SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 3, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED FEBRUARY 3, 2023

	357	CA 21 01522	DONNA ARPINO V ASHLAND, LLC
_____	631	CA 21 00779	MASSA CONSTRUCTION, INC. V JAMES MEANEY
_____	632	CA 21 01650	MASSA CONSTRUCTION, INC. V JAMES MEANEY
_____	694	KA 11 02605	PEOPLE V ARTAMION J. MOORE
_____	831	KA 22 00214	PEOPLE V TODD PRITCHARD
_____	832	KA 21 01580	PEOPLE V HORACE SHEPARD
_____	833	KA 16 01614	PEOPLE V CEDRICK K. WILSON
_____	836	CAF 20 01554	Mtr of MIRAH P.
_____	837	CA 22 00575	GLENN FEDERMAN V TOWN OF LORRAINE
_____	838	CA 21 01291	AMY GORDON V GUY A. MURPHY
_____	839	CA 22 00467	FRANK A. VELLA V IRYNA M. VELLA
_____	840	CA 22 00468	FRANK A. VELLA V IRYNA M. VELLA
_____	841	CA 22 00024	FRANK A. VELLA V IRYNA M. VELLA
_____	842	CA 21 01256	ANDRE STEVENSON V RED ROOF INNS, INC.
_____	843	CA 21 01269	CHRISTOPHER COLLVER V FORNINO REALTY, LLC
_____	844	CA 22 00212	ISABEL M. COFFEY V CITY OF CORNING
_____	845	CA 22 00424	WILLIAM A. MEYERS V BRIAN T. BERL
_____	846	CA 22 00569	WILLIAM A. MEYERS V BRIAN T. BERL
_____	847	CA 21 01544	BRANDI PLUMMER V TOWN OF GREECE
_____	848	CA 21 01254	STONEWELL BODIES & MACHINE, INC. V ALL AREA FIRE & RESCUE APPARATUS SA LES, LLC
_____	910	KA 20 01531	PEOPLE V JAZZMIN ELMORE
_____	911	KA 22 00185	PEOPLE V ROBERT CORNWELL
_____	912	KA 17 01073	PEOPLE V BARBARA A. FREELAND
_____	913	KA 21 01364	PEOPLE V HANDSOME RICE
_____	914	KA 21 00610	PEOPLE V GARY MORGAN

_____	915	KA 20 01530	PEOPLE V JAZZMIN ELMORE
_____	920	CAF 21 00272	RYAN FELTZ V AMY YANUCIL
_____	921	CAF 21 01489	TODD E. DICKES V NICOLE L. JOHNSTON
_____	922	CA 22 00854	SYRACUSE FIRE FIGHTERS ASSOCIATION In the Matter CITY OF SYRACUSE
_____	923	CA 22 00828	RENEE V. SLOMBA V KRISTAN E. KLEPP
_____	924	CA 22 00808	CAYUGA NATION V TOWN OF SENECA FALLS
_____	925	CA 21 01258	FRANCES WADDELL V MILWAUKEE THP, LLC
_____	928	TP 22 01095	TARA MCSHANLEY V NEW YORK STATE OFFICE OF CHILDREN
_____	931	TP 22 00878	LEROY JOHNSON V STEWART T. ECKERT
_____	933	KA 20 01442	PEOPLE V CHRISTOPHER MONTREAL
_____	934	KA 20 01443	PEOPLE V CHRISTOPHER MONTREAL
_____	936	KA 14 00786	PEOPLE V MUSTAF OSMAN
_____	938	KA 20 00058	PEOPLE V ISAIAS N. MARCANO
_____	939	KA 22 00119	PEOPLE V THOMAS E WOLFE
_____	940	KA 18 00156	PEOPLE V OSWALD MCPHERSON, JR.
_____	956	KA 19 00152	PEOPLE V JOSHUA ORTIZ
_____	958	KA 17 01907	PEOPLE V KEVIN M. QUANDER
_____	959	KA 21 01110	PEOPLE V GUILLERMO J. TORRES-ACEVEDO
_____	961	KA 22 00111	PEOPLE V PHILLIP G MCINTOSH
_____	962	KA 21 00374	PEOPLE V NA'FARAN SCOTT
_____	979	KA 18 01801	PEOPLE V GREGORY LATTA
_____	980	KA 18 02111	PEOPLE V JOHN A. MCKOY
_____	981	KA 21 01563	PEOPLE V GREGORY S CUNNINGHAM
_____	983	KA 21 00310	PEOPLE V MICHAEL WILGOSZ
_____	997	KA 18 01757	PEOPLE V EZRA BELL
_____	1002	KA 19 00797	PEOPLE V LEON G. ROACH
_____	1004	KA 19 00350	PEOPLE V AMBER L. WESTBROOKS
_____	1007	CAF 21 01667	JOANNE C. SMITH V DANIEL L. BALDWIN
_____	1015	CA 21 01223	PB-36 DOE V NIAGARA FALLS CITY SCHOOL DISTRICT
_____	1016	KA 21 00728	PEOPLE V TOMBE YANGA

_____	1017	KA 21 00730	PEOPLE V TOMBE YANGA
_____	1018	KA 21 00733	PEOPLE V TOMBE YANGA
_____	1019	KA 21 00734	PEOPLE V TOMBE YANGA
_____	1022	KA 18 00718	PEOPLE V KEITH L. ROBBINS
_____	1023	KA 19 01219	PEOPLE V SANDY JONES
_____	1037	CA 22 00805	MARIA T. V CENTER FOR ELDER LAW & JUSTICE
_____	1039	KA 19 00988	PEOPLE V BERNARD SIPLIN, JR.
_____	1046	KA 22 00078	PEOPLE V NAQUANTEA BOWMAN
_____	1047	KA 21 00520	PEOPLE V LUZ VILELLA
_____	1054	CA 21 01348	RAPHAEL FELICIA V WILMINGTON TRUST NATIONAL ASSOCI
_____	1	TP 22 01440	JAVON M. RIDGEWAY V ANTHONY ANNUCCI
_____	5	KA 19 00536	PEOPLE V SEDETRICE WRIGHT
_____	6	KA 22 00258	PEOPLE V GRACE MITCHELL
_____	10	KAH 22 00827	CHARLES FLOYD V DEPARTMENT OF CORRECTIONS AND COMM
_____	11	CAF 20 01536	MELISSA FROMM V DENNIS GREENE
_____	12	CA 22 01254	ROBERT STERN V GOLUB CORPORATION
_____	13	CA 22 00914	GREAT LAKES ANESTHESIOLOGY, P.C. V DORON FELDMAN
_____	24	KA 22 00196	PEOPLE V STEVEN BUCKINGHAM
_____	25	KA 21 00940	PEOPLE V ADAM J. COLBERT
_____	26	CAF 22 00408	BONITA L. SHARLOW V KATHERINE H. HUGHES
_____	31	CAF 22 00409	JEREMY P. SLAY V BONITA L. SHARLOW
_____	37	CA 21 01633	CONNORS & FERRIS, LLP V BROWN CHIARI, LLP
_____	39	CA 22 00332	DOUGLAS A. BERGSTRESSER V BEVERLY J. BERGSTRESSER
_____	41	CA 22 00034	KORI GRASHA V TOWN OF AMHERST
_____	47	KA 21 01285	PEOPLE V MICHAEL G GORTON
_____	48	KA 18 01565	PEOPLE V TYUS D. EDGE
_____	54	KAH 21 01768	SALEEM SPENCER V ANTHONY J ANNUCCI
_____	58	CAF 21 01784	RICHARD RAWLEIGH V PEARL R. ZAMBITO
_____	59	CAF 22 00458	Mtr of INDIGO S.
_____	64	CA 22 00372	HARRIET BOARDMAN V JOANNE VAN DYKE

_____	84	CA 22 00834	DAMILOLA ANIMASHAUN V STATE OF NEW YORK
_____	88	CA 21 01757	THE ROYCE RESIDENTS HOUSING DEVELOP V JC LANDFUND LLC
_____	89	CA 22 00039	MICHAEL LEE V CANANDAIGUA NATIONAL BANK & TRUST
_____	91	KA 21 00199	PEOPLE V STEVEN J. ORDWAY
_____	92	KA 21 01739	PEOPLE V CLARENCE PARKS
_____	103	CA 22 00192	WALTER R. V STATE OF NEW YORK
_____	106	CA 22 00784	CLIFFORD WALLER V ADMAR SUPPLY CO., INC.
_____	108	CA 22 00703	CARLOS RAMIREZ-HERNANDEZ V MAVIS TIRE SUPPLY, LLC
_____	109	CA 22 00704	CARLOS RAMIREZ-HERNANDEZ V MAVIS TIRE SUPPLY, LLC
_____	114	KA 22 00265	PEOPLE V STEVEN C FORSHEY
_____	127	CA 22 00542	GARY KING V RENTAL ASSISTANCE CORPORATION
_____	129	CA 22 00088	F.Y. V NIAGARA FALLS CITY SCHOOL DISTRIC
_____	131	CA 22 00673	MELIKAH BRUNER V SANTA MOTORS
_____	144	CA 22 00922	ANGEL AVILES V STATE OF NEW YORK
_____	149	CA 21 01405	LAURA KWIATKOWSKI V ERIE COUNTY MEDICAL CENTER COR
_____	151	CA 22 00365	WALTER O. HERRERA V NC LOFTS HOUSING DEVELOPMENT F

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SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

357/22

CA 21-01522

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

DONNA ARPINO, INDIVIDUALLY AND AS EXECUTOR OF
THE ESTATE OF JOHN ARPINO, PLAINTIFF-RESPONDENT,

V ORDER

ASHLAND, LLC, ET AL., DEFENDANTS,
AND E.I. DU PONT DE NEMOURS AND COMPANY,
DEFENDANT-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (JOHN L. MURAD, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOCKS LAW FIRM PLLC, NEW YORK CITY (JANET C. WALSH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Scott J. DelConte, J.), entered April 29, 2021. The order denied the motion of defendant E. I. du Pont de Nemours and Company for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 12, 2023,

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

Entered: February 3, 2023 Ann Dillon Flynn

Clerk of the Court

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

631/22
CA 21-00779
PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MASSA CONSTRUCTION, INC., PLAINTIFF-APPELLANT,

V ORDER

JAMES MEANEY, ALSO KNOWN AS THE GENEVA BELIEVER,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BARCLAY DAMON LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), AND CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC, ITHACA (CHRISTINA N. NEITZEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered May 13, 2021. The order, among other things, granted defendant's motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 6 and 19, 2023,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

632/22
CA 21-01650
PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MASSA CONSTRUCTION, INC., PLAINTIFF-APPELLANT,

V ORDER

JAMES MEANEY, ALSO KNOWN AS THE GENEVA BELIEVER,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BARCLAY DAMON LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GREENBERG TRAURIG, LLP, ALBANY (MICHAEL J. GRYGIEL OF COUNSEL), AND CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC, ITHACA (CHRISTINA N. NEITZEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered November 1, 2021. The order awarded counsel fees in favor of defendant in the total amount of $46,253.00.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 6 and 19, 2023,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

694

KA 11-02605

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTAMION J. MOORE, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered December 14, 2011. The appeal was held by this Court by order entered February 10, 2017, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (147 AD3d 1548 [4th Dept 2017]). 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 murder in the second degree (Penal Law § 125.25 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal with respect to the weapon possession counts, on which the court had reserved decision but failed to rule (*People v Moore*, 147 AD3d 1548, 1548-1549 [4th Dept 2017]). Upon remittal, the court denied the motion. Contrary to defendant's contention, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that the court erred in failing to discharge a juror who failed to timely appear in court at one point during the trial is unpreserved because defendant never moved to discharge that juror (*see People v Boyd*, 175 AD3d 1030, 1032 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]; *People v Armstrong*, 134 AD3d 1401, 1401 [4th Dept 2015], *lv denied* 27 NY3d 962 [2016]). Indeed, when the court asked whether defendant was seeking a mistrial or disqualification of the juror in question, defense counsel responded

in the negative. Consequently, "defendant 'should not now be heard to complain' of the court's failure to discharge the juror" (*People v Phillips*, 34 AD3d 1231, 1231 [4th Dept 2006], *lv denied* 8 NY3d 848 [2007]; *see Armstrong*, 134 AD3d at 1401).

Defendant also contends that the verdict was tainted by two premature, and therefore coercive, *Allen* charges. Inasmuch as defendant did not raise any objection to the first of the two *Allen* charges that he challenges on appeal, his contention with respect to that charge is not preserved for our review (*see People v Gonzalez*, 208 AD3d 981, 982 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]), 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 second *Allen* charge, however, to which defendant did object, we conclude that it was not given prematurely because, at the time it was given by the court, the jury had been allowed to deliberate for approximately 10 hours and had sent a note to the court stating that they could not come to a verdict (*see generally People v Pagan*, 45 NY2d 725, 726-727 [1978]; *People v Sharff*, 38 NY2d 751, 752-753 [1975]; *People v Arguinzoni*, 48 AD3d 1239, 1241-1242 [4th Dept 2008], *lv denied* 10 NY3d 859 [2008]). Additionally, with respect to the substance of the second *Allen* charge, we conclude that, read as a whole, it "was 'encouraging rather than coercive' " (*People v Colon*, 173 AD3d 1704, 1706 [4th Dept 2019], *lv denied* 34 NY3d 929 [2019], quoting *People v Ford*, 78 NY2d 878, 879 [1991]). Indeed, we note that the second *Allen* charge essentially tracked the deadlock charge that appears in the Criminal Jury Instructions (*see* CJI2d[NY] Deadlock Charge; *see generally Gonzalez*, 208 AD3d at 983).

Defendant also contends that the court failed to comply with the procedure for handling and responding to jury notes set forth in *People v O'Rama* (78 NY2d 270 [1991]) with respect to Court Exhibit Nos. 6, 9, 11, and 15. Three of those jury notes—i.e., Court Exhibit Nos. 9, 11, and 15—were ministerial in nature, and therefore defendant failed to preserve his contention for our review when he failed to object to the court's handling of those notes at trial (*see People v Mays*, 20 NY3d 969, 971 [2012]; *People v Cirino*, 203 AD3d 1661, 1664-1665 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]; *People v Paul*, 171 AD3d 1467, 1468 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], *reconsideration denied* 34 NY3d 953 [2019], *cert denied* — US —, 140 S Ct 1151 [2020]). With respect to the fourth note, Court Exhibit No. 6, wherein the jury requested an exhibit, we conclude that defendant waived any objection because he had previously consented to allowing court deputies to provide requested exhibits to the jury without court intervention (*see People v Williams*, 21 NY3d 932, 935 [2013]; *People v King*, 56 AD3d 1193, 1194 [4th Dept 2008], *lv denied* 11 NY3d 926 [2009]).

Additionally, defendant's contention that the court erred by failing to respond immediately to the jury notes is unpreserved for our review due to defendant's failure to object on that ground at trial (*see People v Ortiz*, 1 AD3d 1017, 1018 [4th Dept 2003], *lv*

denied 1 NY3d 634 [2004]; *see generally People v Starling*, 85 NY2d 509, 516 [1995]). 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]). We also reject defendant's contention that the court erred in its response to a jury note requesting the readback of certain witness testimony. Here, in response to that note the court " 'appropriately advised the jurors to narrow their request for readback' " (*People v Lack*, 299 AD2d 872, 873 [4th Dept 2002], *lv denied* 99 NY2d 583 [2003]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

831

KA 22-00214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD S. PRITCHARD, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Jennifer M. Noto, J.), dated October 29, 2021. 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.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court abused its discretion in denying his request for a downward departure from his presumptive risk level. We reject that contention. Even assuming, arguendo, that defendant established at the SORA hearing, by a preponderance of the evidence, that the alleged mitigating circumstances existed in his case and that they were, as a matter of law, mitigating circumstances of a kind or to a degree not adequately taken into account by the guidelines (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *People v Gillotti*, 23 NY3d 841, 861 [2014]; *cf. People v Mann*, 177 AD3d 1319, 1320 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]), we conclude, upon weighing the mitigating circumstances against the aggravating circumstances, that the court did not abuse its discretion in denying the request for a downward departure. The totality of the circumstances demonstrates that "defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism" (*People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see People v Butler*, 129 AD3d 1534, 1535 [4th Dept 2015], *lv denied* 26 NY3d 904 [2015]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

832

KA 21-01580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HORACE SHEPARD, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered July 30, 2021. 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: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress, as the product of an unlawful search and seizure following a vehicle stop, a loaded firearm found on his person. We reject that contention.

Defendant contends that the police improperly relied solely on an anonymous tip as the basis for the stop of the vehicle he was driving and thus they lacked the requisite reasonable suspicion for the stop (*see generally People v Hinshaw*, 35 NY3d 427, 430 [2020]; *People v Spencer*, 84 NY2d 749, 752-753 [1995], *cert denied* 516 US 905 [1995]). Assuming, arguendo, that the 911 call to which the officers were responding, concerning a man with a gun, was made by an anonymous caller (*see People v Tantao*, 178 AD3d 1391, 1393 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]; *cf. People v Dixon*, 289 AD2d 937, 937-938 [4th Dept 2001], *lv denied* 98 NY2d 637 [2002]), we conclude that the police had reasonable suspicion to stop the vehicle based upon the contents of the 911 call and the confirmatory observations of the police officers involved (*see People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]; *People v Moss*, 89 AD3d 1526, 1527 [4th Dept 2011], *lv denied* 18 NY3d 885 [2012]; *see also Prado Navarette v California*, 572 US 393, 398-402 [2014]). Specifically, “the report of the 911 caller was

based on the contemporaneous observation of conduct that was not concealed" (*People v Jeffery*, 2 AD3d 1271, 1272 [4th Dept 2003]; *see People v Argyris*, 99 AD3d 808, 809-810 [2d Dept 2012], *affd* 24 NY3d 1138 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]; *see also People v Herold*, 282 AD2d 1, 6-7 [1st Dept 2001], *lv denied* 97 NY2d 682 [2001]), and the call was an excited utterance (*see People v Rivera*, 84 AD3d 636, 636 [1st Dept 2011], *lv denied* 17 NY3d 904 [2011]). In addition, when the first officer arrived, the people whom he initially encountered immediately confirmed that a fight had occurred and directed him to the location where the 911 caller was found. The caller remained at the scene, and, in excited utterances made when the first officer approached her, she said at least four times that the suspect had "just" driven off, and she confirmed that she was referring to a particular vehicle. A detective observed defendant driving that vehicle, dressed in clothing that matched the initial 911 description, and stopped the vehicle. We conclude that the caller's statements were sufficiently corroborated by the observations of the police to provide reasonable suspicion for the stop (*see Jeffery*, 2 AD3d at 1272; *cf. People v William II*, 98 NY2d 93, 99 [2002]).

Defendant's further contention, that the court erred in declining to reopen the suppression hearing, is "expressly waived" (*People v Hamilton*, 159 AD3d 559, 559 [1st Dept 2018], *lv denied* 31 NY3d 1117 [2018]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

833

KA 16-01614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CEDRICK K. WILSON, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered January 19, 2016. The judgment convicted defendant upon a jury verdict of attempted burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [4]), defendant contends that County Court should have suppressed the victim's in-court identification as unreliable. Because defendant did not move to suppress on that ground, however, his contention is unpreserved for our review (*see* CPL 470.05 [2]). The only ground for suppression advanced by defendant in his omnibus motion and at the *Wade* hearing was that the prior photographic identification procedure was impermissibly suggestive, a contention defendant has abandoned on appeal (*see generally People v Porter*, 200 AD3d 1599, 1600 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022]).

Defendant further contends that the verdict is against the weight of the evidence. We reject that contention. When the crime was committed, defendant was on parole and wearing an ankle device that tracked his movements with GPS. The undisputed evidence at trial established that defendant was within a radius of 50 feet of the victim's house at the exact time that the attempted burglary took place, and that defendant did not live on that street. Defendant circled the victim's block immediately before the crime and left the street immediately after.

