SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 3, 2025

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED OCTOBER 3, 2025

_____	601	KA 22 01676	PEOPLE V KASHBI SANDERS
_____	602	KA 23 00277	PEOPLE V RYAN J. LAWS
_____	603	KA 19 00793	PEOPLE V TONG RIEANG
_____	605	KA 22 00491	PEOPLE V JAMES ELMORE
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_____	608	CAF 23 01688	Mtr of DARIELL P. E.
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_____	610	CAF 23 01702	Mtr of DILAN P. E.
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_____	613	CAF 23 01705	Mtr of KRIS P. E.
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_____	615	CAF 23 01974	Mtr of DASIEL P. E.
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_____	620	CAF 24 01785	WHITNEY LEONARD V ERICA DAVIS
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_____	628	CA 24 01191	GREGORY J. LANGE V MARSHA A. DIXON
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_____	634	KA 22 01360	PEOPLE V NAQUAN SUMLER
_____	635	KA 22 01353	PEOPLE V DELON L. MCNEIL
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_____	644	CAF 24 00860	SHARLETA M. ANDERSON V TRACY KNOTTS
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_____	654	CA 24 01116	CAPYTAL V DJL INCORPORATED/DJL INC/DJL, INC/D
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_____	657	CA 24 00360	HSBC BANK USA V PETER DUBYNA, JR.
_____	658	CA 24 00362	HSBC BANK USA V PETER DUBYNA, JR.
_____	660	KA 22 00360	PEOPLE V HECTOR ROJAS-APONTE
_____	661	KA 23 01686	PEOPLE V JASON S. HARRISON
_____	662	KA 21 01461	PEOPLE V ROBERT I. SAWYER
_____	664	KA 24 00094	PEOPLE V MICHAEL TILLMAN
_____	668	CAF 24 00131	JAMAR T. ZWIEFACH V DEBORAH HEITZMANN
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_____	673	TP 25 00359	CARLOS WHITE V DANIEL F. MARTUSCELLO, III
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_____	677	CA 24 00380	CHANTEL BROOKS V MOHAWK VALLEY HEALTH SYSTEM
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_____	679	CA 24 01202	JMH 200 DOE V CHRISTOPHER JAGIELLO
_____	680	CA 24 00869	CANANDAIGUA NATIONAL BANK AND TRUST In the Matter DAVID EBER
_____	682	KA 17 00924	PEOPLE V DAVID M. KOHMESCHER
_____	685	KA 21 01731	PEOPLE V JASON P. WARREN
_____	689	CAF 23 01830	Mtr of NATALIO B.
_____	690	CAF 23 01831	Mtr of NOVA J.
_____	691	CAF 23 01832	Mtr of NAUDIA J.
_____	692	CAF 23 01835	Mtr of NATALIE J.
_____	693	CAF 23 01836	Mtr of NOEL J.
_____	694	CAF 23 01837	Mtr of NEVAEH W.
_____	696	CAF 23 02038	AUSTIN JOHNSON V SHERRY PRITCHARD
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_____	702	CA 24 01520	CDE GLOBAL, INC. V BRIAN BARNDT
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_____	710	TP 25 00077	BERNABE ENCARNACION V DANIEL F. MARTUSCELLO III
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_____	715	CA 24 01357	JOHN R. V STATE OF NEW YORK
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_____	732	CA 24 01454	ZANTAZ ENTERPRISE ARCHIVE SOLUTION V THE BANK OF NOVA SCOTIA
_____	734	CA 24 01403	JAMIE DILL V STATE OF NEW YORK
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_____	750	CA 24 00943	TIMOTHY SHEA V TAREK OTERO

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

601

KA 22-01676

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KASHBI SANDERS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (REZVANEH GANJI 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 (Thomas E. Moran, J.), rendered September 20, 2022. 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.

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Williams*, 237 AD3d 1581, 1582 [4th Dept 2025], *lv denied* — NY3d — [2025]; *People v Reynolds*, 236 AD3d 1475, 1475 [4th Dept 2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

602

KA 23-00277

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. LAWS, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered December 20, 2022. The judgment convicted defendant upon a jury verdict of robbery in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05) and grand larceny in the fourth degree (§ 155.30 [1]). Defendant's conviction arises out of an incident in which he entered a bank and stole cash from a bank employee after, inter alia, announcing that he was robbing the bank and demanding that the employees turn over large denomination bills. We affirm.

Initially, 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 with respect to defendant's conviction of robbery in the third degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Specifically, we reject defendant's contention that the People did not establish that he forcibly stole the money from the bank. To the extent that defendant challenges the legal sufficiency of the evidence in that regard, we note that " 'we necessarily review the evidence adduced as to each of the elements of the [relevant] crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]).

