one count of robbery in the first degree (§§ 20.00, 160.15 [1]), two counts of robbery in the second degree (§§ 20.00, 160.10 [1], [3]), and one count of criminal possession of stolen property in the fourth degree (§§ 20.00, 165.45 [5]).

Defendant contends that the evidence is legally insufficient to establish her guilt as either a principal or an accessory with respect to the counts of murder, kidnapping, and robbery. Even assuming, arguendo, that defendant's motion for a trial order of dismissal was

sufficiently specific to preserve that contention for our review (*see People v Colon*, 192 AD3d 1567, 1569-1570 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]; *People v Kithcart*, 85 AD3d 1558, 1559 [4th Dept 2011], *lv denied* 17 NY3d 818 [2011]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. "[E]ven in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Hancock*, 229 AD3d 1229, 1230 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]). Here, viewing the evidence in the light most favorable to the People (*see Hines*, 97 NY2d at 62; *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which the jury could find that defendant, either as a principal or an accomplice, kidnapped, robbed, and killed the victim (*see Hancock*, 229 AD3d at 1231).

Contrary to defendant's further contention, even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence "in light of the elements of the crime[s] as charged without objection" (*People v Noble*, 86 NY2d 814, 815 [1995]; *see People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Bailey*, 159 AD2d 1009, 1009 [4th Dept 1990]), the verdict is not against the weight of the evidence with respect to the counts of murder, kidnapping, and robbery (*see Hancock*, 229 AD3d at 1230-1231; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The People presented, among other things, surveillance footage and testimony establishing that defendant, whose clothing and wig were distinctive, had been with the codefendant in the lobby of a bank two days before the victim's disappearance and was walking in tandem with the codefendant along streets in the early morning hours on the day of the victim's disappearance. Surveillance footage then depicted defendant entering the victim's vehicle while the codefendant was nearby. The codefendant was shown less than an hour and a half later on video footage from an ATM, which was located close to where the victim's body was eventually found, driving the victim's vehicle, appearing to speak with someone in the back seat, and making a withdrawal from the victim's account. After further movements of the victim's vehicle around Rochester later on the morning of the victim's disappearance, the victim's vehicle was photographed traveling southwest on the Thruway in New York before eventually being depicted on surveillance footage pulling into a gas station in Pennsylvania. That surveillance footage showed defendant and the codefendant exiting the victim's vehicle and entering the gas station convenience store. The victim's vehicle was located in Florida two days later after being set on fire and, a few days after that, defendant and the codefendant appeared at a Florida pawn shop where they sold a gold chain and pendant that the victim had been wearing before his disappearance (*see People v Carter*, 96 AD3d 1520, 1521 [4th Dept 2012], *amended on rearg* 100 AD3d 1472 [4th Dept 2012], *affd* 21 NY3d 739 [2013]; *People v Crosby*, 158 AD3d 1300, 1302 [4th

Dept 2018], *lv denied* 31 NY3d 1115 [2018]). Additionally, cell-site data and other evidence established that the codefendant's cell phone and the victim's cell phone had traveled together during the relevant time frame and consistent with the movements of the victim's vehicle, and defendant admitted to the police that she had destroyed her cell phone prior to leaving New York to avoid being tracked (*see Isaac*, 195 AD3d at 1410). Along with several other pieces of physical evidence located at the scene of the victim's death, investigators found a five-inch long, two-tone manufactured fiber that the examining forensic criminalist identified as a synthetic hair from a wig or hair extension product. Although the forensic pathologist who performed the autopsy could not determine the precise cause of death due to the decomposition of the victim's body, she was able to conclude to a reasonable degree of medical certainty upon her examination of the body and the various restraint materials on the hands, legs, and neck and jaw area that the victim died as a result of "homicidal violence," i.e., natural causes were ruled out (*see People v Carter*, 1 AD3d 1028, 1029 [4th Dept 2003], *lv denied* 2 NY3d 738 [2004]).

Based on the forgoing, we conclude that, contrary to defendant's assertion, "[t]his is not a case where the evidence established only defendant's mere presence at the scene of the crimes" (*Hancock*, 229 AD3d at 1230-1331). Moreover, even if the jury discredited the testimony that defendant made incriminating statements following her arrest to her jail cellmate, who had significant credibility issues, we conclude that defendant's guilt was nevertheless proved beyond a reasonable doubt " 'by a compelling chain of circumstantial evidence' establishing all of the elements of the crimes" that she now challenges on appeal (*People v Collins*, 106 AD3d 1544, 1545-1546 [4th Dept 2013], *lv denied* 21 NY3d 1072 [2013]). Consequently, upon our review of the evidence, we are satisfied that " 'the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence' " (*People v Baque*, 43 NY3d 26, 30 [2024], quoting *People v Sanchez*, 61 NY2d 1022, 1024 [1984]).

With respect to the sentence, we conclude that Supreme Court erred in directing that the concurrent sentences imposed on the counts of robbery in the second degree run consecutively to the sentence imposed on the count of felony murder inasmuch as the indictment "did not specify which of the [available felony] counts served as the predicate for the felony murder count" (*People v Davis*, 68 AD3d 1653, 1655 [4th Dept 2009], *lv denied* 14 NY3d 839 [2010]; *see People v Wilkins*, 175 AD3d 867, 869 [4th Dept 2019], *affd* 37 NY3d 371 [2021]; *People v Glover*, 117 AD3d 1477, 1478 [4th Dept 2014], *lv denied* 23 NY3d 1036 [2014], *reconsideration denied* 24 NY3d 961 [2014]; *see generally People v Parks*, 95 NY2d 811, 814-815 [2000]). We conclude that the court also erred in directing that the concurrent sentences imposed on the counts of robbery in the second degree run consecutively to the sentence on the count of robbery in the first degree because "it is impossible to ascertain from the record whether the [robbery in the first degree] conviction[was] based on defendant's conduct in relation to any particular [property], and concurrent sentences are required where, as here, 'it is impossible to

determine whether the act that formed the basis for the jury's guilty verdict on [one] count . . . was also . . . the . . . act[ ] that formed the basis for its guilty verdict on [another] count' " (*People v Plume*, 145 AD3d 1469, 1472 [4th Dept 2016], quoting *People v Alford*, 14 NY3d 846, 848 [2010]; *see Parks*, 95 NY2d at 815). Although the legality of the sentence has not been raised by either party, we cannot allow an illegal sentence to stand (*see People v Considine*, 167 AD3d 1554, 1555 [4th Dept 2018]; *Carter*, 96 AD3d at 1522; *see also Plume*, 145 AD3d at 1473). We therefore modify the judgment by directing that the concurrent sentences imposed on counts 5 and 6 of the indictment for robbery in the second degree run concurrently with the concurrent sentences imposed on counts 1 and 4 of the indictment for, respectively, felony murder and robbery in the first degree. Notwithstanding our modification of the judgment, the aggregate sentence of 40 years to life imprisonment is unaffected (*see People v Munford*, 174 AD3d 412, 413 [1st Dept 2019], *lv denied* 34 NY3d 1018 [2019]; *People v Thang Thanh Nguyen*, 2 AD3d 1485, 1485 [4th Dept 2003]; *People v Jeanty*, 268 AD2d 675, 680 [3d Dept 2000], *lv denied* 94 NY2d 949 [2000]), and we reject defendant's contention that the aggregate sentence is unduly harsh and severe.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

157

KA 23-00570

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE E. COFFIE, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered February 14, 2023. The judgment convicted defendant upon a jury verdict of reckless endangerment in the first degree.

It is hereby ORDERED that the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of reckless endangerment in the first degree (Penal Law § 120.25) stemming from an incident where nine gun shots were fired outside a house toward the street. Defendant contends that the evidence is legally insufficient to establish that he was the shooter or that anyone was in or near the line of fire. Defendant's contention is not preserved for our review, both because his trial order of dismissal motion did not raise the specific grounds he advances on appeal and because he did not renew the motion after presenting evidence (*see generally People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The testimony of defendant's girlfriend established defendant's identity as the shooter, and we reject defendant's contention that her testimony was " 'so unworthy of belief as to be incredible as a matter of law' " (*People v Woods*, 26 AD3d 818, 819 [4th Dept 2006], *lv denied* 7 NY3d 765 [2006]; *see People v Toran*, 229 AD3d 1228, 1229 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]).

The evidence also established that the vehicle defendant arrived in when he went to the house was parked in the street, with a

passenger still inside the vehicle, when shots were fired near the vehicle. In addition, a bullet was recovered from a porch directly across the street from the shooting, and the jury could rationally infer that the bullet came from the gun used by defendant in the shooting. Under these circumstances, there is a valid line of reasoning and permissible inferences to enable the jury to find that defendant acted recklessly under circumstances evincing a depraved indifference to human life and created a grave risk of death to a bystander (*see People v Collins*, 70 AD3d 1366, 1367 [4th Dept 2010], *lv denied* 14 NY3d 839 [2010]).

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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). 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" (*id.*).

Defendant's contention that he was denied his right to be convicted only on charges determined by a grand jury is not preserved for our review (*see People v Hursh*, 191 AD3d 1453, 1454 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that County Court failed to comply with the procedure for disclosure of jury notes to counsel set forth in *People v O'Rama* (78 NY2d 270 [1991]). County Court read the jury note at issue into the record in open court in the presence of defendant, defense counsel, and the jury, and thus no mode of proceedings error occurred and defendant was required to object in order to preserve his present contention for review (*see People v Nealon*, 26 NY3d 152, 160-161 [2015]; *People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025]; *People v Wilson*, 158 AD3d 1204, 1204-1205 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]), which he failed to do. 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]).

Defendant further failed to preserve for our review his contention that prosecutorial misconduct on summation deprived him of a fair trial (*see People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]). In any event, to the extent that the prosecutor's remarks were improper, they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]; *see People v Hills*, 234 AD3d 1311, 1314 [4th Dept 2025], *lv denied* 43 NY3d 963 [2025]). We reject defendant's further contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 146-147 [1981]). We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, reveal that defendant received meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998];

Baldi, 54 NY2d at 147).

Inasmuch as defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot (*see People v Castellano*, 232 AD3d 1305, 1305-1306 [4th Dept 2024]; *People v Ismael*, 210 AD3d 1528, 1529-1530 [4th Dept 2022]; *People v Boley*, 126 AD3d 1389, 1390 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). Even assuming, arguendo, that defendant's contention is not moot, we would decline to reduce the sentence as a matter of discretion in the interest of justice (*see Ismael*, 210 AD3d at 1530).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

158

KA 24-01473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER O'NEAL, JR., DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 29, 2024. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, he validly waived his right to appeal (*see People v Moody*, 240 AD3d 1323, 1324 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Williams*, 237 AD3d 1581, 1582 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* 589 US 1302 [2020]). While defendant is correct that Supreme Court failed to ascertain defendant's understanding of the contents of the written waiver of the right to appeal on the record, that "deficiency . . . is of no moment where, as here, the oral waiver was adequate" (*People v Brinson*, 240 AD3d 1376, 1377 [4th Dept 2025], *lv denied* 44 NY3d 1064 [2025]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant further contends that the court abused its discretion in denying his motion to withdraw his guilty plea on the ground of ineffective assistance of counsel without holding a hearing. We reject that contention. As an initial matter, we note that defendant's contention survives his valid waiver of the right to appeal " 'only insofar as he contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance' " (*People v*

Strickland, 103 AD3d 1178, 1178 [4th Dept 2013]; *see People v Wong*, 151 AD3d 1853, 1854 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]). "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[ ] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]; *see People v Ciskiewic*, 219 AD3d 1696, 1696 [4th Dept 2023], *lv denied* 40 NY3d 1091 [2024]). Here, "nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Raghnal*, 185 AD3d 1411, 1413 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020] [internal quotation marks omitted]), "[d]efendant admitted each element of the offense[ ] during his plea allocution and did not claim either that he was innocent or that he had been coerced[,] . . . [and defendant's claims] presented credibility issues that the court could properly resolve without a hearing" (*People v Newsome*, 140 AD3d 1695, 1696 [4th Dept 2016] [internal quotation marks omitted]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

161

KA 22-02026

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTEZ MCLAURIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered October 21, 2022. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [3]), attempted robbery in the first degree (§§ 110.00, 160.15 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Defendant contends that County Court erred in refusing his request to charge manslaughter in the second degree as a lesser included offense of murder in the second degree. We reject that contention. While, as the People correctly concede, manslaughter in the second degree (*see* Penal Law § 125.15) is a lesser included offense of murder in the second degree under Penal Law § 125.25 (1) (intentional murder) (*see People v McIntosh*, 162 AD3d 1612, 1613 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]), defendant was not prejudiced by the failure to charge the lesser offense because he was acquitted on the intentional murder count (*see People v Brown*, 53 NY2d 979, 981 [1981]; *People v Ashraf*, 186 AD2d 1057, 1058 [4th Dept 1992], *lv denied* 80 NY2d 1025 [1992]). Rather, defendant was convicted of felony murder (*see* § 125.25 [3]) and manslaughter in the second degree is not a lesser included offense of that crime (*see People v Langlois*, 17 AD3d 772, 774 [3d Dept 2005]).

Defendant's challenge to the court's second *Allen* charge is

unpreserved for our review (*see generally People v Moore*, 213 AD3d 1213, 1214 [4th Dept 2023], *lv denied* 39 NY3d 1142 [2023]), 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]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, his sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contention and conclude that it does not warrant reversal or modification of the judgment.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

165

TP 25-01499

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

IN THE MATTER OF LEON THOMAS, 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 (KATE H. NEPVEU 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 27, 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 hearing, that he violated several incarcerated individual rules. To the extent that petitioner contends that the determination finding that he violated incarcerated individual rules 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]) and 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]) is not supported by substantial evidence, we note that "his plea of guilty to those violations precludes our review of his contention" (*Matter of Caballero v Annucci*, 187 AD3d 1671, 1672 [4th Dept 2020]; *see Matter of Ingram v Annucci*, 151 AD3d 1778, 1778 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Matter of Williams v Annucci*, 133 AD3d 1362, 1363 [4th Dept 2015]). We have reviewed petitioner's remaining contention and conclude that it does not require a different result.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

176

KA 23-00327

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS A. MACHADO-GARCIA, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (RYAN ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered December 22, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the plea was not entered knowingly, intelligently, and voluntarily because Supreme Court failed to advise him of the sentencing consequences of Penal Law § 70.25 (2-b). By failing to move to withdraw the plea or to vacate the judgment of conviction on that ground, defendant failed to preserve his contention for our review (*see People v Laury*, 156 AD3d 1473, 1473 [4th Dept 2017], *lv denied* 32 NY3d 939 [2018]; *see generally People v Delorbe*, 35 NY3d 112, 119 [2020]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Inasmuch as defendant's contentions regarding the effective assistance of counsel would survive even a valid waiver of the right to appeal to the same extent that they would survive his plea, we need not address the validity of the waiver of the right to appeal (*see People v Burgess*, — AD3d —, —, 2026 NY Slip Op 01892, *1 [4th Dept 2026]; *People v Shaw*, 222 AD3d 1401, 1401, 1403 [4th Dept 2023], *lv denied* 42 NY3d 930 [2024]). Defendant's contention that he was denied effective assistance of counsel prior to entering his plea does not survive his plea because defendant "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his

attorney[’s] allegedly poor performance” (*People v Dewiel*, 100 AD3d 1524, 1525 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013] [internal quotation marks omitted]; *see generally People v Richards*, 239 AD3d 1330, 1331 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025]). Defendant further contends that defense counsel failed to present sufficient mitigating circumstances at sentencing to warrant the imposition of a sentence that would run concurrently with a sentence imposed on an unrelated conviction (*see* Penal Law § 70.25 [2-b]). Even assuming, arguendo, that defendant’s contention survives his guilty plea and waiver of the right to appeal (*see People v McFarley*, 144 AD3d 1521, 1522 [4th Dept 2016]), we conclude that, under the circumstances of this case, defense counsel’s inability to persuade the sentencing court to impose concurrent sentences did not constitute ineffective assistance of counsel (*see generally People v Avent*, 178 AD3d 1403, 1405 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *see People v Smith*, 300 AD2d 745, 746 [3d Dept 2002], *lv denied* 99 NY2d 620 [2003]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

177

KA 20-00981

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVOR E. CLARKE, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered May 28, 2020. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (five counts), sexual abuse in the third degree, predatory sexual assault against a child (three counts), and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences of incarceration imposed on counts 2 and 6 of the indictment shall run concurrently with each other and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of five counts of sexual abuse in the first degree (Penal Law § 130.65 [1], [4]), three counts of predatory sexual assault against a child (former § 130.96), one count of sexual abuse in the third degree (§ 130.55), and two counts of endangering the welfare of a child (§ 260.10 [1]).

Defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495; *see People v Streeter*, 118 AD3d 1287, 1288 [4th Dept

2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]). Although a different verdict would not have been unreasonable, we cannot conclude that the jurors " 'failed to give the evidence the weight it should be accorded' " (*People v Bailey*, 239 AD3d 1375, 1376 [4th Dept 2025], *lv denied* 44 NY3d 1009 [2025]). Any inconsistencies in the testimony of the witnesses merely presented credibility issues for the jury to resolve (*see People v Cerroni*, 225 AD3d 1117, 1120 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]; *People v Watts*, 218 AD3d 1171, 1173-1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]; *People v Woolson*, 122 AD3d 1353, 1355 [4th Dept 2014], *lv denied* 25 NY3d 1078 [2015]).

Defendant further contends that County Court deprived him of his constitutional right to present a defense when it precluded him from questioning one of the victims about statements she attributed to defendant that she had previously attributed to a third party. We conclude that "defendant did not assert a constitutional right to introduce the excluded evidence at trial," and that his constitutional claim is therefore unpreserved for our review (*People v Simmons*, 106 AD3d 1115, 1116 [2d Dept 2013], *lv denied* 22 NY3d 1043 [2013]; *see People v Garrow*, 126 AD3d 1362, 1363 [4th Dept 2015]), 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]).

Finally, we agree with defendant that the sentence is unduly harsh and severe. "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime[s] charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*People v Farrar*, 52 NY2d 302, 305 [1981]). Here, although defendant's conduct was heinous and despicable, we conclude that the aggregate prison sentence of 52 years to life is not justified under the circumstances of this case (*see People v Franklin*, 206 AD3d 1610, 1613 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). In contrast to the aggregate sentence imposed by the court, which effectively guarantees a life sentence without the possibility of parole, we conclude that a prison sentence aggregating to 37 years to life is an appropriate sanction for the crimes committed (*see id.*). We therefore modify the judgment, as a matter of discretion in the interest of justice, by directing that the sentences of incarceration imposed on counts 2 and 6 of the indictment shall run concurrently with each other (*see* CPL 470.15 [6] [b]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

178

KA 25-00383

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH SERRANO, DEFENDANT-APPELLANT.

MICHAEL JOS. WITMER, ROCHESTER, FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 21, 2023. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

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

Contrary to defendant's contention, we conclude, after 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]), that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "Issues of credibility are primarily for the jury's determination" (*People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *see People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]) and, thus, we "must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *Bleakley*, 69 NY2d at 495). Here, the testimony of the two eyewitnesses, particularly when viewed in conjunction with the supporting ballistics evidence, "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]; *see Edwards*, 159 AD3d at 1426), and we see no basis for disturbing the jury's credibility determinations.