Moreover, although the man with a gun who attempted to break into the victim's house wore a mask, the victim identified defendant as the

gunman by his "distinctive" eyes in a photograph shown to him by an investigator along with photographs of five other people, and the victim also identified defendant in court as the gunman. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that, although an acquittal would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, defendant contends that he was deprived of effective assistance of counsel because, among other reasons, his trial attorney failed to explore the fact that the witness had been shown a full-face photograph of defendant during the photographic identification procedure. We disagree. Defense counsel vigorously cross-examined the victim about the out-of-court identification and challenged the reliability of the in-court identification during his summation. Defendant does not specify what else defense counsel could or should have done to explore the issue. Defendant's remaining complaints about defense counsel's performance are based on "matters that are outside the record on appeal and thus must be raised, if at all, by way of a CPL article 440 motion" (*People v Quick*, 187 AD3d 1612, 1614 [4th Dept 2020], *lv denied* 36 NY3d 1053 [2021]; *see generally People v Timmons*, 151 AD3d 1682, 1684 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]).

Although defense counsel's performance at trial was not flawless, 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 People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

836

CAF 20-01554

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

IN THE MATTER OF MIRAH (ALSO KNOWN AS MIREYA) J.P.
AND MONICA J.P.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

MARQUIS P., RESPONDENT-APPELLANT,
AND STEPHANIE J., RESPONDENT.

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

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (AMANDA L. OREN OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered February 22, 2021 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, inter alia, adjudged that he neglected the subject children. We affirm. Contrary to the father's contention, petitioner established that he neglected the children inasmuch as petitioner showed by a preponderance of the evidence that each child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and . . . that the actual or threatened harm to the child[ren] is a consequence of the failure of the [father] to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1046 [b] [i]). Here, the hearing record demonstrates that the father failed to follow through with petitioner to address his mental health and chemical dependency issues, did not maintain suitable housing for the children, failed to regularly visit with the children, and abdicated his parental responsibilities while the children were living in foster care (*see Matter of Destiny B. [Anthony R.]*, 203 AD3d 1042, 1043 [2d Dept 2022]; *Matter of Malachi B. [Windell B.]*, 155 AD3d 492, 492 [1st Dept 2017]; *see also Matter of Evan T.*

[Shaquela T.], 155 AD3d 964, 966 [2d Dept 2017]).

The father failed to preserve for our review his further contention that Family Court erred in granting petitioner's motion to conform the pleadings to the proof (*see Matter of Serenity G. [Orena G.]*, 101 AD3d 1639, 1639 [4th Dept 2012]; *see generally* Family Ct Act § 1051 [b]).

We reject the father's contention that he received ineffective assistance of counsel at the fact-finding hearing. The father failed to "demonstrate the absence of strategic or other legitimate explanations[] for counsel's alleged shortcoming[s]" (*Matter of Faith K. [Jamie K.]*, 203 AD3d 1568, 1569 [4th Dept 2022] [internal quotation marks omitted]) and, viewing the record in totality, we conclude that the father received meaningful representation (*see Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]). Finally, we have reviewed the father's remaining contentions and conclude that none warrants reversal or modification of the order.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

837

CA 22-00575

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

GLENN FEDERMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF LORRAINE, HIGHWAY SUPERINTENDENT JOSEPH WASILEWSKI, DEPUTY HIGHWAY SUPERINTENDENT HAROLD DOWNEY, TOWN SUPERVISOR VINCE MOORE AND TOWN COUNCIL MEMBERS DAVID JOHNSON, JOE HODGES, LESTER HOBBS, GORDON HUTTON, DEVON M. FILSON, TIM TRYON, MICHAEL DOBBINS AND DAMIAN M. SMITH, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FITZGERALD MORRIS BAKER FIRTH, P.C., GLENS FALLS (MICHAEL CROWE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered October 29, 2021. The order granted the motion of defendants for summary judgment, denied the cross motion of plaintiff for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the third cause of action in the amended complaint, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendants, Town of Lorraine and certain of its officials, seeking, inter alia, damages for an unlawful taking of property arising from maintenance performed on Miller Road, which leads to plaintiff's home. Before the motions at issue were filed, Supreme Court granted defendants' motion to dismiss the amended complaint with the exception of that cause of action. No appeal was taken from that order. Plaintiff now appeals from an order granting defendants' motion for summary judgment dismissing the amended complaint, and denying his cross motion for summary judgment on the amended complaint, which at that time consisted of only the eminent domain cause of action. We agree with plaintiff that the court erred in granting the motion, therefore we modify the order accordingly.

As the parties seeking summary judgment dismissing the eminent

domain cause of action, defendants were required to establish, under these circumstances, that no unlawful taking occurred because Miller Road was a public highway by use pursuant to Highway Law § 189 and that all work that they performed was maintenance that did not have the effect of improperly widening the road. We agree with plaintiff that defendants failed to submit evidence establishing that Miller Road is a public highway within the meaning of section 189. "In order for a private road to be deemed a public highway by use, it must be show[n] that, for a period of at least 10 years, the road at issue was used by the public and the municipality exercised dominion and control over the road . . . Such a showing . . . requires more than intermittent use by the public and more than occasional road work by the municipality" (*Matter of Woodson v Town of Riverhead*, 203 AD3d 935, 937 [2d Dept 2022] [internal quotation marks omitted]; *see Brandon v Town of Southeast*, 150 AD3d 659, 659-660 [2d Dept 2017]; *see generally Town of Addison v Meeks*, 233 AD2d 843, 843-844 [4th Dept 1996], *lv denied* 89 NY2d 808 [1997]).

Here, in support of their motion, defendants submitted plaintiff's testimony at a General Municipal Law § 50-h hearing, at which plaintiff repeatedly testified that the Town had, until shortly before the commencement of this action, refused to maintain the part of the road at issue, and the affidavit of defendant Highway Superintendent Joseph Wasilewski, who had personal knowledge of the facts concerning only the two years that preceded the filing of the motion. Consequently, we conclude that defendants failed to "make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), and thus "the burden never shifted to [plaintiff], and denial of the motion was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad*, 64 NY2d at 853).

Contrary to plaintiff's further contention, however, the court properly denied his cross motion. In order to meet his burden on the cross motion, plaintiff was required to establish, as relevant here, either that Miller Road was not a public highway or that defendants engaged in a taking of his property without compensation by improperly widening the road during the recent maintenance. The evidence that plaintiff submitted in support of the cross motion failed to eliminate all triable issues of fact whether Miller Road is a public highway (*see generally Town of Addison*, 233 AD2d at 844; *Provencher v Town of Saranac*, 168 AD2d 770, 770 [3d Dept 1990]). Furthermore, plaintiff failed to establish that defendants' maintenance was outside the three-rod width, i.e., 49.5 feet, that is the minimum permitted width of a public highway by use under Highway Law § 189. Contrary to plaintiff's contention, the Town is not limited to performing maintenance within the area of the prior public use of the road. The statute "plainly permits a town to maintain and improve it in furtherance of the public's right of travel, to the width of 'at least three rods.' Stated differently, so long as the use at issue relates

directly or indirectly to the public's right of travel, the use of the highway may be extended past the [previously maintained] portion of the road to a width of at least three rods" (*Hoffman v Town of Shandaken*, 147 AD3d 1275, 1276 [3d Dept 2017]; *see also Dutcher v Town of Shandaken*, 23 AD3d 781, 782 [3d Dept 2005]). Thus, inasmuch as plaintiff failed to establish that any maintenance occurred outside the minimum width of three rods permitted by the statute, he failed to meet his burden on the eminent domain cause of action.

We have considered plaintiff's remaining contentions, and we conclude that they do not require reversal or further modification of the order.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

838

CA 21-01291

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

AMY GORDON AND MICHAEL LEVERE, PLAINTIFFS,

V MEMORANDUM AND ORDER

GUY A. MURPHY AND LINDA A. MURPHY, DEFENDANTS.

GUY A. MURPHY AND LINDA A. MURPHY, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

LUANNE PALME AND SELECT SOTHEBY'S INTERNATIONAL REALTY, THIRD-PARTY DEFENDANTS-APPELLANTS.

LYDECKER, MELVILLE (MATTHEW W. BIONDI OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

PULLANO & FARROW PLLC, ROCHESTER (LANGSTON D. MCFADDEN OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered June 25, 2021. The order, among other things, denied the motion of third-party defendants to dismiss the third-party complaint.

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

Memorandum: Plaintiffs (buyers) commenced an action seeking, inter alia, specific performance of a purchase and sale contract pursuant to which defendants-third-party plaintiffs (sellers) agreed to sell their lakefront property to the buyers. The sellers had executed a contract with third-party defendants (realtors) giving the realtors the exclusive right to sell the property on behalf of the sellers. When it appeared that the buyers "would not or could not" pay the purchase price, the realtors prepared and the sellers signed a cancellation and release of purchase and sale contract. At that point, the sellers allegedly began to entertain more lucrative offers for the property.

After the buyers commenced their action, the sellers commenced a third-party action, contending that the realtors breached their contract with the sellers and were negligent by, inter alia, failing to cancel the purchase and sale contract, misleading the sellers into

believing that the purchase and sale contract had been cancelled, and failing to assist the sellers in "negotiating an enforceable cancellation" of the purchase and sale contract, with the result that the sellers were not able to take advantage of the more lucrative offers on the property.

The realtors moved to dismiss the third-party complaint (*see* CPLR 3211 [a] [1], [7]). Supreme Court denied the motion, and we now affirm.

"On a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed, and courts must provide a plaintiff with every favorable inference . . . 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' " (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 297-298 [2017]). Specifically, " '[u]nder CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one' " (*id.* at 298; *see Pickard v Campbell*, 207 AD3d 1105, 1106-1107 [4th Dept 2022]).

Here, upon construing the third-party complaint liberally and according the sellers the benefit of every favorable inference, we conclude, contrary to the realtors' contentions, that the allegations of the third-party complaint sufficiently state causes of action for both breach of contract and negligence (*see* CPLR 3211 [a] [7]; *see generally 34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]; *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]).

We further conclude that the documentary evidence does not establish a defense to the third-party complaint as a matter of law (*see* CPLR 3211 [a] [1]). Although the realtors contend that the purchase and sale contract could not have been cancelled and, as a result, they caused no damages to the sellers, the realtors failed to establish that contention as a matter of law.

According to the factual allegations of the third-party complaint, after the buyers attempted to renegotiate the terms of the contract and indicated that they "would not or could not" pay the purchase price for the property, the realtors advised the sellers that the purchase and sale contract could be cancelled and that they could entertain new offers. In our view, the documentary evidence does not "resolve[] all factual issues as a matter of law, and conclusively dispose[] of the [sellers'] claim[s]" (*Pickard*, 207 AD3d at 1107).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

839

CA 22-00467

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

FRANK A. VELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

IRYNA M. VELLA, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARILYN J. PALUMBO, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered February 5, 2021 in a divorce action. The judgment, inter alia, incorporated by reference the parties' prenuptial agreement.

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

Same memorandum as in *Vella v Vella* ([appeal No. 3] — AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

840

CA 22-00468

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

FRANK A. VELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

IRYNA M. VELLA, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARILYN J. PALUMBO, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered August 30, 2021 in a divorce action. The order awarded defendant attorney's fees.

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

Same memorandum as in *Vella v Vella* ([appeal No. 3] — AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

841

CA 22-00024

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

FRANK A. VELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

IRYNA M. VELLA, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARILYN J. PALUMBO, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered December 29, 2021 in a divorce action. The amended judgment, inter alia, incorporated by reference the parties' prenuptial agreement.

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

Memorandum: The parties were married on December 31, 2008. Defendant had come to the United States on a 90-day fiancée visa, which was about to expire. Plaintiff asked defendant to sign a prenuptial agreement that had been drafted by his attorney, and the parties executed that agreement two days prior to the marriage. Among other things, the prenuptial agreement contained, as relevant here, an escalator clause that detailed the assets that plaintiff would be required to transfer to defendant "[i]n the event the impending marriage between the parties is annulled, terminated or dissolved subsequent to the tenth anniversary of the parties' marriage." In May 2018, plaintiff commenced this action for a divorce. At trial, on the issue of equitable distribution, defendant argued that the terms of the prenuptial agreement—particularly the escalator clause governing a 10-year marriage—should determine Supreme Court's distribution of the parties' assets. In contrast, plaintiff argued that the prenuptial agreement was unenforceable. In appeal No. 1, plaintiff appeals from the judgment of divorce that, inter alia, incorporated by reference the prenuptial agreement and distributed the parties' assets accordingly. In appeal No. 2, he appeals from an order that granted defendant's application for attorney's fees. In appeal No. 3, he appeals from an amended judgment of divorce that, inter alia, incorporated by reference the prenuptial agreement and distributed the parties' assets accordingly.

At the outset, we note that the judgment of divorce in appeal No. 1 was superseded by the amended judgment of divorce in appeal No. 3 and we must therefore dismiss appeal No. 1 (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]; *see also NHJB, Inc. v Utica First Ins. Co.* [appeal No. 4], 187 AD3d 1498, 1500 [4th Dept 2020]; *Stuart v Stuart*, 155 AD3d 1371, 1372 n 1 [3d Dept 2017]). We must also dismiss appeal No. 2 because the right of direct appeal from the order in appeal No. 2 terminated with the entry of the amended judgment of divorce in appeal No. 3 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The appeal from the amended judgment of divorce in appeal No. 3 brings up for review the propriety of the order in appeal No. 2 (*see* CPLR 5501 [a] [1]; *Bohner v Bohner*, 186 AD3d 1481, 1481-1482 [2d Dept 2020]).

In appeal No. 3, plaintiff contends that the prenuptial agreement is not enforceable because it is ambiguous. We reject that contention. "It is well settled that duly executed prenuptial agreements are generally valid and enforceable given the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]; *see Bloomfield v Bloomfield*, 97 NY2d 188, 193 [2001]; *Caricati v Caricati*, 181 AD3d 1279, 1280 [4th Dept 2020]). "As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Van Kipnis*, 11 NY3d at 577, quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

"Whether an agreement is ambiguous is a question of law for the courts . . . Ambiguity is determined by looking within the four corners of the documents, not to outside sources" (*Kass v Kass*, 91 NY2d 554, 566 [1998]). "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' " (*Smith v Smith*, 66 AD3d 584, 584-585 [1st Dept 2009], quoting *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]).

Here, the prenuptial agreement stated, in relevant part, that "in the event [the parties' marriage] is annulled, terminated or dissolved subsequent to the tenth anniversary," plaintiff would be required to, inter alia, pay defendant $50,000 "within 30 days following the entry of the office of the clerk of the Court of competent jurisdiction granting the decree of Divorce, Judgment of Separation, Annulment or dissolution of a void marriage." Under the circumstances of this case, that plain language of the agreement is susceptible to no other interpretation than that, for purposes of the escalator clause, the length of the marriage is measured from the date of the parties' marriage until the entry of the judgment of divorce. In particular, the parties' use of precise, well-defined legal terms, including the

words “annulled” and “dissolved,” supports that conclusion (*see generally* Domestic Relations Law §§ 140, 170, 220). Indeed, of particular relevance here, in an action for divorce a marriage is not dissolved until entry of the judgment of divorce (*see generally* § 170).

We reject plaintiff’s contention that using the date of the divorce judgment to determine the end of the marriage renders the escalator clause indefinite or lacking reasonable certainty. On the contrary, using the entry date of the judgment of divorce as the date that a marriage ends provides a straightforward mechanism to determine the length of the marriage. Because the prenuptial agreement’s escalator clause is not ambiguous, the court properly determined that the parties’ marriage would end “subsequent to the tenth anniversary” inasmuch as the judgment of divorce would be entered after the tenth anniversary. Consequently, the court properly distributed to defendant certain of plaintiff’s assets, as directed by the escalator clause (*see generally Bennett v Bennett*, 103 AD3d 825, 826 [2d Dept 2013]).

We further reject plaintiff’s contention that the court abused its discretion in awarding attorney’s fees to defendant. “An award of an attorney’s fee 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” (*Grant v Grant*, 71 AD3d 634, 634-635 [2d Dept 2010] [internal quotation marks omitted]; *see Dechow v Dechow*, 161 AD3d 1584, 1585 [4th Dept 2018]). Here, the court properly considered the circumstances of this case, including the parties’ relative financial circumstances and the merits of their positions during trial, and we conclude that the award is reasonable. In particular, we conclude that the court did not abuse its discretion in imputing income to plaintiff based upon the financial assistance he received from his son (*see generally Matter of Ralph D. v Courtney R.*, 123 AD3d 635, 635 [1st Dept 2014]; *Nederlander v Nederlander*, 102 AD3d 416, 417-418 [1st Dept 2013]). Finally, plaintiff’s contention that the prenuptial agreement barred the award of attorney’s fees to defendant is raised for the first time on appeal and therefore is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

842

CA 21-01256

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

ANDRE STEVENSON, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

RED ROOF INNS, INC., DEFENDANT.

RED ROOF INNS, INC., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

GRACE PROPERTY SERVICE, INC., THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SANTACROSE & FRARY, BUFFALO (LISA M. DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 27, 2021. The order, insofar as appealed from, granted in part the motion of defendant-third-party plaintiff for summary judgment and denied in part the cross motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Andre Stevenson (plaintiff) when he slipped and fell on ice in a parking lot on property owned by defendant-third-party plaintiff, Red Roof Inns, Inc. (Red Roof). Prior to plaintiff's accident, Red Roof had entered into a snow removal maintenance agreement with third-party defendant, Grace Property Service, Inc. (Grace Property). In its answer, Red Roof asserted a cross claim for contractual indemnification against Grace Property. Red Roof subsequently moved for, inter alia, summary judgment on its cross claim for contractual indemnification. Grace Property cross-moved for, inter alia, summary judgment dismissing that cross claim. Supreme Court granted that part of Red Roof's motion seeking summary judgment on its contractual indemnification cross claim, denied Grace Property's cross motion insofar as it sought

dismissal of that cross claim, and converted the cross claim into a third-party claim. Grace Property now appeals.

We agree with Grace Property that the court erred in granting that part of Red Roof's motion seeking summary judgment on its contractual indemnification cross claim. Pursuant to the snow removal maintenance agreement, Grace Property was obligated to indemnify Red Roof for any damages "aris[ing] out of or in connection with any act or omission of [Grace Property] in connection with its performance under [the agreement]." Exhibits to the agreement required Grace Property to "begin performing snow and ice removal services upon two (2) inches of snowfall, and every two (2) inches of snowfall thereafter" and to apply "salt . . . on an as needed basis."

In support of its motion, Red Roof submitted documentary evidence that Grace Property salted the parking lot four days prior to the accident and plowed it three days before the accident. It further submitted the deposition testimony of plaintiff, who testified that the parking lot at the time of his fall had accumulated "unsalted, melting ice and it hadn't been plowed." Plaintiff's wife testified at her deposition that she observed a "patch of . . . chunky, slushy, ice" in the place where plaintiff had fallen. However, plaintiff and his wife testified that it had not snowed during the two days prior to plaintiff's fall. Rather, the temperature had been above freezing and the conditions were rainy. Under these circumstances, we conclude that Red Roof failed to establish as a matter of law that plaintiff's accident "ar[ose] out of or in connection with any act or omission of [Grace Property] in connection with its performance under [the agreement]" (*cf. Imperati v Kohl's Dept. Stores, Inc.*, 91 AD3d 1111, 1114 [3d Dept 2012]; *see generally Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1292-1293 [4th Dept 2010]; *Baratta v Home Depot USA*, 303 AD2d 434, 435 [2d Dept 2003]). We further conclude that Grace Property was not entitled to summary judgment dismissing Red Roof's contractual indemnification cross claim because Grace Property failed to establish as a matter of law that it performed its obligations under the agreement (*see Trzaska*, 77 AD3d at 1292-1293; *Baratta*, 303 AD2d at 435).

