SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 28, 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 APRIL 28, 2023

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_____	969	TP 22 01061	SONYA WILLIAMS V COUNTY OF ONONDAGA
_____	975	CA 22 00571	WELLS FARGO BANK, N.A. V CHERYL A. DEERING
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

946

CA 21-01435

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

STEPHEN D. VICKI AND NICOLE M. VICKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
NIAGARA FALLS WATER BOARD, AND NIAGARA MOHAWK
POWER CORPORATION, DOING BUSINESS AS NATIONAL
GRID, DEFENDANTS-APPELLANTS,

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 21, 2021. The order, among other things, denied in part the motion of defendants Niagara Falls Water Board, Niagara Falls Public Water Authority and Niagara Mohawk Power Corporation, doing business as National Grid, for summary judgment dismissing plaintiffs' amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion of defendants Niagara Falls Water Board, Niagara Falls Public Water Authority and Niagara Mohawk Power Corporation, doing business as National Grid, seeking summary judgment dismissing the Labor Law § 241 (6) claim against defendant Niagara Mohawk Power Corporation, doing business as National Grid, insofar as that claim is based on the alleged violation of 12 NYCRR 23-4.2 (k) and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries Stephen D. Vicki (plaintiff) sustained while working on a sewer replacement project pursuant to a contract executed between defendant Niagara Falls Water Board (Board) and plaintiff's employer. At the time of the accident, plaintiff was using an excavator to disassemble a manhole shield. Before plaintiff began to remove the first side panel of the shield, his supervisor removed securing pins from *both* sides of several spreader bars, contrary to normal procedure. As plaintiff began to separate the first side panel, one of the unsecured spreader bars fell into the cab of the excavator, seriously injuring plaintiff.

The Board and defendants Niagara Falls Public Water Authority (Authority) and Niagara Mohawk Power Corporation, doing business as National Grid (NiMo) (collectively, moving defendants), moved for summary judgment dismissing the amended complaint against them. Plaintiffs moved for partial summary judgment on the issue of liability under Labor Law § 240 (1) against only the Board and the Authority. Supreme Court, inter alia, granted the moving defendants' motion insofar as it sought summary judgment dismissing the amended complaint against the Authority. In addition, the court granted the moving defendants' motion to the extent that it sought summary judgment dismissing the Labor Law § 200 and common-law negligence claims against the Board and NiMo (collectively, defendants), and the Labor Law § 241 (6) claim against defendants except insofar as that claim was predicated on violations of 12 NYCRR 23-4.2 (k) and 23-9.4 (e) (1) and (2). Finally, the court denied the moving defendants' motion insofar as it sought summary judgment dismissing the Labor Law § 240 (1) claim against defendants, and granted plaintiffs' motion with respect to the Board's liability under that section. Defendants now appeal.

Contrary to defendants' contention, the court properly granted plaintiffs' motion insofar as it sought partial summary judgment on the issue of the Board's liability under Labor Law § 240 (1). Initially, plaintiffs established as a matter of law that the Board was an "owner" for purposes of Labor Law § 240 (1) (*see generally Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009]; *Berner v Town of Cheektowaga*, 151 AD3d 1636, 1637 [4th Dept 2017]). Although defendants contend that plaintiffs could not meet their initial burden on their motion in that respect by relying on the contract between the Board and plaintiff's employer, identifying the Board as "owner," we reject that contention (*see Winkler v Halmar Intl., LLC*, 199 AD3d 598, 598 [1st Dept 2021]; *Larosae v American Pumping, Inc.*, 73 AD3d 1270, 1272 [3d Dept 2010]).

Plaintiffs also established that the Board violated Labor Law § 240 (1) and that such violation was a proximate cause of plaintiff's injuries (*see generally Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985], *rearg denied* 65 NY2d 1054 [1985]). Generally, a plaintiff seeking to recover under section 240 (1) for injuries sustained in a falling object case must establish "both (1) that the object was being hoisted or secured, *or* that it required securing for the purposes of the undertaking, and (2) that the object fell because of the absence or inadequacy of a safety device to guard against a risk involving the application of the force of gravity over a physically significant elevation differential" (*Floyd v New York State Thruway Auth.*, 125 AD3d 1456, 1457 [4th Dept 2015] [internal quotation marks omitted]).

Contrary to defendants' contention, this case involved an elevation risk with respect to the spreader bars, which were elevated above the ground at the time of the accident and "required securing for the purposes of the undertaking" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2014] [internal quotation marks omitted]; *see generally Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514

[1991]). Plaintiffs established as a matter of law that the harm in this case "flow[ed] directly from the application of the force of gravity to the object" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). Also contrary to defendants' contention, this is not a case involving the deliberate dropping of an object. Plaintiffs established as a matter of law that the spreader bar fell at a time when neither plaintiff nor his supervisor wanted it to fall (*see Petteys v City of Rome*, 23 AD3d 1123, 1123-1124 [4th Dept 2005]; *cf. Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002]). Moreover, plaintiffs established that the Board failed to ensure that plaintiff knew both that safety devices "were available *and* that he was expected to use them" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004] [emphasis added]; *see Kuhn v Camelot Assn., Inc.* [appeal No. 2], 82 AD3d 1704, 1705-1706 [4th Dept 2011]).

In opposition to plaintiffs' motion, the moving defendants failed to raise any triable issues of fact with respect to the Board's liability (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Contrary to defendants' contention, plaintiff's actions were not the sole proximate cause of the accident. "[P]laintiff was not alone in [disassembling the manhole shield], and thus [his] conduct could not be the sole proximate cause of his injuries" (*Flowers v Harborcenter Dev., LLC*, 155 AD3d 1633, 1635 [4th Dept 2017]). Even if plaintiff's supervisor did not specifically instruct plaintiff on the manner of disassembling the manhole shield, the supervisor's participation in the process and his presence at the scene establish that plaintiff was "acting with the tacit approval of his supervisor" (*Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 750 [2d Dept 2009]; *see Kuhn*, 82 AD3d at 1705-1706). We thus conclude that plaintiff's conduct during the disassembly process "raises, at most, an issue concerning his comparative negligence, which is not an available defense under Labor Law § 240 (1)" (*Flowers*, 155 AD3d at 1635; *see Fronce v Port Byron Tel. Co., Inc.*, 134 AD3d 1405, 1407 [4th Dept 2015]).

For the same reasons, we conclude that the moving defendants failed to meet their initial burden on their motion with respect to the Labor Law § 240 (1) claim against defendants (*see generally Zuckerman*, 49 NY2d at 562).

In light of our determination that plaintiffs are entitled to partial summary judgment on the issue of the Board's liability under Labor Law § 240 (1), we conclude that defendants' contentions regarding plaintiffs' Labor Law § 241 (6) claim are academic insofar as they concern the Board (*see Miller v Rerob, LLC*, 197 AD3d 979, 981 [4th Dept 2021]; *Lagares v Carrier Term. Servs., Inc.*, 177 AD3d 1394, 1395 [4th Dept 2019]). We agree with defendants, however, that the court erred in denying the moving defendants' motion with respect to the Labor Law § 241 (6) claim against NiMo insofar as it was based on the alleged violation of 12 NYCRR 23-4.2 (k). We have repeatedly held that 12 NYCRR 23-4.2 (k) is not sufficiently specific to support a

Labor Law § 241 (6) claim (*see Malvestuto v Town of Lancaster*, 201 AD3d 1339, 1341 [4th Dept 2022]; *Vanderwall v 1255 Portland Ave. LLC*, 128 AD3d 1446, 1447 [4th Dept 2015]; *Buhr v Concord Sq. Homes Assoc., Inc.*, 126 AD3d 1533, 1534 [4th Dept 2015]). Inasmuch as the First and Third Departments have held similarly (*see Willis v Plaza Constr. Corp.*, 151 AD3d 568, 568 [1st Dept 2017]; *Kropp v Town of Shandaken*, 91 AD3d 1087, 1091 [3d Dept 2012]), we decline to adopt contrary precedent in the Second Department (*see Zaino v Rogers*, 153 AD3d 763, 765 [2d Dept 2017]; *Cunha v Crossroads II*, 131 AD3d 440, 441 [2d Dept 2015]; *Ferreira v City of New York*, 85 AD3d 1103, 1105 [2d Dept 2011]). We therefore modify the order accordingly.

We reach a different conclusion with respect to the Labor Law § 241 (6) claim against NiMo insofar as it is based on the alleged violation of 12 NYCRR 23-9.4 (e) (1) and (2). Defendants do not dispute that those regulations are sufficiently specific to support a section 241 (6) claim (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 414-416 [2011]; *Brechue v Town of Wheatfield*, 241 AD2d 935, 936 [4th Dept 1997], *lv denied* 94 NY2d 759 [2000]), and we conclude that the moving defendants failed to establish as a matter of law that NiMo did not violate those regulations or that any alleged violation was not a proximate cause of plaintiff's injuries (*see Baker v City of Buffalo*, 90 AD3d 1684, 1685-1686 [4th Dept 2011]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

964

CA 21-01323

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

PAUL MARINACCIO, SR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF CLARENCE, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 21, 2021. The order denied the motion of defendant for summary judgment.

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

Memorandum: The facts and procedural history of this case are set forth in our decisions on the prior appeals (*Marinaccio v Town of Clarence*, 90 AD3d 1599 [4th Dept 2011], *revd* 20 NY3d 506 [2013], *rearg denied* 21 NY3d 976 [2013]; *Marinaccio v Town of Clarence*, 151 AD3d 1784 [4th Dept 2017], *lv dismissed* 30 NY3d 1039 [2017]). Defendant now appeals from an order that, inter alia, denied its motion seeking summary judgment dismissing the complaint and partial summary judgment on its counterclaims. We affirm.

As a preliminary matter, we agree with defendant that the doctrine of law of the case does not preclude its contentions on this appeal (*see Freeland v Erie County*, 204 AD3d 1465, 1466 [4th Dept 2022]).

We conclude, however, that defendant failed to meet its burden of establishing entitlement to judgment as a matter of law with respect to the causes of action for breach of contract and for recovery of attorney's fees arising from the alleged breach of contract. "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Wilsey v 7203 Rawson Rd., LLC*, 204 AD3d 1497, 1498 [4th Dept 2022]). Here, the parties do not dispute that a contract existed, i.e., a settlement agreement that, inter alia, obligated plaintiff to deed

certain property to defendant and obligated defendant to construct a drainage ditch on the deeded property for the purpose of draining storm water from a subdivision, and that plaintiff performed under the contract. In support of the motion, defendant submitted evidence that it constructed a drainage ditch on the deeded property and that the contract contained no specific standards or specifications for the construction of the drainage ditch. Defendant also submitted, however, the deposition testimony of plaintiff, a highway construction contractor with storm sewer and ditch construction experience, that the drainage ditch was improperly graded and not large enough for its intended purpose of diverting storm water from the subdivision without flooding plaintiff's property. Thus, notwithstanding the absence of specific terms in the contract describing defendant's performance, defendant's own submissions raise questions of fact whether defendant breached an implied promise to perform the contract in a skillful and workmanlike manner (*see Rush v Swimming Pools by Jack Anthony, Inc.*, 98 AD3d 728, 729-730 [2d Dept 2012]; *see generally TJJK Props., LLC v A.E.Y. Eng'g, D.P.C.*, 186 AD3d 1080, 1081-1082 [4th Dept 2020]).

We further conclude that defendant failed to meet its burden for summary judgment on its counterclaims against plaintiff for breach of contract, trespass, and nuisance, which are based on allegations that plaintiff constructed furrows that drained into the ditch, inasmuch as defendant's own submissions raised issues of fact. With respect to the breach of contract and trespass counterclaims, defendant submitted plaintiff's deposition testimony in which he testified that he never created the furrows allegedly connecting to the ditch and, to the extent that he did construct furrows, doing so did not constitute a breach of the contract or a trespass because he did so with the consent of defendant (*see generally Pearl St. Parking Assoc. LLC v County of Erie*, 207 AD3d 1029, 1031-1032 [4th Dept 2022]). Moreover, defendant failed to submit any evidence that plaintiff interfered with defendant's right to use and enjoy its property, i.e., the deeded property upon which it was to construct a drainage ditch, which is an element of the nuisance counterclaim (*see Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977], *rearg denied* 42 NY2d 1102 [1977]).

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

All concur except PERADOTTO, J., who concurs on constraint of *Marinaccio v Town of Clarence* (151 AD3d 1784 [4th Dept 2017], *lv dismissed* 30 NY3d 1039 [2017]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

969

TP 22-01061

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

IN THE MATTER OF SONYA WILLIAMS, PETITIONER,

V MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, ONONDAGA COUNTY LEGISLATURE, EUGENE J. CONWAY, AS SHERIFF OF ONONDAGA COUNTY AND SUSAN C. DEMARI, AS CHIEF DEPUTY/CIVIL DEPARTMENT OF ONONDAGA COUNTY SHERIFF'S OFFICE, RESPONDENTS.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (AARON E. KAPLAN OF COUNSEL), FOR PETITIONER.

COUGHLIN & GERHART, LLP, BINGHAMTON (ANGELO D. CATALANO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Joseph E. Lamendola, J.], entered April 11, 2022) to review a determination of respondent County of Onondaga. The determination denied the application of petitioner for General Municipal Law § 207-c benefits.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner, a correction officer employed by the County of Onondaga (respondent), commenced this CPLR article 78 proceeding seeking to annul respondent's determination denying petitioner's application for benefits pursuant to General Municipal Law § 207-c. The proceeding arises from an incident wherein petitioner discovered three laundry bags in the middle of a hallway on the housing unit floor. Petitioner thought the bags blocking the hallway were a safety concern to persons walking the hallway, so she tried to move the bags close to the wall. When attempting to move one of the bags, she felt a "pop" in her shoulder. Following that incident, petitioner applied for General Municipal Law § 207-c benefits based on allegations that she sustained a shoulder injury in the course of her employment, which respondent denied based on the determination that petitioner's injury did not occur as a result of the performance of her duties. Pursuant to a memorandum of agreement between, among others, petitioner's union and respondent, a hearing was held on the issue whether petitioner's injury occurred as the result of the performance of her duties. The Hearing Officer found

that the laundry bags in the hallway posed a safety hazard and that petitioner had a duty to remedy the situation immediately, and thus recommended that petitioner receive the section 207-c benefits. Respondent issued a final determination rejecting the Hearing Officer's recommendation and denied petitioner's application. Petitioner thereafter commenced this proceeding.

Initially, we note that Supreme Court erred in transferring the proceeding to this Court pursuant to CPLR 7804 (g) on the ground that the petition raised a substantial evidence issue. Respondent's determination "was not 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' (CPLR 7803 [4]). Rather, the determination was the result of a hearing conducted pursuant to the terms of [an] agreement" between petitioner's union and respondent (*Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v County of Erie*, 159 AD3d 1561, 1561 [4th Dept 2018]; *see Matter of Ridge Rd. Fire Dist. v Schiano*, 41 AD3d 1219, 1220 [4th Dept 2007]). Nevertheless, in the interest of judicial economy, we consider the merits of the petition (*see Erie County Sheriff's Police Benevolent Assn., Inc.*, 159 AD3d at 1561-1562).

Our review of this administrative determination is limited to whether the determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]; *see Erie County Sheriff's Police Benevolent Assn., Inc.*, 159 AD3d at 1562). A determination "is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts . . . An agency's determination is entitled to great deference . . . and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014] [internal quotation marks omitted]).