Defendant failed to preserve for our review his contention that his constitutional right to confront witnesses against him was violated when the victim's autopsy report was admitted in evidence during the testimony of a medical examiner who did not prepare the report (*see* CPL 470.05 [2]; *People v Bacon*, 44 NY3d 1076, 1078 [2025]; *People v Flowers*, 166 AD3d 1492, 1496 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]).

Contrary to defendant's contention, Supreme Court did not err in refusing to suppress statements defendant made to police investigators while at a hospital. "[B]oth the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33 [1976]; *see People v Hailey*, 153 AD3d 1639, 1640-1641 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017]). Although defendant was in custody at the time the statements he sought to suppress were made (*cf. People v Green*, 197 AD3d 993, 995 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]), the statements were made in response to a threshold inquiry that was "intended to ascertain the nature of the situation during initial investigation of a crime, rather than to elicit evidence of a crime, and those statements thus were not subject to suppression" (*People v Mitchell*, 132 AD3d 1413, 1414 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016] [internal quotation marks omitted]; *see People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* 580 US 920 [2016]).

Defendant failed to preserve for our review his contention that a photo array identification procedure was unduly suggestive on the grounds that it depicted him in a hospital gown and used a photograph of him that had been broadcast in the media because he did not raise those specific grounds at the suppression hearing (*see* CPL 470.05 [2]; *People v Pinet*, 201 AD3d 1370, 1370 [4th Dept 2022], *lv denied* 38 NY3d 953 [2022]; *People v Bell*, 19 AD3d 1074, 1075 [4th Dept 2005], *lv denied* 5 NY3d 803 [2005], *reconsideration denied* 5 NY3d 850 [2005]).

Defendant's contention that the prosecutor committed misconduct during the grand jury proceeding by failing to correct a witness's allegedly perjurious statement and not disclosing to the grand jury that the same witness did not identify defendant in the first of two photo array identification procedures administered to her is not preserved for our review. Defendant, while seeking dismissal of the indictment "on the general ground that the grand jury proceeding was defective, . . . failed to set forth the specific ground[s] for dismissal now set forth on appeal" (*People v Nesmith*, 242 AD3d 1564, 1565 [4th Dept 2025], *lv denied* 44 NY3d 1067 [2026]; *see* CPL 470.05 [2]; *People v Brown*, 81 NY2d 798, 798 [1993]).

Defendant failed to preserve for our review his present contention that the court erred in failing to preclude a police investigator's testimony as a sanction for the People's failure to disclose photographs and documentation related to a search of defendant's vehicle because, at trial, he did not request the sanction now sought on appeal (*see* CPL 470.05 [2]; *People v Elmore*, 211 AD3d

1536, 1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]; *People v Manigualt*, 125 AD3d 1480, 1480 [4th Dept 2015], *lv denied* 25 NY3d 1074 [2015]). "[I]n the absence of further objection or a request for a mistrial, [the issuance of an adverse inference instruction] must be deemed to have corrected the error to the defendant's satisfaction" (*People v Contreras*, 154 AD3d 1320, 1322 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018] [internal quotation marks omitted]; *see People v Acosta*, 134 AD3d 1525, 1526 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during cross-examination and summation (*see People v Marra*, 96 AD3d 1623, 1626 [4th Dept 2012], *affd* 21 NY3d 979 [2013]; *People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Brown*, 94 AD3d 1461, 1462 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]). In any event, "[r]eversal on grounds of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77 [4th Dept 1984], *lv denied* 63 NY2d 711 [1984]), and that cannot be said here (*see People v Alligood*, 115 AD3d 1346, 1347-1348 [4th Dept 2014], *lv denied* 23 NY3d 1017 [2014]; *People v Rivers*, 82 AD3d 1623, 1624 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]).

Contrary to defendant's contention, the court did not err in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 insofar as it was based on alleged juror misconduct. A motion to set aside a verdict based on juror misconduct "must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief" (CPL 330.40 [2] [a]; *see* CPL 330.30 [2]). Here, defendant's motion insofar as it was based on juror misconduct " 'was supported only by hearsay allegations contained in an [affirmation] of defense counsel' " (*People v Meredith*, 220 AD3d 1201, 1202 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *see People v Kerner*, 299 AD2d 913, 913 [4th Dept 2002], *lv denied* 99 NY2d 583 [2003]).

While we agree with defendant that the People failed to meet their obligation of disclosing impeachment material with respect to an evidence technician (*see generally Giglio v United States*, 405 US 150, 150-154 [1972]), the "failure by the People to comply with their continuing discovery obligations under CPL 245.60 . . . does not . . . implicate speedy trial considerations under CPL 30.30" (*People v Radford*, 237 AD3d 1511, 1513 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]), and we conclude that, contrary to defendant's contention, the court did not abuse its discretion in denying that part of his motion to set aside the verdict pursuant to CPL 330.30 based on that alleged *Giglio* violation. "[I]n the context of this case, the value of the

undisclosed information as admissible impeachment evidence would have been, at best, minimal" (*People v Garrett*, 23 NY3d 878, 892 [2014], *rearg denied* 25 NY3d 1215 [2015] [internal quotation marks omitted]).

We further conclude that the court did not abuse its discretion in denying defendant's motion to set aside the verdict pursuant to CPL 330.30 insofar as it was based on alleged late expert disclosure. Under the circumstances of this case, the limited enhancements to the subject video evidence, which consisted solely of zooming in and adjusting the brightness and contrast of the footage using video editing software, were "within the ken of the typical juror," and thus expert disclosure was not required with respect to the testimony and video evidence in question (*People v Cronin*, 60 NY2d 430, 433 [1983]; *see People v Lemery*, 107 AD3d 1593, 1594 [4th Dept 2013], *lv denied* 22 NY3d 956 [2013]; *see generally People v Ashe*, 208 AD3d 1500, 1507 [3d Dept 2022], *lv denied* 39 NY3d 961 [2022]).

Contrary to defendant's contention, we conclude that he received effective assistance of counsel. When analyzing a contention of ineffective assistance of counsel, the evidence, law, and circumstances of a particular case must be "viewed in totality and as of the time of the representation" and, if they reveal "that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Here, defendant failed to demonstrate the absence of a legitimate or strategic basis for defense counsel's decision not to seek admission in evidence of body-worn camera footage from the officers responding to the shooting, the recording of the 911 call from the victim's girlfriend, or hearsay statements contained within the victim's autopsy report and, thus, "failed to establish that he was denied effective assistance of counsel" on those grounds (*People v Dombrowski*, 94 AD3d 1416, 1417 [4th Dept 2012], *lv denied* 19 NY3d 959 [2012]). Similarly, defense counsel was not ineffective for failing to seek admission in evidence of inadmissible hearsay statements contained in a recorded telephone conversation involving one of the prosecution's witnesses (*see People v McCullough*, 144 AD3d 1526, 1527 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Geddes*, 49 AD3d 1255, 1256 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]), nor was defense counsel ineffective in failing to request that the court recuse itself or in failing to seek suppression of certain identification testimony. Such efforts would have been unlikely to succeed, and "defense counsel cannot be deemed ineffective for failing to make a motion [or argument] that would have had little to no chance of success" (*People v Weeks*, 221 AD3d 1469, 1471 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]). Notably, defense counsel made appropriate pretrial motions, conducted a suppression hearing and other pretrial hearings, presented opening and closing arguments, raised appropriate objections throughout the trial, effectively cross-examined the prosecution witnesses, and presented a cogent defense in challenging his identification as the shooter (*see People v Singleton*, 203 AD3d 1671, 1673 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]; *People v Goncalves*, 283 AD2d 1005, 1005 [4th Dept 2001], *lv denied* 96 NY2d 918

[2001]).

Finally, defendant contends that he was denied a fair trial by the cumulative effect of the errors alleged herein. We reject defendant's contention with respect to the preserved alleged errors previously reviewed, and we decline to exercise our power to review his contention with respect to the unpreserved alleged errors as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Lathrop*, 171 AD3d 1473, 1475 [4th Dept 2019], *lv denied* 33 NY3d 1106 [2019]).

Entered: April 24, 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 23-00328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS MACHADO-GARCIA, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (RYAN ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered December 22, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of stolen property in the third degree (two counts), burglary in the third degree (two counts), attempted grand larceny in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts of criminal possession of stolen property in the third degree (Penal Law § 165.50), two counts of burglary in the third degree (§ 140.20), one count of attempted grand larceny in the third degree (§§ 110.00, 155.35 [2]), and one count of grand larceny in the fourth degree (§ 155.30 [1]). Viewing the evidence in light of the elements of the crime of criminal possession of stolen property in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict with respect to that crime as charged in the first count of the indictment is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "Knowledge that property is stolen can be established through circumstantial evidence such as by evidence of recent exclusive possession, defendant's conduct[,] or contradictory statements from which guilt may be inferred" (*People v Cintron*, 95 NY2d 329, 332 [2000] [internal quotation marks omitted]; *see People v Waterford*, 124 AD3d 1246, 1246-1247 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *see also People v Brown*, 174 AD3d 1329, 1332 [4th Dept 2019], *lv denied* 34 NY3d 979 [2019]). Here, the record establishes, inter alia, that defendant was found to be the sole occupant of the subject stolen vehicle parked in front of a business after midnight. When confronted

by police, defendant provided conflicting statements as to the vehicle's purported owner and was unable to provide contact information for that person. In light of the testimony at trial, we conclude that the jury was entitled to infer that defendant knowingly possessed a stolen vehicle (*see generally People v Ohse*, 114 AD3d 1285, 1286 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]).

Contrary to defendant's further contention, Supreme Court properly denied his motion to sever the counts of the indictment based on the separate incidents to which they pertained because he failed to show " 'good cause for severance' " (*People v Rios*, 107 AD3d 1379, 1380 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *see* CPL 200.20 [3]). The indictment charged defendant with counts arising from four separate theft-related incidents where defendant was alleged to be using a different stolen vehicle on each occasion. The offenses were each " 'the same or similar' and thus were properly joinable [pursuant to CPL 200.20 (2) (c)]" (*People v Cabrera*, 188 AD2d 1062, 1063 [4th Dept 1992]; *see People v Brown*, 172 AD3d 437, 437-438 [1st Dept 2019], *lv denied* 33 NY3d 1067 [2019]; *People v Smart* [appeal No. 2], 224 AD2d 999, 999-1000 [4th Dept 1996], *lv denied* 88 NY2d 854 [1996]). The evidence concerning each incident "was presented separately and was readily capable of being segregated in the minds of the jury," and defendant failed to establish that there was "a substantial likelihood that the jury would be unable to [separately consider the evidence]" (*Rios*, 107 AD3d at 1380). Indeed, "the fact that defendant was acquitted of [certain] charges 'indicates that the jury was able to consider the proof concerning each count separately' " (*id.*; *see People v Smith*, 147 AD3d 1527, 1528 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Barber-Montemayor*, 138 AD3d 1455, 1457 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]). As defendant correctly concedes, he failed to preserve his alternative contention that the court provided the jury with an insufficient limiting instruction regarding the jury's duty to consider each of the counts of the indictment separately (*see generally People v Hymes*, 174 AD3d 1295, 1299 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]).

We likewise reject defendant's contention that he received ineffective assistance of counsel. Initially, defendant's contention that he received ineffective assistance of counsel at sentencing is not properly before us on this appeal. Defendant was sentenced on two indictments, i.e., the instant indictment and a subsequent indictment related to charges arising from conduct that occurred while the charges on the instant indictment were pending. These circumstances triggered the consecutive sentencing regime provided by Penal Law § 70.25 (2-b). Defendant contends that defense counsel was ineffective at sentencing by failing to provide sufficient mitigating circumstances in favor of concurrent sentences as contemplated by that statute. Defendant's contention, however, relates to his judgment of conviction on the second indictment, not the instant indictment (*see People v Dunbar*, 183 AD3d 1263, 1264 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]). We conclude that defendant's remaining contentions regarding the alleged ineffectiveness of counsel represent "simple disagreement[s] with [trial] strategies, tactics or the scope of possible cross-examination" that do not constitute ineffective

assistance (*People v Mastin*, 232 AD3d 1268, 1269 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]; *see People v Austen*, 197 AD3d 861, 861-862 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]; *People v Case*, 197 AD3d 985, 988 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *People v Lozada*, 164 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

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

Entered: April 24, 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 24-01569

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

IN THE MATTER OF AKEEM M. AND AKEELAH M.

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

MEMORANDUM AND ORDER

THOMAS M., RESPONDENT-APPELLANT,
AND ROSE J., RESPONDENT.
(APPEAL NO. 1.)

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

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Thomas M. had neglected the subject children.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, respondent father appeals from three orders of fact-finding and disposition. In the orders in appeal Nos. 2 and 3, Family Court, inter alia, adjudged that he neglected the eldest and the youngest of the four subject children, respectively, and in appeal No. 1, the court, inter alia, adjudged that he neglected the two middle children. We affirm in each appeal.

Initially, to the extent that the father purports to appeal from a June 2022 temporary order entered in a separate neglect proceeding, we note that his contention is not properly before us inasmuch as he "failed to take a timely appeal from that order" (*Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458 [4th Dept 2015], *lv dismissed* 26 NY3d 995 [2015]; *see* Family Ct Act § 1113).

We reject the father's contention in appeal Nos. 1 and 2 that the court erred in determining that he neglected the three eldest children. Pursuant to Family Court Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to

the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug, or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." Thus, "neglect may in some circumstances be presumed if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs [their] judgment while [the] child is entrusted to [their] care" (*Matter of Samaj B. [Towanda H.-B.-Wade B.]*, 98 AD3d 1312, 1313 [4th Dept 2012]; *see Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449 [3d Dept 2011]). "In other words, [t]he presumption contained in Family [Court] Act § 1046 (a) (iii) operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established" (*Samaj B.*, 98 AD3d at 1313 [internal quotation marks omitted]; *see Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], *lv dismissed* 12 NY3d 747 [2009]). Here, we conclude that petitioner met its burden of proof at the fact-finding hearing that was held with respect to the three eldest children (first hearing). Petitioner established that the father tested positive for cocaine while he had custody of the eldest child and that the police responded to two domestic violence calls while the mother—who is a respondent in the proceedings in appeal Nos. 1 and 3—was pregnant with the two middle children, twins, during which the father was found to be severely intoxicated. Although the father denied using cocaine in his testimony, we "accord great deference to the findings of the court, which is in the best position to evaluate the character and credibility of the witnesses" (*Matter of Garland v Goodwin*, 13 AD3d 1059, 1059 [4th Dept 2004]).

Additionally, the evidence at the first hearing established that the father engaged in abusive behavior against the mother on at least two occasions while the eldest child was present, on at least one additional occasion while the mother was pregnant that resulted in the father having to be subdued by the police with a Taser, and on another occasion in the hospital immediately after the birth of the twins (*see Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1513 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]; *Matter of Michael WW.*, 20 AD3d 609, 611-612 [3d Dept 2005]). Thus, petitioner established by a preponderance of the evidence that the three eldest children's "physical, mental or emotional condition[s] [were] impaired or [were] in imminent danger of becoming impaired" by the father's actions (*Jacob W.*, 170 AD3d at 1513 [internal quotation marks omitted]; *see* Family Ct Act § 1012 [f] [i] [B]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]).

Likewise, contrary to the father's further contention with respect to appeal No. 3, we conclude that petitioner adduced sufficient evidence at the fact-finding portion of the relevant hearing concerning the youngest child to establish that he

derivatively neglected that child. As relevant here, "[t]he focus of the inquiry to determine whether derivative neglect is present is whether the evidence of . . . neglect of [the three eldest] child[ren] indicates a fundamental defect in the [father's] understanding of the duties of parenthood . . . or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" (*Matter of Eliora B. [Kennedy B.]*, 146 AD3d 772, 774 [2d Dept 2017] [internal quotation marks omitted]; *see Jacob W.*, 170 AD3d at 1513-1514). The evidence of the father's repeated physical abuse of the mother, as well as his verbal abuse during supervised visitation with all four subject children, established that his neglect of the eldest children is "so closely connected with the care of [the youngest] child as to indicate that [the youngest] child is equally at risk" of being neglected (*Matter of Marino S.*, 100 NY2d 362, 374 [2003], *cert denied* 540 US 1059 [2003]; *see Matter of Ryanna H. [Monique H.]*, 214 AD3d 1308, 1309-1310 [4th Dept 2023], *lv dismissed* 40 NY3d 964 [2023]; *see also* Family Ct Act § 1046 [a] [i]).

We also reject the father's contention in each appeal that petitioner failed to establish that it exercised reasonable efforts to encourage and strengthen his relationship with the subject children, as required by Family Court Act § 1052 (b) (i) (A). Petitioner created a services plan for the father, informed him on a monthly basis of its requirements, attempted home visits frequently, offered drug tests on a regular basis, provided the father with a clinical visitation service, and offered the father access to anger management services, domestic violence classes, and counseling, all of which the father refused. On this record, we conclude that petitioner " 'made reasonable efforts to prevent or eliminate the need for removal of the children from [the father's] home' " (*Matter of Ruth H. [Marie H.]*, 159 AD3d 1487, 1489 [4th Dept 2018]; *see Matter of Jack NN. [Sarah OO.]*, 173 AD3d 1499, 1503-1504 [3d Dept 2019], *lv denied* 34 NY3d 904 [2019]; *Matter of Cloey S. [Anthony T.]*, 99 AD3d 1080, 1081 [3d Dept 2012]).

Entered: April 24, 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 24-01570

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

IN THE MATTER OF AHMILIA M.

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

MEMORANDUM AND ORDER

THOMAS M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered September 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Akeem M. (Thomas M.)* ([appeal No. 1] — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: April 24, 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 25-00668

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

IN THE MATTER OF ALEENA M.

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

MEMORANDUM AND ORDER

ROSE J., RESPONDENT,
AND THOMAS M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered March 17, 2025, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Thomas M. had neglected the subject child.

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

Same memorandum as in *Matter of Akeem M. (Thomas M.)* ([appeal No. 1] — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: April 24, 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 25-00220

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

MEG BRAY AND BRIAN BRAY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SAURIN POPAT, M.D., DELAWARE MEDICAL GROUP, P.C., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 24, 2025, in a medical malpractice action. The order denied the motion of defendants Saurin Popat, M.D., and Delaware Medical Group, P.C., for summary judgment.

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

Memorandum: In this medical malpractice action, Saurin Popat, M.D. and Delaware Medical Group, P.C. (defendants) appeal from an order that denied their motion for summary judgment dismissing the "Amended/Supplemental" complaint against them. We affirm.

Contrary to defendants' contention, we conclude that, although they met their initial burden on their motion by establishing that they did not deviate from the accepted standard of care, plaintiffs raised triable issues of fact with respect to that element sufficient to defeat the motion (*see generally Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]). With respect to plaintiffs' opposition papers, we initially reject defendants' contention that plaintiffs' expert was unqualified to render an opinion regarding the issues in this case. Plaintiffs' anonymous expert averred in their expert affirmation that they are a physician, duly licensed to practice medicine, and that they are board certified by the American Board of Surgery with a clinical focus in endocrine surgery. The affirmation established that "[t]he specialized skills of [the] expert as demonstrated through [their] board certifications, taken together with the nature of the medical subject matter of th[e] action, are sufficient to support the inference that [their] opinion regarding [the] treatment [at issue]

was reliable" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Hilbrecht v Greco*, 189 AD3d 2073, 2074 [4th Dept 2020]). Plaintiffs' expert opined in their affirmation, inter alia, that Popat's assessment, diagnosis and treatment of plaintiff Meg Bray's condition fell below the accepted standard of care, thus presenting a "classic battle of the experts" that precludes summary judgment (*Hilbrecht*, 189 AD3d at 2074 [internal quotation marks omitted]).