Inasmuch as Grace Property failed to meet its initial burden on its cross motion with respect to the cross claim, the court properly denied that part of the cross motion seeking summary judgment dismissing the cross claim. However, the court should have denied that part of Red Roof's motion seeking summary judgment on its contractual indemnification cross claim, without regard to the sufficiency of the opposition papers (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In light of the foregoing, we modify the order by denying Red Roof's motion in its entirety.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

843

CA 21-01269

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

CHRISTOPHER COLLVER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FORNINO REALTY, LLC, AND MICHAEL FORNINO,
DEFENDANTS-APPELLANTS.

KNYCH & WHRITENOUR, LLC, EAST SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE CHIECO LAW GROUP, UTICA (MARK O. CHIECO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered September 9, 2021. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

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 personal injury action seeking damages for injuries he allegedly sustained when the staircase he was descending collapsed under him as he was working on a construction project on property owned by defendant Fornino Realty, LLC. The accident occurred shortly after another worker on the property removed a wooden block that had been screwed into the floor at the base of the staircase to secure it. At the time of the accident, screws that should have been in place to secure the top of the staircase were absent. Defendants appeal from an order insofar as it denied that part of their motion for summary judgment dismissing the complaint with respect to the first and second causes of action, which allege common-law negligence and a violation of Labor Law § 200. We now reverse the order insofar as appealed from.

Generally, landowners "have a duty to maintain their properties in reasonably safe condition" (*Cox v McCormick Farms, Inc.*, 144 AD3d 1533, 1533-1534 [4th Dept 2016]; *see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]), and "Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Forman v Carrier Corp.*, 172 AD3d 1920, 1920 [4th Dept 2019] [internal quotation marks omitted]). Thus, with respect to both common-law negligence and

Labor Law § 200 claims based on a dangerous premises condition, "a defendant landowner has the initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of [the] dangerous condition" (*Menear v Kwik Fill*, 174 AD3d 1354, 1357 [4th Dept 2019]; *see Forman*, 172 AD3d at 1920; *Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014]).

Here, defendants met their initial burden on their motion of establishing that they did not have actual notice of any dangerous condition of the staircase by submitting evidence that defendant Michael Fornino (Fornino) was unaware prior to the accident of any missing screws, he had used the staircase on the night before without incident, he would have noticed a bounce in the staircase if the staircase had not been secure, and neither he nor anyone else noticed such a bounce. In opposition, plaintiff failed to raise a triable issue of fact with respect to actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Similarly, defendants met their initial burden on their motion of establishing that they did not create the dangerous condition that caused plaintiff's accident (*cf. generally Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544, 544-545 [1st Dept 2011]; *Henderson v L & K Collision Corp.*, 146 AD2d 569, 571 [2d Dept 1989]) and, in opposition, plaintiff failed to raise a triable issue of fact whether defendants created that condition.

We further conclude that defendants met their initial burden with respect to the issue of constructive notice of the dangerous condition. For a property owner to be on constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the property owner or the property owner's] employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, defendants had no employees and defendants have established that the dangerous condition did not exist "for a sufficient length of time before the accident to permit [Fornino] . . . to discover and remedy" the condition (*Solecki v Oakwood Cemetery Assn.*, 158 AD3d 1088, 1089-1090 [4th Dept 2018] [internal quotation marks omitted]; *see St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1503 [4th Dept 2016]). In opposition, plaintiff failed to raise a triable issue of fact as to constructive notice.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

844

CA 22-00212

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

ISABEL M. COFFEY AND CALVIN COFFEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF CORNING, DEFENDANT-APPELLANT.

GERBER CIANO KELLY BRADY LLP, GARDEN CITY (BRENDAN T. FITZPATRICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (MEGAN K. COLLINS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered August 18, 2021. The order denied defendant's motion for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this negligence action seeking damages for injuries that plaintiff Isabel M. Coffey allegedly sustained when she slipped and fell on ice in a parking lot owned and operated by defendant. Defendant moved for summary judgment dismissing the amended complaint, contending, among other things, that it had not received prior written notice of the allegedly dangerous condition, as required by the Code of the City of Corning § 200-9. Defendant now appeals from an order denying the motion. We reverse.

Where a municipality meets its initial burden on its summary judgment motion by establishing that it had not received prior written notice as required by its prior notification law (*see DeMaioribus v Town of Cheektowaga*, 188 AD3d 1643, 1643 [4th Dept 2020]), the burden shifts to plaintiffs to show that an issue of fact exists whether defendant had received prior written notice or " 'to demonstrate the applicability of one of [the] two recognized exceptions to the [prior written notice] rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality' " (*Hume v Town of Jerusalem*, 114 AD3d 1141, 1141-1142 [4th Dept 2014], quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Groninger v Village of Mamaroneck*, 17 NY3d 125, 129 [2011]).

We agree with defendant that it met its initial burden of showing that it had not received the requisite prior written notice and that plaintiffs failed to raise a triable issue of fact with respect to that issue. Moreover, the evidence submitted by plaintiffs failed to raise a triable issue of fact whether defendant affirmatively created the dangerous condition through an act of negligence (*see generally Brockway v County of Chautauqua*, 187 AD3d 1674, 1674-1675 [4th Dept 2020]) or "derive[d] a special benefit from th[e] property unrelated to the public use" (*Poirier v City of Schenectady*, 85 NY2d 310, 315 [1995]; *see generally D'Antuono v Village of Saugerties*, 101 AD3d 1331, 1332-1333 [3d Dept 2012]; *Loiaconi v Village of Tarrytown*, 36 AD3d 864, 865 [2d Dept 2007]). Therefore plaintiffs failed to raise a triable issue of fact whether either exception to the prior written notice rule applies (*see Duffel v City of Syracuse*, 103 AD3d 1235, 1235-1236 [4th Dept 2014]). We additionally conclude that there is no merit to plaintiffs' assertion "that the [City]'s prior written notice statute is inapplicable because the [City] acted in a proprietary capacity" (*Belluck v Town of North Hempstead*, 193 AD3d 669, 670 [2d Dept 2021]; *see Creutzberger v County of Suffolk*, 140 AD3d 915, 916-917 [2d Dept 2016]; *see generally Wittorf v City of New York*, 23 NY3d 473, 480 [2014]).

Defendant's remaining contentions are moot in light of our determination.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

845

CA 22-00424

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

WILLIAM A. MEYERS AND EILEEN MEYERS,
PLAINTIFFS-RESPONDENTS,

V ORDER

BRIAN T. BERL AND FAITH BERL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENDALL, WALTON & BURROWS, WATERTOWN (KATHRYN J. HARRIENGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 25, 2021. The judgment and order, inter alia, declared that plaintiffs have an easement over defendants' property.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.,* 147 AD2d 977, 977 [4th Dept 1989]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

846

CA 22-00569

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

WILLIAM A. MEYERS AND EILEEN MEYERS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BRIAN T. BERL AND FAITH BERL,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENDALL, WALTON & BURROWS, WATERTOWN (KATHRYN J. HARRIENGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 21, 2021. The order and judgment, inter alia, granted plaintiffs an easement over defendants' property.

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

Memorandum: Defendants own two parcels of land in Cape Vincent, Lot 10 and Lot 11, which border the St. Lawrence River. Plaintiffs own a single inland parcel across the street from Lot 10. In the 1960s, the parents of plaintiff William A. Meyers (Meyers parents) acquired the inland parcel, and the father of defendant Faith Berl acquired Lot 11. In 1993, Faith Berl became the owner of Lot 11 and, in 2010, defendants became the owners of Lot 10, an unimproved parcel of land. In 2012, plaintiffs became the owners of the inland parcel.

Pursuant to a 1964 Letter Agreement (Land Agreement) signed by Lionel Radley, who owned all the relevant properties at the time, and the father of plaintiff William A. Meyers, the Meyers parents were to obtain a "right of way to the River." The Land Agreement did not specify the location of that right-of-way. In 1969, Radley executed a deed conveying the inland parcel to the Meyers parents, but the deed did not mention any right-of-way regarding access to the river.

From 1964 through 2017, plaintiffs' family members repeatedly used Lot 10 to access the river and to engage in recreational activities. They installed, on an annual basis, a seasonal dock and boat hoist at Lot 10's waterfront, at times with the help of

defendants' family members. In 2017, however, defendants sent plaintiffs a letter "revoking [the] permission" to use Lot 10 and proposing terms for a new agreement to allow plaintiffs to use Lot 10. Plaintiffs rejected the proposal and thereafter commenced this action seeking, inter alia, a determination that they have a prescriptive easement with respect to Lot 10.

Following a nonjury trial, Supreme Court issued an order and judgment that, inter alia, declared that plaintiffs have an easement over and across Lot 10. We now affirm.

As a preliminary matter, it is well settled that where, as here, the appeal is from a nonjury trial, "the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). "Nonetheless, 'the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence' " (*Unger v Ganci*, 200 AD3d 1604, 1605 [4th Dept 2021], quoting *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]).

We conclude that a fair interpretation of the evidence supports the court's determination that plaintiffs had a prescriptive easement over Lot 10 inasmuch as the use of Lot 10 by plaintiffs' family members has, since 1969, been hostile to the owners' rights.

Unlike title by adverse possession, the determination of an easement by prescription focuses on a party's use of property rather than possession thereof (*see Di Leo v Pecksto Holding Corp.*, 304 NY 505, 510-512 [1952]). To establish an easement by prescription, plaintiffs were required to "establish by clear and convincing evidence [use] that was *hostile and under a claim of right*; actual; open and notorious; and continuous for the required period" of 10 years (*Mau v Schusler*, 124 AD3d 1292, 1296 [4th Dept 2015] [emphasis added]; *see Beutler v Maynard*, 80 AD2d 982, 982 [4th Dept 1981], *affd* 56 NY2d 538 [1982]; *Di Leo*, 304 NY at 512). The "hostile and under [a] claim of right" element does not encompass "two distinctly different requirements" (*Walling v Przybylo*, 24 AD3d 1, 6 [3d Dept 2005], *affd* 7 NY3d 228 [2006]). Rather, "the two parts of th[at] element have been viewed as virtually synonymous. Both parts require that the possession be truly adverse to the rights of the party holding record title" (*id.*, citing *Brand v Prince*, 35 NY2d 634, 636 [1974]).

Here, defendants do not contest that plaintiffs established by clear and convincing evidence that their use was actual; open and notorious; and continuous for the required period, inasmuch as plaintiffs are able to "tack[ ] on" the established use by the Meyers parents (*Pierce v Frost*, 295 AD2d 894, 895 [4th Dept 2002]). The sole disputed issue is whether the use of Lot 10 by the Meyers parents was hostile and under a claim of right, i.e., adverse. We agree with the

court that plaintiffs established by clear and convincing evidence that it was hostile and under a claim of right.

"Possession [or use] is hostile when it constitutes an actual invasion of or infringement upon the owner's rights" (*Parklands E., LLC v Spangenberg*, 174 AD3d 1374, 1376 [4th Dept 2019] [internal quotation marks omitted]). Where a plaintiff's " 'entry upon land has been by permission or under some right or authority derived from the owner, adverse possession does not commence until such permission or authority has been repudiated and renounced and the [plaintiff] thereafter has assumed the attitude of hostility to any right in the real owner' " (*Gallea v Hess Realty Corp.*, 128 AD2d 274, 275-276 [4th Dept 1987], *affd* 71 NY2d 999 [1988], quoting *Hinkley v State of New York*, 234 NY 309, 316-317 [1922]). Based on our review of the trial evidence, we conclude that plaintiffs established by clear and convincing evidence that the use of Lot 10 constituted an actual invasion of or infringement upon the owners' rights.

We agree with plaintiffs that the court properly concluded that any provision for a right-of-way in the Land Agreement was extinguished in 1969 when the deed, which did not include any provision for a right-of-way to access the river, was executed. "It is settled law that, where a contract for the sale of land has been executed by a conveyance, the terms of the contract concerning the nature and extent of property conveyed merge into the deed and 'any inconsistencies between the contract and the deed are to be explained and governed solely by the deed, which is presumed to contain the final agreement of the parties' " (*Village of Warsaw v Gott*, 233 AD2d 864, 865 [4th Dept 1996]; *see Pickard v Campbell*, 207 AD3d 1105, 1107-1108 [4th Dept 2022]; *Gately v Gately*, 117 AD3d 1490, 1490 [4th Dept 2014]). Although there are exceptions to the merger doctrine (*see Pickard*, 207 AD3d at 1108; *Sicignano v Dixey*, 124 AD3d 1301, 1303-1304 [4th Dept 2015]), none applies here. As a result, even if the Land Agreement granted the Meyers parents a right-of-way over Lot 10, that express grant of authority was terminated as of 1969. Moreover, the Meyers parents and plaintiffs did not thereafter receive any other permission or authority from Radley or defendants to use Lot 10. Nevertheless, the Meyers parents and plaintiffs' family members continued to use Lot 10 to access the river and for other activities during the required period and indeed for almost five decades following the execution of the 1969 deed under a mistaken, albeit reasonable, belief that they had a legal right to do so.

In sum, the right-of-way set forth in the Land Agreement was extinguished by the deed, and the continued use over the ensuing decades constituted " 'an actual invasion of or infringement upon the owner's rights' " (*Parklands E., LLC*, 174 AD3d at 1376; *see Estate of Becker v Murtagh*, 19 NY3d 75, 81-83 [2012]; *Greenberg v Sutter*, 257 AD2d 646, 646-647 [2d Dept 1999]). We thus conclude that the court properly determined that plaintiffs established by clear and convincing evidence that they had a prescriptive easement over and

across Lot 10.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

847

CA 21-01544

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

BRANDI PLUMMER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF GREECE AND JOHN FARRARO,
DEFENDANTS-APPELLANTS.

GALLO & IACOVANGELO, LLP, ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 28, 2021. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained in a rear-end collision in which the vehicle she was driving was struck by the front plow of a snowplow owned by defendant Town of Greece (Town) and operated by defendant John Farraro, an employee of the Town. Defendants moved for summary judgment dismissing the complaint on the ground that the reckless disregard rather than the ordinary negligence standard of care applied based on Vehicle and Traffic Law § 1103 (b) and that Farraro did not act with reckless disregard for the safety of others. Supreme Court denied the motion. We affirm.

Vehicle and Traffic Law § 1103 (b) "exempts from the rules of the road all vehicles, including [snowplows], which are 'actually engaged in work on a highway' . . . , and imposes on such vehicles a recklessness standard of care" (*Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [2015]; *see Riley v County of Broome*, 95 NY2d 455, 461 [2000]; *Chase v Marsh*, 162 AD3d 1589, 1590 [4th Dept 2018]; *Arrahim v City of Buffalo*, 151 AD3d 1773, 1773 [4th Dept 2017]). That exemption, however, "applies only when such work is in fact being performed at the time of the accident" (*Hofmann v Town of Ashford*, 60 AD3d 1498, 1499 [4th Dept 2009]). Although the exemption does "not apply if the snowplow . . . [is] merely traveling from one route to another route" (*Arrahim*, 151 AD3d at 1773; *see Hofmann*, 60 AD3d at 1499), a snowplow may be "engaged in work even if the plow

blade [is] up at the time of the accident and no salting [is] occurring" when the snowplow operator is nevertheless "working his [or her] 'run' or 'beat' at the time of the accident" (*Arrahim*, 151 AD3d at 1773; *see Clark v Town of Lyonsdale*, 166 AD3d 1574, 1574 [4th Dept 2018]; *Harris v Hanssen*, 161 AD3d 1531, 1533 [4th Dept 2018]; *Matsch v Chemung County Dept. of Pub. Works*, 128 AD3d 1259, 1260-1261 [3d Dept 2015], *lv denied* 26 NY3d 997 [2015]).

Here, viewing the evidence in the light most favorable to plaintiff as the nonmoving party and drawing every available inference in her favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that defendants failed to establish as a matter of law that the snowplow was "actually engaged in work on a highway" at the time of the accident (Vehicle and Traffic Law § 1103 [b]; *see Arrahim*, 151 AD3d at 1773). Although the snowplow may have been "engaged in work" even if the plow blades were raised at the time of the accident and no salting was occurring, we conclude that defendants "failed to establish as a matter of law that [Farraro] was working his 'run' or 'beat' at the time of the accident" (*Arrahim*, 151 AD3d at 1773; *cf. Clark*, 166 AD3d at 1574; *Harris*, 161 AD3d at 1533). The deposition testimony submitted by defendants in support of their motion was vague and equivocal with respect to whether the accident site was part of Farraro's route on the day in question—Farraro did not precisely describe the geographical contours of his route or state that the accident site was a part thereof—and was insufficient to satisfy defendants' initial burden (*see generally Mollette v 111 John Realty Corp.*, 194 AD3d 614, 615 [1st Dept 2021]; *Indarjali v Indarjali*, 132 AD3d 1277, 1277 [4th Dept 2015]). Moreover, defendants' initial submissions otherwise failed to eliminate the question whether Farraro was "merely traveling from one route to another route" on roads that did not constitute part of his run or beat (*Arrahim*, 151 AD3d at 1773; *see Hofmann*, 60 AD3d at 1499). Because defendants failed to meet their initial burden on the motion, the burden never shifted to plaintiff, and denial of the motion "was required 'regardless of the sufficiency of the opposing [or reply] papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408 [4th Dept 2009]).

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

848

CA 21-01254

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

STONEWELL BODIES & MACHINE, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALL AREA FIRE & RESCUE APPARATUS SALES, LLC,
DEFENDANT-APPELLANT.

JAMES F. MISIANO, P.C., BRENTWOOD (JAMES F. MISIANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE CROSSMORE LAW OFFICE, ITHACA (MARISSA A. JOHNSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 4, 2021. The order denied the motion of defendant to vacate a default judgment.

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

Memorandum: Plaintiff and defendant entered into an agreement relating to the manufacture and purchase of three emergency service vehicles. Plaintiff commenced this action seeking damages for, inter alia, defendant's alleged breach of the agreement. Defendant failed to appear in the action and a default judgment was entered against it. Defendant moved to vacate the default judgment and now appeals from an order that denied its motion. We affirm.

We conclude that Supreme Court did not abuse its discretion in denying defendant's motion. To establish an excusable default under CPLR 2005 and 5015 (a) (1), defendant was required to establish a reasonable excuse for the default as well as a meritorious defense to the action (*see Butchello v Terhaar*, 176 AD3d 1579, 1580 [4th Dept 2019]; *Wells Fargo Bank, N.A. v Dysinger*, 149 AD3d 1551, 1552 [4th Dept 2017]). "In determining whether to vacate an order entered on default, the court should consider relevant factors, such as the extent of the delay, prejudice or lack of prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Calaci v Allied Interstate, Inc.*, 108 AD3d 1127, 1128 [4th Dept 2013] [internal quotation marks omitted]). The decision to grant or deny a motion to vacate a default judgment lies within the sound discretion of the court (*see Vogt v Eberhardt*, 163 AD3d 1514, 1515 [4th Dept 2018], *lv*

dismissed 32 NY3d 1091 [2018]).