As relevant here, "[t]he applicable statutes do not require the use or display of a weapon nor actual injury or contact with a victim

[for a person to be guilty of robbery] . . . All that is necessary is that there be a threatened use of force . . . , which may be implicit from the defendant's conduct or gleaned from a view of the totality of the circumstances" (*People v Snow*, 185 AD3d 1400, 1401 [4th Dept 2020], *lv denied* 35 NY3d 1115 [2020] [internal quotation marks omitted]; *see* Penal Law §§ 160.00, 160.05; *People v Parris*, 74 AD3d 1862, 1863 [4th Dept 2010], *lv denied* 15 NY3d 854 [2010]). Here, we conclude that "the People presented evidence from which defendant's threatened use of force could be implied" (*Parris*, 74 AD3d at 1863 [internal quotation marks omitted]; *see People v Mosley*, 59 AD3d 961, 962 [4th Dept 2009], *lv denied* 12 NY3d 918 [2009], *reconsideration denied* 13 NY3d 861 [2009]). The evidence at trial established that defendant entered the bank wearing a mask, told people inside the bank not to look at him, repeatedly banged on the counters, demanded that bank employees turn over large denomination bills, and announced that he was robbing the bank. The weight of the evidence thus establishes that defendant's threatened use of force was implied (*see Snow*, 185 AD3d at 1402; *Parris*, 74 AD3d at 1863; *Mosley*, 59 AD3d at 962).

We also reject defendant's contention that County Court erred when, following defendant's cross-examination of a witness, it instructed the jury that the People asked law enforcement to conduct a particular fingerprint comparison only at the request of defendant. During his opening statement, defendant conceded to the jury that he made the initial request to the People for the fingerprint comparison, i.e., that the People asked law enforcement to make the comparison only at defendant's behest. While cross-examining the above-mentioned witness, however, defendant sought to elicit testimony that the People initiated the request for a fingerprint comparison to suggest that they thought someone other than defendant may have committed the bank robbery. In short, defendant sought to mislead the jury and undermine the evidence of his identity as the perpetrator. Under those unique circumstances, the court did not err in instructing the jury that defendant was the person who requested the fingerprint comparison because it was "appropriate to undo the damage caused to the People's case" by defendant's insinuation (*People v Hill*, 284 AD2d 193, 194 [1st Dept 2001], *lv denied* 96 NY2d 919 [2001]). Moreover, inasmuch as defendant effectively agreed to tell the jury that he was the one who asked for the fingerprint comparison and then indeed stated that fact in his opening statement, he may not now complain that he was deprived of a fair trial because the court effectively held him to that concession (*see People v Brockington*, 126 AD2d 655, 656 [2d Dept 1987]). We also reject defendant's contention that the court committed a mode of proceedings error in issuing the requested instruction (*see generally People v Becoats*, 17 NY3d 643, 651 [2011], *cert denied* 566 US 964 [2012]; *People v Agramonte*, 87 NY2d 765, 770 [1996]).

Defendant's contention that the court erred when it failed to conduct an inquiry into whether some of the jurors observed him restrained in the back of a police vehicle after the first day of trial is unpreserved for our review inasmuch as he did not ask the court to conduct an inquiry into that alleged incident (*see People v Goossens*, 92 AD3d 1281, 1282 [4th Dept 2012], *lv denied* 19 NY3d 960

[2012]; *People v Harris*, 303 AD2d 1026, 1026 [4th Dept 2003], *lv denied* 100 NY2d 594 [2003]; *see also People v Abron*, 37 AD3d 1163, 1163 [4th Dept 2007], *lv denied* 8 NY3d 980 [2007]). In any event, and assuming arguendo that members of the jury actually viewed defendant in restraints in the back of a police car, we conclude that a brief and inadvertent viewing of defendant in that manner, by itself, is insufficient to establish that he was deprived of a fair trial (*see People v Harper*, 47 NY2d 857, 858 [1979]; *People v Fioravantes*, 229 AD2d 784, 785-786 [3d Dept 1996], *lv denied* 89 NY2d 920 [1996]).

We also reject defendant's contention that the court erred in permitting the prosecutor to ask certain questions during voir dire. CPL 270.15 (1) (c) provides, in relevant part, that "[e]ach party shall be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a juror's knowledge of rules of law." "A trial court has broad discretion to restrict the scope of voir dire," provided that the attorney has "a fair opportunity to question prospective jurors about relevant matters" (*People v Jean*, 75 NY2d 744, 745 [1989]). Here, the prosecutor asked prospective jurors, among other things, whether they could put aside their own colloquial definition of everyday terms such as "robbery" or "force" and follow the court's instructions with regard thereto. The court did not abuse its discretion in allowing that line of questioning inasmuch as the prosecutor did not ask the jurors about their "personal feelings for or against" the definitions of those terms (*People v Boulware*, 29 NY2d 135, 141 [1971], *rearg denied* 29 NY2d 670, 749 [1971], *cert denied* 405 US 995 [1972] [internal quotation marks omitted]). Rather, the prosecutor appropriately attempted to ensure that the members of the jury would be able to follow the instructions and definitions provided by the court (*see id.* at 142; *People v Harris*, 23 AD3d 1038, 1039 [4th Dept 2005]; *see also People v Porter*, 226 AD2d 275, 276 [1st Dept 1996]).