Entered: April 24, 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 24-01898

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

ERIC C. BURNS AND HEATHER S. BURNS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VOYTEK W. SOBIERAJ, M.D., AND ASSOCIATED
RADIOLOGISTS OF THE FINGER LAKES, P.C.,
DEFENDANTS-RESPONDENTS.

PORTER LAW GROUP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., BINGHAMTON (RACHEL E. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Steuben County (Jason L. Cook, J.), entered October 16, 2024, in a medical malpractice action. The judgment dismissed the complaint upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the complaint is reinstated against defendants, and a new trial is granted.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Eric C. Burns (plaintiff) as the result of the alleged malpractice of defendant Voytek W. Sobieraj, M.D. At trial, plaintiffs' expert testified that Sobieraj deviated from medically acceptable treatment standards when reviewing a series of X-rays taken of plaintiff's lungs by failing to identify an abnormality as potentially cancerous. The jury returned a verdict finding that Sobieraj was not negligent. We agree with plaintiffs that reversal is required because Supreme Court improperly gave an error in judgment charge (*see* PJI 2:150).

"[A]n error [in] judgment charge is appropriate in a case where a doctor is confronted with several alternatives and, in determining appropriate treatment to be rendered, exercises [their] judgment by following one course of action in lieu of another" (*Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 139 [4th Dept 2007] [internal quotation marks omitted]; *see Spadaccini v Dolan*, 63 AD2d 110, 120 [1st Dept 1978]). However, such a charge should be given "only in a narrow category of medical malpractice cases in which there is evidence that [the] defendant physician considered and chose among

several medically acceptable treatment alternatives" (*Mancuso v Kaleida Health*, 172 AD3d 1931, 1935 [4th Dept 2019], *affd* 34 NY3d 1020 [2019] [internal quotation marks omitted]; *see Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002]; *Martin v Lattimore Road Surgicenter, Inc.*, 281 AD2d 866, 866 [4th Dept 2001]). An error in judgment charge is not warranted where, as here, there was no evidence introduced at trial that the defendant physician "made a choice between or among medically acceptable alternatives" (*Anderson*, 44 AD3d and 140), and the "plaintiffs' [sole] theory of [the] defendant's alleged malpractice ar[ose] from [the] defendant's alleged lack of due care in assessing [the] plaintiff's condition," inasmuch as "the [sole] issue before the jury was [then] whether [the] defendant's failure to diagnose [the] plaintiff's [condition] constituted a deviation from medically accepted standards of care" (*Vanderpool v Adirondack Neurosurgical Specialists, P.C.*, 45 AD3d 1477, 1478 [4th Dept 2007]; *see Lacqua v Silich*, 141 AD3d 690, 692 [2d Dept 2016]). Inasmuch as the error in judgment charge here "create[d] a risk that [the] jury w[ould] find that, because [Sobieraj] exercised his . . . best judgment, there can be no liability despite a failure to adhere to generally accepted standards of care," we conclude that the court's error in giving the charge cannot be deemed harmless (*Anderson*, 44 AD3d at 141; *see Rospierski v Harr*, 59 AD3d 1048, 1049-1050 [4th Dept 2009]; *Vanderpool*, 45 AD3d at 1478), and plaintiffs are thus entitled to a new trial.

Entered: April 24, 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 25-00553

PRESENT: LINDLEY, J.P., SMITH, GREENWOOD, AND DELCONTE, JJ.

HON. ACEA M. MOSEY,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

OFFICE OF COURT ADMINISTRATION,
RESPONDENT-DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

FEATHERSTONHAUGH, CLYNE & MCCARDLE, LLP, ALBANY (JAMES D. FEATHERSTONHAUGH OF COUNSEL), FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 10, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, inter alia, declared that the term nonjudicial personnel in Judiciary Law § 211 (1) (d) does not apply to Chief Clerks and Deputy Chief Clerks in Surrogates' Courts.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the decretal paragraphs are vacated, the petition-complaint insofar as it seeks relief pursuant to CPLR article 78 is denied, and judgment is granted in favor of respondent-defendant as follows:

> It is ADJUDGED and DECLARED that: (1) the term "nonjudicial personnel" in Judiciary Law § 211 (1) (d) applies to and includes the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts of the State of New York; (2) article VI, § 28 of the New York Constitution supersedes sections 2605 and 2606 of the Surrogate's Court Procedure Act; and (3) Judiciary Law § 211 and 22 NYCRR 80.1, through the authority of article VI, § 28 of the New York Constitution, vest the Chief Administrator of the Courts with the power and authority to appoint the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts of the State of New York to the exclusion of the Surrogates.

Memorandum: This hybrid CPLR article 78 proceeding and declaratory judgment action arises from a dispute between petitioner-plaintiff (plaintiff), who is the Erie County Surrogate, and respondent-defendant (defendant) over who has the authority to appoint

the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts—the respective local Surrogates or the Chief Administrator of the Courts (Chief Administrator). Plaintiff commenced this proceeding-action seeking, inter alia, a declaration that she held the authority to make appointments to the Chief Clerk and Deputy Chief Clerk positions in Erie County Surrogate's Court. Supreme Court agreed with plaintiff and, inter alia, granted declaratory relief effectively providing her with the relevant appointment authority to the exclusion of the Chief Administrator. We reverse inasmuch as we conclude that the Chief Administrator, to the exclusion of the respective Surrogates, possesses the power and authority to appoint the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts.

It is undisputed that the plain terms of Surrogate's Court Procedure Act article 26, enacted in 1966, placed the authority to appoint the Chief Clerks and Deputy Chief Clerks with the respective Surrogates (*see* SCPA 2605 [1], [2]). Notwithstanding that statutory provision, however, New York Constitution, article VI, § 28, effective in 1977, "expressly vests the Chief Administrator, on behalf of the Chief Judge, with the broad power to supervise the administration and operation of the Unified Court System" (*Matter of Met Council v Crosson*, 84 NY2d 328, 334-335 [1994]). The Unified Court System includes the Surrogates' Courts (*see* NY Const, art VI, § 1). "The powers of the Chief Judge are said to be 'complete' and may be exercised fully by the Chief Administrator on behalf of the Chief Judge" (*Met Council*, 84 NY2d at 335). On behalf of the Chief Judge, those powers include the power to appoint and remove "all nonjudicial officers and employees" with exceptions not presently relevant (22 NYCRR 80.1 [b] [3]; *see* Judiciary Law § 211 [1] [d]; *see also Met Council*, 84 NY2d at 335).

Although the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts possess significant authority, we agree with defendant that they are, nevertheless, nonjudicial officers. The Chief Clerks, for example, have the authority to sign papers or records of the courts, to adjourn matters, to administer oaths, to supervise disclosure and, in certain circumstances, to hear and report matters to the Surrogates (*see* SCPA 506 [6] [a]; 2609). Such responsibilities, however, are akin to those of referees (*see* SCPA 506; CPLR 4201), which are themselves "nonjudicial officers of the court appointed to assist it in the performance of its judicial functions" (*Met Council*, 84 NY2d at 332; *see generally* CPLR 4312 [5]; *People v Davis*, 13 NY3d 17, 25-26 [2009]). Thus, given the "nature of the position[s]," we agree with defendant that the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts are nonjudicial positions and, "[a]s such, they are subject to the constitutional appointment power of the Chief Administrator, notwithstanding [article 26 of the Surrogate's Court Procedure Act]. Since the appointment powers of the Chief Administrator flow from the State Constitution, they cannot be abrogated by statute" (*Met Council*, 84 NY2d at 335).

Entered: April 24, 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 24-01399

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

AMBER WELL DRILLING, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY A. REED, JENNIFER M. REED,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

CROSSMORE & TIFFANY, ITHACA (EDWARD Y. CROSSMORE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JENNIFER M. YETTO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered July 30, 2024, in an action for breach of contract. The judgment awarded plaintiff money damages.

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

Memorandum: Plaintiff, Amber Well Drilling, LLC, a company that provides well drilling and water supply system services, commenced this action alleging, inter alia, that Timothy A. Reed and Jennifer M. Reed (defendants), residential property owners, had breached a written contract with plaintiff for such services by failing to fully pay for their provision and that plaintiff was therefore entitled to recover the remaining balance as well as interest and attorneys' fees as provided in the contract. The matter proceeded to a jury trial, during which Supreme Court ruled and also instructed the jury that plaintiff could not enforce the contract against defendants because the contract failed to conform to the requirements of General Business Law § 771, but that plaintiff could recover for completed work under principles of quantum meruit if the jury found that plaintiff had established the elements of such a claim. The jury rendered a verdict in favor of plaintiff under the theory of quantum meruit.

Plaintiff subsequently moved for the issuance of a judgment in the amount awarded by the jury, plus interest and attorneys' fees as provided in the contract. Plaintiff contended in an attorney affidavit and a memorandum of law (NY St Cts Elec Filing [NYSCEF] Doc No. 114 at 1-4), the latter of which we take judicial notice for preservation purposes (*see Nosegbe v Charles*, 227 AD3d 1400, 1404 [4th

Dept 2024]), that, although the court had ruled in accordance with Appellate Division precedent that the contract was unenforceable against defendants due to its failure to comply with General Business Law § 771, the contract should be partially enforced by severing the provision allowing for plaintiff to recover interest and attorneys' fees in the event of a default in payment.

The court determined in a decision and order that plaintiff could not recover interest and attorneys' fees as provided in the contract because the contract was unenforceable, but the court nonetheless determined that plaintiff was entitled to prejudgment interest for a certain period, albeit at a lower rate than that provided in the contract. Plaintiff now appeals from a final judgment awarding damages together with interest and statutory costs and disbursements, which appeal brings up for review the prior order denying plaintiff's posttrial motion insofar as it sought an award of interest and attorneys' fees as provided in the contract (*see* CPLR 5501 [a] [1]). We affirm.

We note at the outset that, although defendants initially took a cross-appeal, their cross-appeal was deemed dismissed for failure to timely perfect (*see* 22 NYCRR 1250.10 [a]). In addition, we granted plaintiff's motion to strike that part of defendants' answering brief that was in support of their cross-appeal, and we denied defendants' subsequent motion to vacate the dismissal of their cross-appeal (*see* 22 NYCRR 1250.10 [c]). Consequently, any requests by defendants for affirmative relief on appeal are not before us (*see Edgett v North Fork Bank*, 72 AD3d 1635, 1635 [4th Dept 2010]).

On its appeal, plaintiff contends that we should revisit our precedent in this area of law by adopting a rule that would allow plaintiff to fully enforce the home improvement contract, including the provision for interest and attorneys' fees in the event of a default in payment, via a breach of contract cause of action against defendants, notwithstanding the failure of the contract to strictly comply with General Business Law § 771 or, alternatively, that the contract should be partially enforced by severing from the remainder of the unenforceable contract the provision allowing for plaintiff to recover interest and attorneys' fees.

By way of background, the legislature enacted article 36-A of the General Business Law, which governs home improvement contracts, in order to provide a meaningful measure of protection for residential owners and tenants against fraudulent activities by unscrupulous home improvement contractors while imposing only a minimal burden on legitimate contractors (L 1987, ch 421; *see* Senate Introducer's Mem in Support, Bill Jacket, L 1987, ch 421 at 6; Assembly Introducer's Mem in Support, Bill Jacket, L 1987, ch 421 at 8; Attorney General's Mem in Support, Bill Jacket, L 1987, ch 421 at 21-22; *see also White Knight Constr. Contrs., LLC v Haugh*, 216 AD3d 1345, 1347 [3d Dept 2023] [*White Knight*]). Every home improvement contract subject to the provisions of the article must be in writing and signed by all parties thereto, and must contain numerous terms and notices to the party

purchasing the home improvement (*see* General Business Law § 771 [1]; *White Knight*, 216 AD3d at 1347). Before any work is done, the party purchasing the home improvement must be furnished with a signed copy of the written agreement, which must be legible, in plain English, and in such a form to describe clearly any other document incorporated into the contract (*see* § 771 [2]).

Under our precedent, "the failure 'to enter into a signed written home improvement contract in conformity with General Business Law § 771 bars recovery [by the contractor] based upon breach of contract' " (*Weiss v Zellar Homes, Ltd.*, 169 AD3d 1491, 1493 [4th Dept 2019]; *see Frank v Feiss*, 266 AD2d 825, 826 [4th Dept 1999]). Thus, when a home improvement contract fails to comply with the statutory requirements, the contract is unenforceable by the contractor against the property owner (*see Weiss*, 169 AD3d at 1492-1493). The Third Department agrees that " 'a contractor cannot enforce a contract that fails to comply with General Business Law § 771' " (*Grey's Woodworks, Inc. v Witte*, 173 AD3d 1322, 1323 [3d Dept 2019]; *see e.g. Schott v Lucatelli*, 239 AD3d 1125, 1126 [3d Dept 2025]; *White Knight*, 216 AD3d at 1347; *LaPenna Contr., Ltd. v Mullen*, 187 AD3d 1451, 1453 [3d Dept 2020]), whereas the Second Department primarily holds that "the failure to strictly comply with all of the requirements of General Business Law § 771 does not render a home improvement contract per se unenforceable in all cases" (*Big C Contr. Corp. v Fishman*, 237 AD3d 1022, 1024 [2d Dept 2025]; *see Wowaka & Sons v Pardell*, 242 AD2d 1, 6 [2d Dept 1998]; *but see Home Constr. Corp. v Beaury*, 149 AD3d 699, 702 [2d Dept 2017]; *see generally Chapman v Davis*, 75 Misc 3d 360, 368 [Pleasant Valley Just Ct 2022]). Nevertheless, under our precedent, "although 'the failure to strictly comply with the statute bars recovery under an oral or insufficiently detailed written home improvement contract, such failure does not preclude recovery for completed work under principles of quantum meruit' " (*Weiss*, 169 AD3d at 1493; *see Frank*, 266 AD2d at 826; *see also Harter v Krause*, 250 AD2d 984, 986-987 [3d Dept 1998]).

Here, as the court properly ruled at trial, the contract indisputably failed to comply with General Business Law § 771 because, inter alia, it did not contain plaintiff's license number; state the approximate date of commencement and substantial completion of the work; specify whether the parties had determined a definite completion date to be of the essence; provide a description of the work to be performed and the materials to be provided to defendants, including make, model number or any other identifying information; or include certain requisite notices to defendants (*see* § 771 [1]; *LaPenna Contr., Ltd.*, 187 AD3d at 1452-1453; *Grey's Woodworks, Inc.*, 173 AD3d at 1323; *Weiss*, 169 AD3d at 1492-1493). Thus, in accordance with binding precedent, the court properly determined that "the failure 'to enter into a signed written home improvement contract in conformity with General Business Law § 771 bar[red] recovery [by plaintiff against defendants] based upon breach of contract' " (*Weiss*, 169 AD3d at 1493; *see Frank*, 266 AD2d at 826; *see also LaPenna Contr., Ltd.*, 187 AD3d at 1452-1453; *Grey's Woodworks, Inc.*, 173 AD3d at 1323). Plaintiff's " 'failure to strictly comply with the statute bar[red]

recovery under . . . [the] insufficiently detailed written home improvement contract,' " even though " 'such failure d[id] not preclude recovery for completed work under principles of quantum meruit' " (*Weiss*, 169 AD3d at 1493; *see Frank*, 266 AD2d at 826).

Inasmuch as plaintiff did not raise the specific argument in the trial court, plaintiff failed to preserve for appellate review its contention that, notwithstanding the failure of the contract to strictly comply with General Business Law § 771, it should be allowed to fully enforce the contract, including the provision for interest and attorneys' fees in the event of a default in payment, via a breach of contract cause of action against defendants (*see Sabine v State of New York*, 43 NY3d 1015, 1016-1018 [2024]). Even " 'in the face of adverse Appellate Division precedent, litigants are expected to preserve' their challenges" for appellate review (*id.* at 1017 n 2). Contrary to plaintiff's assertion, "the rarely used exception to the preservation rule" for a new issue, even one of pure law, "which applies only where the unpreserved argument could not have been avoided through 'factual showings or legal countersteps' in the trial court . . . , does not apply here" (*id.* at 1018, quoting *Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]). Indeed, the Court of Appeals has expressly disapproved of the application of that exception to preservation in these circumstances (*see id.*). We decline to address plaintiff's contention in the interest of justice (*see generally id.* at 1017; *Bingham*, 99 NY2d at 359).

Furthermore, we reject plaintiff's more narrow, preserved contention that the interest and attorneys' fees provision of the contract may be severed from the otherwise unenforceable contract and then enforced against defendants. " '[A] contractor cannot enforce a contract that fails to comply with General Business Law § 771' " (*Grey's Woodworks, Inc.*, 173 AD3d at 1323; *see LaPenna Contr., Ltd.*, 187 AD3d at 1453; *Weiss*, 169 AD3d at 1492-1493), and that includes a provision for interest and attorneys' fees (*see J.B. Sterling Co. v Verhelle*, 397 F Supp 3d 286, 296 [WD NY 2019], *reconsideration denied* 470 F Supp 3d 298 [WD NY 2020]; *see generally Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022]; *NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). In that regard, we agree with defendants that "[t]o allow a contractor to draft a noncompliant contract" and yet still recover attorneys' fees and interest at the contractor's chosen rate as provided in the contract would only "incentivize contractors to disregard the statute, thereby thwarting the intent of the statute," which is "designed to protect the homeowner" (*White Knight*, 216 AD3d at 1347).

Entered: April 24, 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 25-00721

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

JAMES PENN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER REV HOLDINGS, LLC, DEFENDANT-RESPONDENT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered April 17, 2025, in an action pursuant to RPAPL articles 6 and 15. The order granted the motion of defendant for summary judgment dismissing the complaint and on its counterclaims.

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

Memorandum: In this action involving the parties' competing claims to ownership of real property pursuant to RPAPL article 15, plaintiff appeals from an order that granted defendant's motion seeking, inter alia, summary judgment dismissing the complaint and on its counterclaims. We reverse.

"To obtain summary judgment in an action to quiet title pursuant to RPAPL article 15, the movant must establish, prima facie, that it holds title, or that the nonmovant's title claim is without merit" (*Corriette v Mele*, 244 AD3d 679, 682 [2d Dept 2025] [internal quotation marks omitted]). "[A] purchaser is charged with knowledge of the exact rights claimed by all persons in possession" (*Raines v Moran*, 57 NYS2d 800, 807 [Sup Ct, Ontario County 1945], *affd* 270 App Div 979 [4th Dept 1946]; *see Phelan v Brady*, 119 NY 587, 591 [1890]). Indeed, a purchaser is charged with "constructive notice of *all the interests, rights and equities* which [a tenant] may have in the property in question by reason of the fact that [such tenant] was in actual possession of the property at the time that conveyances thereof were accepted by [the purchaser]" (*Raines*, 57 NYS2d at 807 [emphasis added]; *see Ward v Ward*, 52 AD3d 919, 920 [3d Dept 2008]).