Here, defendant asserted on the motion to vacate the default that the failure to appear in the action was due to law office failure. "[W]hile CPLR 2005 allows courts to excuse a default due to law office failure, it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse" (*Wilmington Sav. Fund Socy., FSB v Rodriguez*, 197 AD3d 784, 786 [2d Dept 2021]). In support of its motion, defendant submitted the affirmation of its attorney who stated that an answer was not filed due to hardships related to the COVID-19 pandemic and in light of Executive Order [A. Cuomo] 202.8 (9 NYCRR 8.202.8) (Executive Order 202.8), issued in response to the pandemic, which affected court filings and in-person workforce. However, even assuming arguendo that Executive Order 202.8 tolled a defendant's time to answer (*cf. generally Matter of Maziarz v Western Regional Off-Track Betting Corp.*, 207 AD3d 1065, 1065-1066 [4th Dept 2022]; *Little v Steelcase, Inc.*, 206 AD3d 1597, 1599-1600 [4th Dept 2022]), it has no relevance to the delay here because it was not issued until after the deadline for appearing in the action had passed. Further, defendant's attorney submitted only vague claims that hardships related to the pandemic resulted in defendant's not being able to appear in the action before the deadline (*see generally Brehm v Patton*, 55 AD3d 1362, 1363 [4th Dept 2008]). We thus conclude that defendant presented insufficient evidence of the events surrounding the default and failed to establish a reasonable excuse for the default based on law office failure (*see generally id.*).

In light of that conclusion, we need not consider whether defendant established a potentially meritorious defense (*see City of Utica v Mallette*, 200 AD3d 1614, 1616-1617 [4th Dept 2021]; *Butchello*, 176 AD3d at 1581). We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

910

KA 20-01531

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAZZMIN ELMORE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered August 12, 2020. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a firearm.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

911

KA 22-00185

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT CORNWELL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), entered January 20, 2022. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court applied an incorrect standard in denying his request for a downward departure. We affirm.

We agree with defendant that the court failed to set forth its findings of fact and conclusions of law as required by Correction Law § 168-n (3). Further, as defendant contends and the People correctly concede, in determining defendant's request for a downward departure the court should have applied a preponderance of the evidence standard rather than a clear and convincing evidence standard (*see People v Gillotti*, 23 NY3d 841, 860-861 [2014]). Nevertheless, we need not remit the matter because the record is sufficient for us to "make our own findings of fact and conclusions of law" (*People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]; *see People v Carlton*, 78 AD3d 1654, 1655 [4th Dept 2010], *lv denied* 16 NY3d 782 [2011]) and to review defendant's request under the proper standard (*see People v Scott,* 186 AD3d 1052, 1054 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *People v Kowal*, 175 AD3d 1057, 1059 [4th Dept 2019]).

However, even assuming, arguendo, that defendant satisfied his burden with respect to the first two steps of the three-step analysis

required in evaluating a request for a downward departure (*see e.g. People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *cf. People v Harripersaud*, 198 AD3d 542, 542 [1st Dept 2021], *lv denied* 38 NY3d 902 [2022]; *People v Palmer*, 166 AD3d 536, 537 [1st Dept 2018], *lv denied* 32 NY3d 919 [2019]; *see generally Gillotti*, 23 NY3d at 861), we conclude that, after applying the third step of weighing the aggravating and mitigating factors, the totality of the circumstances does not warrant a downward departure to level two (*see Scott*, 186 AD3d at 1054; *see also People v Gillotti*, 119 AD3d 1390, 1391 [4th Dept 2014]; *cf. generally People v Weatherley*, 41 AD3d 1238, 1238-1239 [4th Dept 2007]). To the contrary, we conclude that, based on the number of defendant's charged and "uncharged sexual crimes, the facts of which were proved by clear and convincing evidence and not fully accounted for in the RAI, the SORA court did not abuse its discretion when it declined to downwardly depart from the presumptive risk level three" (*People v Sincerbeaux*, 27 NY3d 683, 691 [2016]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

912

KA 17-01073

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA A. FREELAND, DEFENDANT-APPELLANT.

PEKAREK LAW GROUP, P.C., WELLSVILLE (DANIELLE G. CHAMBERLAIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered June 17, 2013. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree and falsifying business records in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of offering a false instrument for filing in the first degree (Penal Law former § 175.35) and falsifying business records in the first degree (§ 175.10). The conviction arose from defendant's conduct in presenting to the relevant agency an application for food stamp benefits in which she indicated that a young adult, who had previously lived with defendant at her parents' house, was residing with her at her new residence. Defendant challenges the conviction solely on the ground that the People failed to present legally sufficient evidence to establish that she falsely listed the young adult as a member of her household on the application and that she had the requisite intent to defraud. We conclude that defendant's contention lacks merit.

"A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Kancharla*, 23 NY3d 294, 302 [2014]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained [their] burden of proof"

(*Danielson*, 9 NY3d at 349; *see Kancharla*, 23 NY3d at 302). " 'This deferential standard is employed because the courts' role on legal sufficiency review is simply to determine whether enough evidence has been presented so that the resulting verdict was lawful' " (*People v Li*, 34 NY3d 357, 363 [2019]). "Importantly, [i]n determining the legal sufficiency of the evidence for a criminal conviction[,] we indulge all reasonable inferences in the People's favor, mindful that a jury faced with conflicting evidence may accept some and reject other items of evidence" (*id.* at 364 [internal quotation marks omitted]). "It is the 'province of the jury' to assess witness credibility . . . , and we therefore assume on a legal sufficiency review that the jury credited the People's witnesses" (*id.*; *see People v Gordon*, 23 NY3d 643, 649 [2014]; *People v Hampton*, 21 NY3d 277, 288 [2013]).

Here, although the young adult acknowledged that, even after defendant applied for food stamp benefits, defendant's new residence had been used extensively as the young adult's mailing address for various correspondence and he had some belongings at that residence, the testimony of the young adult and his girlfriend established that the young adult stopped residing with defendant at her parents' house four months before the date of the application, moved to live with the girlfriend at the home of the girlfriend's parents and briefly at another location, took personal items such as clothing with him, did not accompany defendant to reside at her new residence, did not live with defendant as of the date of the application, never slept at the new residence, and did not eat there except during occasional visits. Viewing that evidence in a light most favorable to the People, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury, having credited the testimony of the young adult and the girlfriend, could have found that the young adult was not " 'living in [defendant's] household within the commonly understood meaning of that phrase' during the time period in question" (*People v Oberlander*, 60 AD3d 1288, 1289 [4th Dept 2009]; *cf. People v Stumbrice*, 194 AD2d 931, 933-934 [3d Dept 1993], *lv denied* 82 NY2d 727 [1993]).

We reject defendant's related contention that the young adult's testimony is incredible as a matter of law. Under a legal sufficiency review, "[i]ncredibility as a matter of law may result '[w]hen all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence,' because in that event 'the jury is left without basis, other than impermissible speculation, for its determination of either' " (*People v Calabria*, 3 NY3d 80, 82 [2004], quoting *People v Jackson*, 65 NY2d 265, 272 [1985]; *see Hampton*, 21 NY3d at 288). Here, however, the young adult "did not provide internally inconsistent testimony, and [he] was not the source of 'all of the evidence of [defendant's] guilt' " (*Hampton*, 21 NY3d at 288; *see Calabria*, 3 NY3d at 82-83). Defendant correctly points out that the young adult acknowledged on cross-examination that he had initially omitted from his testimony in response to the prosecutor's broad questioning on direct examination the fact that he and the girlfriend had briefly lived together at a location other than the home of the girlfriend's parents. We note,

however, that the young adult immediately explained on redirect examination that he had lived with the girlfriend continuously since moving out of the house of defendant's parents four months prior to the application, with such cohabitation occurring almost exclusively at the home of the girlfriend's parents but interrupted briefly by a stay at another location (*see generally People v Delamota*, 18 NY3d 107, 114-116 [2011]). Additionally, the young adult was unwavering in his testimony on the material issue that he never lived at defendant's new residence (*see id.* at 116; *Calabria*, 3 NY3d at 82-83). While the testimony of the young adult and the girlfriend differed from defendant's testimony regarding whether the young adult was a member of defendant's household at the time of the application, "resolution of such inconsistencies [was] for the jury" (*Hampton*, 21 NY3d at 288; *see Delamota*, 18 NY3d at 116; *Jackson*, 65 NY2d at 272).

Finally, contrary to defendant's contention, we conclude that the evidence is legally sufficient to establish the intent element of each crime because "[t]he requisite intent to defraud may be inferred from the fact that defendant indicated on the [application] that [the young adult] resided with [her] when [she] knew that [the young adult] did not" (*People v Scutt*, 19 AD3d 1131, 1132 [4th Dept 2005], *lv denied* 5 NY3d 810 [2005]; *see People v Swain*, 309 AD2d 1173, 1173-1174 [4th Dept 2003], *lv denied* 1 NY3d 581 [2003]; *People v Mathis*, 218 AD2d 817, 817-818 [2d Dept 1995], *lv denied* 86 NY2d 844 [1995]; *Stumbrice*, 194 AD2d at 934).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

913

KA 21-01364

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HANDSOME RICE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SUSAN M. NORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 17, 2021. The judgment convicted defendant upon a plea of guilty of manslaughter in the second 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 his plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Preliminarily, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Hussein*, 192 AD3d 1705, 1706 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *People v Somers*, 186 AD3d 1111, 1112 [4th Dept 2020], *lv denied* 36 NY3d 976 [2020]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant's contention that, because he was under the age of 21 at the time of the underlying offenses, County Court should have waived the mandatory surcharge and fees pursuant to CPL 420.35 (2-a) is unpreserved for our review (*see* CPL 470.05 [2]; *People v Taylor*, 209 AD3d 772, 773 [2d Dept 2022]) and, in any event, is without merit (*see* CPL 420.35 [2-a]; *People v Attah*, 203 AD3d 1063, 1064 [2d Dept 2022], *lv denied* 38 NY3d 1007 [2022]). Finally, contrary to defendant's contention, we conclude that the bargained-for sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

914

KA 21-00610

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY MORGAN, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Jennifer M. Noto, J.), dated April 9, 2021. The order, insofar as appealed from, designated defendant a sexually violent offender pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the second ordering paragraph designating defendant a sexually violent offender is vacated.

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant, who moved to New York State having been previously convicted in Pennsylvania upon his nolo contendere plea of guilty of indecent assault (18 Pa Cons Stat § 3126 [a] [7]), appeals from an order that, inter alia, designated him a "sexually violent offender" (Correction Law § 168-k [2]). Defendant contends that County Court erred by rejecting the conclusion of the Board of Examiners of Sex Offenders (Board) that the analogous New York offense to the Pennsylvania offense of indecent assault under the essential elements test is sexual abuse in the second degree and by finding that the Pennsylvania offense was tantamount to the New York offense of sexual abuse in the first degree, an enumerated sexually violent offense (§ 168-a [3] [a] [i]). As limited by his brief, defendant appeals from the order to the extent that it designated him a sexually violent offender on the basis of the essential elements test, and we reverse the order insofar as appealed from.

A " '[s]exually violent offender' means a sex offender who has been convicted of a sexually violent offense" (Correction Law § 168-a [7] [b]). A " '[s]exually violent offense,' " includes, as relevant here, "a conviction of an offense in any other jurisdiction which

includes all of the essential elements of any [New York] felony [enumerated in section 168-a (3) (a)]" (§ 168-a [3] [b]). The essential elements test "requires that the Board compare the elements of the foreign offense with the analogous New York offense to identify points of overlap . . . In circumstances where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense" (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]; *see People v Perez*, 35 NY3d 85, 93 [2020], *rearg denied* 35 NY3d 986 [2020]; *People v Cremeans*, 194 AD3d 1369, 1370 [4th Dept 2021], *lv denied* 37 NY3d 910 [2021]). Where, however, a New York offense "cover[s] the same conduct" as the foreign offense of which the offender was convicted, "the analysis need proceed no further" (*North*, 8 NY3d at 753). Here, a comparison of defendant's Pennsylvania conviction of indecent assault (18 Pa Cons Stat § 3126 [a] [7]; *see* § 3101) and the New York offense of sexual abuse in the second degree (Penal Law § 130.60 [2]) establishes that section 130.60 (2) "cover[ed] the same conduct" (*North*, 8 NY3d at 753). Inasmuch as sexual abuse in the second degree is not an enumerated sexually violent offense pursuant to Correction Law § 168-a (3) (a), defendant should not have been designated a sexually violent offender.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

915

KA 20-01530

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAZZMIN ELMORE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered August 12, 2020. The judgment convicted defendant of criminal sale of a firearm in the third degree, criminal possession of a firearm (two counts) and conspiracy in the third degree.

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

Memorandum: On appeal from a judgment convicting her of, inter alia, criminal sale of a firearm in the third degree (Penal Law § 265.11 [1]), defendant contends that her waiver of the right to appeal is invalid and does not foreclose her challenge to the severity of the negotiated sentence. As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as "the perfunctory inquiry made by [Supreme] Court was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Soutar*, 170 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019] [internal quotation marks omitted]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

920

CAF 21-00272

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF RYAN FELTZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMY YANUCIL, RESPONDENT-RESPONDENT.

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

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

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered January 28, 2021 in a proceeding pursuant to Family Court Act article 6. The order stayed the proceedings pending the commencement of custody and visitation proceedings in Mercer County, New Jersey.

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

Memorandum: Petitioner father and respondent mother are the parents of two children who live with the mother in Mercer County, New Jersey. Pursuant to a prior custody order, the mother has sole legal and primary physical custody of the children. The father filed a petition seeking modification of the prior custody order and two violation petitions, and the mother moved to dismiss those petitions on, inter alia, the ground that New York is an inconvenient forum under Domestic Relations Law § 76-f. Family Court determined that New York is an inconvenient forum and therefore issued an order granting the motion to the extent of staying the instant proceedings pending the commencement of custody and visitation proceedings in Mercer County, New Jersey.

Initially, we agree with the mother that the order staying the father's petitions is not appealable as of right (*see* Family Ct Act § 1112 [a]; *Matter of Jeremy A. v Vianca G.*, 120 AD3d 1147, 1147 [1st Dept 2014]; *see generally Matter of Steeno v Szydlowski*, 181 AD3d 1224, 1225 [4th Dept 2020]). Although the father did not request leave to appeal, we nevertheless treat the notice of appeal as an application for leave to appeal and, in the exercise of our discretion, we grant the application (*see Matter of Danielle E.P. v Christopher N.*, 208 AD3d 978, 978 [4th Dept 2022], *lv denied* 39 NY3d

904 [2022]; *see generally* § 1112 [a]).

We reject the father's contention that the court erred in granting the motion to the extent of staying the proceedings on the ground of inconvenient forum and in declining to exercise its jurisdiction in this matter. "In determining whether the state that has jurisdiction is an inconvenient forum, a court should consider such factors as 'the length of time the child[ren have] resided outside th[e] state' (Domestic Relations Law § 76-f [2] [b]), 'the nature and location of the evidence required to resolve the pending litigation, including testimony of the child[ren]' (§ 76-f [2] [f]), and 'the familiarity of the court of each state with the facts and issues in the pending litigation' (§ 76-f [2] [h])" (*Clark v Clark*, 21 AD3d 1326, 1327 [4th Dept 2005]). Here, we conclude that the court, after considering all of the factors, properly exercised its discretion in determining that New Jersey was a more appropriate forum for these proceedings (*see Matter of Dei v Diew*, 56 AD3d 1212, 1213 [4th Dept 2008]; *Clark*, 21 AD3d at 1327-1328).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

921

CAF 21-01489

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF TODD E. DICKES,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

NICOLE L. JOHNSTON,
RESPONDENT-PETITIONER-APPELLANT.

MAUREEN POLEN, ESQ., ATTONEY FOR THE CHILD,
APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

MAUREEN POLEN, ROCHESTER, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeals from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered September 15, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall continue to share joint custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, effectively granted in part petitioner-respondent father's supplemental petition seeking to modify a prior custody order by increasing his parenting time with the subject child.

The mother and the AFC contend that the father failed to establish a change in circumstances sufficient to warrant an inquiry into whether a modification of the prior custody order is in the best interests of the child. The mother, however, waived that contention "inasmuch as [she] alleged in her own . . . petition[] that there had been such a change in circumstances" (*Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1492 [4th Dept 2021] [internal quotation marks omitted]). In any event, while we agree with the mother and the AFC that Family Court did not expressly determine that there was a sufficient change in circumstances, this Court may "independently review the record to ascertain whether the requisite change in circumstances existed" (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d

1264, 1265 [4th Dept 2019] [internal quotation marks omitted]). Contrary to the contention of the mother and the AFC, our review of the record reveals "extensive findings of fact, placed on the record by [the court]," which demonstrate that a change in circumstances occurred since the entry of the prior custody order (*Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017] [internal quotation marks omitted]). Specifically, affording great weight to the court's assessment of the credibility of the witnesses (*see Matter of Paliani v Selapack*, 178 AD3d 1425, 1426 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]), we conclude that the father established that the mother had a pattern of violating the prior custody order (*see Matter of Moreno v Elliott*, 170 AD3d 1610, 1611 [4th Dept 2019]; *Matter of Green v Bontzolakes*, 111 AD3d 1282, 1283-1284 [4th Dept 2013]), and "the evidence that the mother was interfering with the father's visitation with the child[ ] was sufficient to establish the requisite change in circumstances" (*Matter of Amrane v Belkhir*, 141 AD3d 1074, 1075 [4th Dept 2016]; *see Matter of Murphy v Wells*, 103 AD3d 1092, 1093 [4th Dept 2013], *lv denied* 21 NY3d 854 [2013]).

Contrary to the further contention of the mother and the AFC, we conclude that a sound and substantial basis exists in the record to support the court's determination that it is in the best interests of the child to increase the father's parenting time (*see generally Moreno*, 170 AD3d at 1611). Although it is true that "an award of custody must be based on the best interests of the child[ ] and not a desire to punish a recalcitrant parent" (*Verity v Verity*, 107 AD2d 1082, 1084 [4th Dept 1985], *affd* 65 NY2d 1002 [1985]), the modification here does not reflect a punishment for the mother's violations of the prior custody order or a reward for the father's compliance, but rather constitutes a rebalancing of parenting time in the best interests of the child.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

922

CA 22-00854

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
SYRACUSE FIREFIGHTERS ASSOCIATION, LOCAL 280
IAFF, AFL-CIO, CLC, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

CITY OF SYRACUSE, RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (LIZA R. MAGLEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

BLITMAN & KING LLP, SYRACUSE (NATHANIEL G. LAMBRIGHT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered January 12, 2022 in a proceeding pursuant to CPLR article 75. The order and judgment confirmed an arbitration award.

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

Memorandum: In this CPLR article 75 proceeding, respondent appeals from an order and judgment that, inter alia, granted petitioner's petition to confirm an arbitration award and, in effect, denied respondent's cross motion to vacate the award. We affirm.

"It is well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 125 [4th Dept 2017]). As relevant here, "CPLR 7511 (b) (1) (iii) permits vacatur of an award where . . . the arbitrator exceeds his or her power." "An arbitrator exceeds his or her power . . . where his or her award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Barone v Haskins*, 193 AD3d 1388, 1390 [4th Dept 2021], *appeal dismissed* 37 NY3d 1032 [2021], *lv denied* 37 NY3d 919 [2022]; *see Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]), such as "exceed[ing] a limitation on his or her power as set forth in [a collective bargaining agreement]" (*Matter of Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO* [*City of Lackawanna*], 156 AD3d 1406, 1407 [4th Dept 2017]). A court lacks the authority, however, to "examine the merits of an arbitration

award and substitute its judgment for that of the arbitrator[, even if] it believes its interpretation would be the better one" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003] [internal quotation marks omitted]).

Here, contrary to respondent's contention, the arbitrator merely interpreted and applied the provisions of the relevant collective bargaining agreement (CBA), as she had the authority to do (*see Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO*, 156 AD3d at 1408). We are powerless to set aside that interpretation even if we disagree with it (*see id.*). In any event, we conclude that the plain language of the CBA supports the arbitrator's interpretation.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

923

CA 22-00828

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

RENEE V. SLOMBA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTAN E. KLEPP, DEFENDANT-APPELLANT.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (DONNA L. BURDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE JOY E. MISERENDINO LAW FIRM, P.C., ORCHARD PARK (JOY E. MISERENDINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 22, 2022. The order denied the motion of defendant to dismiss the complaint.