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

603

KA 19-00793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONG RIEANG, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered February 20, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree, attempted murder in the second degree, assault in the first degree, attempted robbery in the first degree and robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and attempted robbery in the first degree (§§ 110.00, 160.15 [4]), and two counts of robbery in the first degree (§ 160.15 [4]). We affirm.

As defense counsel correctly conceded at oral argument of this appeal, the supplemental appendix provided by the People establishes that the indictment was signed by the foreperson, and thus the indictment was not facially defective (*see generally People v Quintana*, 159 AD3d 1122, 1123 [3d Dept 2018], *lv denied* 31 NY3d 1086 [2018]) and defense counsel was not ineffective for failing to challenge the indictment on that ground (*see People v Hernandez*, 192 AD3d 1528, 1530 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *see generally People v Caban,* 5 NY3d 143, 152 [2005]).

Defendant further contends that the conviction is not supported by legally sufficient evidence as to the issue of identity. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is

legally sufficient to establish defendant's identity as the individual involved in the crimes (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, the surviving shooting victim identified defendant at trial as the person who shot her and, in the hours after the shooting, defendant was found to be a passenger in a vehicle driven from the scene that had previously been in the physical possession of the other shooting victim (*see People v Rainey*, 231 AD3d 1533, 1534 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we likewise conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

605

KA 22-00491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES ELMORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 18, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on June 30, 2025, and by the attorneys for the parties on July 7 and 9, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

607

KA 23-00068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RIYAD JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 3, 2023. The judgment convicted defendant upon a 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]). We affirm.

Defendant contends that Supreme Court erred in refusing to suppress physical evidence, i.e., a gun, inasmuch as the evidence was the fruit of an unlawful stop of defendant's vehicle. We reject that contention. The evidence at the suppression hearing established that the police lawfully stopped defendant's vehicle after they observed him violate a provision of the Vehicle and Traffic Law when he failed to use a directional signal before turning (*see People v Hall*, 202 AD3d 1485, 1487 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]; *People v Nikiteas*, 167 AD3d 1556, 1558 [4th Dept 2018], *lv denied* 33 NY3d 952 [2019]; *see generally* Vehicle and Traffic Law § 1163 [b]; *People v Hinshaw*, 35 NY3d 427, 433-434 [2020]). Once the vehicle was stopped, a passenger exited the vehicle, causing the gun to drop to the ground, which gun the police observed in plain view, justifying police seizure of that evidence (*see People v Taylor*, 225 AD3d 1202, 1203 [4th Dept 2024]; *Hall*, 202 AD3d at 1487).

Defendant also contends that the court erred in refusing to suppress the gun on the basis that the police lacked reasonable suspicion when they first started following his vehicle, which occurred before the alleged traffic violation. We reject that

contention. In this case, the police were responding to reports of shots fired when they saw defendant's vehicle traveling in the opposite direction. The vehicle sped up as it passed the police, which caused the police to make a U-turn and start following defendant's vehicle. The police observed defendant commit a traffic violation shortly after they started following him. Although police pursuit of a suspect must be supported by reasonable suspicion (*see People v Milord*, 230 AD3d 1567, 1568 [4th Dept 2024], *lv denied* 42 NY3d 1036 [2024]; *People v Lobley*, 31 AD3d 1161, 1163 [4th Dept 2006]), "mere surveillance need not be justified by reasonable suspicion," and therefore "[t]he police may 'continue observation provided that they do so unobtrusively and do not limit defendant's freedom of movement by so doing' " (*People v Thornton*, 238 AD2d 33, 36 [1st Dept 1998], quoting *People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]; *see People v Sobotker*, 43 NY2d 559, 564-565 [1978]). Here, there is no evidence that, when they started following defendant's vehicle, the police officers limited defendant's freedom of movement or took any other action to elevate the encounter into one requiring reasonable suspicion. Rather, the police were merely "pursu[ing] their law enforcement obligations, in continuing to keep the car under observation" until they observed defendant violate a provision of the Vehicle and Traffic Law and could lawfully initiate a traffic stop (*Sobotker*, 43 NY2d at 564).