Here, defendant, which asserts that it acquired title to the

property in question pursuant to a warranty deed, failed to meet its initial burden on its motion. Defendant submitted, inter alia, a lease agreement between plaintiff and a prior owner of the property—which contains a purported purchase option—as well as the affirmation of defendant's managing member, in which he made averments indicating that he knew plaintiff was a tenant prior to recording the warranty deed. Because defendant's own submissions raise triable issues of fact regarding each of plaintiff's causes of action and each of defendant's counterclaims, we conclude that Supreme Court erred in granting defendant's motion (*see generally Ulrich v Estate of Zdunkiewicz*, 8 AD3d 1014, 1015 [4th Dept 2004]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Entered: April 24, 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 23-00355

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN SANCHEZ, DEFENDANT-APPELLANT.

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

JONATHAN SANCHEZ, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 15, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for attempted murder in the second degree under count 2 of the indictment to a determinate term of 15 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and three counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). The charges arose from an incident during which numerous men drove two vehicles to a memorial service where several of the men exited the vehicles and opened fire on the crowd as part of an alleged gang war dispute. Two people were shot, and one died. Four men were indicted on the same five charges under a theory that they were acting in concert with each other.

In his main brief, defendant contends that County Court abused its discretion in issuing a protective order under CPL 245.70 regarding one witness. We reject that contention. " '[T]he legislature, when enacting CPL 245.70, created an exception for disclosure relating to confidential informants' that 'permits the People to withhold and redact from discovery materials the name and contact information of a confidential informant' " (*People v Taylor*,

237 AD3d 1543, 1544 [4th Dept 2025]). It is well settled that the issuance of a protective order under CPL 245.70 "involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection" (*People v Beaton*, 179 AD3d 871, 874 [2d Dept 2020]; *see People v Jeanty*, 187 AD3d 828, 828-829 [2d Dept 2020]). Contrary to the contention of defendant, the People established that there was a " 'danger to . . . the safety of [the] witness' or 'risk of intimidation' " (*Taylor*, 237 AD3d at 1544, quoting CPL 245.70 [4]). The witness, who was in a vehicle with defendant and his codefendants before the shooting and told the police that he had observed defendant take part in the shooting, faced significant risk of harm or intimidation should his identity be revealed to defendant and his codefendants.

To balance defendant's interest in obtaining information for defense purposes against concerns for the witness's safety and risk of intimidation, the court appropriately permitted disclosure of the witness's identity to defense counsel but not to defendant until one month before trial (*see People v Morales-Aguilar*, 186 AD3d 786, 787-788 [2d Dept 2020]; *People v Artis*, 179 AD3d 1440, 1442-1443 [3d Dept 2020]). Thus, although the witness's identity was not disclosed to defendant at the suppression hearing, his identity was " 'turned over early enough' to permit defendant to prepare for effective cross-examination of the witness[ ] at trial" (*People v Eaves*, 152 AD3d 1226, 1227 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]), and we conclude, based on the relevant statutory factors, i.e., "witness safety, risk of witness intimidation, and risk of an adverse effect upon the legitimate needs of law enforcement" (*People v Griggs*, 180 AD3d 853, 855 [2d Dept 2020]; *see* CPL 245.70 [4]), that the court appropriately balanced defendant's interests and the witness's safety and protection.

Defendant further contends in his main brief that the court erred in refusing to suppress identification evidence. We likewise reject that contention. As noted above, the protective order was appropriately issued and, as a result, we conclude that defense counsel had the necessary information at the suppression hearing regarding that witness's identification of defendant in a photo array. Defendant concedes that the photo array shown to the witness was not unduly suggestive, but he contends that some other ground for suggestiveness may have been uncovered at the hearing had he been able to cross-examine the witness or to cross-examine the officer who conducted the photo array about the witness. We note, however, that the Court of Appeals has recognized that "a defendant's opportunity to participate in suppression proceedings must yield in some cases to the need for confidentiality" (*People v Castillo*, 80 NY2d 578, 587 [1992]). Here, inasmuch as defendant has not specified any particular information that could have been obtained regarding the circumstances of the witness's identification of defendant (*cf. People v Ocasio*, 134 AD2d 293, 294 [2d Dept 1987]), we conclude that the court did not abuse its discretion in that regard.

Three officers testified at the suppression hearing regarding their confirmatory identifications of defendant. Even assuming,

arguendo, that defendant's challenge to their identifications is preserved, we conclude that reversal is not warranted. One of the officers did not testify at trial (*see People v Crowley*, 188 AD3d 1665, 1666-1667 [4th Dept 2020], *lv denied* 36 NY3d 1056 [2021]). Another officer, familiar with defendant from defendant's neighborhood, did not independently identify defendant at trial (*see id.*). Although the third officer did identify defendant at trial and may not have had sufficient contacts with defendant to make a confirmatory identification (*see generally People v Mosley*, 41 NY3d 640, 648-649 [2024]), we conclude that any error in that regard is harmless (*see generally People v Crimmins*, 36 NY2d 230, 240-241 [1975]). Surveillance video evidence showed the two vehicles driving to the scene just before the shooting and leaving the scene just after the shooting. Eyewitnesses established that the shooters were some of the occupants of those vehicles. Defendant's fingerprint was found on one of the vehicles. Another passenger of that vehicle, who remained in the vehicle during the shooting, testified that defendant was in possession of a gun. Finally, inasmuch as surveillance videos showed the occupants of the vehicles, the jury was able to compare the videos to defendant's appearance in the courtroom.

In his pro se supplemental brief, defendant contends that the court erred in rejecting his *Batson* challenge. That contention lacks merit. *Batson* set forth a three-step test for trial courts to apply in determining whether peremptory challenges have been used by a party to exclude prospective jurors on the basis of race (*see Batson v Kentucky*, 476 US 79, 94-98 [1986]). First, the party raising a *Batson* challenge must make a prima facie showing that the opposing party exercised a peremptory strike to remove a juror on the basis of race (*see id.* at 96). Second, the nonmoving party must come forward with race-neutral reasons for striking the juror (*see id.* at 97). Finally, the moving party must establish that the reasons proffered were " 'a pretext for intentional discrimination' " (*People v Wright*, 42 NY3d 708, 715 [2024], quoting *People v Smocum*, 99 NY2d 418, 422 [2003]; *see People v Bullock*, 213 AD3d 1351, 1352-1353 [4th Dept 2023], *lv denied* 40 NY3d 933 [2023]).

When defense counsel questioned the prosecutor's use of a peremptory challenge to strike the sole Latino prospective juror, the prosecutor provided several reasons for striking the prospective juror, e.g., he had no hobbies, he "[did] not like to do anything," and he had "no stake in the community." Where the prosecutor provides a race-neutral reason for striking the juror, " 'the inference of discrimination is overcome' " (*People v Hecker*, 15 NY3d 625, 656 [2010], *cert denied* 563 US 947 [2011]; *see People v Allen*, 86 NY2d 101, 109 [1995]), and "the sufficiency of the prima facie case showing becomes moot" (*Hecker*, 15 NY3d at 660; *see People v Tucker*, 181 AD3d 103, 111 [4th Dept 2020], *cert denied* — US —, 141 S Ct 566 [2020]). Here, we conclude that the prosecutor offered facially neutral reasons supporting the challenge and, as a result, the inference of discrimination is overcome. The question then becomes whether the allegedly race-neutral reasons proffered by the People were pretextual (*see Wright*, 42 NY3d at 715). We conclude that the court did not

abuse its discretion in determining that the prosecutor's explanation of the peremptory challenge was not pretextual (*see People v Herrod*, 174 AD3d 1322, 1323 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019]; *People v Jiles*, 158 AD3d 75, 78 [4th Dept 2017], *lv denied* 31 NY3d 1149 [2018]).

Defendant failed to preserve for our review his contention, raised in his pro se supplemental brief, that he was denied a fair trial by prosecutorial misconduct on summation, inasmuch as he made no objection to the allegedly improper comments of the prosecutor (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to the contention of defendant in his main brief, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction with respect to each count (*see People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally id.*).

Contrary to defendant's contention in his main brief, the sentences imposed on the counts of murder in the second degree and attempted murder in the second degree could legally be imposed consecutively as the conduct underlying those offenses constituted separate and distinct acts (*see* Penal Law § 70.25 [2]; *People v Laureano*, 87 NY2d 640, 643 [1996]; *see also People v McKnight*, 16 NY3d 43, 48 [2010]; *People v Brown*, 204 AD3d 1390, 1394 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]). We agree with defendant, however, that his aggregate sentence is unduly harsh and severe. Defendant's aggregate sentence amounted to 50 years to life. The sentence imposed on defendant, who was 19 years old at the time of the offense, is decades longer than those imposed on his codefendants, even though all defendants were charged with acting in concert with each other to commit the same offenses. Although there is some evidence that defendant may have fired the shot that killed the murder victim, "that was due only to happenstance" and does not render any one of the multiple shooters "more or less culpable than the other" (*People v Reed*, 237 AD3d 1490, 1492 [4th Dept 2025], *lv denied* 43 NY3d 1058 [2025]).

We therefore modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *People v Delgado*, 80 NY2d 780, 783 [1992]) by reducing the sentence of imprisonment imposed for attempted murder in the second degree under count 2 of the indictment

to a determinate term of incarceration of 15 years, which results in an aggregate term of imprisonment of 40 years to life.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

205

CA 25-00524

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

DAVID A. CASS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD G. NEWELL, SANDRA G. NEWELL,
CHAUTAUQUA LAKEVIEW, LLC, LAKEVIEW HOTEL, LLC,
CHAUTAUQUA LAKEVIEW AND RESTAURANT, INC.,
AND LAKEVIEW HOTEL AND RESTAURANT, INC.,
DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, WILLIAMSVILLE (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (JACOB A. FREZZA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Emilio Colaiacovo, J.), entered February 24, 2025. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action alleging, inter alia, the breach of an option agreement between him and Richard G. Newell (defendant). Defendants moved pursuant to CPLR 3211 (a) (1), (5), and (7) to dismiss the complaint and pursuant to CPLR 3212 for summary judgment dismissing the complaint. Supreme Court denied the motion to the extent that it sought dismissal of the first, second, and fourth causes of action. Defendants appeal from the order to the extent that it denied their motion, and we reverse the order insofar as appealed from.

Plaintiff and defendant each held a 50% interest in defendants Chautauqua Lakeview, LLC and Lakeview Hotel, LLC (collectively, LLCs), which owned and operated a hotel. In January 2015, plaintiff assigned his interests in the LLCs to defendant. In February 2015, plaintiff and defendant entered into an option agreement. Pursuant to the agreement, plaintiff had "the exclusive right and option to purchase the" 50% interests in the LLCs that he had transferred to defendant. The agreement provided that the "option shall expire at midnight on December 31, 2020, or so long as [defendant] shall continue to own

100% of the interests in" the LLCs. The agreement further provided that, at the termination of the option, plaintiff "shall have the right to extend the option period for an additional period of five . . . years." In November 2023, plaintiff notified defendant of his intent to exercise the option, and defendant responded through his counsel that the agreement was not enforceable.

We agree with defendants that the fourth cause of action, alleging breach of contract, as well as the first and second causes of action, which the parties agree depend on the breach of contract cause of action, must be dismissed pursuant to CPLR 3211 (a) (1). "The elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031 [4th Dept 2022] [internal quotation marks omitted]). It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009] [internal quotation marks omitted]; *see Brad H. v City of New York*, 17 NY3d 180, 185 [2011]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]; *see Selective Ins. Co. of Am. v County of Rensselaer*, 26 NY3d 649, 655 [2016]). "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002]; *see Selective Ins. Co. of Am.*, 26 NY3d at 655).

Here, the option agreement is not ambiguous, and we further conclude that defendants did not breach it. When plaintiff attempted to exercise the option in November 2023, it had already expired inasmuch as the December 31, 2020 deadline had passed, plaintiff never exercised his right to extend the option period, and defendant no longer owned 100% of the interests in the LLCs (*see Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748, 751-752 [2d Dept 2022]). Contrary to the court's determination, inasmuch as plaintiff never sought to exercise the option before it expired at the end of 2020, it is immaterial that defendant had already transferred the assets of the LLCs and dissolved the LLCs prior to that time (*see generally id.*). Moreover, the option agreement did not prohibit defendant from selling his interests in the LLCs and, in fact, it specifically contemplated that defendant would do so inasmuch as it provided that the option would expire at the end of 2020 "or so long as" defendant continued to own 100% of the interests in the LLCs.

We reject plaintiff's contention—raised as an alternative ground for affirmance—that the option agreement was ambiguous and may be interpreted as giving him, in addition to the option, the "exclusive

right" to purchase back his interests in the LLCs, i.e., that he was the only person who could buy those interests. Plaintiff's interpretation "rests on an impermissibly strain[ed reading] to find an ambiguity which otherwise might not be thought to exist" (*Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998] [internal quotation marks omitted]; *see Albert Frassetto Enters. v Hartford Fire Ins. Co.*, 144 AD3d 1556, 1558 [4th Dept 2016]). In addition, under plaintiff's interpretation, the option term and extension of term provisions would be meaningless (*see generally Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). Further, under plaintiff's interpretation, the option agreement never expires, which would be absurd and commercially unreasonable (*see NCCMI, Inc. v Bersin Props., LLC*, 226 AD3d 88, 96 [1st Dept 2024]; *Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1800 [4th Dept 2010]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

213.1

CA 25-01798

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

IN THE MATTER OF HON. CHRISTOPHER P. SCANLON, AS MAYOR OF CITY OF BUFFALO, AND HON. MITCHELL P. NOWAKOWSKI, AS MEMBER OF COMMON COUNCIL OF CITY OF BUFFALO, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

BARBARA MILLER-WILLIAMS, AS COMPTROLLER OF CITY OF BUFFALO, RESPONDENT-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR RESPONDENT-APPELLANT.

CONNORS LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 25, 2025, in a proceeding pursuant to CPLR article 78. The judgment granted the petition to compel respondent to issue and sell certain bonds.

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

Memorandum: In this proceeding pursuant to CPLR article 78, respondent appeals from a judgment granting the petition seeking a writ of mandamus compelling respondent to issue and sell bonds pursuant to resolutions duly adopted by the City of Buffalo Common Council (Common Council). We affirm.

Mandamus to compel lies "only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law . . . While [it] is an appropriate remedy to enforce the performance of a ministerial duty, . . . it will not be awarded to compel an act in respect to which [a public] officer may exercise judgment or discretion" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* 587 US 1027 [2019], *reh denied* 588 US 934 [2019] [internal quotation marks omitted]; *see Klostermann v Cuomo*, 61 NY2d 525, 539-540 [1984]). "A discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Matter of COR Van Rensselaer St.*

Co. III, Inc. v New York State Urban Dev. Corp., 221 AD3d 1524, 1528 [4th Dept 2023], *lv denied* 41 NY3d 907 [2024] [internal quotation marks omitted]; *see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005], *rearg denied* 4 NY3d 882 [2005]). Mandamus is an appropriate remedy to enforce the performance of "those acts which are mandatory but are executed through means that are discretionary" (*Klostermann*, 61 NY2d at 539).

Contrary to respondent's assertion, the comptroller possesses no discretion over *whether* to issue bonds (*see generally Matter of Cohalan v Caputo*, 94 AD2d 742, 742-743 [2d Dept 1983]). The Charter of the City of Buffalo (City Charter) grants the Common Council the power to "authorize the borrowing of funds by the city in accordance with article VIII of the constitution of the state of New York and applicable provisions of state law" (City Charter § 3-7 [f]). The City Charter provides that expenditures pursuant to the capital improvement budget "may not be made unless and until the council by appropriate action for the payment thereof provides funds or authorizes the issuance of serial bonds or other capital obligations" (City Charter § 20-27), and that "no debt shall be incurred for any capital improvement except as further authorized pursuant to" the Local Finance Law (City Charter § 20-30). The comptroller's involvement in the capital improvement budget process consists primarily of preparing a report listing the city's outstanding capital debt, "commenting in detail about the city's financial condition," and "advising as to the maximum amount of capital debt that the city may prudently incur" over the next five years "without impairing [its] credit rating and financial stability" (City Charter § 20-21). If the proposed capital budget exceeds the recommended cap, the comptroller must submit an additional report to the Common Council "advising as to the probable effect of such debt on the city's financial condition" (City Charter § 20-25).

The Local Finance Law gives the Common Council, as a finance board (§ 2.00 [4] [b] [2]) "the power to authorize the issuance of bonds and notes" (Local Finance Law § 30.00 [a]). Although the Common Council may delegate certain powers to the comptroller, its chief fiscal officer (§ 2.00 [5] [b]; *see* City Charter § 7-4), by resolution (Local Finance Law § 30.00 [a], [c]; *see* § 56.00 [a], [b]), we reject respondent's contention that the Common Council delegated all of its authority as a finance board to the comptroller in resolutions passed in 1945 and 1994. Those resolutions involved the delegation of powers relating to the issuance of specific types of bonds and notes, but neither resolution provided the comptroller with the power to authorize, or prevent the authorization of, the issuance of such bonds and notes. In other words, the Common Council delegated certain powers to the comptroller relating to *how* to issue bonds but did not delegate the threshold power found in Local Finance Law § 30.00 regarding *whether* to issue them. Thus, the Common Council did not provide the comptroller with the power to, in effect, veto Common Council authorizations directing her to issue bonds or notes for specific projects.

Inasmuch as respondent's duty to issue bonds was ministerial (*see Klostermann*, 61 NY2d at 539; *Holroyd v Town of Indian Lake*, 180 NY 318, 324 [1905]; *Cohalan*, 94 AD2d at 742-743; *see generally* 1991 Ops St Comp No. 91-8), Supreme Court did not err in granting the petition.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

214

KA 23-01405

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKEEF ROYAL, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 24, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]). The trial was the third on the indictment, the first two having ended in mistrials. Defendant contends that Supreme Court (Moran, J.) declared a mistrial in the first trial without his consent and in the absence of manifest necessity and therefore retrial was barred by the principles of double jeopardy. We reject that contention.

"Both the State and Federal Constitutions provide that the State may not put a defendant in jeopardy twice for the same offense" (*People v Baptiste*, 72 NY2d 356, 359 [1988]; *see* NY Const, art I, § 6; US Const, 5th Amend). "Unlike statutory double jeopardy, the State and Federal constitutional prohibitions against double jeopardy are deemed so fundamental that they are preserved despite the failure to raise them at the trial level" (*People v Michallow*, 201 AD2d 915, 916 [4th Dept 1994], *lv denied* 83 NY2d 874 [1994]; *see People v Michael*, 48 NY2d 1, 6-8 [1979]). "Where a mistrial is granted without the consent or over the objection of a defendant, retrial is barred by double jeopardy protections unless there was 'manifest necessity' for the mistrial or 'the ends of public justice would otherwise be defeated' " (*People v Ferguson*, 67 NY2d 383, 388 [1986], quoting

United States v Perez, 22 US 579, 580 [1824]; *see Michallow*, 201 AD2d at 916). Consent may be either express or implied (*see Michallow*, 201 AD2d at 916).