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

Memorandum: In this personal injury action arising from a motor vehicle accident, defendant moved to dismiss the complaint on the ground that plaintiff was required, and failed, to serve a notice of claim pursuant to General Municipal Law § 50-e (1) (b). Defendant appeals from an order that denied her motion. Contrary to defendant's contention, we conclude that Supreme Court did not abuse its discretion in denying the motion without prejudice to renew after limited discovery on the issue whether plaintiff was required to serve a notice of claim (*see* CPLR 3211 [d]; *Gonzalez-Doldan v Kaleida Health, Inc.*, 160 AD3d 1384, 1384 [4th Dept 2018]; *see generally Herzog v Town of Thompson*, 216 AD2d 801, 803 [3d Dept 1995]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

924

CA 22-00808

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF CAYUGA NATION, GORDON BURGESS
AND JOAN BURGESS,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF SENECA FALLS,
RESPONDENT-DEFENDANT-RESPONDENT,
ET AL., RESPONDENTS-DEFENDANTS.

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR
PETITIONERS-PLAINTIFFS-APPELLANTS.

Appeal from a judgment of the Supreme Court, Seneca County (Daniel J. Doyle, J.), entered March 1, 2022 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, insofar as appealed from, granted that part of the motion of respondent-defendant Town of Seneca Falls seeking to dismiss the second cause of action.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the second cause of action is reinstated.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that certain provisions of the Town of Seneca Falls Zoning Local Law (zoning code), prohibit respondent-defendant Carlin Seneca-John, doing business as Gramma Approved Sovereign Trades, from operating a commercial enterprise out of his residence. Despite petitioners' objections to the operation of Seneca-John's business on the ground that it was not a permitted use (*see* Town of Seneca Falls Zoning Local Law § 300-14 [A]), respondent-defendant Town of Seneca Falls (Town) allegedly failed to enforce the zoning code, thereby allowing Seneca-John to continue to operate his business as a nonconforming use on the premises. The Town moved to dismiss the petition-complaint against it, and Supreme Court granted the motion. As limited by their brief, petitioners appeal from the ensuing judgment to the extent that it granted the motion with respect to the second cause of action, seeking a declaratory judgment, on the ground that they lacked standing. We reverse the judgment insofar as appealed from.

We agree with petitioners that the court erred in granting the

motion with respect to the second cause of action. "Standing 'is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation' " (*Matter of Barbeau v Village of LeRoy*, 181 AD3d 1155, 1157 [4th Dept 2020], quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). Nonetheless, "a party's lack of standing does not constitute a jurisdictional defect" (*Consumer Solutions, LLC v Charles*, 137 AD3d 952, 953 [2d Dept 2016]; *see HSBC Bank, USA, N.A. v Taher*, 104 AD3d 815, 817 [2d Dept 2013]; *U.S. Bank, N.A. v Emmanuel*, 83 AD3d 1047, 1048-1049 [2d Dept 2011]), and therefore a challenge to a party's standing is waived if the defense is not asserted in either the answer or a preanswer motion to dismiss (*see US Bank N.A. v Nelson*, 169 AD3d 110, 114 [2d Dept 2019], *affd* 36 NY3d 998 [2020]; *Matter of Fossella v Dinkins*, 66 NY2d 162, 167 [1985]; *GMAC Mtge., LLC v Coombs*, 191 AD3d 37, 44-45 [2d Dept 2020]). Here, the Town's motion with respect to the second cause of action was not based on petitioners' alleged lack of standing. Thus, we conclude that the court erred in sua sponte reaching the issue of standing with respect to that cause of action (*see Barbeau*, 181 AD3d at 1157; *Matter of Associated Gen. Contrs. of NYS, LLC v New York State Thruway Auth.*, 159 AD3d 1560, 1560 [4th Dept 2018]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

925

CA 21-01258

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

FRANCES WADDELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MILWAUKEE THP, LLC, AND BENDERSON DEVELOPMENT COMPANY, LLC, DEFENDANTS-RESPONDENTS.

MILWAUKEE THP, LLC, AND BENDERSON DEVELOPMENT COMPANY, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

TC NOTARO CONTRACTING, INC., THIRD-PARTY DEFENDANT-RESPONDENT.

LEWIS & LEWIS, P.C., BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (DANIEL J. CERCONE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered August 9, 2021. The order granted the motion of defendants-third-party plaintiffs for summary judgment, granted the cross motion of third-party defendant for summary judgment, dismissed the supplemental complaint and third-party complaint, and denied the cross motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when, after descending a set of concrete steps on a sidewalk and stepping onto the ground, her ankle twisted and she fell. The sidewalk steps were located on property owned by defendant-third-party plaintiff Milwaukee THP, LLC and defendant-third-party plaintiff Benderson Development Company, LLC was the property manager (collectively, defendants). Defendants then commenced a third-party action against third-party defendant, TC Notaro Contracting, Inc.

(Notaro), which had entered into a contract with Benderson to plow the paved areas of the property, including the sidewalk.

Defendants moved for summary judgment dismissing the supplemental complaint. Thereafter, Notaro cross-moved for summary judgment dismissing plaintiff's supplemental complaint and the third-party complaint, and plaintiff cross-moved for summary judgment on the issue of defendants' negligence and proximate cause. Supreme Court granted defendants' motion and Notaro's cross motion and denied plaintiff's cross motion. Plaintiff and defendants appeal. We affirm.

Contrary to plaintiff's contention on her appeal, we conclude that the court properly granted defendants' motion for, and Notaro's cross motion insofar as it sought, summary judgment dismissing plaintiff's supplemental complaint. " 'In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' without engaging in speculation" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014]; *see Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]). Here, defendants and Notaro met their initial burden on the motion and the cross motion insofar as it sought summary judgment dismissing the supplemental complaint by demonstrating that plaintiff could not identify the cause of her fall without engaging in speculation (*see Conners v LMAC Mgt. LLC,* 189 AD3d 2071, 2072 [4th Dept 2020]; *cf. Doner v Camp*, 163 AD3d 1457, 1457 [4th Dept 2018]). In support of their respective motion and cross motion, defendants and Notaro submitted plaintiff's deposition testimony, in which she testified that she never observed the condition of the steps, either before or after she fell, and that she did not know what caused her ankle to twist.

We further conclude that plaintiff failed to raise a triable issue of fact sufficient to defeat summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In light of our determination, we do not address plaintiff's remaining contentions on her appeal or defendants' contentions on their appeal.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

928

TP 22-01095

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF TARA MCSHANLEY, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

PULLANO & FARROW, ROCHESTER (MALLORY K. SMITH OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU 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, Wayne County [John B. Nesbitt, A.J.], entered May 13, 2022) to review a determination of respondent. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for abuse and maltreatment, be amended to unfounded.

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 to review a determination made after a fair hearing that, inter alia, denied her request to amend to unfounded as against her an indicated report of abuse for allowing a sex offense to be committed against her older daughter (*see* 18 NYCRR 432.1 [a] [3]) and of maltreatment for impairing the emotional condition of her older daughter and her younger daughter (*see* 18 NYCRR 432.1 [b] [1] [ii]) and to seal that report (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). Contrary to petitioner's contention, we conclude on the record before us that "the determination that [the Wayne County Department of Social Services] established by a fair preponderance of the evidence at the fair hearing that petitioner [abused her older daughter and] maltreated the subject children and that such [abuse and] maltreatment w[ere] relevant and reasonably related to childcare employment is supported by substantial evidence" (*Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1494 [4th Dept 2016]). We have considered petitioner's remaining contentions

and conclude that they lack merit.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

931

TP 22-00878

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF LEROY JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

STEWART T. ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

LEROY JOHNSON, PETITIONER PRO SE.

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, Erie County [Paul Wojtaszek, J.], entered September 23, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 104.13 (7 NYCRR 270.2 [B] [5] [iv]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II hearing, that he violated inmate rules 104.13 (7 NYCRR 270.2 [B] [5] [iv] [engaging in conduct that disturbs the order of any part of the facility]) and 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey a direct order]). We reject petitioner's contention that the determination that he violated inmate rule 106.10 is not supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

As respondent correctly concedes, however, the determination that petitioner violated inmate rule 104.13 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Lago v Annucci*, 177 AD3d 1309, 1310 [4th Dept 2019]). Inasmuch as petitioner has already served the penalty and there was no

recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Hinspeter v Annucci*, 187 AD3d 1578, 1579 [4th Dept 2020]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

933

KA 20-01442

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. MONTREAL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LELAND D. MCCORMAC, III, PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 17, 2020. The judgment convicted defendant upon a plea of guilty of bail jumping in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Montreal* ([appeal No. 2] — AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

934

KA 20-01443

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER MONTREAL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LELAND D. MCCORMAC, III, PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 17, 2020. The judgment convicted defendant upon a plea of guilty of burglary in the third degree (two counts).

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

Memorandum: In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of burglary in the third degree (Penal Law § 140.20), while in appeal No. 1 he purports to appeal from a judgment convicting him upon his plea of guilty of bail jumping in the second degree (§ 215.56). We note at the outset that the appeal from the judgment in appeal No. 1 must be dismissed because defendant raises no contentions with respect thereto (*see People v Scholz*, 125 AD3d 1492, 1492 [4th Dept 2015], *lv denied* 25 NY3d 1077 [2015]). With respect to appeal No. 2, defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

936

KA 14-00786

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MUSTAF OSMAN, DEFENDANT-APPELLANT.

REBECCA L. WITTMAN, ONEIDA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered February 27, 2014. The judgment convicted defendant upon a jury verdict of attempted criminal possession of a weapon in the second degree, arson in the fifth degree, and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on counts one, two and three of the indictment and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [1] [b]), arson in the fifth degree (§ 150.01) and resisting arrest (§ 205.30), arising from an incident in which defendant was observed, inter alia, throwing and burning miniature American flags that were staked in the ground.

We agree with defendant that, as the People correctly concede, County Court erred in charging the jury with respect to the presumption set forth in Penal Law § 265.15 (4) concerning the possession of weapons, i.e., that the possession by any person of any weapon is presumptive evidence of intent to use the same unlawfully against another. Pursuant to the statute, that presumption applies only where the defendant possesses the weapon in question (*see* Penal Law § 265.15 [4]; *People v Galindo*, 23 NY3d 719, 724 [2014]). Here, the People did not proceed on any theory that defendant had possession of the weapon at issue. We further conclude that the error is not harmless inasmuch as defendant's intent, or lack thereof, in "participating in the incident was the vital issue at trial" (*People v Getch*, 50 NY2d 456, 465 [1980]).

We also agree with defendant that the court abused its discretion by precluding defendant from calling a proposed witness at trial,

namely, a nurse practitioner who treated him at the Mohawk Valley Psychiatric Center prior to the incident, on the grounds that her testimony was not relevant and that defendant failed to give timely notice under CPL 250.10 (1) (c). It is well settled that "[a criminal] defendant has a fundamental right to call witnesses in his [or her] own behalf" (*People v Palmer*, 272 AD2d 891, 891 [4th Dept 2000]). Here, defendant established that the proposed witness would have provided relevant testimony with respect to his defense and also established good cause for the delay in the notice, and the People failed to establish any prejudice (*see generally People v Oakes*, 168 AD2d 893, 893-894 [4th Dept 1990], *lv denied* 78 NY2d 957 [1991]; *People v Burton*, 156 AD2d 945, 945-946 [4th Dept 1989], *lv denied* 75 NY2d 917 [1990]). We further conclude that the error is not harmless (*see People v Crimmins*, 36 NY2d 230, 237 [1975]). Based on the two errors discussed above, we reverse the judgment and grant a new trial on counts one, two and three of the indictment.

Because we are granting a new trial, we address one of defendant's remaining contentions in the interest of judicial economy. Defendant contends that the court erred in denying his pretrial application for $1,800 for an expert psychologist who would render an opinion whether, inter alia, defendant was able to form the requisite intent to commit the crimes charged due to his mental illness (*see* County Law § 722-c). We agree. "Pursuant to County Law § 722-c, upon a finding of necessity, a court shall authorize expert services on behalf of a defendant, and only in extraordinary circumstances may a court provide for compensation in excess of $1,000 per expert" (*People v Micolo*, 171 AD3d 1484, 1485-1486 [4th Dept 2019], *lv denied* 35 NY3d 1096 [2020]). Here, we conclude that the court abused its discretion by denying defendant's application on the sole ground that defendant had a retained attorney (*see generally People v Clarke*, 110 AD3d 1341, 1342 [3d Dept 2013], *lv denied* 22 NY3d 1197 [2014]). We therefore further direct that the matter be remitted to County Court to reconsider prior to trial defendant's application for funds pursuant to County Law § 722-c.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

938

KA 20-00058

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAIAS N. MARCANO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 21, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), arising from his possession of cocaine discovered by police officers when they were attempting to detain him for questioning about crimes he allegedly committed the previous day, but for which he was later acquitted at trial. We affirm.

Contrary to defendant's contention, we conclude that "[t]he amendment to correct the date of the crime[of criminal possession of a controlled substance in the third degree] charged [under count four of the indictment] did not change the theory of the prosecution 'or otherwise tend to prejudice the defendant on the merits,' and thus the amendment was properly permitted" (*People v Terry*, 300 AD2d 1130, 1131 [4th Dept 2002], *lv denied* 99 NY2d 633 [2003]; *see* CPL 200.70 [1]). We also reject defendant's related contention that the amendment effectively rendered the criminal possession of a controlled substance charge improperly joined with the other charges for offenses that were allegedly committed the previous day. We conclude that the offenses were joinable pursuant to CPL 200.20 (2) (b) because, "under the applicable *Molineux* analysis . . . , the '[t]estimony concerning defendant's prior drug sale[related to the offenses allegedly committed the previous day] was admissible with respect to the issue

of defendant's intent to sell' the cocaine discovered as a result of the [encounter with police the following day]" (*People v Morman*, 145 AD3d 1435, 1437 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *see People v Alvino*, 71 NY2d 233, 245 [1987]). In any event, contrary to defendant's further contention, any effective misjoinder is harmless error inasmuch as the evidence of criminal possession of a controlled substance in the third degree is overwhelming and there is no significant probability that defendant would have been acquitted of that charge if the evidence regarding the offenses allegedly committed the previous day had not been before the jury (*see People v Clark*, 139 AD3d 1368, 1368 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]; *cf. People v Gadsden*, 139 AD2d 925, 926 [4th Dept 1988]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Inasmuch as he did not object on *Molineux* grounds, defendant failed to preserve for our review his further contention that County Court, by allowing the amendment to the indictment, erred in effectively permitting the People to present evidence concerning a prior uncharged crime (*see People v Kenney*, 209 AD3d 1301, 1303-1304 [4th Dept 2022], *lv denied* — NY3d — [2022]). Defendant's posttrial CPL 330.30 motion did not preserve his contention for our review (*see People v Owens*, 149 AD3d 1561, 1562 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]; *see generally People v Padro*, 75 NY2d 820, 821 [1990], *rearg denied* 75 NY2d 1005 [1990], *rearg dismissed* 81 NY2d 989 [1993]). 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's related evidentiary challenges are, as defendant correctly concedes, not preserved for our review (*see* CPL 470.05 [2]), and we likewise decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that the court abused its discretion in allowing police testimony at trial with respect to the element of intent to sell. The court properly allowed the officer's testimony inasmuch as "it was limited to matters related to drug transactions that were not within the common knowledge or experience of the average juror, and thus the testimony did not invade the jury's fact-finding function" (*People v Patterson*, 173 AD3d 1737, 1740 [4th Dept 2019], *affd* 34 NY3d 1112 [2019]; *see People v Hicks*, 2 NY3d 750, 751 [2004]).

Defendant's contention that his conviction of criminal possession of a controlled substance in the third degree is based upon legally insufficient evidence is not preserved for our review because defendant did not move for a trial order of dismissal with respect to that count of the indictment (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Lukens*, 107 AD3d 1406, 1408 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]; *see generally People v Person*, 153 AD3d 1561, 1562 [4th Dept 2017], *lv denied* 30 NY3d 1118 [2018]). Moreover, although defendant raised that contention in his posttrial motion to set aside the verdict pursuant to CPL 330.30 (1), " 'a motion pursuant to CPL 330.30 does not preserve for our review a contention that is

not otherwise preserved' " (*People v Lankford*, 162 AD3d 1583, 1584 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]; *see People v Schultz*, 266 AD2d 919, 919 [4th Dept 1999], *lv denied* 94 NY2d 906 [2000]; *see generally Padro*, 75 NY2d at 821). 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]). Additionally, 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant next contends that he was denied a fair trial due to various instances of alleged prosecutorial misconduct. Defendant failed to object to many of those alleged instances, and thus he failed to preserve his contention for our review with respect to those instances (*see* CPL 470.05 [2]). In any event, with respect to the alleged instances of misconduct, both preserved and unpreserved, we conclude that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Torres*, 125 AD3d 1481, 1484 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]).

Defendant contends that the court, in imposing the maximum sentence of postrelease supervision, improperly considered the alleged conduct relating to the counts of the indictment for which he was acquitted. Even assuming, arguendo, that defendant preserved that contention for our review (*see* CPL 470.05 [2]; *cf. People v Beebe*, 137 AD3d 1663, 1664 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]), we conclude that it lacks merit inasmuch as the record establishes that the court " 'did not base its sentence on a crime of which defendant had been acquitted . . . , but rather sentenced him based on all the relevant facts and circumstances surrounding the crime of which he was convicted' . . . , as it was required to do" (*People v Lipford*, 129 AD3d 1528, 1531 [4th Dept 2015], *lv denied* 26 NY3d 1041 [2015]). Finally, we reject defendant's contention that the period of postrelease supervision imposed is unduly harsh and severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

939

KA 22-00119

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS E. WOLFE, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 18, 2021. The judgment convicted defendant upon a plea of guilty of assault in the second degree and attempted criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]) and attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is invalid, we perceive no basis in the record for us to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

940

KA 18-00156

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OSWALD MCPHERSON, JR., DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

OSWALD MCPHERSON, JR., DEFENDANT-APPELLANT PRO SE.

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 November 3, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (two counts) and driving while intoxicated, a misdemeanor (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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and two counts of driving while intoxicated (DWI) as a misdemeanor (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [b] [i]). The conviction arises out of a traffic stop of a vehicle driven by defendant. We affirm.

Defendant contends in his main brief that the traffic stop was unlawful and, therefore, Supreme Court erred in refusing to suppress evidence obtained as a result thereof. We reject that contention. The record establishes that the police officer who effectuated the traffic stop was entitled to stop defendant's vehicle after he observed defendant violate a provision of the Vehicle and Traffic Law (*see People v Ricks*, 145 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *see also* Vehicle and Traffic Law § 1229-c [3]; *see generally People v Robinson*, 97 NY2d 341, 349-350 [2001]; *People v Addison*, 199 AD3d 1321, 1321-1322 [4th Dept 2021]). Here, affording great deference to the court's resolution of credibility

issues at the suppression hearing (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]), as we must, we conclude that the police officer's testimony at the hearing established that he had probable cause to believe that defendant violated a provision of the Vehicle and Traffic Law when, at around 3:30 a.m. on a relatively low traffic roadway, he observed that defendant, who drove past the officer at a speed of approximately 20 miles per hour, was not wearing a seatbelt while operating the motor vehicle (*see People v Taylor*, 57 AD3d 1504, 1504-1505 [4th Dept 2008], *lv denied* 12 NY3d 788 [2009]; *see also People v Herrera*, 179 AD3d 836, 837 [2d Dept 2020], *lv denied* 35 NY3d 942 [2020]).