In order to establish entitlement to General Municipal Law § 207-c benefits, petitioner must establish a "direct causal relationship between job duties and the resulting illness or injury" (*Matter of Theroux v Reilly*, 1 NY3d 232, 244 [2003] [internal quotation marks omitted]). Here, we conclude that petitioner established "such a direct causal relationship and thus demonstrated [her] entitlement to benefits under General Municipal Law § 207-c" (*Matter of Casselman v Village of Lowville*, 2 AD3d 1281, 1281-1282 [4th Dept 2003]). Petitioner testified at the hearing that she thought the laundry bags outside the main entrance door were a "safety issue," particularly because they would block other officers from moving through the hallway quickly and because persons using the hallway may get hurt. She further testified that her training and job responsibilities required her to address safety concerns. Petitioner also submitted documentary evidence that correction officers were under the duty to ensure that laundry bags are not placed on the housing unit floor at any time. Moreover, it is undisputed that there was no policy prohibiting correction officers from moving laundry bags. Although respondent submitted testimony that correction

officers should order inmates to move laundry bags, that testimony did not address the location of the laundry bags and the safety hazard posed by laundry bags left in a hallway. We therefore conclude that the determination to deny petitioner's application for section 207-c benefits was arbitrary and capricious (*see Matter of Lynn v Town of Clarkstown*, 131 AD3d 968, 968-969 [2d Dept 2015], *lv denied* 26 NY3d 918 [2016]; *Matter of D'Accursio v Monroe County*, 74 AD3d 1908, 1909 [4th Dept 2010], *lv denied* 15 NY3d 710 [2010]).

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

975

CA 22-00571

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

WELLS FARGO BANK, N.A., AS TRUSTEE FOR SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2004-OP2, MORTGAGE PASS-THROUGH RECEIVABLES, SERIES 2004-OP2, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHERYL A. DEERING, CARL G. DEERING, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

LAW OFFICE OF JOHN J. KEENAN, HAMBURG (JOHN J. KEENAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MCGLINCHEY STAFFORD, NEW YORK CITY (MARGARET J. CASCINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (Lynn W. Keane, J.), entered October 7, 2021. The judgment, inter alia, granted the motion of plaintiff for a judgment of foreclosure and sale.

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

Memorandum: Plaintiff commenced this foreclosure action against, among others, Cheryl A. Deering and Carl G. Deering (defendants) after defendants stopped paying on a note that was secured by a mortgage on real property. Supreme Court (Chimes, J.) granted plaintiff's motion for summary judgment and we affirmed (*Wells Fargo Bank, N.A. v Deering*, 134 AD3d 1468 [4th Dept 2015]). Defendants thereafter moved to vacate the resulting judgment of foreclosure and sale based on, inter alia, an affidavit sworn to in 2008 by plaintiff's former attorney, who had represented plaintiff in an earlier foreclosure action against defendants with respect to the subject property. In the affirmation, plaintiff's former attorney stated that "the defendant forwarded funds" to him "in order to pay off his mortgage and pay all costs associated with said action." Based on that evidence, Supreme Court (Dillon, J.) granted defendants' motion to vacate the judgment of foreclosure and sale and restored the matter to the calendar. Plaintiff thereafter obtained an affirmation from the former attorney, in which he said that the statement he made in his 2008 affidavit was in error and that defendants paid off their

mortgage arrears at that time but did not pay off the note in full. Plaintiff moved for a judgment of foreclosure and sale and Supreme Court (Keane, J.), inter alia, granted the motion. Defendants appeal and we affirm.

We conclude that defendants' contentions concerning equitable estoppel and judicial estoppel are not preserved for our review (*see #1 Funding Ctr., Inc. v H & G Operating Corp.*, 48 AD3d 908, 910 n 1 [3d Dept 2008]; *Conner v State of New York*, 268 AD2d 706, 707 [3d Dept 2000]).

We further conclude that plaintiff met its initial burden of establishing its entitlement to judgment as a matter of law on its motion for a judgment of foreclosure and sale (*see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1308 [4th Dept 2015]; *I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029 [4th Dept 1994]). In support of the motion, plaintiff submitted the mortgage, the underlying note, evidence of defendants' default, and the affirmation of plaintiff's former attorney who clarified that in 2008 defendants did not pay off the note in full. Additionally, plaintiff submitted documentary evidence establishing that defendants made payments on the note after 2008 and stopped making payments in 2011.

The burden then shifted to defendants to produce "evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[]" (*I.P.L. Corp.*, 202 AD2d at 1029; *see HSBC Bank USA, N.A.*, 125 AD3d at 1308). In opposition, defendants submitted an affidavit of Carl G. Deering, in which he stated that it was his understanding that the mortgage and note were satisfied in 2008 and that he relied on the 2008 affidavit of plaintiff's former attorney, but those conclusory statements are unsupported by the record and are insufficient to raise an issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

995

CA 21-00704

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

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

V MEMORANDUM AND ORDER

TLC HEALTH NETWORK, LAKE SHORE HEALTH CARE CENTER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM A. QUINLAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 12, 2021. The order, inter alia, dismissed as moot the motion of plaintiff seeking, inter alia, to strike the answer of defendants TLC Health Network and Lake Shore Health Care Center.

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

Memorandum: In this medical malpractice and wrongful death action, plaintiff appeals from an order that dismissed as moot her motion to strike the answer of TLC Health Network and Lake Shore Health Care Center (collectively, defendants) or compel them to comply with her fourth notice to produce (notice to produce), which sought, inter alia, electronic medical record audit trails relating to defendants' care and treatment of plaintiff's decedent. We affirm.

"[T]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Prattico v City of Rochester*, 197 AD3d 882, 883 [4th Dept 2021] [internal quotation marks omitted]; *see Castro v Admar Supply Co., Inc.* [appeal No. 2], 159 AD3d 1616, 1617 [4th Dept 2018]; *Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). In recognition of the fact that "[a]ctions should be resolved on their merits wherever possible" (*Pezzino v Wedgewood Health Care Ctr., LLC*, 175 AD3d 840, 841 [4th Dept 2019] [internal quotation marks omitted]), we have "repeatedly held that the striking of a pleading is appropriate only where there

is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Perry v Town of Geneva*, 64 AD3d 1225, 1226 [4th Dept 2009] [internal quotation marks omitted]; *see generally* CPLR 3126 [3]). "The willful or contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders" (*Pezzino*, 175 AD3d at 841 [internal quotation marks omitted]). " 'Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse' " (*Hann v Black*, 96 AD3d 1503, 1504-1505 [4th Dept 2012]).

We reject plaintiff's contention that Supreme Court erred in refusing to strike defendants' answer for failure to comply with the notice to produce. Plaintiff did not establish that defendants engaged in any "willful, contumacious, or . . . bad faith" noncompliance with the notice to produce (*Perry*, 64 AD3d at 1226; *see Pezzino*, 175 AD3d at 841-842). The record contains no showing, "beyond mere conjecture, that there is relevant information to be gleaned from . . . audit trails which cannot be obtained from other sources" of information that were already supplied by defendants (*Punter v New York City Health & Hosps. Corp.*, 2019 NY Slip Op 31065[U], *7 [Sup Ct, NY County 2019], *mod on rearg* 2019 NY Slip Op 34239[U], *affd* 191 AD3d 563 [1st Dept 2021]; *cf. Vargas v Lee*, 170 AD3d 1073, 1076-1077 [2d Dept 2019]). We further conclude that the court did not abuse its discretion in dismissing the motion on the ground that defendants substantially complied with the notice to produce insofar as it sought audit trail data; defendants disclosed decedent's electronic medical records, which already displayed much of the information sought from the audit trails—i.e., alterations made to the electronic medical records—and defendants otherwise provided reasonable explanations for why some of the requested information was no longer available (*see Tanriverdi v United Skates of Am., Inc.*, 164 AD3d 858, 860 [2d Dept 2018]; *Lampel v Sergel*, 287 AD2d 548, 549 [2d Dept 2001]; *see generally Castro*, 159 AD3d at 1617).

Plaintiff's contention that the court erred in considering the papers defendants submitted in surreply is not properly before us because it is raised for the first time on appeal (*see Oerlemans v Cornish*, 21 AD3d 1308, 1309 [4th Dept 2005]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, the court did not err in relying on the surreply for the purpose of affording defendants the reasonable opportunity to respond to the new arguments advanced by plaintiff in her reply (*see generally Conarton v Holy Smoke BBQ & Catering, LLC*, 186 AD3d 1111, 1111 [4th Dept 2020]; *Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1170 [4th Dept 2020]).

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

1033

TP 22-00935

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

IN THE MATTER OF ANTHONY GULLACE, PETITIONER,

V MEMORANDUM AND ORDER

MARK J.F. SCHROEDER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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, Monroe County [Victoria M. Argento, J.], entered December 8, 2021) to review a determination of respondent. The determination revoked the driver's license of petitioner.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. Petitioner was placed in the back of a police vehicle after he was involved in a motor vehicle accident wherein he rear-ended another vehicle. A New York State Police Trooper thereafter responded to the scene to conduct an investigation into whether petitioner had been driving while intoxicated (DWI). The Trooper ultimately took petitioner into custody after petitioner exhibited signs of intoxication. Petitioner refused to submit to a chemical test and, based on that refusal, his license was temporarily suspended. A refusal revocation hearing was then held pursuant to Vehicle and Traffic Law § 1194 (2) (c). The Administrative Law Judge revoked petitioner's license after concluding that all of the relevant elements of Vehicle and Traffic Law § 1194 had been established. Respondent confirmed the determination upon petitioner's administrative appeal. Contrary to petitioner's contention, the matter was properly transferred to this Court inasmuch as petitioner raised a question whether the determination is supported by substantial evidence (*see* CPLR 7804 [g]).

We reject petitioner's contention that respondent's determination is not supported by substantial evidence (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]; *Matter of Dennstedt v Appeals Bd. of Admin. Adjudication Bur.*, 206 AD3d 1693, 1694 [4th Dept 2022]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). The Trooper's testimony at the hearing established that petitioner was temporarily detained at the scene of the motor vehicle accident on suspicion of DWI, and that detention did not constitute a de facto arrest (*see e.g. People v Palmer*, 204 AD3d 1512, 1514 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]; *see also People v Pruitt*, 158 AD3d 1138, 1139 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]). In addition, the Trooper's testimony, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to the chemical test after he was arrested for DWI and warned three times of the consequences of such refusal (*see Malvestuto*, 207 AD3d at 1246; *see generally* Vehicle and Traffic Law § 1194 [2] [b]). Petitioner's remaining contention was not raised in his administrative appeal, and therefore petitioner has failed to exhaust his administrative remedies with respect to that contention (*see Matter of Neelman v State Univ. of N.Y. at Buffalo*, 192 AD3d 1621, 1623 [4th Dept 2021]; *Matter of Gorman v New York State Dept. of Motor Vehs.*, 34 AD3d 1361, 1361 [4th Dept 2006]).

Entered: April 28, 2023 Ann Dillon Flynn

Clerk of the Court

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

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KA 19-00703

PRESENT: PERADOTTO, J.P., CURRAN, BANNISTER, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN CROSBY, DEFENDANT-APPELLANT.

BRADLEY E. KEEM, SYRACUSE, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 20, 2018. The appeal was held by this Court by order entered June 17, 2021, decision was reserved and the matter was remitted to Oneida County Court for further proceedings (195 AD3d 1573 [4th Dept 2021]). 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 attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]). We previously held this case, reserved decision, and remitted the matter to County Court to state for the record its reasons for denying defendant's pro se motion to dismiss the indictment on the ground that he was not afforded an opportunity to testify before the grand jury pursuant to CPL 190.50 (5) (a) (*People v Crosby*, 195 AD3d 1573, 1573 [4th Dept 2021]). Upon remittal, the court denied the motion on the ground that it was untimely. We now affirm.

Defendant contends that the court erred in denying his motion to dismiss the indictment because the People violated his right to testify before the grand jury (*see generally* CPL 190.50 [5] [a]). We conclude, however, that defendant waived that contention inasmuch as it is undisputed that he did not move to dismiss the indictment "on that ground within five days after he was arraigned" (*People v Linder*, 170 AD3d 1555, 1557 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019] [internal quotation marks omitted]; *see* CPL 190.50 [5] [c]; *People v McCoy*, 174 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019], *reconsideration denied* 35 NY3d 994 [2020]).

Defendant's contentions that the court did not comply with the procedure outlined by CPL 200.60 and that he was coerced into entering

a pretrial stipulation admitting to the confinement element of assault in the second degree (*see* Penal Law § 120.05 [7]) are unpreserved for our review (*see People v Castillo*, 151 AD3d 1802, 1803 [4th Dept 2017], *lv denied* 30 NY3d 978 [2017]; *People v Diaz*, 39 AD3d 1244, 1245 [4th Dept 2007], *lv denied* 9 NY3d 842 [2007]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's contention that he was deprived of his right to a fair trial when the court informed the jury that defendant was in custody and that correction officers would be near him throughout trial is without merit. The court instructed the jury that it should "draw no unfavorable inference from the fact that defendant was in custody and unable to make bail," and the jury is presumed to have followed that instruction (*People v Wilkins*, 175 AD3d 867, 869 [4th Dept 2019], *affd* 37 NY3d 371 [2021] [internal quotation marks omitted]; *see People v Pressley*, 156 AD3d 1384, 1384 [4th Dept 2017], *amended on rearg* 159 AD3d 1619 [4th Dept 2018], *lv dismissed* 31 NY3d 1085 [2018]; *see also People v Konovalchuk*, 148 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]). We also reject defendant's contention that the court's instruction was rendered unduly prejudicial by the fact that he was shackled throughout trial; the court stated on the record that the shackles were at all times covered and could not be seen by the jury (*see generally People v Cruz*, 17 NY3d 941, 944-945 [2011]; *People v Alexander*, 127 AD3d 1429, 1432 [3d Dept 2015], *lv denied* 25 NY3d 1197 [2015]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. With respect to defendant's claim that defense counsel was ineffective in failing to object to the People's alleged noncompliance with CPL 200.60, we conclude that defendant failed to "demonstrate the absence of strategic or other legitimate explanations" for defense counsel's decision (*People v Rivera*, 71 NY2d 705, 709 [1988]). Instead of objecting, defense counsel agreed to a stipulation that had the same practical effect as following the procedure in CPL 200.60 in that it prevented the jury from learning that defendant was being detained due to pending charges. Consequently, the record reflects that defense counsel "pursued a rational trial strategy . . . and . . . provided defendant with meaningful representation" (*People v Keener*, 152 AD3d 1073, 1076 [3d Dept 2017]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). With respect to defendant's claim of ineffective assistance based on defense counsel's alleged attempt to bribe defendant by giving him money for his prison commissary account, we note that, even assuming, arguendo, that defense counsel violated his ethical obligations when he gave defendant money (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.8 [e]), "not every violation of an ethical rule will constitute ineffective assistance of counsel" (*People v Grimes*, 32 NY3d 302, 318 [2018] [internal quotation marks omitted]; *see People v Berroa*, 99 NY2d 134, 140 [2002]). Here, we conclude that defendant failed to establish that defense counsel's allegedly unethical behavior negatively impacted his defense at trial or even that defense counsel's action was, in fact, intended to be a

bribe. Viewed in its entirety, the record reflects that "counsel pursued a rational trial strategy, vigorously cross-examined the People's witnesses, presented cogent opening and closing statements, secured an acquittal on one of the charges and otherwise provided defendant with meaningful representation" (*Keener*, 152 AD3d at 1076; *see generally People v Benevento*, 91 NY2d 708, 713-715 [1998]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-01174

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

IN THE MATTER OF NUSHAWN W., ALSO KNOWN AS SHYTEEK J., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), dated July 15, 2021 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.

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

Petitioner first contends that Supreme Court erred in denying his motion for a change of venue to New York County. Contrary to respondents' assertion, petitioner's appeal from the final order brings up for review the nonfinal order denying the motion for a change of venue because it "necessarily affect[s] the final order" (*Matter of Tyrone D. v State of New York*, 24 NY3d 661, 666 [2015]; *see Matter of Aho*, 39 NY2d 241, 248 [1976]). We nonetheless conclude that the court did not abuse its discretion in denying the motion (*see Matter of David G. v State of New York*, 183 AD3d 1249, 1250 [4th Dept 2020]; *Matter of State of New York v Williams*, 92 AD3d 1271, 1272 [4th Dept 2012]; *see generally* Mental Hygiene Law § 10.08 [e]).

Petitioner further contends that the evidence is legally insufficient to establish that he is a dangerous sex offender

requiring confinement. Assuming, arguendo, that petitioner preserved that contention for our review (*see generally Matter of State of New York v Peters*, 144 AD3d 1654, 1654 [4th Dept 2016]), we conclude that it is without merit.

At an annual review hearing, the State has the burden to prove, by clear and convincing evidence, that the individual who is the subject of the hearing is currently a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). A person may be found to be a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control [their] behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). A mental abnormality is "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes [them] to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]).