Here, although we agree with defendant that there was no express consent and no manifest necessity for a mistrial inasmuch as the court could have stricken defendant's offending testimony and issued a curative instruction (*see People v Ferguson*, 115 AD2d 215, 216 [4th Dept 1985], *affd* 67 NY2d 383 [1986]; *see generally Matter of Romero v Justices of Supreme Ct., Queens County*, 237 AD2d 292, 293 [2d Dept 1997], *lv denied* 89 NY2d 817 [1997]), we nevertheless conclude that defense counsel gave implied consent to the declaration of a mistrial.

During defendant's testimony, he attempted to impart information concerning a codefendant's admission that the gun that was found in a satchel in defendant's vehicle belonged to the codefendant. The court sustained multiple objections by the prosecutor, but defendant continued trying to testify that the codefendant had admitted ownership of the gun. The court then interrupted defendant and sua sponte declared a mistrial. The jury was removed from the courtroom, and the court engaged in a colloquy with the attorneys, asking the prosecutor whether the prosecutor was moving for a mistrial. The prosecutor responded in the affirmative. The court then stated that the prosecutor's motion for a mistrial was "granted because of the actions of the defendant." Defense counsel did not object. The court subsequently stated: "We'll schedule it for tomorrow morning. I will tell the jury what happened and I will dismiss them. Anybody have a problem with that?" Defense counsel responded "No." The court dismissed the jury.

We note that "defendant raised no objection to the court's *sua sponte* declaration of a mistrial, and 'actively participate[d] in the various colloquies' with the court" (*Michallow*, 201 AD2d at 916; *see People v Hawkins*, 228 AD2d 450, 451 [2d Dept 1996]). Inasmuch as "[a] '[d]efendant's personal consent to the mistrial is not necessary' and may be made by [their] attorney" (*Michallow*, 201 AD2d at 916, quoting *Ferguson*, 67 NY2d at 390), we conclude that defense counsel's "conduct constituted implied consent, and an effective waiver of defendant's constitutional rights against double jeopardy" (*id.*; *see Hawkins*, 228 AD2d at 451; *Ferguson*, 115 AD2d at 216).

Contrary to defendant's further contention, with respect to his third trial, Supreme Court (Renzi, J.) did not err in refusing to dismiss for cause a prospective juror who expressed a discomfort with guns due to a personal experience related to an individual who had been killed by a gun. Inasmuch as the defense struck the prospective juror and exhausted all peremptory challenges before the completion of jury selection, this issue is preserved for our review (*see* CPL 270.20 [2]; *People v Betances*, 147 AD3d 1352, 1354 [4th Dept 2017]; *People v Griffin*, 145 AD3d 1551, 1552 [4th Dept 2016]). The court asked the prospective juror whether he could put his personal experience out of his mind in this case, which the court noted was strictly a possession case. The prospective juror answered in the affirmative. Based upon

a "review of the voir dire transcript 'in totality and in context' and giving due deference to the determination of the trial court," we conclude that it was not an abuse of discretion for the court to deny defendant's challenge for cause (*People v Turner*, 221 AD3d 1590, 1591 [4th Dept 2023], *lv denied* 41 NY3d 1004 [2024], quoting *People v Warrington*, 28 NY3d 1116, 1120 [2016]; *cf. People v Santiago*, 218 AD3d 1270, 1271-1272 [4th Dept 2023]).

Defendant further contends that he was denied effective assistance of counsel during the third trial based on defense counsel's failure to poll the prospective jurors to determine whether they heard a particular sidebar discussion with a prospective juror and failure to raise any challenge when another prospective juror stated that a friend did not have a good relationship with defendant. We reject that contention. Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

With respect to defendant's contention that Penal Law § 265.03 (3) is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]), we have rejected identical contentions in prior cases (*see People v Richardson*, 246 AD3d 1396, 1396-1397 [4th Dept 2026]; *People v Davis*, 234 AD3d 1356, 1356-1357 [4th Dept 2025], *lv granted* 44 NY3d 1051 [2025]; *see also People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]), and we perceive no reason to reach a different conclusion here.

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

217

KA 24-00910

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUSTIN R. DEAL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 18, 2024. The judgment convicted defendant upon a plea of guilty of aggravated family offense.

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

Memorandum: In these consolidated appeals, defendant appeals, in appeal No. 1, from a judgment convicting him upon a plea of guilty of aggravated family offense (Penal Law § 240.75) and, in appeal No. 2, from a judgment convicting him upon a plea of guilty of aggravated criminal contempt (§ 215.52 [3]).

Contrary to defendant's contention in both appeals, County Court did not abuse its discretion in issuing the order of protection. The court was not required to obtain the consent of the person for whose benefit the order of protection was issued (*see People v Monacelli*, 299 AD2d 916, 916 [4th Dept 2002], *lv denied* 99 NY2d 617 [2003]; *see generally* CPL 530.13 [4]). In any event, the order of protection is subject to modification upon a motion should the circumstances warrant (*see* CPL 530.12 [15]; *see generally People v Nieves*, 2 NY3d 310, 317 [2004]; *People v Blauvelt*, 211 AD3d 1175, 1176 [3d Dept 2022]).

Contrary to defendant's further contention in both appeals, we conclude that his sentence is not unduly harsh or severe.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

218

KA 24-00911

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AUSTIN R. DEAL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 18, 2024. The judgment convicted defendant upon a plea of guilty of aggravated criminal contempt.

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

Same memorandum as in *People v Deal* ([appeal No. 1] — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

222

KA 25-00946

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY COLBERT, DEFENDANT-APPELLANT.

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

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (MERIDETH H. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered April 2, 2025. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining, inter alia, that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court abused its discretion when it denied his request for a downward departure from his presumptive risk level. We conclude, after "weighing the aggravating and mitigating factors" at the third step of the downward departure analysis, that the totality of the circumstances does not warrant a downward departure (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Allis*, 229 AD3d 1375, 1376 [4th Dept 2024]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

223

CAF 24-01683

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

IN THE MATTER OF ADELAIDE H.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HEATHER H., RESPONDENT-APPELLANT.

TYSON BLUE, MACEDON, FOR RESPONDENT-APPELLANT.

JEANNIE D'ALESSANDRO, LYONS, FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Wayne County (John L. Grow, J.), dated August 15, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected 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 10, respondent mother appeals from an order of disposition that, inter alia, placed her under the supervision of petitioner. That order, although expired in part, brings up for review the underlying fact-finding order in which Family Court found that, as a result of the mother's mental illness and illicit drug use, she neglected the subject child (*see Matter of Clarissa F. [Carrie W.]*, 227 AD3d 1543, 1543 [4th Dept 2024], *lv denied* 42 NY3d 907 [2024]; *Matter of Jimmy D.*, 302 AD2d 892, 892 [4th Dept 2003], *lv denied* 100 NY2d 503 [2003]). We affirm.

Contrary to the mother's contention, we conclude that petitioner established by a preponderance of the evidence that the subject child was neglected as a result of the mother's mental illness and substance abuse (*see Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1595 [4th Dept 2019]; *Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403-1404 [4th Dept 2016]; *see generally* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]). The evidence at the fact-finding hearing established that, as a result of the mother's mental illness and substance abuse, the mother suffered from delusions and engaged in paranoid behavior that placed the subject child's physical, mental, or emotional condition in imminent danger of becoming impaired (*see Matter of Jahkai S. [Shirley*

S.], 216 AD3d 1432, 1432 [4th Dept 2023]; *Zackery S.*, 170 AD3d at 1595; *see generally Matter of Alexis H. [Jennifer T.]*, 90 AD3d 1679, 1680 [4th Dept 2011], *lv denied* 18 NY3d 810 [2012]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

224

CAF 25-00238

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

IN THE MATTER OF KRISTA H. HOOVER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK W. ESTER, RESPONDENT-RESPONDENT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR PETITIONER-APPELLANT.

BRYANNE L. JONES, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), dated January 8, 2025, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother filed a petition seeking to modify a visitation order entered upon the parties' consent that granted the parties joint custody of their two children, with primary placement of the children with respondent father. The consent order also provided the mother with supervised agency visitation, once per month, subject to agency availability and the wishes and schedules of the children. Additionally, the mother would have "further supervised visitation as agreed and arranged between the parties." The mother appeals from an order, following an evidentiary hearing, that dismissed the mother's petition.

"Where an order of custody and visitation is entered on stipulation, a court cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the child[ren]" (*Matter of McKenzie v Polk*, 166 AD3d 1529, 1529 [4th Dept 2018] [internal quotation marks omitted]; *see Matter of Berg v Stoufer-Quinn*, 179 AD3d 1544, 1544-1545 [4th Dept 2020]). To warrant an inquiry into whether a change in custody is in the child's best interests, the change in circumstances must be significant (*see Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017]). "Upon determining that there has been a change in circumstances, [Family Court] must consider whether the requested

modification is in the best interests of the child[ren]" (*Matter of Luce v Buehlman*, 218 AD3d 1243, 1243 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023] [internal quotation marks omitted]).

Here, notwithstanding Family Court's failure to make an express finding relative to the change in circumstances alleged by the mother in her petition, "we have the authority to review the record to ascertain whether the requisite change in circumstances existed" (*Matter of William F.G. v Lisa M.B.*, 169 AD3d 1428, 1429 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Dickes v Johnston*, 213 AD3d 1247, 1248 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]).

We conclude, contrary to the mother's contention, that evidence of her sustained sobriety is not adequate to establish a change in circumstances inasmuch as that circumstance existed at the time of the parties' consent order (*see William F.G.*, 169 AD3d at 1429). We nonetheless agree with the mother that the court erred in dismissing the petition inasmuch as the mother established a change in circumstances by testifying that, almost immediately after the parties entered into the consent order, the agency indicated that there was an indefinite wait list for supervised visitation, which made such visitation improbable, and the father indicated that the mother would not be granted any visitation pursuant to the "as agreed and arranged" provision of the consent order (*see Matter of Gelling v McNabb*, 126 AD3d 1487, 1487-1488 [4th Dept 2015]; *Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]; *see generally Matter of Kelley v Fifield*, 159 AD3d 1612, 1613-1614 [4th Dept 2018]).

Where the record is sufficient to make a best interests determination, this Court "will do so 'in the interests of judicial economy and the well-being of the child[ren]' " (*Matter of Cole v Nofri*, 107 AD3d 1510, 1512 [4th Dept 2013], *appeal dismissed* 22 NY3d 1083 [2014]). Here, however, the court dismissed the petition before the father testified or offered any evidence and before the court could conduct a *Lincoln* hearing, if necessary, and, thus, we do not have an adequate record upon which to make our own determination in the interest of judicial economy (*see Matter of Heinsler v Sero*, 177 AD3d 1316, 1317 [4th Dept 2019]; *Matter of McClinton v Kirkman*, 132 AD3d 1245, 1246 [4th Dept 2015]; *see generally Matter of Austin v Austin*, 254 AD2d 703, 703-704 [4th Dept 1998]). We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for a new hearing to determine whether the modifications sought by the mother in her petition are in the children's best interests.

Finally, the mother failed to preserve her contention that the court was biased against her inasmuch as she failed to make a motion for the court to recuse itself (*see Matter of Melish v Rinne*, 221 AD3d 1560, 1561 [4th Dept 2023]; *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2021]), and, in any event, our review of the record does not indicate the existence of any such bias that would

warrant remittal before a different judge (*see Melish*, 221 AD3d at 1561).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

227

CA 25-00918

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

FLORENCE LOUISE HARMS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROBERT L. HARMS, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CLEMENTINA LEWIS, M.D., ET AL., DEFENDANTS, TLC HEALTH NETWORK AND LAKE SHORE HEALTH CARE CENTER, DEFENDANTS-APPELLANTS.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL WILLIAM BELTZ, LLC, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered May 8, 2025, in a medical malpractice and wrongful death action. The order, among other things, granted the motion of plaintiff to the extent that it seeks to compel defendants TLC Health Network and Lake Shore Health Care Center to comply with certain discovery demands.

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

Memorandum: In this medical malpractice and wrongful death action, defendants TLC Health Network and Lake Shore Health Care Center (collectively, defendants) appeal from an order that, inter alia, granted plaintiff's motion to the extent that it seeks to compel defendants to comply with certain discovery demands relative to the disclosure of electronic medical record audit trails (audit trails) arising out of defendants' care and treatment of plaintiff's decedent. We affirm.

This appeal is not the first instance where we have been called to adjudicate a discovery dispute between plaintiff and defendants concerning the audit trails. Previously, we affirmed an order dismissing as moot plaintiff's motion (first motion) to strike defendants' answer or, alternatively, to compel defendants to comply with her fourth notice to produce, which sought, inter alia, the aforementioned audit trails (*Harms v TLC Health Network*, 215 AD3d 1295, 1295-1296 [4th Dept 2023]). In affirming the order, we noted that, in support of the first motion, "[p]laintiff did not establish

that defendants engaged in any willful, contumacious, or . . . bad faith noncompliance with the notice to produce" (*id.* at 1296 [internal quotation marks omitted]). Indeed, based on the record before us at that time, we noted that the first motion "contain[ed] no showing, beyond mere conjecture, that there is relevant information to be gleaned from . . . audit trails which cannot be obtained from other sources of information that were already supplied by defendants" (*id.* [internal quotation marks omitted]). We concluded that Supreme Court (Marshall, J.) did not err "in dismissing the [first] motion on the ground that defendants substantially complied with the notice to produce" with respect to the audit trails inasmuch as "defendants disclosed decedent's electronic medical records, which already displayed much of the information sought from the audit trails" and "defendants otherwise provided reasonable explanations for why some of the requested information was no longer available" (*id.*).

During the pendency of the prior appeal, however, plaintiff took depositions of several representatives of defendants during which those individuals were questioned about the creation, modification, and retention of the audit trails. Some of those representatives had previously provided affidavits in connection with the first motion that, in essence, stated that the audit trails were no longer available. Information obtained during the ensuing depositions of those representatives, however, contradicted some of the central assertions in their affidavits with respect to the audit trails and, indeed, suggested that some of the information sought by plaintiff in relation to the electronic medical records and audit trails may, in fact, still exist and was not disclosed to plaintiff. The depositions also revealed that the representatives were not entirely knowledgeable about defendants' policies and procedures in retaining the audit trails. Thus, as a consequence of the information obtained during the depositions, plaintiff moved to compel defendants to produce, inter alia, knowledgeable representatives for depositions, defendants' policies on the preservation and maintenance of records and audit trails, information on how the audit trails were produced, and audit trails from defendants' data storage system. Supreme Court (Licata, J.) granted plaintiff's second motion, and defendants appeal.

Defendants contend that the court erred in granting plaintiff's motion for the requested discovery concerning the audit trails inasmuch as that decision impermissibly conflicted with this Court's prior determination that plaintiff was not entitled to disclosure of similar material. We reject that contention. At the outset, we note again that "[t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Prattico v City of Rochester*, 197 AD3d 882, 883 [4th Dept 2021] [internal quotation marks omitted]; *see Castro v Admar Supply Co., Inc.* [appeal No. 2], 159 AD3d 1616, 1617 [4th Dept 2018]; *Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). The CPLR provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]; *see Crysler v Erk* [appeal No. 2], 227 AD3d 1410, 1412 [4th Dept 2024]).

Further, audit trails, such as the ones sought by plaintiff here, are subject to discovery where a plaintiff establishes legitimate questions regarding whether portions of the medical records provided by a defendant have been withheld or altered (*see Wright v Stephens*, 239 AD3d 1271, 1274-1275 [4th Dept 2025]; *Vargas v Lee*, 170 AD3d 1073, 1077 [2d Dept 2019]).

Here, we conclude that the court's decision to grant the second motion and compel disclosure pertaining to the audit trails—based on the record provided by plaintiff in support of that motion—was not an abuse of the court's discretion and does not conflict with our prior determination (*cf. Harms*, 215 AD3d at 1295-1296). As noted above, plaintiff's second motion was based on new information that came to light *after* Supreme Court (Marshall, J.) decided the first motion and while the prior appeal was pending. Indeed, in concluding that the court had not abused its discretion in denying the first motion, we noted, among other things, that "[t]he *record* [before us] contain[ed] no showing, beyond mere conjecture, that there is relevant information to be gleaned from . . . [the] audit trails" and that, in opposition to the first motion, "defendants otherwise provided reasonable explanations for why some of the requested information was no longer available" (*id.* at 1296 [emphasis added and internal quotation marks omitted]). In other words, our conclusion on the prior appeal was based on the record before the court *at the time it denied the first motion*, which included the affidavits of defendants' representatives suggesting that the audit trail information was no longer available. Inasmuch as there were subsequent developments to the contrary—i.e., new evidence that the requested audit trail information may be available, that some of the requested material had been withheld, and that defendants' representatives lacked critical knowledge about defendants' audit trails and their retention—we perceive no conflict between our holding in the prior appeal and the order granting the second motion based on that new information.

We reject defendants' further contention that Supreme Court (Licata, J.) was bound by the law of the case to follow our prior decision affirming the order dismissing the first motion. We note that the first motion "preceded [the] deposition [of defendants' representatives on the audit trails], which introduced additional evidence and raised further issues, thereby precluding application of the law of the case doctrine" (*Milligan v Bifulco*, 153 AD3d 1624, 1625 [4th Dept 2017] [internal quotation marks omitted]; *see M&T Bank Corp. v Moody's Invs. Servs., Inc.*, 191 AD3d 1288, 1292 [4th Dept 2021]; *Ziolkowski v Han-Tek, Inc.*, 126 AD3d 1431, 1432 [4th Dept 2015]). In any event, even assuming, arguendo, that the law of the case doctrine applied to the motion court, we note that the doctrine "is not binding upon this Court's review of the order" (*Ziolkowski*, 126 AD3d at 1432; *see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]; *Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017]).

We have reviewed defendants' remaining contentions and conclude

that none warrants reversal or modification of the order.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

229

CA 25-00007

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

SANDRA VERBRIDGE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HARPREET DEOL, D.D.S., L.L.C., DOING BUSINESS AS PROGRESSIVE ENDODONTICS OF PITTSFORD/CANANDAIGUA/GENESEO, HARPREET DEOL, D.D.S., MMSC., INDIVIDUALLY AND IN HIS CAPACITY AS A DENTIST, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

SMITH PARRY, P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH MURTHA CULLINA PLLC, PITTSFORD (BRIAN D. GINSBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered November 14, 2024, in a dental malpractice action. The order granted the motion of defendants Harpreet Deol, D.D.S., L.L.C., doing business as Progressive Endodontics of Pittsford/Canandaigua/Geneseo, and Harpreet Deol, D.D.S., MMSc., for summary judgment and dismissed the complaint against said defendants.

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

Memorandum: Plaintiff commenced this dental malpractice action seeking damages for injuries sustained as a result of root canals and related treatment performed by defendant Tanjit S. Taggar, D.M.D., M.S., an endodontist practicing at a dental office in Canandaigua operated by defendant Harpreet Deol, D.D.S., L.L.C., doing business as Progressive Endodontics of Pittsford/Canandaigua/Geneseo, a professional limited liability company owned by defendant Harpreet Deol, D.D.S., MMSc. (collectively, Deol defendants). Following discovery, the Deol defendants moved for summary judgment dismissing the complaint against them on the ground that Taggar was an independent contractor and, thus, they are not liable for his malpractice. Supreme Court granted the motion and dismissed the complaint against the Deol defendants. Plaintiff appeals, and we affirm.

"Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not [vicariously] liable for the independent contractor's negligent acts" (*Dziedzic v*

Wirth, 162 AD3d 1749, 1749 [4th Dept 2018] [internal quotation marks omitted]; *see Van Hook v Doak*, 227 AD3d 1537, 1538-1539 [4th Dept 2024]; *Chan v Toothsavers Dental Care, Inc.*, 125 AD3d 712, 713 [2d Dept 2015]; *see also Tereshchenko v Lynn*, 36 AD3d 684, 686 [2d Dept 2007]). The rationale underlying the rule is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]; *see Begley v City of New York*, 111 AD3d 5, 28 [2d Dept 2013], *lv denied* 23 NY3d 903 [2014]). In keeping with that rationale, "[c]ontrol of the method and means by which the work is to be done . . . is the critical factor in determining whether one is an independent contractor or an employee for the purposes of [vicarious] tort liability" (*Gfeller v Russo*, 45 AD3d 1301, 1302 [4th Dept 2007]; *see Begley*, 111 AD3d at 28). Additionally, while a principal who retains an independent contractor may be held directly liable for, inter alia, the principal's own negligence in "supervising the contractor" (*Kleeman*, 81 NY2d at 274), such a claim requires that the principal actually *exercised* supervision over the contractor inasmuch as "the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of [direct] liability against the principal" (*Wendt v Bent Pyramid Prods., LLC*, 108 AD3d 1032, 1033 [4th Dept 2013] [internal quotation marks omitted]; *see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381 [1995], *rearg denied* 87 NY2d 862 [1995]).

Here, in support of their motion, the Deol defendants submitted an Independent Contractor Associate Agreement executed by Harpreet Deol, D.D.S., L.L.C., and Taggar providing, inter alia, that Taggar was "an independent contractor . . . responsible for scheduling and maintaining office hours to treat [his] patients, as [he] deem[s] appropriate," and that the Deol defendants "shall not exercise any control or direction over the professional aspects of [his] providing services, which shall be [his] sole responsibility." The agreement further provided that Taggar would retain 50% of his gross collections and was "solely responsible for payments of all federal income and self-employment taxes." The Deol defendants also submitted transcripts from the depositions of Taggar and Deol, who testified that Taggar was the only individual working in the Canandaigua dental office, that he did not discuss his patients with the Deol defendants, and that the Deol defendants did not review his work. Contrary to plaintiff's contentions, the Deol defendants thus met the initial burden on their motion with respect to both vicarious and direct liability (*see Wendt*, 108 AD3d at 1033; *Carlineo v Akins*, 71 AD3d 1535, 1535-1536 [4th Dept 2010]; *Gfeller*, 45 AD3d at 1302-1303). In opposition, plaintiff submitted only the affirmation of her attorney, who had no personal knowledge of the facts, and thus failed to raise a triable issue of fact in opposition (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Contacare, Inc. v CIBA-Geigy Corp.*, 49 AD3d

1215, 1216 [4th Dept 2008], *lv denied* 10 NY3d 714 [2008]; *cf. Santiago v Spinuzza*, 48 AD3d 1257, 1258 [4th Dept 2008]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

233

CA 24-01941

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

KELLY SUE MCINNIS, EXECUTOR OF THE ESTATE OF
RONALD MCINNIS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

A.O. SMITH WATER PRODUCTS, ET AL., DEFENDANTS,
AND THE WILLIAM POWELL COMPANY,
DEFENDANT-RESPONDENT.

BELLUCK LAW, LLP, NEW YORK CITY (MICHAEL A. MACRIDES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered November 15, 2024, in an action for damages for injuries caused by exposure to asbestos. The order, insofar as appealed from, granted the motion of defendant The William Powell Company to dismiss the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendant The William Powell Company.

Memorandum: Plaintiff's decedent commenced this action seeking damages for injuries he sustained as a result of his exposure to asbestos contained in, inter alia, products manufactured or supplied by, among others, defendant The William Powell Company (defendant), an out-of-state corporation. Following depositions, defendant moved for, inter alia, dismissal of the complaint against it pursuant to CPLR 3211 (a) (8) or, in the alternative, summary judgment dismissing the complaint against it pursuant to CPLR 3212 based on an alleged lack of personal jurisdiction. Supreme Court treated the motion as one for summary judgment (*see* CPLR 3211 [c]), and, inter alia, granted the motion. Plaintiff appeals from the order to the extent that it granted the motion, and we now reverse the order insofar as appealed from.

At the outset, we conclude that the court did not err in treating the motion under the standard applicable to motions for summary judgment under CPLR 3212. Although the court did not "give the parties notice of its intent" to treat the motion as one for summary

judgment (*Carcone v D'Angelo Ins. Agency*, 302 AD2d 963, 963 [4th Dept 2003]; *see* CPLR 3211 [c]), the failure to provide notice is not fatal where, as here, "the parties expressly [sought] summary judgment or [submitted] facts and arguments clearly indicating that they were deliberately charting a summary judgment course" (*Carcone*, 302 AD2d at 963 [internal quotation marks omitted]; *see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]). Specifically, we note that defendant's motion expressly—albeit, alternatively—sought summary judgment under CPLR 3212. In addition, by the time of the motion, both parties had been deposed and, in connection with the motion, they "laid bare their proof" (*Nowacki v Becker*, 71 AD3d 1496, 1497 [4th Dept 2010] [internal quotations omitted]; *see Mihlovan*, 72 NY2d at 508; *Tudisco v Mincer*, 126 AD3d 1501, 1501 [4th Dept 2015]).

On the merits, we agree with plaintiff that, by failing to mention defendant's initial burden as movant and, indeed, by repeatedly reasoning in the first instance that decedent had not adduced sufficient evidence to establish long-arm jurisdiction over defendant pursuant to CPLR 302 (a) (3), the court "erred in placing the initial burden of proof on [decedent] with respect to [defendant's] motion" (*Horning v J.B. Wise Professional Bldg. LLC*, 243 AD3d 1284, 1285 [4th Dept 2025]; *see generally Pelow v Tri-Main Dev.*, 303 AD2d 940, 940-941 [4th Dept 2003]; *Kasinski v Questel*, 99 AD2d 396, 398 [4th Dept 1984], *appeal dismissed* 62 NY2d 977 [1984]). "[W]hile the ultimate burden of proof at trial will fall upon the plaintiff[ ], a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form" (*Can Man Carting, LLC v Spiezio*, 165 AD3d 1029, 1030 [2d Dept 2018] [internal quotation marks omitted]). If the moving defendant makes a prima facie showing, "the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action' " (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Critically, it is well settled that "the same burden-shifting framework applies where, as here, a defendant moves for summary judgment on the affirmative defense of lack of long-arm jurisdiction" (*Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept 2018], *affd* 33 NY3d 523 [2019]).

CPLR 302 (a) (3) provides, in relevant part, that a court may exercise personal jurisdiction over a non-domiciliary "who in person or through an agent . . . commits a tortious act without the state causing injury to a person or property within the state . . . if [the non-domiciliary] (i) . . . derives substantial revenue from goods used or consumed . . . in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Here, we conclude that defendant did not meet its initial burden on the motion inasmuch as it merely pointed to gaps in decedent's proof in asserting that decedent could not establish long-arm jurisdiction under CPLR 302 (a) (3) because decedent could not establish that defendant sold the asbestos-containing parts that allegedly caused injury to him or that decedent—a Canadian citizen and resident—was exposed to asbestos from defendant's products in New York (*see*

generally Horning, 243 AD3d at 1286). We conclude, after drawing "every available inference . . . in the [non-moving party's] favor" (*Williams*, 159 AD3d at 152), that defendant's submissions in support of the motion raise a question of fact whether decedent was exposed to defendant's asbestos-containing products during the combined period of approximately six months that he worked in New York (*see generally Howard v A.O. Smith Water Prods.*, 212 AD3d 924, 924-925 [3d Dept 2023]; *Reid v Georgia-Pacific Corp.*, 212 AD2d 462, 463 [1st Dept 1995]). Because defendant failed to satisfy its initial burden on the motion, the burden never shifted to decedent, "requir[ing] denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see End of the Hill, LLC v Brock Acres Realty, LLC*, 206 AD3d 1587, 1588 [4th Dept 2022]; *Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016]).

Entered: April 24, 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 25-00958

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

AKIYLA POINDEXTER, AS THE ADMINISTRATOR
OF THE ESTATE OF KAAZIM F. FREEMAN, DECEASED,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 137356.)

BARKET EPSTEIN KEARON ALDEA & LOTURCO, LLP, GARDEN CITY (ALEXANDER KLEIN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DOUGLAS E. WAGNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered May 5, 2025, in a negligence and wrongful death action. The order granted the motion of claimant seeking leave to amend her claim and denied the cross-motion of defendant to dismiss the claim.

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

Memorandum: Claimant commenced this action in the Court of Claims seeking damages related to the death of Kaazim F. Freeman, an incarcerated individual who died in a correctional facility. The claim alleges that, although defendant, the State of New York (State), had taken the position that Freeman's death was a suicide, upon information and belief Freeman had been violently attacked by other incarcerated individuals or correction officers. During discovery, the State produced records regarding its investigation into Freeman's death for the first time, indicating, inter alia, that Freeman's death was a suicide. Claimant moved for leave to amend her claim to conform to the proof, pursuant to CPLR 3025 and Court of Claims Act § 9 (8), by alleging, inter alia, that the State had prior notice that Freeman presented a risk of self-harm and following Freeman's death at least one correction officer attempted to cover up evidence relating to that notice. The court, inter alia, granted claimant's motion. The State appeals, as limited by its brief, from the order insofar as it granted claimaint's motion, and we affirm.

It is well settled that, "[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted" (*Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735, 1735 [4th Dept 2010]; *see* CPLR

3025 [b]). However, even though " '[a]pplications to amend pleadings [pursuant to CPLR 3025] are within the sound discretion of the court,' . . . there is no sound basis in law to grant amendment pursuant to CPLR 3025 (c) to add an untimely claim" (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 50 [2022]). It is undisputed here that when claimant sought to amend her claim the statute of limitations on the proposed amended claims had expired, and the proposed amendment would be "time-barred unless it related back to the original pleading" (*id.*). The relation back doctrine is codified in CPLR 203 (f), which provides that, where a plaintiff or claimant seeks leave to amend a pleading to assert new claims against an existing defendant or respondent, "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transaction or occurrences, to be proved pursuant to the amended pleading." "Section 203 (f) requires the court to determine solely whether [the] original pleading gives notice of the transactions or occurrences underlying the proposed amendment" and, thus, a court "should not . . . look[ ] beyond the four corners of the original pleading to determine whether defendant was on notice of transactions or occurrences underlying [the proposed amendment]" (*34-06 73, LLC*, 39 NY3d at 51).

Under the circumstances of this case, we conclude that claimant established that the relation back doctrine applied for statute of limitations purposes with respect to the claims in her proposed amendment inasmuch as they were based on the same occurrence as the claims in her original claim—namely, the unexplained death of Freeman while in State custody—and thus related back to the original claim (*see Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]; *Taylor v Deubell*, 153 AD3d 1662, 1662 [4th Dept 2017]; *Stokes v Komatsu Am. Corp.*, 117 AD3d 1152, 1154 [3d Dept 2014]; *cf. Raymond v Ryken*, 98 AD3d 1265, 1266 [4th Dept 2012]). In opposition to the motion, the State failed to establish that it would be prejudiced by claimant's delay in seeking leave to amend the claim (*see Wojtalewski*, 161 AD3d at 1561; *see Boxhorn*, 74 AD3d at 1736).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

238

KA 23-01812

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WARREN LOVE, DEFENDANT-APPELLANT.

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

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 19, 2023. The judgment convicted defendant upon his plea of guilty of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the third degree (Penal Law § 155.35 [1]). We affirm.

We reject defendant's contention that County Court erred in denying his request to proceed pro se. "It is well settled that a criminal defendant's constitutional right to counsel concomitantly includes the right to refuse appointed counsel" (*People v Davis*, 240 AD3d 1162, 1163 [4th Dept 2025], *lv denied* 44 NY3d 1051 [2025] [internal quotation marks omitted]; *see People v McIntyre*, 36 NY2d 10, 15 [1974]; *see generally* US Const Amend VI; NY Const, art I, § 6). "In other words, there is a constitutional right 'to self-representation . . . and [a] corresponding—and sometimes competing—requirement that the state provide [a] defendant competent counsel to conduct [their] defense' " (*Davis*, 240 AD3d at 1163, quoting *People v Stone*, 22 NY3d 520, 525 [2014]). "A defendant in a criminal case may invoke the right to defend pro se provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*McIntyre*, 36 NY2d at 17).

Here, defendant informed the court that he had been having communication issues with defense counsel, particularly with respect

to certain motions that he wished to file, and stated that, "if we can't communicate I would rather represent myself." Although defendant briefly inquired whether he could proceed pro se specifically to file the motions, he immediately explained that he wanted "a competent lawyer" who would "communicate with [him]" in regard to those motions. The court responded that it would not relieve defense counsel at that time; rather, it would consider the issues raised in the motions filed by defense counsel and, thereafter, if defendant felt that "there [was] something . . . to be argued beyond that," the court would consider a new request to proceed pro se. No new request was made.

Under these facts, we conclude that defendant did not unequivocally request to proceed pro se inasmuch as he "ask[ed] to proceed pro se [only] as an alternative to receiving new counsel," thereby seeking to "leverage his right of self-representation in an attempt to compel the court to appoint another lawyer" (*People v Lewis*, 44 NY3d 350, 359 [2025]; *see Davis*, 240 AD3d at 1164). "A request to proceed pro se is equivocal where, as here, it does not reflect an affirmative desire for self-representation and instead shows that self-representation was reserved as a final, conditional resort" (*Davis*, 240 AD3d at 1164 [internal quotation marks omitted]; *see People v Dixon*, 42 NY3d 609, 618 [2024], *cert denied* — US —, 145 S Ct 1460 [2025]). Defendant's request consisted of "equivocal and hesitant statements about proceeding pro se" (*Lewis*, 44 NY3d at 360) and thus, the court's duty to "make a searching inquiry . . . to determine whether that request was knowing, voluntary, and intelligent" was not triggered (*id.* at 352; *see generally McIntyre*, 36 NY2d at 17).

Defendant's contention that his plea is invalid because the court failed to inquire about the voluntariness of his plea after he expressed dissatisfaction with defense counsel is not preserved for our review inasmuch as defendant failed to move either to withdraw the plea or to vacate the judgment of conviction (*see People v Green*, 70 AD3d 1392, 1392 [4th Dept 2010]; *People v Richardson*, 295 AD2d 763, 764 [3d Dept 2002], *lv denied* 98 NY2d 771 [2002]), and this case does not fall within the narrow exception to the preservation requirement (*see generally People v Lopez*, 71 NY2d 662, 666-667 [1988]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

239

KA 23-00808

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH T. MOUNTZOUROS, DEFENDANT-APPELLANT.

ALAN P. REED, BATH, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered April 18, 2023. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, sexual abuse in the second degree, and forcible touching (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of one count each of sexual abuse in the first degree (Penal Law § 130.65 [4]) and sexual abuse in the second degree (§ 130.60 [2]) and two counts of forcible touching (§ 130.52 [1]). We affirm.

Defendant contends that the People's pretrial motion seeking to introduce certain uncharged incidents of sexual abuse committed by defendant against the victim as *Molineux* evidence was an effective concession by the People that the indictment was facially duplicitous. We reject that contention. "An indictment is duplicitous when a single count *charges* more than one offense" (*People v Allen*, 24 NY3d 441, 448 [2014] [internal quotation marks omitted and emphasis added]). *Molineux* evidence, conversely, regards a defendant's *uncharged* crimes or bad acts, admitted under an exception to the general rule prohibiting such proof (*see People v Telfair*, 41 NY3d 107, 114 [2023]). Thus, the People's attempt to introduce uncharged acts of sexual abuse as *Molineux* evidence did not reflect—or, as defendant contends, effectively result in a concession—that the indictment was facially duplicitous. To the extent that defendant raises other contentions regarding the alleged duplicity of the indictment, defendant failed to preserve those contentions for our review (*see generally Allen*, 24 NY3d at 449-450; *People v Woods*, 221 AD3d 1415, 1416 [4th Dept 2023], *lv denied* 40 NY3d 1095 [2024]).

To the extent that defendant contends that the time period alleged in count 1 of the indictment, which charged him with sexual abuse in the first degree, rendered that count defective and subject

to dismissal because it included a time period after which the subject child turned 13 years old, we conclude that the contention lacks merit (*see People v Carter*, 147 AD3d 1514, 1515 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]). Count 1 charged defendant with sexual abuse in the first degree by name, with reference to the relevant section of the Penal Law as well as the relevant subdivision containing the age element (*see id.*). In addition, count 1 specifically alleged that defendant committed the act against a child who was, at the time, less than 13 years old, and that allegation was not negated by inclusion of a period of time when the victim was 13 years of age or older (*see id.*).

We likewise reject defendant's contention that County Court erred in admitting in evidence the testimony of the victim regarding uncharged sexual abuse by defendant. Such evidence was admissible in this case "to complete the narrative of the events charged in the indictment . . . , and it also provided necessary background information" (*People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009] [internal quotation marks omitted]; *see People v Bailey*, 239 AD3d 1375, 1375-1376 [4th Dept 2025], *lv denied* 44 NY3d 1009 [2025]; *People v Caballero*, 199 AD3d 1468, 1470 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022], *reconsideration denied* 38 NY3d 949 [2022]). To the extent that defendant contends that the court's instructions to the jury regarding the *Molineux* evidence were inadequate, defendant failed to preserve that contention for our review (*see generally People v Hildreth*, 199 AD3d 1366, 1368 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]).

Defendant next contends that he was denied a fair trial when the court provided an allegedly insufficient instruction in response to a prospective juror's comments during voir dire that allegedly tainted certain seated jurors and the pool of prospective jurors. By failing to object to the content of the court's instruction, however, defendant failed to preserve that issue for our review (*see generally People v Gaiter*, 224 AD3d 1384, 1384 [4th Dept 2024], *lv denied* 41 NY3d 1018 [2024], *reconsideration denied* 42 NY3d 970 [2024]; *People v Hall*, 194 AD3d 1372, 1373 [4th Dept 2021], *lv denied* 37 NY3d 972 [2021]; *People v Standsblack*, 162 AD3d 1523, 1527 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]).

Defendant further contends that the court erred in permitting the People to elicit testimony from an expert regarding child sexual abuse accommodation syndrome (CSAAS). Contrary to defendant's contention, however, such testimony is admissible to explain to a jury why a child victim might, as did the victim in this case, delay in disclosing sexual abuse (*see People v Nicholson*, 26 NY3d 813, 828 [2016]; *People v Williams*, 20 NY3d 579, 584 [2013]; *People v Young*, 206 AD3d 1631, 1632 [4th Dept 2022]). To the extent that defendant contends that answers given during voir dire established that this particular jury panel did not require CSAAS testimony, the record of jury voir dire does not support defendant's contention (*see Nicholson*, 26 NY3d at 828-829).

Defendant's contention regarding the legal sufficiency of the evidence is not preserved for our review inasmuch as defendant made only a general motion for a trial order of dismissal (*see People v Fowler*, 239 AD3d 1444, 1444 [4th Dept 2025], *lv denied* 44 NY3d 1011 [2025]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]).