Defendant further contends in his main and pro se supplemental briefs that the police conducted an illegal inventory search of the vehicle upon defendant's arrest, and therefore the court should have suppressed the evidence obtained as a result thereof. We reject that contention as well. "Following a lawful arrest of the driver of an automobile that must then be impounded, the police may conduct an inventory search of the vehicle" (*People v Johnson*, 1 NY3d 252, 255 [2003]; *see People v Padilla*, 21 NY3d 268, 272 [2013], *cert denied* 571 US 889 [2013]; *People v Nichols*, 175 AD3d 1117, 1119 [4th Dept 2019], *lv denied* 34 NY3d 1018 [2019]). "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*Johnson*, 1 NY3d at 256). Here, the suppression hearing testimony established that "the police followed the procedure set forth in the applicable order of the Rochester Police Department in conducting the inventory search" (*People v Nesmith*, 124 AD3d 1325, 1326 [4th Dept 2015], *lv denied* 26 NY3d 1042 [2015]; *see People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]). Contrary to defendant's contention, the search of the vehicle did not exceed the permissible scope of an inventory search under the applicable general order. The applicable order permitted an inventory search of "[a]ny . . . area large enough to conceal any dangerous instrument or items of value" (Rochester Police Department General Order 511 § III [former (E) (1) (d)]), and the location where the police ultimately found the evidence in question—i.e., a space within the front passenger's seat located behind a loose piece of fabric—was plainly large enough to conceal a dangerous instrument.

Defendant failed to preserve for our review his contention in his main brief "concerning the court's procedure for determining his *Batson* objection" (*People v Schumaker*, 136 AD3d 1369, 1371 [4th Dept 2016], *lv denied* 27 NY3d 1075 [2016], *reconsideration denied* 28 NY3d 974 [2016]; *see People v Massey*, 173 AD3d 1801, 1802 [4th Dept 2019]; *People v Scott*, 81 AD3d 1470, 1471 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]). 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's contention in his main brief that the evidence is legally insufficient to support the conviction is preserved only with respect to the weapon and DWI counts (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), and we reject the contention to that extent (*see*

generally People v Danielson, 9 NY3d 342, 349 [2007]). Further, 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]). Although a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent there is conflicting testimony, we conclude that it merely "presented an issue of credibility for the jury to resolve" (*People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018] [internal quotation marks omitted]; *see People v Urrutia*, 181 AD3d 1338, 1339 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]).

Defendant further contends in his main brief that he was denied his right to a fair trial by the prosecutor's failure to disclose certain *Brady* material, i.e., information that one of the testifying officers had been punished for falsifying a police document and perjuring himself. Even assuming, arguendo, that a *Brady* violation did occur, we conclude that there was no violation of defendant's right to a fair trial because he was "given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" (*People v Cortijo*, 70 NY2d 868, 870 [1987]; *see People v Gazzillo*, 177 AD3d 1406, 1407 [4th Dept 2019]; *People v McMillian*, 158 AD3d 1059, 1060 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]).

Defendant failed to preserve for our review his contention in his main brief that, in determining the sentence to be imposed, the court penalized him for exercising his right to a jury trial, inasmuch as defendant did not raise that contention at sentencing (*see People v Good*, 199 AD3d 1461, 1463 [4th Dept 2021], *lv denied* 37 NY3d 1161 [2022]; *People v Stubinger*, 87 AD3d 1316, 1317 [4th Dept 2011], *lv denied* 18 NY3d 862 [2011]). 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]). The sentence is not unduly harsh or severe.

Finally, we have considered defendant's remaining contention in his main brief and conclude that it does not warrant reversal or modification of the judgment.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

956

KA 19-00152

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA ORTIZ, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered November 27, 2018. The judgment convicted defendant, upon his plea of guilty, of rape 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 rape in the second degree (Penal Law § 130.30 [1]). As defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. Here, the rights encompassed by defendant's purported waiver of the right to appeal "were mischaracterized during the oral colloquy and in [the] written form[] executed by defendant[], which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . . advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*People v Bisono*, 36 NY3d 1013, 1017-1018 [2020], quoting *People v Thomas*, 34 NY3d 545, 566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Montgomery*, 191 AD3d 1418, 1418-1419 [4th Dept 2021], *lv denied* 36 NY3d 1122 [2021]). We conclude that defendant's purported waiver is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*Thomas*, 34 NY3d at 559; *see Montgomery*, 191 AD3d at 1419; *People v Stenson*, 179 AD3d 1449, 1449 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence (*see Montgomery*, 191 AD3d at 1419), we nevertheless conclude that the

sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

958

KA 17-01907

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN M. QUANDER, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 5, 2017. The judgment convicted defendant upon a plea of guilty of murder in the first degree and attempted 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 his plea of guilty of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and attempted robbery in the first degree (§§ 110.00, 160.15 [3]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Jackson*, 207 AD3d 1077, 1077-1078 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]; *see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

959

KA 21-01110

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUILLERMO J. TORRES-ACEVEDO, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), dated June 24, 2021. 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 modified on the law and in the exercise of discretion by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order classifying him as a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Although the risk assessment instrument prepared by the Board of Examiners of Sex Offenders classified defendant as a presumptive level one risk, County Court ordered an upward departure to a level two risk based on the fact that after his initial arrest and release, defendant removed the victim from New York State for the purpose of continuing a months-long sexual relationship.

We conclude there is no basis for an upward departure where, as here, the first alleged aggravating factor of the continuing nature of the crime is adequately taken into account by the risk assessment guidelines (*see People v Logsdon,* 169 AD3d 1466, 1467 [4th Dept 2019]). The continuing nature of the crime was appropriately assessed under risk factor 4, i.e., continuing course of sexual misconduct. Second, although defendant's further actions in taking the victim across state lines does "constitute an aggravating factor that is, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines' " (*id*., quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]), we nevertheless conclude that

factor does not warrant granting an upward departure under the circumstances of this case. We therefore substitute our own discretion (*see Logsdon*, 169 AD3d at 1467; *see generally People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]), and we modify the order by determining that defendant is a level one risk.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

961

KA 22-00111

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP G. MCINTOSH, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, 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 (Chauncey J. Watches, J.), rendered December 9, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [7]). County Court initially imposed a term of interim probation supervision (*see* CPL 390.30 [6]), but the court revoked the interim probation following a hearing and sentenced defendant to a term of incarceration.

Defendant contends that the court erred in determining that he violated the conditions of his interim probation because, despite the testimony and documentary evidence presented by the People at the hearing, the court should have credited the reasonable explanations he offered during his testimony. We reject that contention. Initially, contrary to defendant's suggestion, "[t]he procedures set forth in CPL 410.70 do not apply where, as here, there has been no sentence of probation" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]). Instead, "because interim probation is imposed prior to sentencing, the presentence procedures set forth in CPL 400.10 apply" (*People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *see Rollins*, 50 AD3d at 1536). Here, the "hearing conducted by the court 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 Boje*, 194 AD3d at 1368). Indeed, upon conducting the hearing, the court "possessed sufficient reliable and accurate

information to support its conclusion that there was a legitimate basis for the defendant's discharge from [two drug] treatment program[s], and that his failure to successfully complete the program[s and his absence from the county without permission] constituted . . . violation[s] of [the] condition[s] of his interim probation" (*People v Rodas*, 131 AD3d 1181, 1182 [2d Dept 2015], *lv denied* 26 NY3d 1111 [2016]; *see Boje*, 194 AD3d at 1368; *see also People v Lynn*, 144 AD3d 1491, 1492-1493 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]). Moreover, defendant was afforded the opportunity to testify to his ostensibly exculpatory explanations and, contrary to his contention, the court was entitled to discredit his version of events and find his excuses insufficient (*see People v Reynolds*, 27 NY3d 1099, 1102 [2016]; *People v Albergotti*, 17 NY3d 748, 750 [2011]; *Outley*, 80 NY2d at 714; *People v Alsaaidi*, 173 AD3d 1836, 1837 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]).

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

962

KA 21-00374

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NA'FARAN SCOTT, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 9, 2020. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed on his conviction, by plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), and sentencing him to a term of incarceration. We affirm. While on probation, defendant was charged with criminal possession of a weapon in the second degree, among other offenses, resulting in a violation petition being filed against him. The petition alleged other violations as well, including the failure to report to his probation officer. Defendant thereafter admitted that he violated the terms and conditions of probation in return for dismissal of the new charges and a promised sentence. Supreme Court imposed the promised sentence, which defendant now contends is unduly harsh and severe.

Based on our review of the record, we perceive no basis to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

979

KA 18-01801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY LATTA, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 6, 2018. The judgment convicted defendant upon a plea of guilty of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [4]), defendant contends that his waiver of the right to appeal is invalid and thus does not foreclose his challenge to the severity of the negotiated sentence. The People correctly concede that the waiver of the right to appeal is invalid because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

980

KA 18-02111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN A. MCKOY, DEFENDANT-APPELLANT.

LELAND D. MCCORMAC, III, INTERIM PUBLIC DEFENDER, UTICA (JAMES P. GODEMANN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 18, 2018. The judgment convicted defendant upon a jury verdict of burglary in the second degree, attempted burglary in the second degree, criminal mischief in the third degree (two counts) 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, inter alia, burglary in the second degree (Penal Law § 140.25 [2]) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]), arising out of two separate incidents. Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Delamota*, 18 NY3d 107, 113 [2011]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). That evidence includes the presence of defendant's blood at both crime scenes, including in the specific areas where the perpetrator sought to gain entry and, in the case of the completed burglary, inside the residence where the owner discovered that personal property was missing. Thus, the element of identity was established by "a compelling chain of circumstantial evidence that had no reasonable explanation except that defendant was . . . the perpetrator[]" (*People v Geroyianis*, 96 AD3d 1641, 1642 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012], *reconsideration denied* 19 NY3d 1102 [2012] [internal quotation marks omitted]; *see also People v Black*, 110 AD3d 569, 569 [1st Dept 2013], *lv denied* 23 NY3d 1059 [2014]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, the certificate of disposition must be amended

to reflect that defendant was sentenced as a second violent felony offender (*see People v St. Denis*, 207 AD3d 1084, 1084-1085 [4th Dept 2022]; *see generally People v Saxton*, 32 AD3d 1286, 1286-1287 [4th Dept 2006]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

981

KA 21-01563

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY S. CUNNINGHAM, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered August 3, 2021. The judgment convicted defendant upon a plea of guilty of assault 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 his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Brackett*, 174 AD3d 1542, 1542 [4th Dept 2019], *lv denied* 34 NY3d 949 [2019]). That valid waiver forecloses defendant's challenges to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]) and the factual sufficiency of his plea allocution (*see People v Oliver*, 178 AD3d 1463, 1464 [4th Dept 2019], *lv denied* 39 NY3d 987 [2022]; *People v Yates*, 173 AD3d 1849, 1850 [4th Dept 2019]; *People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]).

Defendant further contends that his plea was not knowingly, voluntarily, and intelligently entered because a potential defense was raised both prior to the plea proceeding and by statements he made at sentencing. Although that contention survives defendant's waiver of the right to appeal, it is not preserved for our review because defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (see *People v Brown*, 204 AD3d 1519, 1519 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *People v Allen*, 137 AD3d 1719, 1720 [4th Dept 2016], *lv denied* 27 NY3d 1127 [2016]; *People v Wilson*, 115 AD3d 1229, 1229 [4th Dept 2014], *lv*

denied 23 NY3d 969 [2014]). The narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case because defendant said "[n]othing . . . during the plea colloquy itself" that negated an element of the pleaded-to crime or otherwise called into doubt the voluntariness of his plea (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see also People v Romanowski*, 196 AD3d 1081, 1082 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal "only insofar as he demonstrates 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 Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]). To the extent that defendant's contention is based on defense counsel's alleged failure to investigate or prepare a defense of mental disease or defect, it is unreviewable on direct appeal because it involves matters outside the record (*see People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]; *People v Washington*, 39 AD3d 1228, 1230 [4th Dept 2007], *lv denied* 9 NY3d 870 [2007]). To the extent that defendant's contention survives his plea and appeal waiver and is reviewable on direct appeal, we conclude that it lacks merit inasmuch as nothing in the record suggests that defense counsel's representation was anything less than meaningful (*see Boyde*, 71 AD3d at 1443).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

983

KA 21-00310

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WILGOSZ, DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Matthew J. Murphy, III, J.), entered January 14, 2021. 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: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that he was denied due process as a result of the nine-year delay between his release from jail on the underlying sex offense and the SORA determination. Although defendant challenged the timeliness of the proceeding, he never alleged that the delay deprived him of due process. He therefore failed to preserve that contention for our review (*see People v Smith*, 103 AD3d 616, 617 [2d Dept 2013], *lv denied* 21 NY3d 857 [2013]). In any event, we conclude that the contention lacks merit (*see People v Gallagher*, 129 AD3d 1252, 1253 [3d Dept 2015], *lv denied* 26 NY3d 908 [2015]; *People v Martin*, 119 AD3d 1385, 1385 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]; *People v Wilkes*, 53 AD3d 1073, 1074 [4th Dept 2008], *lv denied* 11 NY3d 710 [2008]).

We reject defendant’s further contention that County Court erred in assessing points under risk factor 11 based on a history of alcohol or drug abuse and risk factor 12 for failure to accept responsibility. The evidence at the SORA hearing established that defendant told the probation officer who prepared the presentence investigation report that he began drinking alcohol and smoking marihuana when he was 13 years old, and he testified at the SORA hearing that he continued to use marihuana regularly until he was sentenced. That evidence supports the court’s assessment of points under risk factor 11 (*see*

People v Kunz, 150 AD3d 1696, 1696-1697 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]). With respect to risk factor 12, the court's assessment of points was warranted by defendant's denial of guilt to the probation officer who prepared his presentence investigation report, as well as by his testimony at the SORA hearing in which he repeatedly denied that he had engaged in sexual intercourse with the victim (*see People v Anderson*, 138 AD3d 1435, 1435 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]; *see generally People v Ford*, 25 NY3d 939, 941 [2015]). We therefore conclude that the court properly determined the appropriate risk level.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

997

KA 18-01757

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EZRA BELL, ALSO KNOWN AS EZRA B. BELL, JR.,
DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered July 27, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the admission is vacated and the matter is remitted to Monroe County Court for further proceedings on the information for delinquency.

Memorandum: Defendant appeals from a judgment that, upon his admission to violating a condition of probation, revoked the sentence of probation imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentenced him to a term of imprisonment and postrelease supervision. Defendant contends that his admission was not knowing, voluntary and intelligent because County Court failed to inform him at any time that he would be subject to postrelease supervision if the court sentenced him to prison. We agree. The People contend that defendant's challenge to the voluntariness of his admission is not preserved for our review, inasmuch as he failed to move to withdraw his admission, but we reject that contention. Although defendant pleaded guilty to a probation violation, as opposed to a crime, "where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion" (*People v Louree*, 8 NY3d 541, 545-546 [2007]; *see People v Bolivar*, 118 AD3d 91, 93 [3d Dept 2014]; *cf. People v Shaw*, 118 AD3d 1461, 1461-1462 [4th Dept 2014], *lv denied* 24 NY3d 1005 [2014]).

Defendant failed to preserve for our review his contention with respect to the alleged unreliability of certain information relied upon by the court in sentencing him (*see People v Cooper*, 136 AD3d 1397, 1398 [4th Dept 2016], *lv denied* 27 NY3d 1067 [2016]) and, in any event, that contention is without merit. Defendant's remaining contentions are academic in light of our determination.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1002

KA 19-00797

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON G. ROACH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered December 3, 2018. The judgment convicted defendant upon a nonjury verdict of attempted assault in the first degree, assault in the second degree, strangulation in the second degree and attempted assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him following a bench trial of, inter alia, attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Defendant's contention that he was denied effective assistance of counsel is based upon matters outside the record and thus is not properly before us on his direct appeal and must be pursued by way of a motion pursuant to CPL article 440 (*see People v Jackson*, 153 AD3d 1605, 1606 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]). Defendant also contends that the evidence is legally insufficient to support the conviction. At the close of the People's proof, defendant moved for a trial order of dismissal, and County Court reserved decision. Although defendant renewed the motion at the close of his proof, the court never ruled on the motion and, at a later appearance, rendered a guilty verdict. Thus, we may not address defendant's contention because "we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Capitano*, 198 AD3d 1324, 1325 [4th Dept 2021] [internal quotation marks omitted]; *see generally People v Concepcion*, 17 NY3d 192, 197-198 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion (*see Capitano*, 198 AD3d at 1325). In light of our

determination, we do not address defendant's remaining contentions.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1004

KA 19-00350

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMBER L. WESTBROOKS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 7, 2018. The judgment convicted defendant upon a jury verdict of assault in the second degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]) and criminal contempt in the second degree (§ 215.50 [3]), arising out of an incident in which she repeatedly stabbed the victim. We affirm.

Defendant contends that the verdict with respect to the assault count is against the weight of the evidence because the People failed to establish that the victim suffered a physical injury. We reject that contention. Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). On appeal, the People do not contest that the victim did not suffer impairment of physical condition but contend that the evidence established that he experienced substantial pain. We agree. "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Whether the 'substantial pain' necessary to establish an assault charge has been proved is generally a question for the trier of fact" (*People v Rojas*, 61 NY2d 726, 727 [1984]). Here, viewing the evidence in light of the elements of the crime of assault in the second degree 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 whether the

victim sustained a physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 further contends that the verdict with respect to the assault count is against the weight of the evidence because the People failed to prove that she intended to cause physical injury. Again viewing the evidence in light of the elements of assault in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject that contention as well (*see generally Bleakley*, 69 NY2d at 495). Defendant's intent to cause physical injury may be inferred from her conduct in stabbing the victim at least six times (*see People v Zindle*, 48 AD3d 971, 972-973 [3d Dept 2008], *lv denied* 10 NY3d 846 [2008]; *People v Tedesco*, 30 AD3d 1075, 1076-1077 [4th Dept 2006], *lv denied* 7 NY3d 818 [2006]; *see also Matter of Brittanie G.*, 6 AD3d 1213, 1213-1214 [4th Dept 2004]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1007

CAF 21-01667

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF JOANNE C. SMITH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL L. BALDWIN, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered July 6, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded respondent sole legal and physical custody of the subject children.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner mother appeals from an order that, inter alia, awarded respondent father sole custody of the subject children, with therapeutic visitation to the mother. We take judicial notice of the fact that, subsequent to the entry of the order on appeal, Family Court entered an order upon the consent of the parties that, inter alia, ordered that sole custody of the subject children would remain with the father and further ordered that the court "relinquishe[d] jurisdiction to Fulton County in the State of Georgia" (*see generally Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021]; *Matter of Salgado v Santiago*, 178 AD3d 1399, 1400 [4th Dept 2019]). Even assuming, arguendo, that not all of the provisions of the order on appeal were superseded by the subsequent order (*see Allison*, 199 AD3d at 1491), we conclude that the court nonetheless divested itself of jurisdiction in a nonappealable consent order (*see* CPLR 5511; *Matter of Kendall N. [Angela M.]*, 188 AD3d 1688, 1688 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]), and we "cannot now make a determination . . . that would directly affect any interest or right of the parties" (*Matter of Richard Y. v Victoria Z.*, 198 AD3d 1200, 1202 [3d Dept 2021]; *see generally* Domestic Relations Law §§ 76-a [1]; 76-f). The appeal must therefore be dismissed as moot.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1015

CA 21-01223

PRESENT: WHALEN, P.J., SMITH, LINDLEY, BANNISTER, AND MONTOUR, JJ.

PB-36 DOE, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

NIAGARA FALLS CITY SCHOOL DISTRICT, LASALLE JUNIOR HIGH SCHOOL, DEFENDANTS-APPELLANTS, AND ROBERT LEWIS, DEFENDANT.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, INTERVENOR-RESPONDENT.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS (JONATHAN P. SHAUB OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (YITZCHAK M. FOGEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF COUNSEL), FOR INTERVENOR-RESPONDENT.