Here, viewing the evidence in the light most favorable to respondents (*see Matter of Gooding v State of New York*, 144 AD3d 1644, 1645 [4th Dept 2016]), we conclude that it is legally sufficient to establish by clear and convincing evidence the "predisposition prong of the mental abnormality test" (*Matter of Edward T. v State of New York*, 185 AD3d 1423, 1424 [4th Dept 2020] [internal quotation marks omitted]; *see Matter of Vega v State of New York*, 140 AD3d 1608, 1609 [4th Dept 2016]). Following a review of previous psychological reports and an in-person interview of petitioner, respondents' expert diagnosed petitioner with antisocial personality disorder, three substance use disorders, psychopathy, and hypersexuality, which, when viewed in combination, predisposed petitioner to commit sex offenses and were sufficiently connected to his sex offending behavior (*see Edward T.*, 185 AD3d at 1424-1425; *Peters*, 144 AD3d at 1654-1655).

We further conclude that respondents presented legally sufficient evidence that petitioner has serious difficulty controlling his behavior within the meaning of the Mental Hygiene Law. Respondents' expert testified that petitioner had not made sufficient progress in treatment; that he failed to address his sexual deviance, which included a desire to have sex with underage girls; and that he failed to recognize how his substance abuse was related to his sexual offenses. The expert also used two different assessments to determine that petitioner had a high risk of recidivism. For the aforementioned reasons, we also conclude that respondents met their burden of establishing that petitioner has " 'such an inability to control [his] behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility' " (*Edward T.*, 185 AD3d at 1425, quoting Mental Hygiene Law § 10.03 [3]; *see Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585-1586 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]).

Finally, we reject petitioner's contention that the determination is against the weight of the evidence. The evidence does not preponderate so greatly in petitioner's favor that the court could not have reached its conclusion on any fair interpretation of the evidence (*see Matter of State of New York v Orlando T.*, 184 AD3d 1149, 1149 [4th Dept 2020]). The testimony of an independent expert psychologist appointed by the court was generally consistent with the testimony of respondents' expert, and "[t]he court was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented" (*id.* at 1150 [internal quotation marks omitted]; *see Matter of Brandon D. v State of New York*, 195 AD3d 1478, 1480 [4th Dept 2021]; *Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]). We see no reason to disturb the court's credibility determinations here (*see Brandon D.*, 195 AD3d at 1480; *Edward T.*, 185 AD3d at 1425).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00484

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

RICKY NIKEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

5287 TRANSIT ROAD, LLC, DEFENDANT-APPELLANT.

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

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered March 16, 2022. The order, inter alia, granted the motion of plaintiff insofar as it sought a protective order limiting the scope of defendant's independent medical examination of plaintiff's lumbar spine.

It is hereby ORDERED that said appeal from the order insofar as it precluded defendant's expert from testifying at trial about the issue of causation with respect to the first surgery is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained while working on a construction project on property owned by defendant. Defendant appeals from an order that, inter alia, granted plaintiff's motion insofar as it sought a protective order limiting the scope of defendant's independent medical examination (IME) of plaintiff's lumbar spine to plaintiff's second spinal surgery and whether that surgery was caused by the accident.

We conclude that, under the circumstances of this case, Supreme Court did not abuse its discretion in limiting the scope of the IME of plaintiff's lumbar spine to the second spinal surgery and its causal relationship to the underlying accident. "[T]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Hann v Black*, 96 AD3d 1503, 1504 [4th Dept 2012] [internal quotation marks omitted]; *see Peterson v New York Cent. Mut. Fire Ins. Co.*, 174 AD3d 1386, 1387-1388 [4th Dept 2019]; *see generally* CPLR 3103 [a]). The parties do not dispute that, after plaintiff's first lumbar spine surgery, defendant expressly waived its right to conduct an IME of that body part. At the time it made the waiver, defendant knew

that plaintiff might undergo another surgery at the direction of his doctor, and thus we reject defendant's assertion that the second surgery constituted an unusual or unanticipated circumstance that would justify setting aside defendant's waiver of the IME (*see generally Lewis v City of New York*, 206 AD3d 896, 898 [2d Dept 2022]; *Everhardt v Klotzbach*, 306 AD2d 869, 870 [4th Dept 2003]). Further, this is not a situation in which defendant inadvertently waived the IME of the spine or was requesting reexamination of a body part that had already been the subject of an IME (*cf. Vargas v City of New York*, 4 AD3d 524, 525 [2d Dept 2004]; *Everhardt*, 306 AD2d at 870; *McDowell v Eagle Trans. Corp.*, 303 AD2d 655, 656 [2d Dept 2003]). Indeed, despite defendant's waiver, the court allowed defendant to conduct an IME of plaintiff's spine, only limiting the scope of the exam to the second spinal surgery and its causal relationship to the accident. We cannot say that, in fashioning such a compromise, the court abused its broad discretion in supervising disclosure.

Finally, we dismiss the appeal from the order insofar as it precludes defendant's expert from opining at trial about plaintiff's first spinal surgery and its causal relationship to the accident. "Generally an order ruling [on a motion in limine], even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" (*Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [4th Dept 2009] [internal quotation marks omitted]; *see Kinach v Tops Mkt.*, 209 AD3d 1274, 1275 [4th Dept 2022]; *Winograd v Price*, 21 AD3d 956, 956 [2d Dept 2005]). Here, the motion did not seek to preclude any trial testimony offered by defendant, and the court's statement—which was prompted by defendant—about the testimony defendant would be prohibited from offering represents nothing more than an advisory opinion. Inasmuch as that part of the order "merely adjudicate[d] the admissibility of evidence [at trial] and [did] not affect a substantial right, no appeal lies as of right from [it]" (*Innovative Transmission & Engine Co., LLC*, 63 AD3d at 1507 [internal quotation marks omitted]; *see Shahram v St. Elizabeth School*, 21 AD3d 1377, 1378 [4th Dept 2005]; *see generally* CPLR 5701).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CAF 21-01328

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

IN THE MATTER OF D. T.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

C. T., RESPONDENT-APPELLANT.

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

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered July 14, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole legal and primary physical custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the third ordering paragraph directing that supervised parenting time is awarded to respondent "as the parties mutually agree" and as modified the order is affirmed without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner father sole legal and primary physical custody of the subject children, with supervised visitation to the mother "as the parties mutually agree."

Initially, the father and the attorney for the children (AFC) contend that the appeal should be dismissed due to the mother's improper service of the notice of appeal (*see* CPLR 2103 [a]). Inasmuch as neither the father nor the AFC were prejudiced as a result of the mother's mistake, we exercise our discretion to disregard the irregularity (*see* CPLR 2001, 5520 [a]; *M Entertainment, Inc. v Leydier*, 71 AD3d 517, 518 [1st Dept 2010]; *see generally Ruffin v Lion Corp.*, 15 NY3d 578, 582-583 [2010]; *Matter of Conti v Clyne*, 120 AD3d 884, 886 [3d Dept 2014], *lv denied* 23 NY3d 908 [2014]).

We reject the mother's contention that Family Court erred in

admitting into evidence two exhibits containing screenshots of text messages between the mother and two of the subject children. Here, "the identity of the senders and receivers of the messages was sufficiently authenticated by the content of the text messages" (*People v Mencel*, 206 AD3d 1550, 1552 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *see generally Matter of Byler v Byler*, 207 AD3d 1072, 1073-1074 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]; *Matter of Colby II. [Sheba II.]*, 145 AD3d 1271, 1272-1273 [3d Dept 2016]), as well as by the maternal grandmother's testimony that she observed one of the subject children using his phone at the times the text messages were sent. Further, "there was no evidence . . . that any omitted material was necessary for explanatory purposes" (*People v Saylor*, 173 AD3d 1489, 1491 n 2 [3d Dept 2019]), and the mother was free to introduce other text messages between herself and the child that would have resolved any purported distortion caused by admitting in evidence only portions of the text conversation (*see People v Smalls*, 191 AD3d 1258, 1259 [4th Dept 2021], *lv denied* 36 NY3d 1124 [2021]).

We also reject the mother's contention that the AFC improperly substituted her judgment for that of the children. Pursuant to 22 NYCRR 7.2 (d), an attorney for the child "must zealously advocate the child's position." However, an attorney for the child is entitled to advocate a position that is contrary to a child's wishes when the attorney is "convinced . . . that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]). In circumstances when an attorney for the child advocates for a position that is contrary to the child's wishes, the attorney is still required to "inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position" (22 NYCRR 7.2 [d] [3]). Here, the children's wishes were made known to the court during the *Lincoln* hearing. Further, although the AFC substituted her judgment for that of the children, she was entitled to do so because the record establishes that the mother engaged in a pattern of alienating the children from the father, which was likely to result in a substantial risk of imminent, serious harm to the children (*see Matter of Vega v Delgado*, 195 AD3d 1555, 1556 [4th Dept 2021]; *Matter of Grabowski v Smith*, 182 AD3d 1002, 1004 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]; *Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680-1681 [4th Dept 2015]).

The mother's contention that the court erred in admitting into evidence a recorded telephone conversation between two non-party witnesses because it consisted of inadmissible hearsay is unpreserved inasmuch as the mother failed to object to the admission of the recording on that ground (*see Matter of Norah T. [Norman T.]*, 165 AD3d 1644, 1645 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]; *Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1319 [4th Dept 2016]).

Contrary to the mother's contention, we conclude that "there is a sound and substantial basis in the record to support [the court's] determination that it was in the child[ren's] best interests to award [sole custody] to the [father]" (*Matter of Conrad v Conrad*, 211 AD3d

1528, 1529 [4th Dept 2022] [internal quotation marks omitted]; *see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]). Further, there is a sound and substantial basis in the record supporting the determination to impose supervised visitation for the mother inasmuch as the record establishes that the mother frequently disparaged the father to the children (*see Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344-1345 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1769 [4th Dept 2016]), exposed the children to domestic violence (*see generally Matter of Carin R. v Seth R.*, 196 AD3d 776, 778 [3d Dept 2021]; *Matter of Anaya v Hundley*, 12 AD3d 594, 595 [2d Dept 2004]), unwittingly allowed pornographic images of herself and her partner to be sent to the children's mobile devices, and failed to maintain a stable home environment for a period of several years (*see generally Matter of Edmonds v Lewis*, 175 AD3d 1040, 1042 [4th Dept 2019], *lv denied* 34 NY3d 909 [2020]).

Finally, we agree with the mother that the court should have set a visitation schedule rather than ordering visitation as agreed upon by the parties "inasmuch as the record demonstrates that an order directing supervised visitation as mutually agreed upon by the parties would be untenable under the circumstances" (*id.* at 1043; *see generally Matter of Kelley v Fifield*, 159 AD3d 1612, 1613-1614 [4th Dept 2018]). We therefore modify the order accordingly and remit the matter to Family Court to fashion an appropriate schedule for supervised visitation in accordance with the best interests of the children.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01814

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

LINDA BROOKS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VILLAGE OF FAIRPORT, DEFENDANT-RESPONDENT.

THE RUSSELL FRIEDMAN LAW GROUP, LLP, ROCHESTER (RON F. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MORRIS DUFFY ALONSO FALEY & PITCOFF, NEW YORK CITY (IRYNA S. KRAUCHANKA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 17, 2021. The order, inter alia, granted the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries that she allegedly sustained when she tripped and fell on a raised crack in a sidewalk slab purportedly caused by the roots of a curbside tree planted in an area adjacent to the sidewalk slab. Plaintiff, as limited by her brief, appeals from an order insofar as it granted defendant's motion for summary judgment dismissing the complaint. We affirm.

Defendant met its initial burden by establishing that it did not receive prior written notice of the allegedly dangerous or defective condition of the sidewalk as required by Village Law § 6-628 and the Code of the Village of Fairport § 336-1 (*see Franklin v Learn*, 197 AD3d 982, 983 [4th Dept 2021], *lv denied* 37 NY3d 918 [2022]; *see generally Yarborough v City of New York*, 10 NY3d 726, 728 [2008]), and plaintiff does not dispute on appeal the absence of prior written notice (*see Yarborough*, 10 NY3d at 728; *Simpson v City of Syracuse*, 147 AD3d 1336, 1337 [4th Dept 2017]).

The burden thus shifted to plaintiff to raise a triable question of fact, as relevant here, as to whether defendant "affirmatively created the defect through an act of negligence . . . 'that immediately result[ed] in the existence of a dangerous condition' " (*Yarborough*, 10 NY3d at 728; *see Horst v City of Syracuse*, 191 AD3d 1297, 1301 [4th Dept 2021]; *Simpson*, 147 AD3d at 1337). Plaintiff failed to meet that burden. Even assuming, arguendo, that the

affidavit of plaintiff's expert and other submissions are sufficient to establish that the defect in the sidewalk was caused by the growth of roots of a curbside tree that was planted and maintained by defendant, defendant's planting of the tree coupled with its subsequent "failure to control the roots of the tree, would at most constitute nonfeasance, not affirmative negligence" (*Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 726 [2d Dept 2003]; *see Monteleone v Incorporated Vil. of Floral Park*, 74 NY2d 917, 919 [1989]; *Dragonetti v 301 Mar. Ave. Corp.*, 180 AD3d 870, 871 [2d Dept 2020]; *Zizzo v City of New York*, 176 AD2d 722, 723 [2d Dept 1991]; *see also Oswald v City of Niagara Falls*, 13 AD3d 1155, 1157 [4th Dept 2004]). Additionally, even if defendant's alleged conduct constituted affirmative negligence, plaintiff still "failed to raise a triable question of fact as to whether [defendant] created a defective condition within the meaning of the exception, which requires that the affirmative negligence of [defendant] immediately result in the existence of a dangerous condition" (*Yarborough*, 10 NY3d at 728). As plaintiff's own expert acknowledged, the defect in the sidewalk developed over time, not immediately, as a result of the gradual growth of the tree roots (*see id.*; *Burke v City of Rochester*, 158 AD3d 1218, 1219 [4th Dept 2018]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00124

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

MICHAEL CARPENTIERI,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

1438 SOUTH PARK AVENUE CO., LLC AND
TOPS MARKETS, LLC,
DEFENDANTS-RESPONDENTS-APPELLANTS.

1483 SOUTH PARK AVENUE CO., LLC, C/O BENENSON
PARTNERS, AND TOPS MARKETS LLC,
THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

INDUSTRIAL POWER & LIGHTING CORP.,
THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS-APPELLANTS.

JOHN J. FROMEN ATTORNEY AT LAW, P.C., SNYDER (MICHAEL A. IACONO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (JOSEPH H. EMMINGER, JR., OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

Appeal and cross appeals from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered December 28, 2021. The order granted in part and denied in part the motion of defendants-third-party plaintiffs, the cross-motion of third-party defendant, and the cross-motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendants-third-party plaintiffs and the cross-motion of third-party defendant seeking summary judgment dismissing plaintiff's common-law negligence cause of action and Labor Law § 200 claim and reinstating that cause of action and claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he received an electric shock from an

exposed live wire while performing remodeling work at a grocery store. The property was owned by defendant-third-party plaintiff 1438 South Park Avenue Co., LLC and leased to defendant-third-party plaintiff Tops Markets, LLC (collectively, defendants). The complaint, as amplified by the bills of particulars, asserts causes of action against defendants for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Defendants commenced a third-party action against plaintiff's employer, third-party defendant, Industrial Power & Lighting Corp. (IPL), seeking contractual indemnification.

Following discovery, defendants jointly moved for summary judgment dismissing the complaint and for summary judgment on their third-party complaint. IPL cross-moved for summary judgment dismissing the complaint and the third-party complaint, and plaintiff cross-moved for summary judgment on his section 241 (6) claim, which is premised upon violations of two provisions of the Industrial Code that protect workers from electrocution.

Supreme Court granted defendants' motion and IPL's cross-motion with respect to the common-law negligence cause of action and Labor Law §§ 200 and 240 (1) claims; denied defendants' motion and IPL's cross-motion with respect to the section 241 (6) claim; denied defendants' motion with respect to their third-party complaint; denied IPL's cross-motion with respect to the third-party complaint; and granted plaintiff's cross-motion in part, determining that defendants violated the Industrial Code provisions but that issues of fact exist regarding proximate cause and comparative negligence. IPL appeals, and defendants cross-appeal. Plaintiff cross-appeals from the order insofar as it granted defendants' motion and IPL's cross-motion with respect to the common-law negligence cause of action and the section 200 claim.