Finally, although we conclude that defendant has raised no issue warranting reversal or modification of the judgment, we note that the Livingston County District Attorney failed to file a brief in opposition to this appeal and therefore failed "to perform [her] duty to the people of [her] county" (*People v Maull*, 218 AD3d 1236, 1243 [4th Dept 2023] [internal quotation marks omitted]; *see People v Coger*, 2 AD3d 1279, 1280 [4th Dept 2003], *lv denied* 2 NY3d 738 [2004]). The District Attorney is obligated to file a brief in opposition "unless the appeal is from a judgment which [s]he concedes should be reversed" (*Coger*, 2 AD3d at 1280 [internal quotation marks omitted]). No such concession has been made in this case.

Entered: April 24, 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 22-00359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DVONTEA ALEXANDER, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 10, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree, attempted murder in the second degree (two counts), assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). We affirm.

Contrary to defendant's contention, County Court did not err in denying defendant's for-cause challenge to a prospective juror. While the prospective juror's initial statements in response to questions from defense counsel raised a concern about his ability to render an impartial verdict, his responses to defense counsel's additional inquiries constituted " 'a personal, unequivocal assurance of impartiality [that] cure[d his] prior indication that [he was] . . . predisposed against . . . defendant' " (*People v Clark*, 171 AD3d 1530, 1531 [4th Dept 2019], quoting *People v Arnold*, 96 NY2d 358, 364 [2001]; *see People v Warrington*, 28 NY3d 1116, 1120-1121 [2016]).

Defendant next contends that the court erred in admitting in evidence certain software-generated video files purporting to show defendant's location based upon GPS coordinates obtained from an ankle monitor that defendant wore while on parole. The video files, together with multiple other files, were admitted on a single disc identified as People's Exhibit 31. Defendant argues that the People did not lay an adequate foundation for admission of the video files

because the People failed to explain how the video files were created and failed to establish that the locations identified on the video files accurately reflected the ankle monitor's location. However, defendant's general objection to a lack of foundation for admission of Exhibit 31 is insufficient to preserve the specific contention that defendant now advances on appeal with respect to the adequacy of the foundation for the video files at issue (*see generally People v Combs*, 243 AD3d 1259, 1260 [4th Dept 2025]).

Contrary to defendant's further contention, we conclude that the court did not err in permitting defendant's parole officer to identify him in two still images taken from surveillance video footage. The parole officer "had sufficient contact with . . . defendant to achieve a level of familiarity that render[ed] the lay opinion helpful" (*People v Mosley*, 41 NY3d 640, 648 [2024] [internal quotation marks omitted]), and while the images at issue are relatively clear, they are "not so crystal clear that the jury could identify a person as capably as any witness" (*id.* at 649). To the extent that defendant challenges the parole officer's identification of him in three other still images, that contention is unpreserved for our review (*see People v Rhynes*, 239 AD3d 1461, 1465 [4th Dept 2025], *lv denied* 44 NY3d 1029 [2025]; *see generally People v Montanez*, 135 AD3d 528, 528 [1st Dept 2016], *lv denied* 27 NY3d 1072 [2016]).

Defendant also failed to preserve his contention that the People engaged in prosecutorial misconduct during summation (*see People v McGuire*, 218 AD3d 1357, 1358 [4th Dept 2023]; *People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]), 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 [3] [c]).

We have reviewed defendant's remaining contentions and conclude that they do not warrant modification or reversal of the judgment.

Entered: April 24, 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 23-00922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT TURNER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Betty Calvo-Torres, A.J.), rendered April 3, 2023. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second 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, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We reverse.

Preliminarily, we agree with defendant that, under "the totality of the circumstances" presented here, his waiver of the right to appeal is invalid (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]; *see People v Nixon*, — AD3d —, — [Apr. 24, 2026] [4th Dept 2026] [decided herewith]). Consistent with our "responsibility to oversee the [plea] process and to review the record to ensure that the defendant's waiver of the right to appeal reflects a knowing and voluntary choice" (*People v Callahan*, 80 NY2d 273, 280 [1992]; *see Thomas*, 34 NY3d at 559), we must look at "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement" (*Thomas*, 34 NY3d at 559-560 [internal quotation marks omitted]), and, as necessary, "address our concern that trial judges may encourage the use of appeal waivers in order to insulate their decisions from appellate review and thus avoid reversals" (*Nixon*, — AD3d at — [internal quotation marks omitted]).

Thus, pursuant to the long-standing principle that "[n]ot only must judges actually be neutral, they must appear so as well" (*People v Novak*, 30 NY3d 222, 226 [2017]), "where a waiver of the defendant's right to appeal is a condition of a court-initiated plea agreement that does not require the People's consent, the waiver is invalid and unenforceable unless it is apparent from the record that the court had a distinct and proper reason to demand the waiver and foreclose judicial review at the time the demand was made" (*Nixon*, — AD3d at —).

Here, according to the testimony at the suppression hearing, two Buffalo Police Department officers received a dispatch report to respond to a residential address based on an anonymous 911 phone tip that an older Black man was knocking on the front door of that residence and arguing with a woman. The anonymous caller further reported overhearing the woman say to the man "why would you pull out a gun." The officers responded to the location and observed defendant, "an older [B]lack male on the [front] porch of [a neighboring house]." One of the officers approached defendant and asked if he could "pat him down." Although the officer testified that defendant unequivocally responded "yes" to his search request, the officer's body-worn camera (BWC) footage—which was admitted during the suppression hearing—instead records defendant responding, albeit faintly, to the officer's request with a question, namely, "For what?" The officer nonetheless proceeded to frisk defendant, and he recovered a handgun from defendant's jacket. A subsequent search of defendant incident to his arrest recovered narcotics. Following the hearing, Supreme Court denied suppression, concluding that "[t]he fact that the [BWC] failed to make an audible recording of defendant's response does not contradict or refute [the officer's] testimony" as to defendant's consent to a frisk.

Defendant thereafter pleaded guilty to the indictment upon his understanding that the court would impose the minimum sentence, to run concurrently, on both counts. While plea discussions were conducted off the record, defense counsel appropriately made a record of the fact that, although defendant requested to preserve his right to appeal the adverse suppression ruling, "the [c]ourt will not accept that . . . [and] will require [defendant] to waive all suppression issues except for illegalities in sentencing and other illegalities that would survive a waiver of appeal." Neither the court nor the prosecutor objected to, or otherwise qualified, defense counsel's assertion that the court had demanded defendant waive his right to appeal as a condition of the plea agreement.

Here, the consent of the People to the plea agreement was not required because the charges remained as presented (*see* CPL 220.10 [2]) and, thus, the People were not in a position to demand a waiver of defendant's right to appeal nor was such a waiver—or any other plea condition—necessary to secure the People's consent (*see Nixon*, — AD3d at —). It follows, then, that the court's demand of an appeal waiver, particularly as viewed in light of defendant's expressed desire to seek appellate review of the court's suppression ruling, "gives rise to the appearance that the court [was] seeking to shield its decisions

from appellate review or otherwise act[ing] as an advocate for the People" and, therefore, "we must look to the record as a whole to determine whether there is a distinct and proper reason for the court's demand" (*id.* at —).

Although the record establishes that defendant received consideration for his waiver of the right to appeal inasmuch as he "secure[d] the benefit of the sentencing limitation promised by the court" (*People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]; *see People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]; *cf. People v Gramza*, 140 AD3d 1643, 1643-1644 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]), the sentencing limitation does not constitute a distinct and proper reason for the court's demand of an appeal waiver because the court retains both the obligation and the discretion to impose sentence in light of the information subsequently obtained from the presentence report and other sources regardless of whether defendant waived his right to appeal (*see People v Farrar*, 52 NY2d 302, 306 [1981]; *Nixon*, — AD3d at —). Similarly, any perceived finality for the court derived from the appeal waiver following its denial of defendant's suppression motion does not constitute a distinct and proper reason for the demand of the waiver because, "unlike the People, the trial court does not participate in an appeal, and thus does not have the same interest in achieving finality to the case" (*People v Sutton*, 184 AD3d 236, 244 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]).

Upon our review of the record here, including defense counsel's unrefuted assertion that the court unilaterally demanded an appeal waiver that would foreclose appellate review of its determination of defendant's suppression motion as a condition of the court-initiated plea agreement, we conclude that it is not apparent that the court had a distinct and proper reason to demand that waiver of defendant's right to appeal. Therefore, the waiver of the right to appeal is invalid and does not preclude our review of defendant's contentions.

We agree with defendant that the court erred in refusing to suppress physical evidence. "It is well established that, in evaluating the legality of police conduct, [a court] must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Burnett*, 126 AD3d 1491, 1492 [4th Dept 2015] [internal quotation marks omitted]; *see People v De Bour*, 40 NY2d 210, 215 [1976]; *People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998]). In *De Bour*, the Court of Appeals "set forth a graduated four-level test for evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; [and] level four, arrest,

requires probable cause to believe that the person to be arrested has committed a crime" (*People v Moore*, 6 NY3d 496, 498-499 [2006], citing *De Bour*, 40 NY2d at 223; *see Burnett*, 126 AD3d at 1492).

Here, as the People acknowledge, the anonymous 911 phone tip generated only a belief that criminal activity was afoot and, as such, limited the officers' permissible action to a level two common-law right of inquiry (*see Moore*, 6 NY3d at 498-499). The officers thus were "entitled to interfere with [defendant] to the extent necessary to gain explanatory information, but short of a forcible seizure" (*De Bour*, 40 NY2d at 223), permitting them to engage defendant in "extended and accusatory" questioning (*People v Hollman*, 79 NY2d 181, 191 [1992]) and to "ask[ ] defendant for permission to search his person" (*People v Dibble*, 43 AD3d 1363, 1364 [4th Dept 2007], *lv denied* 9 NY3d 1032 [2008]; *see People v Battaglia*, 86 NY2d 755, 756 [1995]).

"It is the People's burden to establish the voluntariness of defendant's consent [to such a search], and that burden is not easily carried, for a consent to search is not voluntary unless it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" (*People v Packer*, 49 AD3d 184, 187 [1st Dept 2008], *affd* 10 NY3d 915 [2008] [internal quotation marks omitted]; *see People v Gonzalez*, 39 NY2d 122, 128 [1976]). Although "great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]), we conclude that the court's determination that defendant consented to the search is "unsupported by the record" in light of the BWC footage and discernible audio (*People v Williams*, 244 AD3d 1785, 1788 [4th Dept 2025]; *see generally People v Savage*, 137 AD3d 1637, 1639 [4th Dept 2016]).

Inasmuch as the People failed to present evidence at the suppression hearing establishing defendant's voluntary consent to the search of his person, all physical evidence seized as a result of that consent "should have been suppressed" (*People v Kendrick*, 147 AD3d 1419, 1421 [4th Dept 2017] [internal quotation marks omitted]; *see People v Purdy*, 106 AD3d 1521, 1523 [4th Dept 2013]). We therefore reverse the judgment, vacate the plea, and grant that part of the omnibus motion seeking to suppress physical evidence. Additionally, because our conclusion results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (*see People v Ruise*, 242 AD3d 1587, 1588 [4th Dept 2025]), and we remit the matter to Supreme Court for proceedings pursuant to CPL 470.45 (*see People v Corey*, 209 AD3d 1306, 1306-1307 [4th Dept 2022]; *People v Holz*, 184 AD3d 1156, 1157 [4th Dept 2020]).

In light of our determination, we do not address defendant's challenge to the severity of the sentence.

Entered: April 24, 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 24-00065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM GIAMBELLUCA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 16, 2023. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery 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 murder in the second degree (Penal Law § 125.25 [3] [felony murder]) and robbery in the first degree (§ 160.15 [1]). Defendant's conviction arises out of an incident in which defendant followed the victim out of a bar to the parking lot, inflicted blows to the victim's head with a wooden baluster, and stole the victim's wallet. The victim then drove from the bar to his apartment, where he was found unconscious. He was hospitalized and shortly thereafter succumbed to his injuries.

Defendant contends that the evidence with respect to his conviction of felony murder is legally insufficient because the People did not establish that his actions in robbing the victim caused the victim's death. Although defendant correctly concedes that his legal sufficiency contention is unpreserved (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), he also challenges the weight of the evidence with respect to the causation element of felony murder, and we note that " 'we necessarily review the evidence adduced as to each of the elements of th[at] crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]).

As relevant here, a conviction of felony murder requires evidence

that defendant "commit[ted] or attempt[ed] to commit robbery . . . , and, in the course of and in furtherance of such crime or of immediate flight therefrom, he . . . cause[d] the death of" the victim (Penal Law § 125.25 [3]). To prove causation in this case, the People were required to demonstrate that defendant's conduct was "a sufficiently direct cause of death, and that there was not an obscure or merely probable connection between defendant's conduct and the death[ ]" (*People v Li*, 34 NY3d 357, 369 [2019] [internal quotation marks omitted]; *see People v Stewart*, 40 NY2d 692, 696-697 [1976]). Although defendant's conduct need not be the sole cause of the victim's death, his conduct is a "sufficiently direct cause" of it where "(1) [his] actions were an actual contributory cause of [the] death, in the sense that they forged a link in the chain of causes which actually brought about the death; and (2) . . . the fatal result was reasonably foreseeable" (*Li*, 34 NY3d at 369 [internal quotation marks omitted]; *see People v Davis*, 28 NY3d 294, 300 [2016]).

Here, the trial evidence included surveillance video showing that the victim paid with cash and that defendant then closely followed him out of the bar. During the portion of defendant's police interview that was played during the trial, defendant admitted that he hit the victim with a piece of wood. Moreover, a wooden baluster was found near the bar with the victim's blood on it, along with tissue, hair, and a mixture of DNA from which defendant's DNA could not be excluded. Additionally, there was a large spot of blood in the parking lot of the bar where the victim's phone and glasses were found, and there was blood all over the victim's car and apartment. The victim was found lying unconscious on the floor in his apartment, and he never regained consciousness at the hospital. An autopsy revealed that the victim died from blunt-impact head injuries, and the Medical Examiner who conducted the autopsy opined that those injuries were consistent with being hit by an item like the wooden baluster. Viewing the evidence in light of the elements of felony murder 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 causation (*see People v Swift*, 160 AD3d 1341, 1342-1343 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]; *see generally Davis*, 28 NY3d at 300-302; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, inasmuch as the evidence supports the determination that "defendant's conduct was an actual contributory cause of the victim's death" (*Davis*, 28 NY3d at 301), it cannot be said that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495).

Contrary to the further contention of defendant, we conclude that County Court did not err in refusing to suppress the statements that he made to the police while being interviewed at the police station. We reject defendant's contention that he was incapable of making voluntary statements or knowingly waiving his *Miranda* rights as a result of his purported impaired mental state due to drug use and lack of sleep. The record of the suppression hearing, including the video recording of the interview, establishes that defendant was read and waived his *Miranda* rights before the interview began, and he "was

alert and made coherent decisions about the topics of discussion with the police" during the interview (*People v Ashline*, 124 AD3d 1258, 1259 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]). We thus conclude that defendant's cognitive ability was not so impaired by drugs or lack of sleep that he was incapable of making voluntary statements (*see People v Carbonaro*, 134 AD3d 1543, 1548 [4th Dept 2015], *lv denied* 27 NY3d 994 [2016], *reconsideration denied* 27 NY3d 1149 [2016]). Moreover, there is no basis to disturb the court's credibility determinations, which are "entitled to great deference" (*People v Butler*, 170 AD3d 1496, 1497 [4th Dept 2019]; *see People v Morrow*, 167 AD3d 1516, 1517 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019]).

We agree with defendant that the People were improperly permitted to use extrinsic evidence to impeach defendant's expert on a collateral issue relevant only to the expert's credibility (*cf. People v Snow*, 185 AD3d 1400, 1402 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *see generally People v Alvino*, 71 NY2d 233, 247-248 [1987]). Here, the court erred in allowing the prosecutor to read from a court decision rejecting the expert's testimony in an unrelated criminal prosecution of a different defendant. However, given that there is overwhelming evidence of defendant's guilt and no significant probability that the error contributed to defendant's conviction, we find the error harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation is unpreserved for our review inasmuch as defendant failed to object to the statements he now challenges on appeal (*see People v Moorhead*, 224 AD3d 1225, 1227 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]; *People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]). In any event, we conclude that the contention is without merit inasmuch as the statements were either fair comment on the evidence or appropriate response to arguments made in defendant's summation (*see People v Speaks*, 28 NY3d 990, 992 [2016]; *People v Cerroni*, 225 AD3d 1117, 1120 [4th Dept 2024], *lv denied* 41 NY3d 1017 [2024]).

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

Entered: April 24, 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 25-01177

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

IN THE MATTER OF KAREN ANTHONE, FORMERLY KNOWN AS KAREN CARLO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE CARLO, GERALD T. CARLO, AND LAURIE LYNN CARLO, TRUSTEE OF THE CARLO FAMILY TRUST, RESPONDENTS-RESPONDENTS.

ROACH, LENNON & BROWN, PLLC, BUFFALO (DAVID L. ROACH OF COUNSEL), FOR PETITIONER-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered January 31, 2025. The order denied petitioner's motion for summary judgment.

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

Memorandum: Petitioner commenced this special proceeding pursuant to CPLR 5236 seeking, inter alia, an order directing the sale of real property owned by respondent George Carlo (respondent) and the Carlo Family Trust (Trust), of which respondent is the grantor and lifetime beneficiary, in order to satisfy a judgment lien against respondent. Supreme Court denied petitioner's motion for summary judgment. We affirm.

Initially, we agree with petitioner that the court erred in concluding that she had the burden to establish a fraudulent conveyance in order to seek enforcement of her judgment lien against any of the assets held by the Trust. "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator" (EPTL 7-3.1 [a]). "The statutory language is abundantly clear and unequivocal that self-settled trusts are void as against creditors" (*State of New York v Hawes*, 169 AD2d 919, 920 [3d Dept 1991]). Thus, the "settlor's creditors need not allege or prove [that a self-settled] trust is a fraudulent conveyance before they are permitted to reach the full amount of the beneficial interest retained by the settlor" (*Vanderbilt Credit Corp. v Chase Manhattan Bank*, 100 AD2d 544, 546 [2d Dept 1984]; *see State of New York v Coyle*,

171 AD2d 288, 290 [3d Dept 1991], *appeal dismissed* 79 NY2d 805 [1991]).

Here, the Trust was funded with assets transferred either by respondent or a "person or entity who is acting under the authority granted to that person or entity by [respondent]"; the purpose of the Trust is to, inter alia, "receive and manage assets for the benefit of [respondent]"; during respondent's lifetime, the Trustee "shall pay all of the income of th[e] Trust, and also such sums from principal as [respondent] may request . . . to or for the benefit of [respondent], or as [respondent] may designate"; and respondent may revoke the Trust at any time. We conclude that the "trust then is totally owned by [respondent]" (*Hawes*, 169 AD2d at 921) and, therefore, "is available to satisfy [respondent's] obligation to [petitioner]" (*Coyle*, 171 AD2d at 290).