SHOOK HARDY & BACON L.L.P., NEW YORK CITY (SCOTT A. CHESIN OF COUNSEL), FOR AMERICAN TORT REFORM ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AMICI CURIAE.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered August 23, 2021. The order, among other things, denied that part of the motion of defendants Niagara Falls City School District and LaSalle Junior High School seeking to dismiss, in its entirety, the complaint against defendant Niagara Falls City School District.

It is hereby ORDERED that said appeal insofar as taken by defendant LaSalle Junior High School is unanimously dismissed and the order is affirmed without costs.

Opinion by BANNISTER, J:

The question presented on this appeal is whether the Child Victims Act's "reviv[al]" for statute of limitations purposes of certain civil claims by survivors of child sexual abuse (CPLR 214-g) violates the Due Process Clause of the New York State Constitution. We conclude that it does not.

Plaintiff commenced this action pursuant to the Child Victims Act

(CVA) (*see id.*) alleging that plaintiff was sexually abused over a period of several years in the early 1980s while attending school at LaSalle Junior High School (LaSalle) in the Niagara Falls City School District (District) (collectively, defendants) by defendant Robert Lewis, a former teacher. Defendants moved, inter alia, to dismiss the complaint against them as time-barred on the ground that the CVA is unconstitutional under the Due Process Clause of the New York State Constitution and thus that the CVA did not serve to revive plaintiff's claims. As relevant here, Supreme Court denied the motion insofar as it sought to dismiss the complaint against the District in its entirety on that ground, and defendants appeal.

As an initial matter, we note that the appeal insofar as taken by LaSalle must be dismissed inasmuch as Supreme Court, on plaintiff's consent, granted the motion insofar as it sought to dismiss the complaint against LaSalle, and thus LaSalle is not "[a]n aggrieved party" (CPLR 5511; *see Haidt v Kurnath*, 86 AD3d 935, 935 [4th Dept 2011]).

With respect to the merits, it is well settled that "a claim-revival statute will satisfy the Due Process Clause of the [New York] State Constitution if it was enacted as a reasonable response in order to remedy an injustice" (*Matter of World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d 377, 400 [2017]). Addressing the second prong of that standard first—i.e., whether the statute "remed[ied] an injustice"—the Court of Appeals recognized that, "[i]n the context of a claim-revival statute, there is no principled way for a court to test whether a particular injustice is 'serious' or whether a particular class of plaintiffs is blameless; such moral determinations are left to the elected branches of government" (*id.*). Here, as evidenced by the legislative history of the CVA, the legislature considered the need for "justice for past and future survivors of child sexual abuse" and the need to "shift the significant and lasting costs of child sexual abuse to the responsible parties" (Senate Introducer's Mem in Support, Bill Jacket, L 2019, ch 11 at 8). Specifically, the legislative history noted the significant barriers those survivors faced in coming forward with their claims, including that child sexual abuse survivors may not be able to disclose their abuse until later in life after the relevant statute of limitations has run because of the mental, physical and emotional injuries sustained as a result of the abuse (*see id.* at 7; NY St Coalition Against Domestic Violence Mem in Support, Bill Jacket, L 2019, ch 11 at 15). As explained in the Senate Introducer's Memorandum in Support, "New York currently requires most survivors to file civil actions . . . against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average" (Bill Jacket, L 2019, ch 11 at 7). Because the statutes of limitations left "thousands of survivors" of child sexual abuse unable to sue their abusers, the legislature determined that there was an identifiable injustice that needed to be remedied (*id.*; *see World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 399-400).

Contrary to the District's contention, the fact that not all

survivors of child sexual abuse encountered those same barriers and that some survivors were able to file timely claims does not negate the existence of an injustice (*see Hymowitz v Eli Lilly & Co.*, 73 NY2d 488, 514-515 [1989], *cert denied* 493 US 944 [1989]; *PC-41 Doe v Poly Prep Country Day Sch.*, 590 F Supp 3d 551, 561 [ED NY 2021]). Indeed, the Court of Appeals has never set forth a requirement that all plaintiffs covered by a claim-revival statute must have been unable to timely commence an action in order for that statute to comport with the New York Due Process Clause (*see PC-41 Doe*, 590 F Supp 3d at 561). The Court of Appeals has instead concluded, in its review of a different claim-revival statute, that the legislature "properly determined that it would be more fair for all plaintiffs to uniformly now have [additional time] to bring their actions, rather than for the courts to begin drawing arbitrary lines" excluding certain plaintiffs based on their ability to sue under the relevant statutes of limitations (*Hymowitz*, 73 NY2d at 515). Given the above, we conclude that the second prong of the standard has been met under these circumstances.

With respect to the first prong of the standard, we conclude that the revival of certain civil claims brought by child sexual assault survivors for a period of one year (*see* CPLR former 214-g), which was extended an additional year due to the COVID-19 pandemic (*see* CPLR 214-g), was a reasonable response to remedy the injustice to those survivors caused by application of the relevant statutes of limitations (*see generally World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 30 NY3d at 399-400). Significantly, other states have opened claim-revival windows in cases involving survivors of child sexual assault for periods of two years or longer from their inception, for an indefinite time, or on an age-based approach (*see Giuffre v Andrew*, 579 F Supp 3d 429, 454-455 [SD NY 2022]).

Accordingly, we conclude that the CVA comports with the requirements of the New York Due Process Clause, and we therefore affirm.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1016

KA 21-00728

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMBE YANGA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered April 13, 2021. The judgment convicted defendant upon a plea of guilty of robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). In appeal No. 2, he appeals from a judgment convicting him upon a plea of guilty of attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). In appeal No. 3, he appeals from a judgment convicting him upon a plea of guilty of two counts of criminal possession of a controlled substance in the seventh degree (§ 220.03). In appeal No. 4, he appeals from a judgment convicting him upon a plea of guilty of criminal possession of stolen property in the fourth degree (§ 165.45 [5]). The four pleas were taken during one proceeding.

Defendant contends in each of the four appeals that his plea was involuntary because, during the plea colloquy, the court did not advise him that he would be forfeiting his right against self-incrimination by pleading guilty. We conclude that defendant "failed to preserve that contention for our review because . . . he failed to move to withdraw the plea or to vacate the judgment of conviction" (*People v Connolly*, 70 AD3d 1510, 1511 [4th Dept 2010], *lv denied* 14 NY3d 886 [2010]; *see People v Ramos-Perez*, 188 AD3d 1741, 1742 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]). In any event, defendant's contention is without merit. After reviewing the record as a whole and the circumstances of the plea in its totality, we

conclude that the plea was knowing, intelligent, and voluntary (*see People v Barnes*, 206 AD3d 1713, 1714-1715 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]).

Finally in appeal No. 3, we note that the certificate of conviction incorrectly reflects that defendant was convicted of one count of criminal possession of a controlled substance in the seventh degree, and it must therefore be amended to reflect that he was convicted of two counts of criminal possession of a controlled substance in the seventh degree (*see People v Raghnal*, 185 AD3d 1411, 1414 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1017

KA 21-00730

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMBE YANGA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered April 13, 2021. The judgment convicted defendant upon a plea of guilty of attempted murder in the second degree, assault in the second degree and criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Yanga* ([appeal No. 1] — AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1018

KA 21-00733

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMBE YANGA, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered April 13, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the seventh degree (two counts).

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

Same memorandum as in *People v Yanga* ([appeal No. 1] — AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1019

KA 21-00734

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMBE YANGA, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered April 13, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of stolen property in the fourth degree.

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

Same memorandum as in *People v Yanga* ([appeal No. 1] — AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1022

KA 18-00718

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH ROBBINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN J. MORRISSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

JASON L. SCHMIDT, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (David W. Foley, J.), rendered December 18, 2017. The judgment convicted defendant upon a plea of guilty of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [2]), defendant contends that his waiver of the right to appeal is invalid and thus does not foreclose his challenge to the severity of the negotiated sentence. We agree. Here, "there is no basis [in the record] upon which to conclude that [County Court] ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Barzee*, 204 AD3d 1422, 1422 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1023

KA 19-01219

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SANDY JONES, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. MATTLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 5, 2018. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

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

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

Defendant's contention that Supreme Court erred at trial by admitting in evidence testimony about his flight from the scene of the crime is unpreserved for our review (*see People v Turner*, 197 AD3d 997, 998-999 [4th Dept 2021], *lv denied* 37 NY3d 1061 [2021]; *see also People v Cullen*, 110 AD3d 1474, 1475 [4th Dept 2013], *affd* 24 NY3d 1014 [2014]). In any event, the contention lacks merit. "The limited probative force of flight evidence . . . is no reason for its exclusion" (*People v Yazum*, 13 NY2d 302, 304 [1963], *rearg denied* 15 NY2d 679 [1964]). Moreover, "ambiguities or explanations tending to rebut an inference of guilt [arising from evidence of flight] do not render flight evidence inadmissible but, rather, must be introduced as a part of the defense" (*id*. at 305; *see People v Waterman*, 39 AD3d 1259, 1259 [4th Dept 2007], *lv denied* 9 NY3d 927 [2007]). Contrary to defendant's related contention, the court did not err in charging the jury with respect to evidence of flight. There was sufficient evidence of flight to warrant a charge on that evidence (*see People v Martinez*, 298 AD2d 897, 899 [4th Dept 2002], *lv denied* 98 NY2d 769 [2002], *cert denied* 538 US 963 [2003], *reh denied* 539 US 911 [2003]), and the court gave appropriate limiting instructions in the jury charge that evidence of flight is of slight value and that there may

be an innocent explanation for flight (*see People v Hall*, 202 AD3d 1485, 1487 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation 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 generally People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]; *People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]). In any event, the challenged remarks 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]) and did not shift the burden to defendant (*see People v Coleman*, 32 AD3d 1239, 1240 [4th Dept 2006], *lv denied* 8 NY3d 844 [2007]).

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]). Even assuming, arguendo, that 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 Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]; *see generally Bleakley*, 69 NY2d at 495).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Defendant failed to meet his burden of demonstrating "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 Carver*, 27 NY3d 418, 421 [2016]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1037

CA 22-00805

PRESENT: SMITH, J.P., PERADOTTO, BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF MARIA T., AN INCAPACITATED PERSON, PETITIONER-APPELLANT,

V ORDER

CENTER FOR ELDER LAW AND JUSTICE AND HELLEN FERRARO-ZAFFRAM, RESPONDENTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (SAMUEL L. YELLEN OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF DAVID TENNANT PLLC, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered May 11, 2022 in a proceeding pursuant to Mental Hygiene Law article 81. The order denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* CPLR 5511; *Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453, 1453 [4th Dept 2007]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1039

KA 19-00988

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD SIPLIN, JR., DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered November 16, 2017. The judgment convicted defendant upon a jury verdict of burglary in the first degree, robbery in the first degree, robbery 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, burglary in the first degree (Penal Law § 140.30 [4]). Although defendant contends that the conviction is not supported by legally sufficient evidence, his "general motion to dismiss at the close of the People's case did not preserve for our review any of his specific challenges on appeal to the sufficiency of the evidence" (*People v Bubis*, 204 AD3d 1492, 1493-1494 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). Further, 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]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they do not require reversal or modification of the judgment.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1046

KA 22-00078

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAQUANTEA BOWMAN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered January 5, 2022. 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 unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), arising from defendant's fatal shooting of the victim on a street from the rear passenger side window of a vehicle. We affirm.

Initially, as defendant contends and the People correctly concede, defendant did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]; *People v Murray*, 197 AD3d 1017, 1017 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]). Contrary to defendant's contention, however, we conclude that the negotiated sentence is not unduly harsh or severe. Finally, defendant failed to preserve for our review his contention that County Court should have waived the mandatory surcharge, crime victim assistance fee, and DNA databank fee pursuant to CPL 420.35 (2-a) (*see* CPL 470.05 [2]; *People v Shaw*, 90 NY2d 879, 880 [1997]), 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]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1047

KA 21-00520

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUZ VILELLA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered December 18, 2020. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting her, upon her plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that her sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of her challenge to the severity of her sentence, we conclude that the sentence is not unduly harsh or severe.

Defendant further contends that her sentence should be reduced pursuant to Penal Law § 60.12, which permits courts to impose alternative, less severe sentences in certain cases involving defendants who are victims of domestic violence (*see People v Burns*, 207 AD3d 646, 648 [2d Dept 2022]). Assuming, arguendo, that defendant's waiver of the right to appeal is invalid or otherwise does not encompass her contention based on Penal Law § 60.12, we agree with the People that defendant's contention is unpreserved for our review inasmuch as defendant did not ask for discretionary relief under section 60.12 in Supreme Court (*see People v Trifunovski*, 199 AD3d 1344, 1347 [4th Dept 2021], *lv denied* 38 NY3d 931 [2022]). In any event, the statute does not apply because, among other reasons, there is no indication in the record that "substantial physical, sexual or psychological abuse . . . was a significant contributing factor to[ ]

defendant’s criminal behavior” (§ 60.12 [1]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1054

CA 21-01348

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

RAPHAEL FELICIA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILMINGTON TRUST NATIONAL ASSOCIATION,
NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY
TRUSTEE FOR MFRA TRUST 2014-2,
DEFENDANT-RESPONDENT.

RAPHAEL FELICIA, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 17, 2021. The order, inter alia, denied the application of plaintiff for permission to proceed as a poor person.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for "wrongful foreclosure" concerning a judgment of foreclosure entered against her in 2019. She appeals from an order that, inter alia, denied her request for permission to proceed as a poor person under CPLR 1101. In her brief on appeal, however, plaintiff challenges only the judgment of foreclosure and certain orders in the underlying foreclosure action. Inasmuch as plaintiff has not raised any contention with respect to the order on appeal, we dismiss the appeal as abandoned (*see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1634 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

1

TP 22-01440

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF JAVON M. RIDGEWAY, PETITIONER,

V ORDER

ANTHONY ANNUCCI, 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 (FRANK BRADY 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 [Michael M. Mohun, A.J.], entered September 1, 2022) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

5

KA 19-00536

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEDETRICE WRIGHT, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS 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 (Charles A. Schiano, Jr., J.), rendered January 28, 2019. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts) and assault in the second degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of two counts each of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and assault in the second degree (§ 120.05 [2], [6]). The conviction arose from defendant's conduct following a fight that ensued at a house party. Specifically, defendant left the party, returned with a gun, and fired at two people, striking one in the arm.

Defendant contends that Penal Law § 265.03 is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Inasmuch as defendant failed to raise that challenge in Supreme Court, it is not preserved for our review (*see People v Reese*, 206 AD3d 1461, 1462-1463 [3d Dept 2022]; *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* — US —, 137 S Ct 392 [2016]). Contrary to defendant's contention, her "challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

Defendant failed to preserve for our review her contention that the fourth count of the indictment for assault in the second degree (Penal Law § 120.05 [6]) was rendered duplicitous by the court's jury

instructions (*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 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 support the conviction with respect to count four. At the close of proof, defendant moved for a trial order of dismissal, and the court reserved decision. There is no indication in the record that the court ruled on that portion of defendant's motion with respect to count four (*see generally* CPL 290.10 [1]). Thus, we may not address defendant's contention because, "in accordance with *People v Concepcion* (17 NY3d 192, 197-198 [2011]) and *People v LaFontaine* (92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on [the relevant part of] the . . . motion as a denial thereof" (*People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020] [internal quotation marks omitted]; *see People v Moore*, 147 AD3d 1548, 1548-1549 [4th Dept 2017]). We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on that part of defendant's motion (*see Bennett*, 180 AD3d at 1358; *Moore*, 147 AD3d at 1549).

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

6

KA 22-00258

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

GRACE MITCHELL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered August 2, 2021. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on December 19, 2022 and by the attorneys for the parties on January 3, 2023,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

10

KAH 22-00827

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CHARLES FLOYD, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 16, 2022 in a habeas corpus proceeding. The judgment denied the petition and dismissed the proceeding.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus pursuant to CPLR article 70, contending that the Board of Parole improperly revoked his parole release after a final revocation hearing and remanded him to serve another 36 months of incarceration. Supreme Court denied the petition, and we affirm.

Contrary to petitioner's contention, the Parole Board's determination that petitioner violated the conditions of his parole is supported by substantial evidence (*see People ex rel. Lewis v Hunt,* 72 AD3d 1630, 1631 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]; *People ex rel. Fletcher v Travis*, 19 AD3d 1097, 1098 [4th Dept 2005], *lv denied* 5 NY3d 709 [2005]). With respect to charge one alleging that petitioner assaulted a female victim, we conclude that, contrary to petitioner's contention, the Administrative Law Judge (ALJ) who presided over the hearing was entitled to consider hearsay evidence (*see Matter of Hampton v Kirkpatrick*, 82 AD3d 1639, 1639 [4th Dept 2011]; *People ex rel. Fryer v Beaver*, 292 AD2d 876, 876 [4th Dept 2002]; *see generally Matter of Currie v New York State Bd. of Parole*, 298 AD2d 805, 805-806 [3d Dept 2002]). Moreover, the determination was not based solely on the hearsay evidence inasmuch as the victim's sworn statement was submitted in evidence and two witnesses testified at the hearing that the victim appeared frightened of petitioner and

had visible bruising. Petitioner's further contention that the ALJ violated his right to due process by permitting hearsay evidence without making a specific finding of good cause was not raised at the hearing and, thus, is not preserved for our review (*see Currie*, 298 AD2d at 806).

Regarding petitioner's challenge to charges eight and nine, which allege that petitioner possessed a knife, petitioner's parole officer testified that petitioner did not have permission to carry a knife during the relevant parole supervision time period. A witness further testified that petitioner was in possession of a folding knife. To the extent that petitioner challenges the credibility of those witnesses, the ALJ was entitled to resolve such issues of credibility (*see Matter of Johnson v Thompson*, 134 AD3d 1404, 1405 [4th Dept 2015]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

11

CAF 20-01536

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

IN THE MATTER OF MELISSA FROMM,
PETITIONER-APPELLANT,

V ORDER

DENNIS GREENE, RESPONDENT-RESPONDENT.

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

KELLY L. BALL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered October 22, 2020 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 affirmed without costs.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

12

CA 22-01254

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

ROBERT STERN, PLAINTIFF-APPELLANT,

V ORDER

GOLUB CORPORATION, PRICE CHOPPER OPERATING CO., INC., GOLUB CORP., DOING BUSINESS AS PRICE CHOPPER (STORE #172), AND JOHN L. BETSEY, DEFENDANTS-RESPONDENTS.

ROBERT STERN, PLAINTIFF-APPELLANT PRO SE.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (DAVID M. KATZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GOLUB CORPORATION, PRICE CHOPPER OPERATING CO., INC., AND GOLUB CORP., DOING BUSINESS AS PRICE CHOPPER (STORE #172).

JOHN L. BETSEY, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 3, 2022. The order granted the motion of defendants Golub Corporation, Price Chopper Operating Co., Inc., and Golub Corp., doing business as Price Chopper (Store #172) for summary judgment, granted the motion of defendant John L. Betsey for summary judgment and denied the cross motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

13

CA 22-00914

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, BANNISTER, AND OGDEN, JJ.

GREAT LAKES ANESTHESIOLOGY, P.C., PLAINTIFF,

V ORDER

JAMES FOSTER, DEFENDANT-RESPONDENT,
AND DORON FELDMAN, DEFENDANT-APPELLANT.

DORON FELDMAN, THIRD-PARTY PLAINTIFF-APPELLANT,

V

DJA SOLUTIONS, LLC, ET AL., THIRD-PARTY DEFENDANTS,
AND ANDREA MORELLI, THIRD-PARTY DEFENDANT-RESPONDENT.

DORON FELDMAN, DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT PRO SE.