Initially, with respect to IPL's appeal, we reject IPL's contention that the court erred in denying IPL's cross-motion with respect to the Labor Law § 241 (6) claim, which is premised upon defendants' alleged violations of two provisions of 12 NYCRR 23.-1.13 (b). IPL does not dispute that defendants violated those provisions of the Industrial Code or that 12 NYCRR 23.-1.13 (b) is sufficiently specific to support a section 241 (6) claim (*see Hernandez v Ten Ten Co.*, 31 AD3d 333, 333-334 [1st Dept 2006]). According to IPL, however, it met its initial burden to that extent by establishing that plaintiff was negligent in working on the live wire without contacting his supervisor or shutting off the power to that line and that his negligence was the sole proximate cause of his injuries. We reject that contention. It is well settled that there may be more than one proximate cause of an injury (*see Thomas v North Country Family Health Ctr., Inc.*, 208 AD3d 962, 964 [4th Dept 2022]), and that questions of proximate cause are generally for the jury to resolve (*see Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403 [4th Dept 2008]). Here, even assuming, arguendo, that plaintiff was negligent in his handling of the wire, we conclude that IPL failed to establish as a matter of law that defendants' violations of the Industrial Code were not "a substantial factor in bringing about the injury" (PJI 2:70; *see generally Wild v Catholic Health Sys.*, 21 NY3d 951, 954-955

[2013]).

Regarding plaintiff's cross-appeal, however, we conclude that the court erred in granting defendants' motion and IPL's cross-motion with respect to the common-law negligence cause of action and Labor Law § 200 claim, and we therefore modify the order accordingly. Initially, we note that this cause of action and claim are based on an alleged dangerous condition at the work site (i.e., an exposed live electrical wire) and not the method and manner of plaintiff's work (*cf. McFadden v Lee*, 62 AD3d 966, 967-968 [2d Dept 2009]). With respect to both common-law negligence and section 200 claims based on a dangerous premises condition, a defendant 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 (*see Forman v Carrier Corp.,* 172 AD3d 1920, 1920 [4th Dept 2019]; *Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014]). Here, IPL and defendants do not dispute that the exposed live wire constituted a dangerous condition, and we conclude that IPL and defendants failed to establish as a matter of law that defendants did not create the dangerous condition or have actual or constructive notice of that condition.

Finally, with respect to defendants' cross-appeal, we conclude that the court properly denied defendants' motion insofar as it sought summary judgment on their third-party complaint seeking contractual indemnification. The contract between Tops Market, LLC (Tops) and IPL, which included an indemnification clause, was signed approximately two months after plaintiff's accident. "An indemnification agreement that is executed after a plaintiff's accident . . . may only be applied retroactively where it is established that (1) the agreement was made as of a date prior to the accident and (2) the parties intended the agreement to apply as of that prior date" (*Tanksley v LCO Bldg. LLC*, 196 AD3d 1037, 1039 [4th Dept 2021] [internal quotation marks omitted]; *see Kolakowski v 10839 Assoc.*, 185 AD3d 427, 428 [1st Dept 2020]; *Guthorn v Village of Saranac Lake*, 169 AD3d 1298, 1300 [3d Dept 2019]).

Here, defendants failed to meet their initial burden of establishing as a matter of law that Tops and IPL intended the indemnification clause of their contract to apply retroactively. In support of the motion, defendants submitted the contract, which does not state that it is retroactive, along with the deposition testimony of various witnesses, none of whom testified unequivocally about the intent of Tops and IPL. Under the circumstances, we conclude that there are questions of fact regarding whether Tops and IPL intended the clause to apply retroactively (*see Lorica v Krug*, 195 AD3d 1194, 1197 [3d Dept 2021]; *Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 902 [2d Dept 2018]).

Entered: April 28, 2023 Ann Dillon Flynn

Clerk of the Court

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

146

CA 21-01713

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

K. C., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

N. C., DEFENDANT-RESPONDENT.

MARYBETH D. BARNET, ESQ., ATTORNEY FOR
THE CHILDREN, APPELLANT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARYBETH D. BARNET, MIDDLESEX, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

MAUREEN A. PINEAU, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeals from a judgment of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), entered November 29, 2021. The judgment, among other things, awarded the parties joint legal custody with respect to the subject children, and awarded defendant primary physical custody of the children.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provisions regarding the custody and physical residency of the children, the school district where the children attend school, the residency schedule, and child support; awarding sole legal and physical custody of the children to plaintiff with visitation to defendant; and directing that the children shall attend school in the school district in which plaintiff resides; and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In this divorce action, plaintiff mother and the Attorney for the Children (AFC) appeal from a judgment that, inter alia, granted the parties joint legal custody of the subject children and granted defendant father primary physical custody of the children.

We agree with the mother that Supreme Court's determination to award the parties joint legal custody of the children is not supported by "a sound and substantial basis in the record" (*Matter of Jacobson v Wilkinson*, 128 AD3d 1335, 1336 [4th Dept 2015]). "Entrusting the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical

custody, is insupportable when parents are severely antagonistic and embattled" (*Braiman v Braiman*, 44 NY2d 584, 587 [1978]). In determining whether joint legal custody is appropriate, "the question of fault is beside the point" (*Trapp v Trapp*, 136 AD2d 178, 183 [1st Dept 1988]).

Here, "the obvious hostility" between the mother and the father makes joint custody inappropriate (*Seago v Arnold*, 91 AD2d 835, 836 [4th Dept 1982], *lv dismissed* 59 NY2d 603, 761 [1983]). The parties do not agree on where the children should attend school, the specifics of their medical care, whether the children need routine in their lives, whether the elder child should be given her allergy medication or enrolled in counseling, and whether the younger child needed speech therapy or to adhere to a strict diet. According to the report prepared by a licensed psychologist after court-ordered psychological evaluations of the mother and the father, "neither parent appear[ed] able to sufficiently distance themselves from their mutual enmity and embitterment in order to fully act in ways which [were] . . . reflective of the children's needs." With respect to co-parenting, the licensed psychologist concluded that "neither parent ha[d] demonstrated the capability to adequately fulfill this expectation." Here, the record establishes that, although the mother and the father "could sometimes effectively communicate with each other, most of their interactions were acrimonious" (*Benedict v Benedict*, 169 AD3d 1522, 1523 [4th Dept 2019]). Thus, the determination to award the parties joint legal custody lacks a sound and substantial basis in the record (*see Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399 [4th Dept 2011]; *see also Matter of Benson v Smith*, 178 AD3d 1430, 1431 [4th Dept 2019]; *Benedict*, 169 AD3d at 1523). We conclude that it is in the best interests of the children to award sole legal custody to the mother (*see generally Benedict*, 169 AD3d at 1523-1524; *Jacobson*, 128 AD3d at 1336; *Matter of Felty v Felty*, 108 AD3d 705, 707-708 [2d Dept 2013]).

We further agree with the mother and the AFC that the court's determination to award the father primary physical custody of the children is not supported by a sound and substantial basis in the record. "In making a custody determination, the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015] [internal quotation marks omitted]; *see Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]). Further, because the court determined that the mother had proven by a preponderance of the evidence that the father had committed an act of domestic violence against her, it was required to "consider the effect of such domestic violence upon the best interests of the child[ren], together with such other facts and circumstances as the court deem[ed] relevant in making a direction pursuant to [Domestic Relations Law § 240] and state on the record how such findings, facts and circumstances factored into the direction"

(§ 240 [1] [a]).

Here, we conclude that the court failed to give adequate weight to the father's extensive history of domestic violence or his continued minimization of his actions and denial of the nature and extent of his mental illness. The evidence established that the father engaged in multiple acts of domestic violence against the mother in the presence of the children. Despite having been convicted of and serving a jail sentence for one of those acts, the father continued to deny that he had ever engaged in domestic violence. Further, although the father has been diagnosed, by more than one provider, with a bipolar disorder, he testified at trial that he could not recall ever having been given such a diagnosis. Both the mother and the father testified that the father had discontinued the use of his prescribed medications without discussing it with his treatment providers. The father had also threatened to commit suicide on more than one occasion, prompting calls to the police that resulted in brief hospitalizations for which the father blamed the mother. At the time of the trial, the evidence established that the father's current medication regimen was inappropriate for Bipolar Disorder treatment and that the father was not currently engaged in any regular mental health counseling.

By contrast, the court gave undue weight to the mother's decision to relocate and failed to give adequate weight to factors that weigh in favor of granting physical custody to the mother, including the AFC's recommendation that the children attend the mother's school district. We note that, at the time of the trial, the mother, in contrast to the father, was attending counseling services once or twice a month and taking her prescribed medication. Further, the mother testified that she had moved from Spencerport to Fairport during the pendency of the proceedings because she had a strong support structure consisting of immediate and extended family in Fairport and because of the school district's high ranking in the county. In addition, the mother testified that she shared photographs of the children with the father and had the children call the father when significant milestones happened in the children's lives. By contrast, the mother testified that she was unable to speak to the children approximately 25% to 49% of the time that they were in the father's custody and the father admitted having threatened to cut off the mother's telephone access to the children during his parenting time. An award of sole physical custody to the mother is also supported by the testimony of the court-ordered licensed psychologist that he had concerns about the decisions that the father made regarding the children, including dietary changes and the lack of consistency in the children's routine. After reviewing the appropriate factors, we conclude that the children's best interests are served by awarding the mother sole physical custody of the children with visitation to the father. In light of the change in physical custody, the children shall attend school in the school district in which the mother resides.

We therefore modify the order by vacating the provisions regarding the custody and physical residency of the children, the

school district where the children attend school, the residency schedule, and child support; awarding sole legal and physical custody to the mother with visitation to the father; and directing that the children shall attend school in the school district in which the mother resides. We remit the matter to Supreme Court for a determination with respect to a visitation schedule and with respect to child support, inasmuch as the previous child support determination was based upon the prior physical custody determination.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00809

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

MICHAEL DAVIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

R. FOSTER HINDS AND NANCY HINDS,
DEFENDANTS-APPELLANTS.

ERNEST D. SANTORO, ESQ., P.C., ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PULOS AND ROSELL, LLP, HORNELL (TIMOTHY J. ROSELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), dated November 3, 2021. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part against defendant Nancy Hinds and dismissing the complaint against that defendant, and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he fell from a tree stand on property owned by defendants. Just prior to the accident, plaintiff and R. Foster Hinds (defendant) installed the tree stand. Defendant supplied the tree stand platform, a ladder, and a ratchet strap that was used to secure the stand to the tree. Defendant had purchased the ratchet strap in a set of three and was aware that one of the straps in that set had previously broken when he tested it. After the tree stand was installed, plaintiff stepped onto the platform to test it and the ratchet strap broke, causing plaintiff to fall. Following a bench trial, Supreme Court determined, inter alia, that defendants were liable for negligence and awarded plaintiff money damages. Defendants appeal.

Contrary to defendants' contention, we conclude that they are not immune from liability pursuant to General Obligations Law § 9-103. That provision, also known as the "recreational use statute," grants landowners immunity from liability for ordinary negligence when a person is injured while engaged in certain enumerated recreational activities (*see Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 546-547 [1994]). The statute provides, as relevant here, that a landowner has "no duty to keep the premises safe . . . or to give warning of any

hazardous condition . . . to persons entering for [the enumerated recreational] purposes" (General Obligations Law § 9-103 [1] [a]). However, if a defendant's alleged liability is not premised on any condition on the land but rather is based on the defendant's "affirmative acts of negligence," General Obligations Law § 9-103 is not applicable (*Sabia v Niagara Mohawk Power Corp.*, 87 AD3d 1291, 1293 [4th Dept 2011]; *see Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 1001-1002 [4th Dept 2003]; *Del Costello v Delaware & Hudson Ry. Co.*, 274 AD2d 19, 21-24 [3d Dept 2000]; *Sauberan v Ohl*, 239 AD2d 891, 891 [4th Dept 1997]; *Lee v Long Is. R.R.*, 204 AD2d 280, 281-282 [2d Dept 1994]). Here, defendants' liability was not premised on any condition on the land, but rather was based on defendant's alleged affirmative negligence in providing plaintiff with the faulty strap for the installation of the tree stand.

We reject defendants' further contention that the court's determination that defendant was affirmatively negligent is against the weight of the evidence. "It is well settled . . . that the decision of a court following a nonjury trial should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Burke v Women Gynecology & Childbirth Assoc., P.C.*, 195 AD3d 1393, 1394 [4th Dept 2021] [internal quotation marks omitted]; *see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]). Based on our review of the record, we conclude that the trial testimony that defendant bought the ratchet strap in a package of three, that another strap in that set had previously broken, and that, despite that knowledge, defendant provided the strap to use in the installation of the tree stand supports the court's determination. We reject defendants' contention that plaintiff's own conduct constituted an intervening, superseding cause that broke the chain of causation (*see generally Hain v Jamison*, 28 NY3d 524, 529-532 [2016]). We agree, however, with defendants that the court's determination that defendant Nancy Hinds was negligent could not be reached under any fair interpretation of the evidence (*see generally Thoreson*, 80 NY2d at 495; *Tarsel v Trombino*, 196 AD3d 1100, 1101 [4th Dept 2021]). We therefore modify the judgment accordingly.

We have considered defendants' remaining contentions and conclude that none warrants further modification or reversal of the judgment.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 17-00339

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK WOODARD, ALSO KNOWN AS “WOOD,”
DEFENDANT-APPELLANT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 25, 2017. The appeal was held by this Court by order entered November 12, 2021, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (199 AD3d 1377 [4th Dept 2021]). The proceedings were held and completed.

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

Memorandum: In this prosecution arising from an investigation into a multi-level drug sales operation, defendant appeals from a judgment convicting him, following a joint jury trial with three codefendants, of conspiracy in the second degree (Penal Law § 105.15), criminal sale of a controlled substance in the third degree (§ 220.39 [1]), and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We previously held the case, reserved decision, and remitted the matter to Supreme Court for a hearing on defendant’s motion to set aside the verdict pursuant to CPL 330.30 (2) on the ground of misconduct during jury deliberations, which had been summarily denied by the court, and we also rejected defendant’s remaining contentions (*People v Woodard*, 199 AD3d 1377 [4th Dept 2021]). Defendant’s motion was supported by sworn allegations, including the affidavits of two jurors, indicating that certain other jurors may have had undisclosed preexisting prejudices against people of defendant’s race that may have affected defendant’s substantial right to an impartial jury and fair trial (*id.* at 1380). Upon remittal, the court conducted a hearing during which all 12 jurors testified, and thereafter denied the motion.

As relevant here, a court may, upon a motion of the defendant,

set aside the verdict on the ground "[t]hat during the trial there occurred, out of the presence of the court, improper conduct by a juror, . . . which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (CPL 330.30 [2]). "Generally, a jury verdict should not be impeached, absent special circumstances, by affidavit or testimony of jurors after their verdict is publicly returned, [which is] a rule designed to protect jurors from being harassed after verdict and to ensure the secure foundation of the verdict" (*Woodard*, 199 AD3d at 1379 [internal quotation marks omitted]; *see People v Estella*, 68 AD3d 1155, 1157 [3d Dept 2009]; *People v Rukaj*, 123 AD2d 277, 280 [1st Dept 1986]). Nonetheless, setting aside the verdict "is warranted where a juror had an undisclosed preexisting prejudice that would have resulted in his or her disqualification if it had been revealed during voir dire, such as an undisclosed, pretrial opinion of guilt against the defendant" (*People v Rivera*, 304 AD2d 841, 842 [2d Dept 2003]; *see People v Leonti*, 262 NY 256, 258 [1933]; *Estella*, 68 AD3d at 1157; *Rukaj*, 123 AD2d at 280-281). Upon a hearing pursuant to CPL 330.30, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40 [2] [g]). "The trial court is invested with discretion and posttrial fact-finding powers to ascertain and determine whether the activity . . . constituted misconduct and whether the verdict should be set aside and a new trial ordered" (*People v Maragh*, 94 NY2d 569, 574 [2000]).