We further conclude, contrary to petitioner's contention, that although petitioner met her initial burden on the motion, respondent's affidavit in opposition raises a triable issue of fact whether the homestead exemption is applicable to the sale of the subject real property (*see generally* CPLR 5206 [a]; *Matter of Halpern v White*, — AD3d —, —, 2026 NY Slip Op 01360, *2 [2d Dept 2026]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

249

CA 24-02023

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

BARBARA SCIARRINO, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND P. SCIARRINO, DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

JUST CAUSE, ROCHESTER (HENRY W. JONES, IV, OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KAMAN BERLOVE LLP, ROCHESTER (BRYANNE L. JONES OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Livingston County (John B. Gallagher, Jr., J.), entered September 19, 2024, in a divorce action. The order, inter alia, equitably distributed the marital property of the parties.

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

Same memorandum as in *Sciarrino v Sciarrino* ([appeal No. 2] — AD3d — [Apr. 24, 2026] [4th Dept 2026]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

250

CA 24-02024

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

BARBARA SCIARRINO, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND P. SCIARRINO,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

JUST CAUSE, ROCHESTER (HENRY W. JONES, IV, OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

KAMAN BERLOVE LLP, ROCHESTER (BRYANNE L. JONES OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from a judgment of the Supreme Court, Livingston County (John B. Gallagher, Jr., J.), entered November 21, 2024, in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of life insurance that defendant is required to obtain from $750,000 to the remaining unpaid amount of his maintenance obligation and by providing that defendant may obtain a declining term life insurance policy, and as modified the judgment is affirmed without costs in accordance with the following memorandum: In this contested matrimonial action, in appeal No. 1, plaintiff wife appeals and defendant husband cross-appeals from an order entered following a nonjury trial that, inter alia, equitably distributed the marital property. In appeal No. 2, the wife appeals and the husband cross-appeals from a subsequent judgment of divorce, which incorporated the order in appeal No. 1.

In appeal No. 2, the wife contends that Supreme Court erred in calculating the equitable distribution of the marital property. We reject that contention. Although the wife contends that the equitable distribution award ignores the husband's dissipation of marital assets, her "claims [of dissipation] are conclusory and rely on the credibility of the parties, and in such circumstances[, this Court] shall afford the trial court great deference" (*Jonas v Jonas*, 225 AD3d 1229, 1229 [4th Dept 2024] [internal quotation marks omitted]; *see Fishman v Fishman*, 244 AD3d 526, 526 [1st Dept 2025]; *McPheeters v McPheeters*, 284 AD2d 968, 969 [4th Dept 2001]). We likewise reject the wife's further contention that the court erred in ordering the

sale of the marital residence and neighboring properties instead of awarding them to her (*see Barrett v Barrett*, 175 AD3d 1067, 1068-1069 [4th Dept 2019]; *see generally Wojtowicz v Wojtowicz*, 171 AD2d 1073, 1073 [4th Dept 1991]). Inasmuch as we agree with the court that the husband did not wastefully dissipate marital assets, there is no basis to award the wife additional marital property on that ground (*see generally Barrett*, 175 AD3d at 1068-1069).

Contrary to the wife's further contention, the court did not err in declining to distribute certain personal property given that the parties presented insufficient evidence with respect to the value of that property (*see Iwasykiw v Starks*, 179 AD3d 1485, 1486 [4th Dept 2020]). Contrary to her related contention, the record does not reflect that the husband waived his right to that personal property.

We reject the contention of the parties on their respective appeal and cross-appeal in appeal No. 2 that the court abused its discretion in setting the amount and duration of maintenance awarded to the wife. "[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Mehlenbacher v Mehlenbacher*, 199 AD3d 1304, 1307 [4th Dept 2021] [internal quotation marks omitted]), and we conclude that the court did not abuse its discretion in light of, inter alia, its overall distribution of marital assets and debts. Furthermore, we conclude that the court did not err in applying the statutory income cap to the husband's income when determining the wife's award of maintenance (*see* Domestic Relations Law § 236 [B] [6] [b] [4]; [d] [1], [2]). The court appropriately set forth the relevant factors that it relied upon in declining to include income above the cap (*see* § 236 [B] [6] [d] [3]), and we perceive no abuse of discretion in the court's decision in that regard (*see Lisowski v Lisowski*, 218 AD3d 1214, 1216 [4th Dept 2023]).

We agree with the husband on his cross-appeal, however, that the amount of life insurance that he is required to carry in order to secure his maintenance obligations is excessive. Although the judgment directed the husband to pay durational maintenance in the amount of approximately $650,000, it required that the husband secure the maintenance obligation with a policy of life insurance in the amount of $750,000, naming the wife as beneficiary. We conclude that he should instead be required to maintain a life insurance policy of at least, but not more than, the remaining amount of his total maintenance obligation. In other words, "the amount of life insurance [that the husband] is required to obtain to secure his . . . maintenance obligation[ ] may have a declining term that would permit [him] to reduce the amount of life insurance by the amount of . . . maintenance actually paid, provided that at all times the amount of life insurance is not less than the amount of . . . maintenance remaining unpaid" (*Syrett v Syrett*, 208 AD3d 1030, 1032 [4th Dept 2022]; *see Marfone v Marfone*, 118 AD3d 1488, 1489 [4th Dept 2014]). We therefore modify the judgment accordingly.

We reject the wife's contention that the court abused its discretion in awarding her only a portion of the requested amount of attorney's fees. "An award of attorney's fees pursuant to Domestic Relations Law § 237 (a) is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case" (*Vella v Vella*, 213 AD3d 1225, 1227 [4th Dept 2023] [internal quotation marks omitted]). Here, the court properly considered the circumstances of the case, the nature of the attorney's fees sought, the wife's previous award of interim attorney's fees, and the allocation of marital debts, and we conclude that the award is reasonable (*see generally id.*).

With respect to appeal No. 1, because the issues raised on appeal from the order are brought up for review and have been considered on the appeal and cross-appeal from the final judgment in appeal No. 2, the appeal and cross-appeal from the order in appeal No. 1 are dismissed (*see generally* CPLR 5501 [a]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

251

CA 25-01089

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

PETER A. DERKOVITZ AND CHERYL A. DERKOVITZ,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

UP STATE TOWER CO., LLC, DEFENDANT-RESPONDENT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 4, 2025. The order denied the motion of plaintiffs for summary judgment and granted the cross-motion of defendant for summary judgment.

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

Memorandum: In this action sounding in breach of contract, plaintiffs appeal from an order that denied their motion for summary judgment on the complaint and granted defendant's cross-motion for, inter alia, summary judgment dismissing the complaint. Although Supreme Court properly denied plaintiffs' motion, it erred in granting defendant's cross-motion, and we therefore modify the order accordingly.

Plaintiffs entered into a lease agreement (lease) with defendant to permit defendant to place a cell tower (Communications Facility) on a designated portion of plaintiffs' property (Premises). As relevant here, the lease provides that plaintiffs would pay "all real estate taxes and assessments on the Property on time" and that defendant would pay "all personal property taxes on the Communications Facility on time." The "Property" is defined by the metes and bounds of the real property owned by plaintiffs, while "Communications Facility" is defined as "a pole or tower, and . . . related equipment, cables, antennas, equipment shelters or cabinets and fencing and any other items [defendant] need[s] to successfully and securely use the Premises." The lease provides that title to the Communications Facility would remain "personal to and be vested in [defendant]" and

is described in the lease as defendant's "personal property." However, neither "real estate taxes and assessments" nor "personal property taxes" are defined in the lease, and New York State does not impose personal property taxes.

The central dispute here is whether, in agreeing to "pay all personal property taxes on the Communications Facility," defendant agreed to pay the additional tax attributable to the Communications Facility or whether, in agreeing to pay "all real estate taxes and assessments on the Property," plaintiffs agreed to pay that additional tax. "It is well settled that '[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent' " (*Colella v Colella*, 129 AD3d 1650, 1651 [4th Dept 2015], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Because the "best evidence of what the parties intend is what they say in their writing, . . . a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield*, 98 NY2d at 569). If an "agreement on its face is reasonably susceptible of more than one interpretation," however, the contract is ambiguous (*Kowalak v Keystone Med. Servs. of N.Y., P.C.*, 197 AD3d 893, 894 [4th Dept 2021] [internal quotation marks omitted]). Where a contract is ambiguous, to be entitled to summary judgment, "the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon" (*id.* [internal quotation marks omitted]).

We conclude that the lease provisions regarding the parties' respective tax obligations are ambiguous as to which party is responsible for paying the additional tax attributable to the Communications Facility. Defendant argues that the only reasonable interpretation of the lease is that it imposes upon plaintiffs the responsibility for paying the additional tax related to the Communications Facility inasmuch as the plain language requires plaintiffs to pay real estate taxes and assessments, that defendant is obligated to pay only personal property taxes, and that there are no personal property taxes imposed in New York State. Plaintiffs effectively contend that the only reasonable interpretation of the provision requiring defendant to pay personal property taxes is that defendant agreed to pay the additional tax attributable to the Communications Facility and that any other interpretation would render that requirement " 'meaningless or without force or effect' " (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]).

We conclude that neither party met the burden on their respective motion and cross-motion of establishing that their construction of the salient lease provisions is the only reasonable interpretation of those provisions, and thus no party is entitled to summary judgment (*see generally Corter-Longwell v Juliano*, 200 AD3d 1578, 1583-1584 [4th Dept 2021]; *Kowalak*, 197 AD3d at 894). Summary judgment is inappropriate "[w]here[, as here,] resolution of an ambiguous [provision] turns on questions of credibility and the choice between

reasonable inferences to be drawn therefrom, [and thus] determination of the intent of the parties is a question of fact for the trier of fact" (*Show Car Speed Shop v United States Fid. & Guar. Co.*, 192 AD2d 1063, 1065 [4th Dept 1993]; *see State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

287

CA 24-02071

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

IN THE MATTER OF THE ESTATE OF JANET HESS,
ALSO KNOWN AS JANET ELAINE HESS, DECEASED.

BARRETT HESS, PETITIONER-APPELLANT,

ORDER

JENNIFER HESS, ADAM HESS AND
EPHRAIM HESS, RESPONDENTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (AMANDA L. LOWE OF COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, ALBANY (MICHAEL D. ZAHLER OF COUNSEL), FOR RESPONDENT-RESPONDENT JENNIFER HESS.

LIPPES MATHIAS LLP, BUFFALO (COURTNEY DONAHUE TASNER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ADAM HESS AND EPHRAIM HESS.

Appeal from an order of the Surrogate's Court, Chautauqua County (Stephen W. Cass, S.), entered December 4, 2024. The order granted the motion of respondents to dismiss the probate petition and dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs for reasons stated in the decision by the Surrogate.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

294

KA 24-01950

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CRAIG E. LAIRD, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 3, 2024. The judgment convicted defendant, upon a guilty plea, of aggravated family offense (four counts) and criminal contempt in the second degree.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

302

CAF 25-00820

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

IN THE MATTER OF SHAIYAH H.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAI-JANAE H., RESPONDENT-APPELLANT.

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

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

MAUREEN N. POLEN, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered April 18, 2025, in a proceeding pursuant to Family Court Act article 10. The order continued the custody of the subject child with petitioner.

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 denied her Family Court Act § 1028 application seeking the return of her child to her care and custody following her temporary removal pursuant to a prior order. We affirm.

A parent's application pursuant to Family Court Act § 1028 for the return of a child who has been temporarily removed shall be granted unless Family Court finds, upon a hearing, that "the return presents an imminent risk to the child's life or health" (Family Ct Act § 1028 [a]; *see Matter of Nyomi P. [Imeisha P.]*, 224 AD3d 906, 906 [2d Dept 2024], *lv dismissed* 41 NY3d 1008 [2024]; *Matter of Mikayla T. [Jyranda R.]*, 199 AD3d 1009, 1010 [2d Dept 2021]). "A credibility assessment of a hearing court is accorded considerable deference on appeal" (*Matter of Gavin G. [Carla G.]*, 165 AD3d 1258, 1259 [2d Dept 2018]), and the court's determination will not be disturbed if it is supported by a sound and substantial basis in the record (*see Matter of Junny B. [Homere B.]*, 200 AD3d 687, 688 [2d Dept 2021]; *Matter of Zaniyah R.-T. [Wanda R.]*, 196 AD3d 584, 585 [2d Dept 2021]). In making its determination, the court "must weigh, in the factual setting before it, whether the imminent risk to the child can be

mitigated by reasonable efforts to avoid removal," and "balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" (*Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]; *see Nyomi P.*, 224 AD3d at 907). The child protective services agency bears the burden of establishing that the child would be at imminent risk and therefore should remain in its custody (*see Matter of Skkyy M.R. [Justin R.—Desanta C.]*, 206 AD3d 660, 661 [2d Dept 2022]; *Matter of Chase P. [Maureen Q.]*, 199 AD3d 807, 809 [2d Dept 2021]).

Here, there is a sound and substantial basis in the record for the court's determination that the return of the child to the mother would present an imminent risk to the child, and that the risk could not be mitigated by reasonable efforts to avoid removal, in light of the testimony at the hearing as to the mother's untreated, severe mental health conditions. Petitioner established that the mother suffered from frequent "visions" that predominantly focused on murder and also—at times—included the child; that the mother lacked insight into her mental health conditions; that the mother failed to take medication for her mental health conditions or to seek mental health therapy; and that the mother followed her "visions" and intrusive thoughts, thereby engaging in unsafe behaviors that placed the child at imminent risk of harm (*see Matter of Jurenny M.-J. [Kelley M.]*., 235 AD3d 980, 982 [2d Dept 2025]; *Gavin G.*, 165 AD3d at 1259; *Matter of Alex A.E. [Adel E.]*, 103 AD3d 721, 722 [2d Dept 2013]; *see also Matter of Ayanna O. [Amanda M.]*, 233 AD3d 1418, 1420-1421 [3d Dept 2024]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

304

CAF 24-02030

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

IN THE MATTER OF DANA DIFLORIO,
PETITIONER-RESPONDENT,

V ORDER

JOHN HEISLER, III, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Diane E. Plumley, J.), entered November 27, 2024, in a proceeding pursuant to Family Court Act article 4. The order, among other things, granted petitioner's written objection to an order of the support magistrate entered October 7, 2024.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

319

TP 25-01691

PRESENT: LINDLEY, J.P., BANNISTER, MONTOUR, GREENWOOD, AND HANNAH, JJ.

IN THE MATTER OF OSCAR ASENCIO, PETITIONER,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI 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 October 2, 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

328

CA 25-00905

PRESENT: LINDLEY, J.P., BANNISTER, MONTOUR, GREENWOOD, AND HANNAH, JJ.

YOERKIS GAMBOA, PLAINTIFF-RESPONDENT,

V ORDER

TJM SYRACUSE, LLC, DEFENDANT-APPELLANT.

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

VIRGINIA & AMBINDER, LLP, NEW YORK CITY (MICHELE A. MORENO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered October 31, 2024. The order, insofar as appealed from, granted in part the motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 23, 2026,

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

350

CA 25-00898

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

SYCAMORE MAPLE FAMILY LIMITED PARTNERSHIP,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

JAMES F. JERGE, JR., DEFENDANT-RESPONDENT-APPELLANT.

HOOVER & DURLAND LLP, BUFFALO (SPENCER L. DURLAND OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

THE KNOER GROUP, PLLC, BUFFALO (COLIN M. KNOER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered April 15, 2025. The order granted in part and denied in part plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 2, 2026,

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

351

CA 24-00573

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

COLLEEN PANDY, INDIVIDUALLY AND AS THE
EXECUTOR OF THE ESTATE OF CYNTHIA GALVIN, DECEASED,
PLAINTIFF-APPELLANT,

V ORDER

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
OF AMERICA, JAMES J. GALVIN, III, AND
ROBERT W. COYLE, AS EXECUTOR OF THE ESTATE OF
JULIA M. COYLE, DECEASED, DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH PIZZI O'REILLY FALANGA LLP, NEW YORK CITY (JOSEPH L. LINARES OF COUNSEL), NEW YORK CITY, FOR DEFENDANT-RESPONDENT TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA.

THE MCGORRY LAW FIRM, LLP, BUFFALO (MICHAEL P.J. MCGORRY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JAMES J. GALVIN, III, AND ROBERT W. COYLE, AS EXECUTOR OF THE ESTATE OF JULIA M. COYLE, DECEASED.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 6, 2024. The order, inter alia, granted the motion of defendants for summary judgment.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

352

CA 24-01986

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

JEREMIAH SMITH, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, CITY OF BUFFALO POLICE DEPARTMENT, AND JOHN DOES 1-10, DEFENDANTS-RESPONDENTS.

HORN WRIGHT, LLP, BUFFALO (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROBERT E. QUINN, ACTING CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Edward Pace, J.), entered November 12, 2024. The order denied the motion of plaintiff for leave to amend the complaint.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

358

KA 24-00461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RYAN S. KELSEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Jon E. Budelmann, A.J.), rendered February 13, 2024. The judgment convicted defendant, upon his plea of guilty, of aggravated family offense.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

359

KA 24-00462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RYAN S. KELSEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Jon E. Budelmann, A.J.), rendered May 16, 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.

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

370

KAH 25-00481

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RICHARD F. MILLS, PETITIONER-APPELLANT,

V ORDER

J. WOLCOTT, SUPERINTENDENT, ATTICA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Terrence M. Parker, A.J.), dated December 18, 2024, in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

373

CA 25-00585

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

TOWD POINT MORTGAGE TRUST 2019-3, U.S. BANK NATIONAL ASSOCIATION, INDENTURE TRUSTEE, PLAINTIFF-RESPONDENT,

V ORDER

PATRICK MINOGUE, ALSO KNOWN AS PATRICK J. MINOGUE, III, DEFENDANT-APPELLANT.

PATRICK J. MINOGUE, III, DEFENDANT-APPELLANT PRO SE.

ZECHNER ELLMAN & KRAUSE LLP, NEW YORK CITY (BJ FINNERAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered October 7, 2024. The order denied defendant's motion to vacate a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by defendant and the attorney for the plaintiff on February 9 and 16, 2026,

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

379

KA 23-02080

PRESENT: BANNISTER, J.P., OGDEN, NOWAK, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DIANE E. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered June 20, 2023. The appeal was held by this Court by order entered March 14, 2025, decision was reserved and the matter was remitted to Steuben County Court for further proceedings (236 AD3d 1345 [4th Dept 2025]). The proceedings were held and completed.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Odyssty D.R.*, 208 AD3d 1596, 1596-1597 [4th Dept 2022]).

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

380

KA 24-01098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DAVID W. FREE, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Niagara County (Mario A. Giacobbe, A.J.), entered April 11, 2024. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

382

KA 25-00933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ALEXANDER R. WATROS, DEFENDANT-APPELLANT.

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Oswego County Court (Armen J. Nazarian, J.), dated March 28, 2025. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court

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

394

CA 25-00711

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

MAURA BIANCO, PLAINTIFF-APPELLANT,

V ORDER

JACQUELINE S. JOHNSON, DEFENDANT-RESPONDENT.

BRONSTER LLP, NEW YORK CITY (MELANIE S. WOLK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MANCUSO BRIGHTMAN PLLC, ROCHESTER (ERIN E. ELMOUJI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered December 27, 2024. The order, inter alia, denied the motion of plaintiff for summary judgment.

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

Entered: April 24, 2026

Ann Dillon Flynn
Clerk of the Court