CONNORS LLP, BUFFALO (JAMES W. GRABLE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

VAHEY LAW OFFICES, PLLC, ROCHESTER (JARED K. COOK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 1, 2021. The order, among other things, granted the motion of third-party defendant Andrea Morelli for summary judgment and denied the cross motions of defendant-third-party plaintiff Doron Feldman for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

24

KA 22-00196

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEVEN BUCKINGHAM, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered January 21, 2022. The judgment convicted defendant, upon a plea of guilty, of attempted robbery in the third degree.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

25

KA 21-00940

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM J. COLBERT, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered January 7, 2021. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, as a class E felony.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Henry*, 207 AD3d 1062, 1062-1063 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

26

CAF 22-00408

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

IN THE MATTER OF BONITA L. SHARLOW,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATHERINE H. HUGHES, RESPONDENT-APPELLANT,
AND GREGORY STARKEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

CARA A. WALDMAN, FAIRPORT, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered January 13, 2022 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject child and ordered that respondent Katherine H. Hughes participate in counseling, take prescribed medications, and provide proof of a negative hair follicle test prior to having therapeutic visitation with the child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the phrase "once she re-engages in counseling, takes her medications as prescribed, and provides proof of a negative hair follicle test" from the second ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Jefferson County, for further proceedings in accordance with the following memorandum: In these proceedings pursuant to Family Court Act article 6, respondent Katherine H. Hughes (mother) appeals in appeal No. 1 from an order that, inter alia, granted petitioner grandmother sole custody of the mother's older child and awarded the mother therapeutic visits with that child. In appeal No. 2, the mother appeals from a separate order that, inter alia, modified a prior custody order relating to the mother's younger child by granting petitioner father sole custody and awarding the mother therapeutic visits with that child.

Contrary to the mother's contention in appeal No. 1, we conclude that Family Court properly determined that the grandmother met her burden of proving the existence of extraordinary circumstances and, thus, that she had standing to seek custody of the older child (*see Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]; *Matter of Thomas*

v Small, 142 AD3d 1345, 1345 [4th Dept 2016]). The evidence at the hearing established that the grandmother, with whom the older child had a close bond, was granted a temporary order of custody after the mother's mental health began to significantly deteriorate. The evidence further established that the mother failed to adequately address her mental health issues and that her resulting behavior was a danger to the welfare of the older child (*see Matter of Kaylub T. [Erik C.–Mandy C.]*, 150 AD3d 862, 862-863 [2d Dept 2017]; *Matter of Thomas v Armstrong*, 144 AD3d 1567, 1568 [4th Dept 2016], *lv denied* 28 NY3d 916 [2017]).

Contrary to the mother's contention in appeal No. 2, the court did not err in determining that the father met his burden of establishing " 'a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the [younger] child[ ]' " (*Matter of Johnson v Johnson*, 209 AD3d 1314, 1315 [4th Dept 2022]). The record evidence established that the mother failed to obtain the necessary mental health treatment and failed to divulge any of her mental health problems. The mother's behavior–which included making delusional statements to the children regarding the grandmother, forcing the children into hiding, and becoming physical with the grandmother in the children's presence–called the mother's fitness as a parent into question and is sufficient to establish a change in circumstances (*see generally Matter of Jeremy J.A. v Carley A.*, 48 AD3d 1035, 1036 [4th Dept 2008]).

Contrary to the mother's further contention in both appeals, we conclude that the court's custody determinations have a sound and substantial basis in the record and should not be disturbed (*see generally Matter of Krug v Krug*, 55 AD3d 1373, 1374 [4th Dept 2008]). Although there is, as the mother contends, a preference for keeping siblings together, "that rule is not absolute and may be overcome where it is not in the best interests of the child[ren]" (*Matter of Sandy L.S. v Onondaga County Dept. of Children & Family Servs.*, 188 AD3d 1751, 1753 [4th Dept 2020]). Here, in contrast to the mother, the grandmother and the father each demonstrated the ability to provide an appropriate, stable home environment for the child who is the subject of their respective petitions.

In both appeals, we conclude, however, that the court erred in requiring the mother to participate in counseling, take her medications as prescribed, and provide proof of a negative hair follicle test prior to having therapeutic visitation with the children. Although the court may include such directives as a component of visitation, it does not have the authority to make them a prerequisite to visitation (*see Matter of Waite v Clancy*, 136 AD3d 1287, 1287 [4th Dept 2016]; *Matter of Avdic v Avdic*, 125 AD3d 1534, 1535 [4th Dept 2015]). We therefore modify the orders accordingly, and we remit the matters to Family Court to fashion schedules for the mother's therapeutic visitation with each child.

We have reviewed the mother's remaining contentions in each

appeal and conclude that they are without merit.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

31

CAF 22-00409

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

IN THE MATTER OF JEREMY P. SLAY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BONITA L. SHARLOW, RESPONDENT-RESPONDENT,
AND KATHERINE H. HUGHES, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Eugene R. Renzi, A.J.), entered January 13, 2022 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole custody of the subject child and ordered that respondent Katherine H. Hughes participate in counseling, take prescribed medications and provide proof of a negative hair follicle test prior to having therapeutic visitation with the child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the phrase “once she re-engages in counseling, takes her medications as prescribed, and provides proof of a negative hair follicle test” from the second ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Family Court, Jefferson County, for further proceedings in accordance with the same memorandum as in *Matter of Sharlow v Hughes* (— AD3d — [Feb. 3, 2023] [4th Dept 2023]).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

37

CA 21-01633

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

CONNORS & FERRIS, LLP, AND GREGORY R. CONNORS,
PLAINTIFFS-APPELLANTS,

V ORDER

BROWN CHIARI, LLP, DEFENDANT-RESPONDENT.

GROSS SHUMAN P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BROWN CHIARI LLP, BUFFALO (MICHAEL C. SCINTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered November 12, 2021. The order denied the motion of plaintiffs for, among other things, leave to amend the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 19, 2022,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

39

CA 22-00332

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

DOUGLAS A. BERGSTRESSER, PLAINTIFF-APPELLANT,

V ORDER

BEVERLY J. BERGSTRESSER, DEFENDANT-RESPONDENT.

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

BEVERLY J. BERGSTRESSER, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, A.J.), entered October 22, 2021. The order granted in part the motion of defendant for post judgment relief.

Now, upon reading and filing the stipulation of discontinuance signed by the defendant and by the attorney for the plaintiff on January 4, 2023,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

41

CA 22-00034

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

KORI GRASHA, PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

STANLEY J. SLIWA, TOWN ATTORNEY, WILLIAMSVILLE, GERBER CIANO KELLY BRADY LLP, GARDEN CITY (BRENDAN T. FITZPATRICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered December 21, 2021. The order, among other things, calculated the amount of interest defendant Town of Amherst had to pay to plaintiff.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

47

KA 21-01285

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL G. GORTON, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered August 12, 2021. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [a]) and imposing a determinate term of imprisonment, followed by a period of postrelease supervision. Contrary to defendant's contention, the sentence is not unduly harsh or severe. We note, however, that the uniform sentence and commitment form erroneously reflects that defendant was convicted of robbery in the second degree, and it therefore must be corrected to reflect that defendant was convicted of attempted robbery in the second degree.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

48

KA 18-01565

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYUS D. EDGE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered May 2, 2018. The judgment convicted defendant, upon a plea of guilty, of robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of robbery in the first degree (Penal Law § 160.15 [4]). Preliminarily, as defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. County Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Porchea*, 204 AD3d 1444, 1444 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022]). Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

54

KAH 21-01768

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
SALEEM SPENCER, PETITIONER-APPELLANT,

V ORDER

ANTHONY J. ANNUCCI, NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION PAROLE,
RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SEAN P. MIX OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered May 8, 2020 in a habeas corpus proceeding. The judgment dismissed 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: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

58

CAF 21-01784

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF RICHARD RAWLEIGH,
PETITIONER-APPELLANT,

V ORDER

PEARL R. ZAMBITO, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), entered November 12, 2021 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

59

CAF 22-00458

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF INDIGO S., PRETTY J.T. AND
RAJEA S.T., JR.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

RAJEA S.T., SR. AND NIASIA S.J.,
RESPONDENTS-RESPONDENTS.

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

VERONICA REED, SCHENECTADY, FOR RESPONDENT-RESPONDENT NIASIA S.J.

WENDY S. SISSON, GENESEO, ATTORNEY FOR THE CHILD.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Erin P. DeLabio, A.J.), entered February 7, 2022 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of petitioner seeking recusal.

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, petitioner appeals from an intermediate order that denied its motion seeking recusal of the Acting Family Court Judge assigned to this case. We affirm.

"Absent a legal disqualification, . . . a [j]udge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495 [1993]), and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion (*see People v Moreno*, 70 NY2d 403, 405-406 [1987]; *Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491 [4th Dept 2021]). Contrary to petitioner's contention, the court's knowledge of certain instances of negative treatment of respondent mother by workers associated with petitioner stemmed not from an extrajudicial source, but from a report of a domestic violence crisis and prevention services organization that was received by the court in the course of this judicial proceeding and immediately shared with all parties when the court was made aware that the report had not initially been so distributed (*see Allison*, 199 AD3d at 1491; *see generally* 22 NYCRR 100.3 [E] [1] [a] [ii]).

Moreover, "[a]lthough some of the comments [about petitioner's efforts and handling of the matter] would have been better left unsaid, nothing in the record reveals that any bias on the court's part unjustly affected the result to the detriment of [petitioner] or that the court [had] a predetermined outcome of the case in mind" (*Allison*, 199 AD3d at 1491-1492 [internal quotation marks omitted]). While the court's "intemperate remarks reflected a lack of patience [with petitioner] that is not appropriate in this delicate [and serious] matter" involving the well-being of the subject children (*Matter of Smith v Lopez*, 163 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 32 NY3d 907 [2018]), we perceive no abuse of discretion by the court in denying petitioner's recusal motion (*see Allison*, 199 AD3d at 1492).

Finally, contrary to petitioner's assertion, issues related to visitation and certain other matters previously decided by the court in the proceeding are not properly before us on this appeal from the intermediate order denying petitioner's recusal motion because "an appeal from a nonfinal order or an intermediate order does not bring up for review prior nonfinal orders" (*Abasciano v Dandrea*, 83 AD3d 1542, 1543 [4th Dept 2011]; *see generally* CPLR 5501 [a] [1]; Family Ct Act § 1118).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

64

CA 22-00372

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

HARRIET BOARDMAN, PLAINTIFF-APPELLANT,

V ORDER

JOANNE VAN DYKE AND COTE & VAN DYKE, LLP,
DEFENDANTS-RESPONDENTS.

ANDREW LAVOOTT BLUESTONE, NEW YORK CITY, FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (DAVID L. COOK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered March 2, 2022. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

84

CA 22-00834

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

DAMILOLA ANIMASHAUN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 129022.)

DAMILOLA ANIMASHAUN, CLAIMANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Court of Claims (Linda K. Mejias-Glover, J.), entered February 1, 2022. The judgment awarded claimant money damages of $120.75, plus interest.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

88

CA 21-01757

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

THE ROYCE RESIDENTS HOUSING DEVELOPMENT FUND CORPORATION, AS NOMINEE FOR TMG-NY II, L.P., PLAINTIFF-APPELLANT,

V ORDER

JC LANDFUND LLC, DEFENDANT-RESPONDENT.

MANGANO LAW OFFICE, PLLC, SYRACUSE (KEVIN A. BARONE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (MICHAEL R. VACCARO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered October 29, 2021. The order granted the motion of plaintiff for leave to reargue and, upon reargument, granted in part and denied in part the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

89

CA 22-00039

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

MICHAEL LEE, ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-RESPONDENT,

V ORDER

CANANDAIGUA NATIONAL BANK & TRUST,
DEFENDANT-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (CAROLYN G. NUSSBAUM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (DAVID H. TENNANT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered December 10, 2021. The order, insofar as appealed from, denied in part the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

91

KA 21-00199

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN J. ORDWAY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Jacqueline E. Sisson, A.J.), rendered January 8, 2021. The judgment convicted defendant upon a plea of guilty of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that his waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. As the People correctly concede, the purported waiver of the right to appeal is not enforceable inasmuch as County Court's minimal inquiry "was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Days*, 150 AD3d 1622, 1624 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017] [internal quotation marks omitted]; *see People v McCoy*, 107 AD3d 1454, 1454 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]; *see generally People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Although we are thus not precluded from reviewing defendant's challenge to the severity of his sentence, we nevertheless conclude that the negotiated sentence is not unduly harsh or severe.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

92

KA 21-01739

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CLARENCE PARKS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SUSAN M. NORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered August 11, 2021. The judgment convicted defendant upon a plea of guilty of strangulation in the second degree, criminal contempt in the second degree (two counts) and criminal contempt in the first degree.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

103

CA 22-00192

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF WALTER R. FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered January 26, 2022 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

106

CA 22-00784

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

CLIFFORD WALLER, PLAINTIFF-RESPONDENT,

V ORDER

ADMAR SUPPLY CO., INC., ET AL., DEFENDANTS,
AND EPIC ENVIRONMENTAL CONTRACTING, INC.,
DEFENDANT-APPELLANT.

STARPOINT CENTRAL SCHOOL DISTRICT, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

EPIC ENVIRONMENTAL CONTRACTING, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

RUSSO & GOULD, LLP, BUFFALO (FLORINA ALTSHILER OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY DEFENDANT-APPELLANT.

MAXWELL MURPHY, LLC, BUFFALO (JOHN F. MAXWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA T. MASTRIANO OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered May 4, 2022. The order, inter alia, granted the motion of plaintiff insofar as it sought partial summary judgment on the Labor Law § 240 (1) claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

108

CA 22-00703

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

CARLOS RAMIREZ-HERNANDEZ, PLAINTIFF-RESPONDENT,

V ORDER

ANDREW C. BLOOMINGDALE, ET AL., DEFENDANTS,
AND MAVIS TIRE SUPPLY, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDRUSCHAT LAW FIRM, BUFFALO (TIMOTHY J. ANDRUSCHAT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered March 16, 2022. The order denied the motion of defendant Mavis Tire Supply, LLC seeking leave to serve a demand for a jury trial.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 1, 2022,

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

Entered: February 3, 2023 Ann Dillon Flynn

Clerk of the Court

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

109

CA 22-00704

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

CARLOS RAMIREZ-HERNANDEZ, PLAINTIFF-RESPONDENT,

V ORDER

ANDREW C. BLOOMINGDALE, ET AL., DEFENDANTS,
AND MAVIS TIRE SUPPLY, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDRUSCHAT LAW FIRM, BUFFALO (TIMOTHY J. ANDRUSCHAT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered March 23, 2022. The order, among other things, denied defendants' motions seeking to vacate the note of issue and certificate of readiness.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 1, 2022,

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

Entered: February 3, 2023 Ann Dillon Flynn

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

114

KA 22-00265

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN C. FORSHEY, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (ELIZABETH K. OGDEN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Orleans County Court (Charles N. Zambito, A.J.), entered December 10, 2020. 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: On appeal from a December 2020 order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that the 2020 SORA hearing was duplicative of a SORA hearing held in 2019 which resulted in a 2019 order determining that he is a level three risk (*People v Forshey*, 201 AD3d 1352 [4th Dept 2022], *lv denied* 38 NY3d 907 [2022]), and this Court should therefore vacate the 2020 determination as a matter of public policy. Defendant failed to raise that contention at the 2020 SORA hearing and it is therefore not preserved for our review (*see People v Sanchez*, 186 AD3d 880, 881 [2d Dept 2020]). In any event, his contention is without merit. In 1994, defendant was convicted in Florida of a felony sex offense and, in 2000, he was convicted in New York of rape in the first degree. The Board of Examiners of Sex Offenders prepared two risk assessment instruments (RAIs) based on the two separate convictions, with the RAI prepared with respect to the New York conviction giving rise to the 2019 order, and the RAI prepared with respect to the Florida conviction giving rise to the 2020 order. Defendant's reliance on *People v Cook* (29 NY3d 114 [2017]) is misplaced. In that case, the Court of Appeals held that, where "a single set of '[c]urrent offenses' " forms the basis of a single RAI, only one SORA determination is permitted (*id.* at 116; *see id.* at 119). Here, defendant's two different convictions do not constitute the "current offenses" under a single RAI. Thus, it is permissible for there to be

two different SORA hearings and two different risk level determinations (*see Sanchez*, 186 AD3d at 881-882; *People v Fuentes*, 177 AD3d 788, 789 [2d Dept 2019], *lv denied* 35 NY3d 901 [2020]; *People v Hirji*, 170 AD3d 412, 412-413 [1st Dept 2019], *lv denied* 33 NY3d 907 [2019]). The 2020 SORA hearing was "based on a separate RAI and case summary and concerning a different current offense, [and therefore] was not a duplicative proceeding unauthorized by statute" (*Fuentes*, 177 AD3d at 789).

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

127

CA 22-00542

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

GARY KING, PLAINTIFF-APPELLANT,

V ORDER

RENTAL ASSISTANCE CORPORATION,
DEFENDANT-RESPONDENT.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND SCHOENECK & KING, PLLC, BUFFALO (KATHLEEN H. MCGRAW OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 8, 2022. The order granted defendant's motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

129

CA 22-00088

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

F.Y., PLAINTIFF-RESPONDENT,

V ORDER

NIAGARA FALLS CITY SCHOOL DISTRICT AND NIAGARA FALLS CITY SCHOOL DISTRICT BOARD OF EDUCATION, DEFENDANTS-APPELLANTS.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS (NICHOLAS TAM OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEITZ & LUXENBERG, P.C., NEW YORK CITY (JARED LACERTOSA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered November 29, 2021. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 6, 2023,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

131

CA 22-00673

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

MELIKAH BRUNER, PLAINTIFF-RESPONDENT,

V ORDER

SANTA MOTORS AND JOSEPH SANTA,
DEFENDANTS-APPELLANTS.

FORSYTH, HOWE, KALB & MURPHY, P.C., ROCHESTER (SANFORD R. SHAPIRO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Monroe County Court (Karen Bailey Turner, J.), dated April 6, 2022. The order affirmed an order of the Rochester City Court (Nicole D. Morris, J.) entered July 1, 2021, awarding plaintiff $4,874.89 in damages.

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

144

CA 22-00922

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

ANGEL AVILES, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 132919.)

TRACIE A. SUNDACK & ASSOCIATES, LLC, WHITE PLAINS (TRACIE A. SUNDACK OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered December 3, 2021. The order, among other things, granted defendant's motion for summary judgment dismissing the claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

149

CA 21-01405

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

LAURA KWIATKOWSKI, PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT,
AND PATRICK ALEXANDERSON, R.N.,
DEFENDANT-RESPONDENT.

HOGANWILLIG, PLLC, AMHERST (RYAN C. JOHNSEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICOTTA, MATTREY, CALLOCHIA, MARKEL & CASSERT, BUFFALO (BRYAN J. DANIELS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 8, 2021. The order granted the motion of defendant Patrick Alexanderson, R.N. seeking to dismiss plaintiff's corrected second amended complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 11 and 12, 2023,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court

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

151

CA 22-00365

PRESENT: WHALEN, P.J., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

WALTER O. HERRERA, PLAINTIFF-RESPONDENT,

V ORDER

NC LOFTS HOUSING DEVELOPMENT FUND CORPORATION, NIAGARA CITY LOFTS LLC, NIAGARA CITY LOFTS MM LLC, CB EMMANUEL WIH PRESERVATION LLC, CB NCL LLC, CB-EMMANUEL REALTY, LLC, CB EMMANUEL RECOVERY LLC, AND R&P OAK HILL DEVELOPMENT LLC, DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL R. ROLOFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 22, 2022. The order, among other things, denied in part defendants' motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 1, 2022,

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

Entered: February 3, 2023

Ann Dillon Flynn
Clerk of the Court