We reject defendant's contention that the court abused its discretion in denying his motion to set aside the verdict. Here, upon our review of the record, we conclude that " '[t]here is no basis to disturb the court's fact-findings and credibility determinations, which are entitled to great deference on appeal' " (*People v Dizak*, 93 AD3d 1182, 1185 [4th Dept 2012], *lv denied* 19 NY3d 972 [2012], *reconsideration denied* 20 NY3d 932 [2012]; *see People v Blunt*, 187 AD3d 1646, 1647 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]). The jurors, including the two who had initially complained shortly after the verdict, were unanimous in their testimony at the hearing that, contrary to the allegation in the affidavit of one of the initially complaining jurors, none of them had heard a racial slur uttered during deliberations, and most of the jurors did not recall any discussion of race whatsoever. Of the few jurors who recalled conversations about race, one disclaimed that the comments had any impact on the verdict, which in fact involved acquittals on various charges against several defendants, and the other jurors provided, at most, ambivalent opinions—based on a personal feeling or sentiment about the deliberations or an intuition about the "energy" in the jury room—that considerations of race may have factored into some jurors' decision-making (*cf. Leonti*, 262 NY at 258; *Estella*, 68 AD3d at 1156-1157; *Rivera*, 304 AD2d at 842; *Rukaj*, 123 AD2d at 280-281). Such speculation and surmise is insufficient to meet defendant's burden of establishing by a preponderance of the evidence that juror misconduct in the form of racial bias may have affected his substantial right to an impartial jury and fair trial (*see People v Quinn*, 210 AD3d 1284, 1291 [3d Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v*

Hernandez, 107 AD3d 504, 504 [1st Dept 2013], *lv denied* 22 NY3d 1199 [2014]). Finally, we reject defendant's contention that he was prejudiced by the passage of years between the deliberations and the hearing because the record establishes that the jurors, despite some faded memories, adequately recalled the most pertinent details of the deliberations and several jurors indicated that they would have remembered if a racial slur had been uttered in the jury room (*see generally People v Smith*, 76 Misc 3d 597, 613-616 [Sup Ct, Bronx County 2022]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

173

KA 18-01536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIA J. ACOSTA, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 9, 2018. The judgment convicted defendant upon a plea of guilty of arson 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 arson in the second degree (Penal Law § 150.15), defendant contends that her waiver of the right to appeal is invalid and that her sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and does not preclude our review of her challenge to the severity of the sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), 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: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

206

CA 22-00684

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

DEBORAH R. GLENNON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WEST TAFT ROAD ASSOCIATES, LLC, INDIVIDUALLY, ALSO KNOWN AS AND/OR DOING BUSINESS AS, BY AND/OR THROUGH WEST TAFT ROAD ASSOCIATES OR W TAFT RD ASSOCIATES, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, SYRACUSE (JOHN F. PFEIFER OF COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLAS, PEROT, SMITH, WELCH & SMITH, LIVERPOOL (MICHAEL J. WELCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered April 15, 2022. The order denied the motion of defendant 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 that she sustained when she allegedly slipped and fell on ice in a parking lot owned by defendant. Defendant moved for summary judgment dismissing the complaint and now appeals from an order denying its motion. We affirm.

Even assuming, arguendo, that defendant met its initial burden of establishing that plaintiff's fall occurred during a storm in progress and that the condition that caused her to fall was caused by that storm in progress (*see Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541 [4th Dept 2015]; *cf. Schult v Pyramid Walden Co., L.P.*, 167 AD3d 1577, 1577 [4th Dept 2018]; *see also Battaglia v MDC Concourse Ctr., LLC*, 175 AD3d 1026, 1027 [4th Dept 2019], *affd* 34 NY3d 1164 [2020]), we conclude that plaintiff raised a triable issue of fact whether her " 'accident was caused by a slippery condition . . . that existed prior to the storm, as opposed to precipitation from the storm in progress, and that . . . defendant had actual or constructive notice of the preexisting condition' " (*Burniston v Ranric Enters. Corp.*, 134 AD3d 973, 974 [2d Dept 2015]; *see O'Neil v Ric Warrensburg Assoc., LLC*, 90 AD3d 1126, 1126-1127 [3d Dept 2011]).

Contrary to defendant's contention, we conclude that the opinion

of plaintiff's expert that there was ice in the parking lot before the storm began is supported by the exhibits attached to the expert's affidavit and is not speculative, and that the affidavit also raises triable issues of fact whether defendant had actual or constructive notice of that allegedly dangerous condition (*see Ayers v Pioneer Cent. Sch. Dist.*, 187 AD3d 1625, 1626 [4th Dept 2020]; *Johnson v Pixley Dev. Corp.*, 169 AD3d 1516, 1520-1521 [4th Dept 2019]; *Gervasi v Blagojevic*, 158 AD3d 613, 614 [2d Dept 2018]; *cf. Battaglia*, 175 AD3d at 1027-1028; *Gould v 93 NYRPT, LLC*, 191 AD3d 1452, 1453 [4th Dept 2021]). Inasmuch as the role of the courts in resolving summary judgment motions is "issue finding, not issue determination" (*Potter v Polozie*, 303 AD2d 943, 944 [4th Dept 2003]; *see generally Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957]), we conclude that Supreme Court properly denied defendant's motion.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

214

CA 22-01315

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

LIBERTY MAINTENANCE, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLIANT INSURANCE SERVICES, INC.,
DEFENDANT-APPELLANT.

GORDON REES SCULLY MANSHUKHANI, LLP, NEW YORK CITY (DON WILLENBURG, OF THE CALIFORNIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 9, 2022. The order, among other things, granted in part plaintiff's cross-motion for leave to amend the amended complaint and denied defendant's motion to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, defendant's alleged breach of its brokerage services agreement with plaintiff. Defendant thereafter moved to dismiss the amended complaint, and plaintiff cross-moved for leave to file a second amended complaint. Defendant appeals from an order that granted plaintiff's cross-motion in part and denied defendant's motion as moot.

In its order, Supreme Court wrote that its determination to grant plaintiff's cross-motion in part "obviate[d] consideration of [d]efendant's application to dismiss the [a]mended [c]omplaint." Additionally, the relevant ordering paragraph stated that defendant's motion was "denied, as moot." Thus, the court's denial of defendant's motion was based solely on the ground of mootness. Although defendant contends that the court erred in denying its motion, it does not challenge the determination that the motion is moot. Having failed to present any argument with respect to the dispositive determination in the order appealed from, defendant is deemed to have abandoned any contention with respect to the propriety thereof (*see Jones v Town of Carroll*, 197 AD3d 1003, 1003 [4th Dept 2021]; *see also Papaj v County*

of Erie, 211 AD3d 1617, 1618 [4th Dept 2022]; *Buczek v Town of Evans*, 210 AD3d 1428, 1428 [4th Dept 2022], *appeal dismissed* 39 NY3d 1090 [2023]), and we therefore affirm (*see Jones*, 197 AD3d at 1004).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

217

CA 22-01292

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

REBECCA M. FLANDERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN F. GOODFELLOW AND MICHELLE GOODFELLOW,
DEFENDANTS-RESPONDENTS.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SANTACROSE, FRARY, TOMKO, DIAZ-ORDAZ & WHITING, BUFFALO (MICHAEL P. SCHUG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered August 10, 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.

Memorandum: Plaintiff was delivering a package to defendants when one of defendants' dogs escaped from their house, jumped up, and bit plaintiff, injuring her shoulder. Plaintiff commenced this action to recover damages for her injuries, asserting causes of action for negligence and for strict liability. Plaintiff appeals from an order granting defendants' motion for summary judgment dismissing the complaint. We affirm.

It is well established that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 446 [2004]). Such knowledge "may . . . be established by proof of prior acts of a similar kind of which the owner had notice" (*id.*). "Vicious propensities include the 'propensity to do any act that might endanger the safety of the persons and property of others in a given situation' " (*id.*, quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]; *see Modafferi v DiMatteo*, 177 AD3d 1413, 1414 [4th Dept 2019]). Thus, "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier*, 1 NY3d at

447). "Such behaviors can include the animal being territorial, aggressively barking when [their] area [is] invaded, attacking another animal, growling and biting at another dog and jumping on individuals" (*Grillo v Williams*, 71 AD3d 1480, 1481 [4th Dept 2010] [internal quotation marks omitted]). Here, defendants met their burden on the motion with respect to the strict liability cause of action by demonstrating that they neither knew nor had reason to know of the dog's allegedly vicious propensities (*see Spinosa v Beck*, 77 AD3d 1426, 1426 [4th Dept 2010]) and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Further, inasmuch as cases involving harm caused by a domestic animal "may proceed only under a theory of strict liability, [and] not on theories of common-law negligence" (*Vikki-Lynn A. v Zewin*, 198 AD3d 1342, 1343 [4th Dept 2021]; *see Russell v Hunt*, 158 AD3d 1184, 1185-1186 [4th Dept 2018]), Supreme Court properly granted the motion with respect to the negligence cause of action.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

230

CA 22-00669

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

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF11 MASTER PARTICIPATION TRUST, PLAINTIFF-APPELLANT,

V ORDER

PIROOZEH SHAYESTEH, ALSO KNOWN AS PIROOZEH K. SHAYESTEH, ALSO KNOWN AS PIA NAULT, ALSO KNOWN AS PIA SHAYESTEH, INDIVIDUALLY AND AS TRUSTEE OF THE JAFAR SHAYESTEH AND PIROOZEH SHAYESTEH FAMILY TRUST, DATED JULY 7, 1999, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

FRIEDMAN VARTOLO LLP, GARDEN CITY (JULIANA THIBAUT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAMS LECLAIR, LLP, ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, J.), entered March 15, 2022. The order denied the motion of plaintiff for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 19 and 20, 2023, and filed in the Ontario County Clerk’s Office on January 23, 2023,

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

241

KA 21-00869

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAM SIDES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Alex R. Renzi, J.), rendered November 21, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). In appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of grand larceny in the third degree (§ 155.35 [1]). The judgments arise out of an incident in which defendant allegedly broke into a dwelling and stole property therein. We affirm in both appeals.

Defendant contends that Supreme Court erred in admitting in evidence at his trial the entirety of the victim's 911 call made during the break-in, on the ground that the last 30 seconds of the audio recording consisted solely of the victim's crying. We conclude, however, that the court did not abuse its discretion in admitting the entirety of the 911 call because, as a contemporaneous account of the break-in, the call "was relevant to corroborate some of the [victim's] testimony" and the admission of the call in its entirety "was not so inflammatory that its prejudicial effect exceeded its probative value" (*People v Gonzalez*, 177 AD3d 569, 570 [1st Dept 2019], *lv denied* 35 NY3d 993 [2020] [internal quotation marks omitted]; *see generally People v Stevens*, 76 NY2d 833, 835 [1990]; *People v Walton*, 178 AD3d 1459, 1459 [4th Dept 2019], *lv denied* 35 NY3d 1030 [2020]). In any event, we conclude that any error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant's contention that the evidence is legally insufficient to support the conviction of grand larceny in the third degree is unpreserved for our review because defendant's general motion for a trial order of dismissal was not " 'specifically directed' at" any alleged shortcoming in the evidence now raised on appeal (*People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Ford*, 148 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1079 [2017]). Nevertheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). An acquittal would have been unreasonable on this record given the largely uncontested evidence establishing that, within minutes of the break-in, defendant was found outside the victim's house, he fled in a vehicle when approached by the police, and upon his arrest, items stolen from the house were found inside that vehicle (*see People v McDermott*, 200 AD3d 1732, 1733 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022], *reconsideration denied* 38 NY3d 1009 [2022]). Further, we conclude that defendant's "recent and exclusive possession of the property that constituted the fruits of the [break-in], and the absence of credible evidence that the crime was committed by someone else" justified the inference that defendant intended to steal the property from the victim's residence (*People v Carmel*, 138 AD3d 1448, 1449 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016] [internal quotation marks omitted]). Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; *see McDermott*, 200 AD3d at 1733).

Defendant further contends that the court abused its discretion in refusing to recuse itself. We reject that contention. " '[U]nless disqualification is required under Judiciary Law § 14, a judge's decision on a recusal motion is one of discretion' " (*People v Hazzard*, 129 AD3d 1598, 1598 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015]), and "when recusal is sought based upon 'impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter' " (*People v Moreno*, 70 NY2d 403, 406 [1987]). Here, defendant did not allege a disqualification and made no showing that the court displayed actual bias (*see People v McCray*, 121 AD3d 1549, 1551 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]), and in the circumstances of this case we conclude that the court did not abuse its discretion in denying defendant's request.

Defendant contends that he was denied effective assistance of counsel at trial based on a series of alleged errors by defense counsel. We reject that contention. We conclude that defendant was not denied effective assistance due to defense counsel's failure to preserve his challenge to the legal sufficiency of the evidence

inasmuch as that "challenge[] would not have been meritorious" (*People v Lostumbo*, 182 AD3d 1007, 1010 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020] [internal quotation marks omitted]; *see People v Bubis*, 204 AD3d 1492, 1494 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]; *People v Person*, 153 AD3d 1561, 1563-1564 [4th Dept 2017], *lv denied* 30 NY3d 1118 [2018]). Defendant's remaining contentions regarding ineffective assistance involve "simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial," and therefore are insufficient to establish ineffective assistance of counsel (*People v Flores*, 84 NY2d 184, 187 [1994]; *see People v Colon*, 211 AD3d 1613, 1614 [4th Dept 2022]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant also contends that the court violated *People v Barthel* (199 AD3d 32 [4th Dept 2021], *lv denied* 37 NY3d 1058 [2021]) when it made statements at sentencing about the imposition of consecutive sentences with respect to a sentence that had not yet been imposed. We reject that contention. It is well settled that "[a] sentencing court has no power to dictate whether its sentence will run concurrently or consecutively to another sentence that has not yet been imposed" (*id.* at 34; *see id.* at 38-39). In short, "the sentencing discretion afforded by [CPL] 70.25 (1) devolves upon the *last judge in the sentencing chain*" (*Barthel*, 199 AD3d at 38-39 [internal quotation marks omitted]; *see Matter of Murray v Goord*, 1 NY3d 29, 32 [2003]). Here, the court did not violate *Barthel* because it did not purport to impose a consecutive term with respect to a sentence that had not yet been imposed. Indeed, we note that the consecutive terms imposed on defendant were imposed by "the last judge in the sentencing chain" (*Barthel*, 199 AD3d at 39 [emphasis omitted]).

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

242

KA 22-01717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAM SIDES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM 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 (Brian D. Dennis, J.), rendered October 8, 2019. The judgment convicted defendant upon a jury verdict of grand larceny in the third degree.

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

Same memorandum as in *People v Sides* ([appeal No. 1] — AD3d — [Apr. 28, 2023] [4th Dept 2023]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

245

KA 22-00920

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL E. KRANZ, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Armen J. Nazarian, J.), rendered May 19, 2022. The judgment convicted defendant upon a nonjury verdict of criminal mischief in the second degree, reckless driving, and reckless endangerment in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Oswego County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of, inter alia, criminal mischief in the second degree (Penal Law § 145.10), defendant contends that he was denied effective assistance of counsel based on a series of alleged errors by defense counsel. We reject that contention.

With respect to defendant's assertion that defense counsel was ineffective because he failed to oppose the People's pretrial request to admit a 911 call made by one of the complainants, "[i]t is well settled that '[a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make . . . a[n] argument that has little or no chance of success' " (*People v March*, 89 AD3d 1496, 1497 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, the complainant placed the 911 call immediately after defendant backed his truck into the vehicle she was driving, while she was attempting to restart the vehicle in order to leave the scene. During the call, the complainant told the 911 operator "I need the police here, I'm shaking, I'm scared." An objection to the admission of the 911 call would not have been meritorious, because the call was properly admitted "under the excited utterance exception to the hearsay rule inasmuch as the statements were made while [the

complainant] was under the extraordinary stress of" the situation, as well as "under the present sense impression exception . . . because [the call] [was] made while the declarant was perceiving 'the event as it [was] unfolding' " (*People v Jones*, 66 AD3d 1442, 1443 [4th Dept 2009], *lv denied* 13 NY3d 939 [2010], quoting *People v Vasquez*, 88 NY2d 561, 574 [1996]). We further reject defendant's contentions that he was denied effective assistance of counsel based on defense counsel's elicitation of allegedly damaging testimony in cross-examining the People's witnesses regarding earlier disputes between defendant and the complainants, and defense counsel's failure to cross-examine the complainants as to which one of them was driving the vehicle when it was struck by defendant. Those contentions involve "simple disagreement[s] with strategies, tactics or the scope of possible cross-examination, weighed long after the trial," and thus are insufficient to establish ineffective assistance of counsel (*People v Flores*, 84 NY2d 184, 187 [1994]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). With respect to defendant's remaining allegations of ineffective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*Baldi*, 54 NY2d at 147).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

246

CAF 22-00553

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

IN THE MATTER OF DENNYM K.J.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RONNIE O., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Monroe County (Fatimat O. Reid, J.), entered March 22, 2022 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order, following a fact-finding hearing, that, inter alia, terminated his parental rights with respect to the subject child on the ground of abandonment. We affirm.

The father contends that petitioner failed to prove by clear and convincing evidence that he abandoned the subject child. We reject that contention. A child is deemed abandoned where, for the period of six months immediately prior to the filing of the petition for abandonment (*see* Social Services Law § 384–b [4] [b]), a parent "evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency [having legal custody of the child], although able to do so and not prevented or discouraged from doing so by the agency" (§ 384–b [5] [a]). Here, the father had "almost no contact" with the subject child during the six-month period preceding the filing of the petition and thus "evince[d] an intent to forego his . . . parental rights" (*Matter of Maddison B. [Kelly L.]*, 74 AD3d 1856, 1856 [4th Dept 2010] [internal quotation marks

omitted]). Although the father was present on video during one video call between the child's mother and the child, and he attended one planning meeting, we conclude that those were " 'minimal, sporadic [and] insubstantial contacts,' " which are insufficient to preclude a finding of abandonment (*Matter of Azaleayanna S.G.-B. [Quaneesha S.G.]*, 141 AD3d 1105, 1105 [4th Dept 2016]; *see Matter of Jamal B. [Johnny B.]*, 95 AD3d 1614, 1615-1616 [3d Dept 2012], *lv denied* 19 NY3d 812 [2012]; *Maddison B.*, 74 AD3d at 1856-1857). We further conclude that, contrary to the father's contention, petitioner did not prevent or discourage him from having contact with the child. Although petitioner required that the father establish paternity before it allowed him to visit the child, the father did not take the necessary actions in time to obtain an order of filiation before the abandonment petition was filed (*see Matter of Beverly EE. [Ryan FF.]*, 88 AD3d 1086, 1087 [3d Dept 2011]; *Matter of Male M.*, 210 AD2d 136, 136 [1st Dept 1994]).

As the father correctly concedes, his further contention that Family Court abused its discretion in failing to hold a dispositional hearing is not preserved for our review (*see Matter of Messiah C.T. [Eusebio C.T.]*, 180 AD3d 544, 545 [1st Dept 2020]; *Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1576 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]), and, in any event, we conclude that the contention lacks merit (*see Matter of Keith B. [Sharrone S.]*, 180 AD3d 670, 671 [2d Dept 2020]; *Matter of Howard R.*, 258 AD2d 893, 894 [4th Dept 1999]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

257

KA 19-01307

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMAR K. BARRON, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN 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 July 20, 2017. The appeal was held by this Court by order entered June 10, 2022, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (206 AD3d 1687 [4th Dept 2022]). The proceedings were held and completed (Michael L. Dollinger, J.).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We previously held the case, reserved decision, and remitted the matter to County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*People v Barron*, 206 AD3d 1687, 1687 [4th Dept 2022]). Upon remittal, the court, on the record, declined to adjudicate defendant a youthful offender. On resubmission, defendant contends that he was denied effective assistance of counsel at the remittal proceeding. We agree, inasmuch as defense counsel was not "sufficiently familiar with the case and defendant's background to provide meaningful representation" (*People v Saladeen*, 12 AD3d 1179, 1180 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005]; *see People v Burgun*, 256 AD2d 1093, 1094 [4th Dept 1998]). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state on the record a new determination whether defendant should be afforded youthful offender status.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

259

KA 19-01113

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE L. HOWARD, DEFENDANT-APPELLANT.

JULIE A. CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 March 27, 2019. The judgment convicted defendant upon a 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 [1]). The charge arose from the discovery of 176 bags of heroin in defendant's residence by the police during the execution of a search warrant. As a preliminary matter, we agree with defendant that his purported waiver of the right to appeal is unenforceable because the written waiver form "provided defendant with erroneous information about the scope of the waiver" (*People v Singletary*, 207 AD3d 1191, 1191 [4th Dept 2022], *lv denied* 38 NY3d 1190 [2022]), and Supreme Court's oral colloquy did not "cure [the] incorrect language in the written waiver form" (*People v Thomas*, 34 NY3d 545, 563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

We nevertheless reject defendant's contention that the search warrant was not issued upon probable cause. "[A] search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched" (*People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021] [internal quotation marks omitted]; *see People v Bartholomew*, 132 AD3d 1279, 1280 [4th Dept 2015]). "Probable cause does not require proof sufficient to warrant

a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]).

Here, in an affidavit submitted in support of the warrant application, a police investigator stated that a confidential informant with whom he had been working made seven controlled buys of narcotics from defendant. The first five controlled buys took place inside defendant's residence, while the last two occurred at a different location to which defendant directed the informant during a telephone conversation overheard by the police. Although the transactions inside defendant's residence occurred more than a year before issuance of the warrant, "the remaining information in the application was sufficient to establish probable cause to believe that evidence of a crime might be found in defendant's residence" (*People v Mothersell*, 204 AD3d 1403, 1404 [4th Dept 2022]). The last two controlled buys occurred within two weeks prior to the issuance of the warrant, and the police executed the warrant two days after such issuance. Although those two transactions, unlike the others, did not take place inside defendant's home, the investigator alleged that defendant, who was under police surveillance, left his home shortly after speaking on the phone with the informant and drove directly to the parking lot where he told the informant to meet him. After selling heroin to the informant, defendant drove back to his home. Under the circumstances, it was more probable than not that defendant kept drugs in his home. "Affording great deference to the determination of the issuing Magistrate and reviewing the application in a common-sense and realistic fashion" (*People v Humphrey*, 202 AD3d 1451, 1451 [4th Dept 2022], *lv denied* 38 NY3d 951 [2022] [internal quotation marks omitted]), we conclude that the search warrant was issued upon probable cause.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

261

KA 22-01023

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FREDERICK WRIGHT, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered May 23, 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 ([SORA] Correction Law § 168 *et seq.*), defendant contends that he met his initial burden of establishing a mitigating factor under steps one and two of the analysis required for a downward departure, and that County Court erred in failing to weigh the mitigating and aggravating factors under step three of the analysis. We agree. A sex offender seeking a downward departure has the initial burden of "(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence" (*People v Sanders*, 196 AD3d 1066, 1066 [4th Dept 2021], *lv denied* 37 NY3d 916 [2021] [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant met that initial burden by establishing, by a preponderance of the evidence, that he has not been convicted of any sex offenses while at liberty without supervision for an extended period of time (*see People v Edwards*, 200 AD3d 1594, 1595 [4th Dept 2021]; *People v Souverain*, 171 AD3d 1225, 1226 [2d Dept 2019], *lv denied* 33 NY3d 913 [2019]; *People v Sotomayer*, 143 AD3d 686, 687 [2d Dept 2016]). Where, as here, a defendant meets the initial burden, under step three of the analysis " 'the court *must* exercise its discretion by weighing the

mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism' " (*Edwards*, 200 AD3d at 1595; *see Gillotti*, 23 NY3d at 861). Inasmuch as the court incorrectly determined that defendant failed to identify a mitigating factor not adequately taken into account by the SORA Guidelines, it did not exercise its discretion under the third step of the analysis (*see Edwards*, 200 AD3d at 1595-1596; *see generally Gillotti*, 23 NY3d at 861).

Where, however, the record is sufficient for us to make our own findings of fact and conclusions of law, we may review a defendant's request for a downward departure instead of remitting (*see People v Cornwell*, 213 AD3d 1239, 1240 [4th Dept 2023]; *People v Taylor*, 198 AD3d 1369, 1370 [4th Dept 2021], *lv denied* 38 NY3d 905 [2022]; *People v Chrisley*, 193 AD3d 1422, 1425 [4th Dept 2021], *lv denied* 37 NY3d 909 [2021]; *cf. Edwards*, 200 AD3d at 1596). We conclude that the mitigating factor of defendant's lack of convictions for sex offenses for over six years since his release without supervision does not outweigh the aggravating factors of the heinous nature of the underlying sex offense and defendant's conduct while on probation, which included noncompliance with sex offender registration requirements (*see People v Garcia*, 212 AD3d 468, 469 [1st Dept 2023]; *People v Lopez*, 154 AD3d 531, 532 [1st Dept 2017]; *People v Gonzalez*, 138 AD3d 814, 815 [2d Dept 2016], *lv denied* 27 NY3d 913 [2016]). We therefore conclude, after weighing the aggravating and mitigating factors, that the totality of the circumstances does not warrant a downward departure to level two or to level one (*see Cornwell*, 213 AD3d at 1240; *Taylor*, 198 AD3d at 1370).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

278

KA 21-01424

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MINUTOLO, JR., DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered September 15, 2021. The judgment convicted defendant upon a nonjury verdict of overdriving, torturing and injuring animals.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of one count of overdriving, torturing and injuring animals (Agriculture and Markets Law § 353). The conviction arose from an incident in which defendant repeatedly struck one of his dogs because he was "frustrated" that the animal failed to come when called. He was acquitted of a separate count charging the same offense with respect to a different dog. Defendant's conduct was captured on the surveillance video of a nearby gas station and, contrary to defendant's contention, the People properly authenticated that part of the video showing the incident involving the dog in question inasmuch as two witnesses who observed that incident testified at trial that the video was a true and accurate representation of what they witnessed (*see People v Smith*, 187 AD3d 1652, 1654 [4th Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *People v Wemette*, 285 AD2d 729, 730 [3d Dept 2001], *lv denied* 97 NY2d 689 [2001]; *see generally People v Patterson*, 93 NY2d 80, 84 [1999]). To the extent that defendant contends that County Court erred in admitting in evidence as not properly authenticated that part of the video depicting events prior to the witnesses' arrival at the scene, that contention is not preserved for our review inasmuch as defendant failed to object to the admission of that part of the video on that ground (*see* CPL 470.05 [2]; *see generally People v Powell*, 115 AD3d 1253, 1255 [4th Dept 2014], *lv denied* 23 NY3d 1024 [2014]).

Contrary to the further contention of defendant, the evidence is legally sufficient to establish that he "cruelly beat[]" the dog in question (Agriculture and Markets Law § 353). Here, the video evidence and the testimony of the two witnesses to the incident established that defendant punched the dog three to five times with a closed fist while

the animal whimpered and cried (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that "an acquittal would have been unreasonable . . . , and thus the verdict is not against the weight of the evidence" (*People v Weezorak*, 134 AD3d 1590, 1590 [4th Dept 2015], *lv denied* 27 NY3d 970 [2016] [internal quotation marks omitted]; *see People v Kreutter*, 121 AD3d 1534, 1535-1536 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]; *see generally Bleakley*, 69 NY2d at 495).

Finally, we reject defendant's challenge to the penalty imposed by the court under Agriculture and Markets Law § 374 (8) (c). That section permits a court, in addition to imposing any other penalty provided by law, to issue an order directing that a convicted defendant may not "own, harbor, or have custody or control of any other animals, other than farm animals, for a period of time which the court deems reasonable" (*id.*). Here, the court issued an order that imposed such a penalty for a period of 10 years and, considering defendant's violent actions against his own dog in this incident, we decline to disturb the court's determination regarding the period of time that the order will remain in effect.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

279

KA 20-00872

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS P. HOWDEN, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered November 14, 2018. The judgment convicted defendant upon a jury verdict of attempted assault in the first degree, assault in the second degree, unauthorized use of a vehicle in the first degree, criminal mischief in the third degree and assault 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 a jury verdict of, inter alia, attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that he was denied effective assistance of counsel based on several alleged errors by defense counsel. Defendant initially claims that defense counsel was ineffective in connection with a proposed plea agreement that County Court ultimately refused to accept because defendant's factual recitation during the plea colloquy negated an element of the crime in question. That claim involves strategic discussions between defendant and defense counsel outside the record on appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10 (*see People v Manning*, 151 AD3d 1936, 1938 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *People v Mangiarella*, 128 AD3d 1418, 1418 [4th Dept 2015]). Likewise, defendant's claim that defense counsel was ineffective for failing to call an expert at trial on the effects of a prescription medication that defendant had taken also involves factual matters outside the record and must be raised by way of a motion pursuant to CPL 440.10 (*see People v Tetro*, 175 AD3d 1784, 1786 [4th Dept 2019]; *People v Langevin*, 164 AD3d 1597, 1598 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). To the extent that defendant's contention is reviewable on this appeal, we conclude that, although defense counsel's performance at trial was not flawless, the evidence, the law, and the circumstances of

this case, viewed as a whole and as of the time of the representation, establish that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant further contends that he was denied his right to counsel of his choosing when the court denied his request for an adjournment of trial to retain new counsel. We reject that contention. Although the right to counsel under the Federal and State Constitutions "embraces the right of a criminal defendant to be represented by counsel of [their] own choosing" (*People v Arroyave*, 49 NY2d 264, 270 [1980]), that right "is qualified, and may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system" (*People v O'Daniel*, 24 NY3d 134, 138 [2014] [internal quotation marks omitted]). Here, defendant made his request on the eve of trial, he had not retained other counsel despite having ample opportunity to do so, and he failed to demonstrate that substitution of counsel "was necessitated by forces beyond his control and was not a dilatory tactic" (*People v Hunter*, 171 AD3d 1534, 1535 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019] [internal quotation marks omitted]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

291

CA 22-01633

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

A.E.Y. ENTERPRISES, INC., PLAINTIFF-APPELLANT,

V ORDER

LG EVANS CONSTRUCTION, INC., AND MICHAEL HILL,
DEFENDANTS-RESPONDENTS.

BURNS & SCHULTZ LLP, ROCHESTER (ANDREW M. BURNS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SESSLER LAW P.C., GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wayne County (J. Scott Odorisi, J.), entered April 1, 2022. The order, among other things, granted defendants' motions for summary judgment dismissing the complaint.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

292

CA 22-00199

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

IN THE MATTER OF THE ACCOUNTING BY CHERYL M. PASTOR, AS EXECUTOR OF THE ESTATE OF JOHN W. MORRISON, DECEASED, PETITIONER-RESPONDENT.

IN THE MATTER OF THE ACCOUNTING BY CHERYL M. PASTOR, AS EXECUTOR OF THE JOHN W. MORRISON RESIDUARY TRUST, PETITIONER-RESPONDENT;

DYANNA M. WHITE, OBJECTANT-APPELLANT.

ORDER

FALCON RAPPAPORT & BERKMAN PLLC, ROCKVILLE CENTER (LORI J. PERLMAN OF COUNSEL), FOR OBJECTANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Surrogate's Court, Jefferson County (Eugene R. Renzi, S.), entered December 2, 2021. The amended order dismissed objection 10 of the amended objections of Dyanna M. White.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

300

TP 22-00892

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

IN THE MATTER OF CHRISTOPHER E. ROBINSON,
PETITIONER,

V ORDER

BOARD OF PAROLE APPEALS UNIT, RESPONDENT.

CHRISTOPHER E. ROBINSON, PETITIONER PRO SE.

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 an order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered May 31, 2022) to review a determination of respondent. The determination revoked petitioner's release to parole supervision.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

301

KA 19-01916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAIRON GRAHAM, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BRAEDAN M. GILLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered June 20, 2019. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree, endangering the welfare of a child, criminal mischief 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 him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Jenkins*, 184 AD3d 1150, 1150 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *People v Work*, 180 AD3d 1383, 1384 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]). At the plea proceeding, defendant acknowledged that he spoke with his attorney about the meaning of the waiver and stated that he understood the rights he was waiving. Although the language of the plea colloquy was overbroad, it was coupled with clarifying language in the written waiver stating that certain issues are not covered by the appeal waiver, including the legality of the sentence and plea (*see generally People v Thomas*, 34 NY3d 545, 557-563 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of his right to appeal forecloses appellate review of his challenges to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]) and to Supreme Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833 [1999]). Nevertheless, we reiterate that the better practice is for the court to use the Model Colloquy, "which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right

to Appeal, https://www.nycourts.gov/judges/cji/8-Colloquies/Waiver_of_Right_to_Appeal.pdf [last accessed April 4, 2023]).

Finally, we note that the uniform sentence and commitment form must be amended to correct a clerical error (*see People v Thurston*, 208 AD3d 1629, 1630 [4th Dept 2022]). The uniform sentence and commitment form erroneously states that defendant was convicted of criminal mischief in the second degree under Penal Law § 142.10, and it should therefore be amended to correctly reflect that defendant was convicted of that offense under Penal Law § 145.10.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

302

KA 18-00846

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID S. ALCARAZ-UBILES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 21, 2016. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree (two counts), criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree and dismissing counts 28, 30, and 32 of the indictment against him and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of kidnapping in the second degree (Penal Law § 135.20), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]).

Contrary to defendant's contention, the evidence is legally sufficient to support his conviction of kidnapping in the second degree as an accomplice. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had "a shared intent, or 'community of purpose' with the principal[s]" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016]). The People presented testimony at trial that defendant was present in the house while the victims were being held in the bedroom. Two witnesses testified that they observed defendant's codefendant take a gun from the

table and place a mask on his face. One of the witnesses testified that defendant's codefendant and another man, whose face was covered by a sweatshirt and who was wielding a knife, entered the room where the victims were being held. Another witness testified that he observed defendant standing outside the door to the same room with a knife and slashing around the door. That evidence was sufficient for the jury to infer that defendant was the other man who entered the room wielding the knife and, thus, to establish that defendant had the requisite community of purpose with the principal, as well as defendant's "full knowledge of [his codefendant's] intentions" (*People v Cabey*, 85 NY2d 417, 421 [1995]) to keep the victims confined in a place they were not likely to be found (*see* Penal Law §§ 135.00 [2]; 135.20), and that defendant committed overt acts to help his codefendant accomplish that goal (*see People v Lora*, 192 AD3d 1488, 1489 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021]; *People v Rolldan*, 175 AD3d 1811, 1812 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]). In addition, viewing the evidence in light of the elements of kidnapping 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 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

As defendant contends and as the People correctly concede, however, the evidence is legally insufficient to support defendant's conviction of the counts of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, and we therefore modify the judgment accordingly. Those counts were based on defendant's constructive possession of a rifle that was found in the house after the police entered. As was the case with two of defendant's codefendants relative to those counts, the People established nothing more than "defendant's mere presence in the house where the weapon [was] found," which is insufficient to support the conviction on those counts (*Rolldan*, 175 AD3d at 1813; *see Lora*, 192 AD3d at 1489).

Defendant further contends that Supreme Court erred in its response to a jury note that requested a readback of the testimony of one of the People's witnesses with respect to DNA evidence relating to defendant. Insofar as defendant challenges the procedure used by the court in responding to the note, the contention is unpreserved because defendant failed to object to the court's procedure, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). In contrast, defendant objected to the court's substantive response to the note and we therefore agree with defendant that he preserved his contention that the court erred by providing a summary rather than a verbatim readback of the requested testimony (*see People v Rivers*, 138 AD3d 1446, 1446-1447 [4th Dept 2016]; *see also People v Taylor*, 26 NY3d 217, 222-224 [2015]). We nevertheless conclude that defendant's contention is without merit. "[T]he court has significant discretion in determining the proper scope and nature of the response" (*Taylor*, 26 NY3d at 224). When reviewing the court's response to a jury note, this Court "must determine whether the court acted within the bounds of its discretion in fashioning an answer to the jury's inquiry" (*id.*; *see People v Owens*, 183 AD3d 1276, 1278 [4th Dept 2020], *lv denied* 35 NY3d 1068 [2020], *reconsideration*

denied 35 NY3d 1115 [2020]). Here, we discern no abuse of discretion arising from the court's acceptance of the prosecutor's suggestion, to which defense counsel consented, that the court inform the jury that there was no testimony that defendant's DNA profile matched any of the profiles tested by the witness (*see generally People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

Defendant's challenge to the court's imposition of a time limit on voir dire is unpreserved for our review inasmuch as defendant failed to join in the objections of his codefendants (*see People v Bailey*, 32 NY3d 70, 80 [2018]; *People v Brown*, 28 NY3d 392, 409 [2016]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

304

KA 19-00985

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEVELAND C. ST. JOHN, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered September 26, 2018. The judgment convicted defendant upon a nonjury verdict of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). Defendant contends that County Court's conclusion that defendant was not justified in using deadly physical force and was therefore guilty of murder in the second degree is against the weight of the evidence. Viewing the evidence in light of the elements of that crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the court's rejection of the justification defense was not contrary to the weight of the evidence (*see People v Allen*, 183 AD3d 1284, 1286 [4th Dept 2020], *affd* 36 NY3d 1033 [2021]). The testimony of the People's witnesses and the surveillance videos showed that defendant and the victim had a physical altercation outside a convenience store, after which defendant walked away from the store and toward his girlfriend's home nearby. Two to three minutes later, defendant walked back toward the store. As he neared the victim, defendant ran toward the victim with a gun in his hand and shot the victim as the victim ran away. When the victim fell to the ground, defendant shot at him several more times.

The court, "as the finder of fact, 'was entitled to discredit the testimony of defendant' that the victim was the initial aggressor" and thus to conclude that defendant was not entitled to use deadly physical force against the victim (*People v Contreras*, 154 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *see People v Addison*, 184 AD3d 1099, 1101 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]; *see generally* Penal Law § 35.15 [1] [b]; *People v Petty*, 7 NY3d 277, 285

[2006]). In addition, the surveillance videos established that the victim was not using or attempting to use deadly physical force when defendant chased him down and shot him (*see People v Warner*, 194 AD3d 1098, 1104 [3d Dept 2021], *lv denied* 37 NY3d 1030 [2021]; *People v Massey*, 140 AD3d 1736, 1737 [4th Dept 2016], *lv denied* 28 NY3d 972 [2016]; *People v Walker*, 78 AD3d 1082, 1083 [2d Dept 2010]; *see generally* § 35.15 [2] [a]; *People v Sparks*, 29 NY3d 932, 934-935 [2017]). Moreover, the justification defense was inapplicable under the circumstances of this case inasmuch as defendant had the opportunity to retreat and failed to do so (*see Massey*, 140 AD3d at 1737; *see generally* § 35.15 [2] [a]).

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]). Defendant failed to raise a constitutional challenge before the court, however, and therefore any such contention is not preserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* — NY3d — [2023]; *People v Reese*, 206 AD3d 1461, 1462 [3d Dept 2022]). Contrary to defendant's contention, we conclude that his constitutional challenge is not exempt from the preservation rule (*see People v Thomas*, 50 NY2d 467, 472-473 [1980]; *Jacque-Crews*, 213 AD3d at 1336). We decline to exercise our power to review defendant's constitutional challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

305

KA 22-00523

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND CONGDON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), dated January 27, 2022. 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 reversed on the law without costs and defendant's risk level determination pursuant to the Sex Offender Registration Act is vacated.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). While this appeal was pending, this Court reversed the judgment convicting defendant of eight counts of promoting a sexual performance by a child as a sexually motivated felony (Penal Law §§ 130.91, 263.15) on the law and dismissed the indictment (*People v Congdon*, — AD3d —, 2023 NY Slip Op 01622 [4th Dept 2023]).

A "sex offender" includes a person who is convicted of an offense described in Correction Law § 168-a (2) or (3). However "[a]ny [such] conviction set aside pursuant to law is not a conviction" for purposes of the statute (§ 168-a [1]; *see* § 168-d [1] [a]). Inasmuch as defendant's judgment of conviction has been "set aside pursuant to law" (§ 168-a [1]) by reversal of this Court (*see generally People v Extale*, 18 NY3d 690, 696 [2012]), defendant does not qualify as a "sex offender" within the meaning of SORA, and the risk level determination must be vacated (*see generally People v Diaz*, 32 NY3d 538, 544 [2018]; *People v Miller*, 179 AD3d 1517, 1518 [4th Dept 2020]; *People v Ramos*, 178 AD3d 1408, 1408-1409 [4th Dept 2019]). In light of our determination, defendant's contentions on this appeal are academic.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

306

KA 22-01271

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL HUSTED, DEFENDANT-APPELLANT.

CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ 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 (Rory A. McMahon, J.), rendered June 29, 2022. The judgment convicted defendant upon his plea of guilty of disseminating indecent material to minors in the first degree, use of a child in a sexual performance, possessing a sexual performance by a child, endangering the welfare of a child and sexual abuse in the first degree (two counts).

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 disseminating indecent material to minors in the first degree as a sexually motivated felony (Penal Law §§ 130.91, 235.22), use of a child in a sexual performance as a sexually motivated felony (§§ 130.91, 263.05), possessing a sexual performance by a child (§ 263.16), endangering the welfare of a child (§ 260.10 [1]), and two counts of sexual abuse in the first degree (§ 130.65 [4]), 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 his sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Contrary to defendant's further contention, County Court did not abuse its discretion in denying his motion to withdraw his plea of guilty without additional inquiry. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Where the motion is "patently insufficient on its face, a court may simply deny the motion

without making any inquiry" (*People v Mitchell*, 21 NY3d 964, 967 [2013]). Here, in response to defendant's initial pro se motion to withdraw his plea of guilty, the court assigned new defense counsel and allowed counsel to file supplemental motion papers. Thus, the court allowed defendant "reasonable opportunity to advance his claims," and no further inquiry was required (*People v Saccone*, 211 AD3d 1520, 1521 [4th Dept 2022], *lv denied* — NY3d — [2023] [internal quotation marks omitted]; *see People v Harris*, 206 AD3d 1711, 1712 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]). The court did not abuse its discretion in denying the motion inasmuch as all of defendant's claims are belied by the transcript of the plea colloquy (*see People v Rados*, 210 AD3d 1516, 1517-1518 [4th Dept 2022]; *People v Floyd*, 210 AD3d 1530, 1531 [4th Dept 2022], *lv denied* 39 NY3d 1072 [2023]; *see also People v Freeland*, 198 AD3d 1380, 1380 [4th Dept 2021]).

Defendant failed to preserve for our review his contention that his plea of guilty was not knowing, intelligent, and voluntary because "his motion to withdraw his plea was made on grounds different from those advanced on appeal" (*People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

307

OP 22-01868

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

IN THE MATTER OF ADAM BRADSTREET, PETITIONER,

V MEMORANDUM AND ORDER

HON. DOUGLAS A. RANDALL, AS MONROE COUNTY COURT JUDGE, RESPONDENT.

MICHAEL J. WITMER, ROCHESTER, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b]) to review a determination of respondent. The determination revoked petitioner's firearm license.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent revoking his firearm license. Contrary to petitioner's contention, we conclude that the determination is not arbitrary and capricious. A licensing officer, such as respondent, is vested with broad discretion in determining whether to revoke a permit (*see Matter of Gurnett v Bargnesi*, 147 AD3d 1319, 1320 [4th Dept 2017], *appeal dismissed* 29 NY3d 1019 [2017], *lv denied* 30 NY3d 902 [2017], *cert denied* — US —, 138 S Ct 1300 [2018]). Furthermore, "[a] licensing officer's factual findings and credibility determinations are entitled to great deference" (*Matter of Sibley v Watches*, 194 AD3d 1385, 1389 [4th Dept 2021], *lv denied* 37 NY3d 1131 [2021], *rearg denied* 38 NY3d 1006 [2022]; *see Matter of Cuda v Dwyer*, 107 AD3d 1409, 1410 [4th Dept 2013]). Here, the record before the licensing officer demonstrated that petitioner engaged in unsafe firearm practices by leaving his weapon unsecured in the residence of his girlfriend despite the fact that she had repeatedly taken hold of the weapon and threatened to harm him or herself with it. "[T]he exercise of poor judgment in the handling of a weapon is a sufficient ground for revocation of a pistol permit" (*Matter of Maye v Dwyer*, 295 AD2d 890, 890 [4th Dept 2002], *appeal dismissed* 98 NY2d 764 [2002] [internal quotation marks omitted]). Further, respondent credited a police officer's testimony, which was based on a police investigation of petitioner, that petitioner was involved in altercations with his girlfriend, including incidents in which he attacked her and caused her

to fear for her safety. To the extent that petitioner's girlfriend testified that she never feared petitioner, that testimony created issues of credibility for respondent to resolve (*see Matter of Kerr v Teresi*, 91 AD3d 1153, 1154 [3d Dept 2012]; *see generally Sibley*, 194 AD3d at 1389).

Finally, we conclude that petitioner's contention that respondent acted unconstitutionally in light of the United States Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]) and the recent legislative amendments to Penal Law § 400.00 is without merit (*see generally Matter of Chomyn v Boller*, 137 AD3d 1705, 1706-1707 [4th Dept 2016], *appeal dismissed* 27 NY3d 1119 [2016], *lv denied* 28 NY3d 908 [2016]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

322

KA 19-01435

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS SOUCLAT-VEGA, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK 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 (Vincent M. Dinolfo, J.), rendered June 6, 2019. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Hettig*, 210 AD3d 1508, 1508-1509 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

327

CAF 21-01154

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

IN THE MATTER OF STACI R. FAVRET,
PETITIONER-APPELLANT,

V ORDER

JEREMY J. FAVRET, RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.

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

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Jefferson County (James K. Eby, R.), entered June 17, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent sole custody of the younger child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 3 and 6, 2023,

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

Entered: April 28, 2023 Ann Dillon Flynn

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

339

KA 19-00557

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD COOK, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 March 13, 2019. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

340

KA 21-00419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER LINDSEY, 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 a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 26, 2021. The judgment convicted defendant upon his plea of guilty of robbery 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 robbery in the second degree (Penal Law § 160.10 [2] [b]), 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 his sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

343

KA 20-00180

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE MCTYERE, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered December 13, 2019. The judgment convicted defendant upon a jury verdict of reckless endangerment 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 reckless endangerment in the first degree (Penal Law § 120.25) and criminal possession of a weapon in the second degree (§ 265.03 [3]).

We reject defendant's contention that County Court erred in denying his motion to dismiss the indictment on the ground that the People were not ready for trial within six months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]). "The statutory period is calculated by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' " (*People v Barnett*, 158 AD3d 1279, 1280 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018], quoting *People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]). Even assuming, arguendo, that defendant's contention that the People's declaration of readiness was illusory is preserved for our review, we conclude that it is without merit. At the time the People announced their readiness for trial, they would have been able to establish a prima facie case and proceed to trial even without the subsequently acquired DNA test results (*see People v Pratt*, 186 AD3d 1055, 1057 [4th Dept 2020], *lv denied* 36 NY3d 975 [2020]; *People v Hewitt*, 144 AD3d 1607, 1607-1608 [4th Dept 2016], *lv denied* 28 NY3d 1185 [2017]; *People v Bargerstock*, 192 AD2d 1058, 1058 [4th Dept 1993], *lv denied* 82 NY2d 751 [1993]). Moreover, even assuming, arguendo, that

defendant correctly contends that 132 days of postreadiness delay are chargeable to the People, we conclude that such period plus the periods of prereadiness delay that were chargeable to the People did not exceed six months (*see Hewitt*, 144 AD3d at 1607-1608).

Defendant's further contention that he was denied his constitutional right to a speedy trial is not preserved for our review inasmuch as he moved to dismiss the indictment on statutory speedy trial grounds only (*see People v Burke*, 197 AD3d 967, 969 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *People v Williams*, 120 AD3d 1526, 1526-1527 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]), 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 additionally contends that the court erred in granting the People's untimely motion to compel him to submit to a buccal swab for DNA testing. As relevant here, CPL former 240.90 (1) provided that a motion by a prosecutor for discovery "shall be made within [45] days after arraignment, but for good cause shown may be made at any time before commencement of trial." We conclude that the court did not err in granting the motion, considering the proffered reasons for the People's delay in making the motion, the relevance of the evidence, and the lack of prejudice to defendant from the delay (*see People v Ruffell*, 55 AD3d 1271, 1272 [4th Dept 2008], *lv denied* 11 NY3d 900 [2008]; *People v Tyran*, 248 AD2d 1011, 1011 [4th Dept 1998], *lv denied* 92 NY2d 1054 [1999]).

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

348

CAF 20-00016

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

IN THE MATTER OF SHAWN M. EPPS,
PETITIONER-APPELLANT,

V ORDER

ERICA D. WILLIAMS, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered December 5, 2019 in a proceeding pursuant to Family Court Act article 6. The order confirmed a report by the Referee which, among other things, directed that respondent shall continue to have sole custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the report of the Referee at Family Court.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

349

CAF 22-01862

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

IN THE MATTER OF SHAWN M. EPPS,
PETITIONER-APPELLANT,

V ORDER

ERICA D. WILLIAMS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered December 5, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Jaime D. [Jacquelina D.]*, 170 AD3d 1584, 1585 [4th Dept 2019]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

355

CA 22-01248

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

MICHELLE BURNS AND RICHARD S. BURNS, JR.,
PLAINTIFFS-APPELLANTS,

V ORDER

CONCRETE APPLIED TECHNOLOGIES CORPORATION
(CATCO), DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

STEPHEN R. FOLEY, LLC, BUFFALO (ZACHARY S. DRAGONETTE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 8, 2022. The order granted the cross-motion of defendant Concrete Applied Technologies Corporation (CATCO) 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: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

356

CA 22-01250

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

MICHELLE BURNS AND RICHARD S. BURNS, JR.,
PLAINTIFFS-APPELLANTS,

V ORDER

DESTRO & BROTHERS CONCRETE COMPANY, INC.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

STEPHEN R. FOLEY, LLC, BUFFALO (ZACHARY S. DRAGONETTE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CHRISTOPHER R. BITAR OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 8, 2022. The order, among other things, granted the motion of defendant Destro & Brothers Concrete Company, Inc. 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: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

357

CA 22-01251

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

MICHELLE BURNS AND RICHARD S. BURNS, JR.,
PLAINTIFFS-APPELLANTS,

V ORDER

FOIT-ALBERT ASSOCIATES, ARCHITECTURE, ENGINEERING
AND LAND SURVEYING, P.C., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 3.)

STEPHEN R. FOLEY, LLC, BUFFALO (ZACHARY S. DRAGONETTE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (MARINA A. MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 8, 2022. The order granted the motion of defendant Foit-Albert Associates, Architecture, Engineering and Land Surveying, P.C. 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: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

363

KA 19-02187

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEVIN BENJAMIN-FOSTER, DEFENDANT-APPELLANT.

JULIE CIANCA, 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 (Charles A. Schiano, Jr., J.), rendered October 4, 2019. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal. Supreme Court's oral colloquy mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Davis*, 188 AD3d 1731, 1731 [4th Dept 2020], *lv denied* 37 NY3d 991 [2021]). Although the record establishes that defendant executed a written waiver of the right to appeal, the written waiver did not cure the defects in the oral colloquy (*see Davis*, 188 AD3d at 1732).

Defendant contends that Penal Law § 265.03 (3) is unconstitutional in light of the United States Supreme Court's decision in *New York Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Inasmuch as defendant failed to raise a constitutional challenge to the statute before the court, any such contention is not preserved for our review (*see People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* — NY3d — [2023]; *People v Reese*, 206 AD3d 1461, 1462 [3d Dept 2022]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's contention, we conclude that his constitutional challenge is not

exempt from the preservation rule (*see People v Thomas*, 50 NY2d 467, 472-473 [1980]; *Jacque-Crews*, 213 AD3d at 1336).

Defendant contends that his term of interim probation was revoked without due process of law. That contention is not preserved for our review (*see People v Alsaaidi*, 173 AD3d 1836, 1837 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]; *People v Butler*, 151 AD3d 1959, 1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]; *see also People v Peckham*, 195 AD3d 1437, 1438 [4th Dept 2021], *lv denied* 37 NY3d 994 [2021]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant further contends that the court did not properly consider whether he should receive youthful offender status because it had predetermined that he would not receive youthful offender status if he violated his conditions of interim probation. We reject that contention. The court advised defendant during the plea colloquy that it could adjudicate him a youthful offender in its discretion, even if defendant violated the conditions of interim probation. After finding that defendant had violated the conditions of interim probation, the court at sentencing considered the appropriate factors before exercising its discretion to not grant defendant youthful offender status (*see generally People v Rudolph*, 21 NY3d 497, 499 [2013]; *People v Rice*, 175 AD3d 1826, 1826 [4th Dept 2019], *lv denied* 34 NY3d 1132 [2020]).

We decline defendant’s request that we exercise our discretion in the interest of justice to afford him youthful offender status (*see People v Martin*, 199 AD3d 1402, 1402 [4th Dept 2021], *lv denied* 37 NY3d 1162 [2022]; *People v Spencer*, 197 AD3d 1004, 1005 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]). Finally, contrary to defendant’s contention, the sentence is not unduly harsh or severe.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

365

KA 22-00342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH BISHOP, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CAITLIN M. CONNELLY 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 (Stephen J. Dougherty, J.), rendered February 15, 2022. The judgment convicted defendant upon his plea of guilty of course of sexual conduct against a child 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), defendant contends that his waiver of the right to appeal is unenforceable and his sentence is unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is unenforceable, 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: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

366

KA 22-00341

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROBERT WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 January 25, 2022. The judgment convicted defendant, upon his plea of guilty, of arson in the second degree.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

368

CAF 21-01419

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

IN THE MATTER OF JORDYN P.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CYNTHIA L., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered August 25, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

369

CAF 21-01420

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

IN THE MATTER OF JAXSON P.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CYNTHIA L., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

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

Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered August 25, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

370

CAF 21-01421

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

IN THE MATTER OF BLAKE P.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CYNTHIA L., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

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

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

Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered August 25, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

371

CAF 21-01422

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

IN THE MATTER OF GRACELYNN S.-P.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

CYNTHIA L., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

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

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

Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered August 25, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

372

CAF 22-00558

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

IN THE MATTER OF AMILIANAH E.

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

ORDER

TIARRA E., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JANELLE L. BANDOBLU OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELIZABETH SCHENCK, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered March 28, 2022 in a proceeding pursuant to Family Court Act article 10. The order, among other things, found that respondent had neglected the subject child.

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

Entered: April 28, 2023 Ann Dillon Flynn

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

373

CAF 22-00561

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

IN THE MATTER OF ARMANI M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

ANGELEANA M., RESPONDENT,
AND DARYL G., RESPONDENT-APPELLANT.

LYNNE M. BLANK, WEBSTER, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH DEV. MOELLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered February 15, 2022 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Daryl G. had neglected the subject child.

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

Entered: April 28, 2023 Ann Dillon Flynn

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

374

CA 22-00294

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

FRANCIE F. GILCHRIST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK OLVER, DEFENDANT-RESPONDENT.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (ZACHARY JAMES WOODS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCCARNEY LAW P.C., NEW YORK CITY (JAMES G. MCCARNEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

MARSH LAW FIRM PLLC, NEW YORK CITY (JAMES R. MARSH OF COUNSEL), FOR CHILD USA, AMICUS CURIAE.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered February 10, 2022. The order granted defendant's motion insofar as it sought to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 208 [b]; 214-g) to recover for personal injuries resulting from alleged childhood sexual abuse perpetrated by defendant. Defendant moved, inter alia, to dismiss the complaint on the ground that this action is barred because plaintiff executed a general release arising out of a federal action commenced by plaintiff against defendant, which pertained to the same alleged childhood sexual abuse (*see* CPLR 3211 [a] [5]). Supreme Court granted defendant's motion insofar as it sought to dismiss the complaint, and plaintiff appeals. We affirm.

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]). A release will not be treated lightly because it is a "a jural act of high significance without which the settlement of disputes would be rendered all but impossible" (*Mangini v McClurg*, 24 NY2d 556, 563 [1969]). Where the language is clear and unambiguous, the release is binding on the parties unless it is demonstrated to be invalid "for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' " (*Centro*

Empresarial Cempresa S.A., 17 NY3d at 276).

Here, defendant met his initial burden on the motion by submitting the binding general release executed by plaintiff (*see Cain-Henry v Shot*, 194 AD3d 1465, 1466 [4th Dept 2021]; *Ford v Phillips*, 121 AD3d 1232, 1233 [3d Dept 2014]). The burden thus shifted to plaintiff " 'to show that there has been fraud, duress or some other fact which will be sufficient to void the release' " (*Centro Empresarial Cempresa S.A.*, 17 NY3d at 276). The conclusory allegations of duress contained in plaintiff's affidavit in opposition to the motion are insufficient to meet that burden (*see Putnam v Kibler*, 210 AD3d 1458, 1462 [4th Dept 2022]; *Hydrodyne Indus. v Marine Midland Bank*, 118 AD2d 626, 626 [2d Dept 1986]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

379

CA 22-01534

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

GAIL J. MORELLE, PLAINTIFF-RESPONDENT,

V ORDER

PETER VULJANOVICH, JR. AND JENNIFER VULJANOVICH,
DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL C. PRETSCH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LOONEY INJURY LAW, PLLC, BUFFALO (JOHN W. LOONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered March 29, 2022. The order denied defendants' motion for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 22, 2023,

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

Entered: April 28, 2023 Ann Dillon Flynn

Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

386

KA 19-00951

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. JOHNSON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (Thomas E. Moran, J.), rendered March 18, 2019. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that his waiver of the right to appeal is invalid and that his enhanced sentence is unduly harsh and severe. As the People correctly concede, defendant's 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 enhanced sentence is not unduly harsh or severe.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

388

KA 18-01622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEMENT G. HILL, DEFENDANT-APPELLANT.

MICHAEL PULVER, NORTH SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered June 26, 2017. The judgment convicted defendant upon his plea of guilty of promoting a sexual performance by a child (five counts).

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 five counts of promoting a sexual performance by a child (Penal Law § 263.15), defendant contends that his plea was involuntarily entered because Supreme Court failed to inform him during the colloquy that his attorney was correct in advising him that the period of postrelease supervision (PRS) imposed by the court here would merge with the period of PRS previously imposed on a prior felony conviction. As defendant correctly concedes, his contention is unpreserved for our review because he did not move to withdraw his plea or vacate the judgment of conviction (*see People v Brown*, 162 AD3d 1568, 1568 [4th Dept 2018], *affd* 32 NY3d 935 [2018]; *People v Dempsey*, 197 AD3d 1020, 1021 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]). We decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), particularly in view of the fact that the periods of PRS did in fact merge as defendant was led to believe by his attorney.

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

391

CAF 21-00349

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

IN THE MATTER OF LANDIN F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JODI G., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 23, 2021 in a proceeding pursuant to Family Court Act article 10. The order denied the motion of respondent to vacate a default judgment.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

392

CAF 22-00186

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

IN THE MATTER OF ADAM M.C.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

JOHN C., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered December 20, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

393

CAF 22-01105

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

IN THE MATTER OF AMBER M. OHLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BARTKOVICH, RESPONDENT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Tanya Conley, R.), entered June 27, 2022 in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection against respondent.

It is hereby ORDERED that the order of protection so appealed from is unanimously affirmed without costs and the findings in the underlying decision dated June 27, 2022 that respondent committed the family offenses of disorderly conduct under Penal Law § 240.20 and aggravated harassment in the second degree under section 240.30 (1) are vacated.

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued against him, contending that petitioner failed to prove by a fair preponderance of the evidence that he committed a family offense (*see* § 832). We reject that contention. The undisputed evidence at the fact-finding hearing established that the parties had dated more than a decade earlier and that, after petitioner terminated the relationship, respondent continued to contact her, prompting petitioner to obtain at least two orders of protection against him. After years of not seeing each other, respondent went to petitioner's house uninvited on October 28, 2021 and rang the doorbell. When petitioner answered the door, respondent said that she owed him a conversation. Petitioner responded that she did not want to talk to him and repeatedly asked him to leave. Respondent refused to leave, prompting petitioner to call the police. Respondent eventually left before the police arrived. Approximately six weeks later, respondent again went to petitioner's house uninvited and demanded to speak to her. Petitioner asked him to leave at least a dozen times, but respondent ignored those requests and entered her garage where she was

standing. The police arrived shortly thereafter and took respondent into custody, charging him with trespass.

In our view, Family Court properly determined that respondent committed the family offense of harassment in the second degree by engaging in a course of conduct or repeatedly committing acts that alarmed or seriously annoyed petitioner while having the intent to harass, annoy or alarm petitioner (*see* Penal Law § 240.26 [3]; *Matter of Wandarsee v Pretto*, 183 AD3d 1245, 1245-1246 [4th Dept 2020]). We agree with respondent, however, that petitioner failed to meet her burden of establishing by a fair preponderance of the evidence that respondent committed the family offenses of disorderly conduct (§ 240.20) or aggravated harassment in the second degree (§ 240.30 [1]). We therefore vacate the finding in the underlying decision that respondent committed those family offenses (*see Matter of Whitney v Judge*, 138 AD3d 1381, 1382 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]).

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-00577

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

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF MANUFACTURERS AND TRADERS TRUST COMPANY, AS TRUSTEE OF THE ROBERT S. BASSETT TRUST NUMBER 7 OF 1974, FOR THE PERIOD COVERING SEPTEMBER 7, 1983 TO OCTOBER 18, 2013, PETITIONER-RESPONDENT;

ORDER

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF MANUFACTURERS AND TRADERS TRUST COMPANY, AS TRUSTEE OF THE ROBERT S. BASSETT TRUST NUMBER 7 OF 1974, FOR THE PERIOD COVERING OCTOBER 19, 2013 TO MAY 15, 2017, PETITIONER-RESPONDENT;

SUE M. WILLIAMS, DANIEL H. WILLIAMS, IV, JENNIFER B. WILLIAMS, AMELIA J. WILLIAMS, A MINOR BY AND THROUGH HER NATURAL FATHER AND GUARDIAN DANIEL H. WILLIAMS, IV, BRODERICK D. WILLIAMS, A MINOR BY AND THROUGH HIS NATURAL FATHER AND GUARDIAN DANIEL H. WILLIAMS, IV, AND JOSEPH H. CHAPMAN, A MINOR BY AND THROUGH HIS NATURAL MOTHER AND GUARDIAN JENNIFER B. WILLIAMS, OBJECTANTS-APPELLANTS.

DANIEL H. WILLIAMS, III, FLAGSTAFF, ARIZONA, FOR OBJECTANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Stephen W. Cass, A.S.), entered January 27, 2022. The order, inter alia, granted in part petitioner's motion for summary judgment.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

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

407

CAF 22-00811

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

IN THE MATTER OF ERIN CONWAY,
PETITIONER-RESPONDENT,

V ORDER

ANDREW STOUGHTENGER, RESPONDENT-APPELLANT.

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

JOSEPH P. MORAWSKI, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Ann L. Magnarelli, A.J.), entered May 6, 2022 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody with respect to the subject children.

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

Entered: April 28, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-01015

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND OGDEN, JJ.

SANDRA MYERS AND DAVID MYERS,
PLAINTIFFS-APPELLANTS,

V ORDER

BRIAN KARASZEWSKI, M.D., ET AL., DEFENDANTS,
LINDA BURNS, D.O., AND BUFFALO RHEUMATOLOGY &
MEDICINE, PLLC, DEFENDANTS-RESPONDENTS.

FARACI LANGE, LLP, BUFFALO (JENNIFER L. FAY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 30, 2022. The order granted the motion of defendants Linda Burns, D.O., and Buffalo Rheumatology & Medicine, PLLC, 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: April 28, 2023

Ann Dillon Flynn
Clerk of the Court