We reject defendant's further contention that the vehicle stop was unlawful on the basis that it was pretextual. It is well settled that, where the police have probable cause to believe that the driver of an automobile has committed a traffic violation, a vehicle "stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*People v Williams*, 224 AD3d 1332, 1333 [4th Dept 2024] [internal quotation marks omitted]; *see People v Addison*, 199 AD3d 1321, 1321-1322 [4th Dept 2021]; *People v Howard*, 129 AD3d 1469, 1470 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015], *reconsideration denied* 26 NY3d 1089 [2015]). In light of the police officers having personally observed defendant commit a traffic violation, giving them probable cause to effectuate the traffic stop, the police officers' other motivations in stopping the vehicle—i.e., investigating a separate criminal matter—were irrelevant to determining whether the stop was lawful (*see Williams*, 224 AD3d at 1333-1334; *see generally People v Robinson*, 97 NY2d 341, 349 [2001]).

Finally, contrary to defendant's further contention, " '[n]othing about the officer[s'] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, . . . self-contradictory' " or tailored to nullify constitutional objections (*People v Knighton*, 144 AD3d 1594, 1594-1595 [4th Dept 2016], *lv denied* 28 NY3d 1147 [2017]; *see Nikiteas*, 167 AD3d at 1558). We therefore discern no basis in the record for disturbing the court's finding that probable cause existed for the traffic stop

(*see People v Rucker*, 165 AD3d 1638, 1638 [4th Dept 2018], *lv*

denied 32 NY3d 1177 [2019]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

608

CAF 23-01688

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

IN THE MATTER OF DARIELL P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent mother appeals from 12 orders that, inter alia, terminated her parental rights with respect to the six subject children. In appeal Nos. 1 through 6, the mother appeals from orders that, inter alia, terminated her parental rights with respect to each child on the basis of abandonment, and in appeal Nos. 7 through 12 she appeals from orders that, inter alia, terminated her parental rights with respect to each child on the basis of permanent neglect.

We reject the mother's contention that petitioner failed to establish abandonment. "A child is deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment . . . , a parent 'evinces an intent to forego [their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]' " (*Matter of Azaleayanna S.G.-B. [Quaneesha S.G.]*, 141 AD3d 1105, 1105 [4th Dept 2016], quoting Social Services Law § 384-b [5] [a]; *see* § 384-b [4] [b]). Petitioner bears the burden of establishing abandonment "by clear and convincing evidence" (*Matter of John F. [John F., Jr.]*, 149 AD3d 1581, 1582 [4th Dept 2017]).

Here, petitioner established by clear and convincing evidence that the mother had not visited three of the children during the relevant six-month period, and that she had visited the other three children just twice during that time. Although the mother contends that she remained in telephone contact with petitioner, testimony reflected that this contact largely involved petitioner's attempts at scheduling visitation, which the mother then declined to exercise. Under the circumstances of this case, we conclude that those are merely " 'sporadic and insubstantial contacts' " that do not defeat a finding of abandonment (*Matter of Kaylee Z. [Rhiannon Z.]*, 154 AD3d 1341, 1342 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *see Matter of Armani W. [Adifah W.]*, 167 AD3d 1569, 1570 [4th Dept 2018]).

We likewise reject the mother's contention that Family Court erred in finding that she permanently neglected the subject children. Upon our review of the record, we conclude that "[p]etitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the children] by providing services and other assistance aimed at ameliorating or resolving the problems preventing [the children's] return to [the mother's] care . . . , and that the mother failed substantially and continuously to plan for the future of the child[ren] although physically and financially able to do so . . . Although the mother participated in [some of] the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Matter of Michael S. [Kathryne T.]*, 162 AD3d 1651, 1652 [4th Dept 2018], *lv denied* 32 NY3d 906 [2018] [internal quotation marks omitted]; *see* Social Services Law § 384-b [7] [a]; *Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020], *lv dismissed in part & denied in part* 35 NY3d 1003 [2020]).

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

609

CAF 23-01690

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

IN THE MATTER OF DASIEL P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

610

CAF 23-01702

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

IN THE MATTER OF DILAN P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

611

CAF 23-01703

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

IN THE MATTER OF KRISHEL P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

612

CAF 23-01704

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

IN THE MATTER OF YANELIS I.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

613

CAF 23-01705

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

IN THE MATTER OF KRIS P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 6.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

614

CAF 23-01973

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

IN THE MATTER OF YANELIS I.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 7.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

615

CAF 23-01974

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

IN THE MATTER OF DASIEL P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 8.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

616

CAF 23-01975

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

IN THE MATTER OF DILAN P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 9.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

617

CAF 23-01976

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

IN THE MATTER OF KRIS P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 10.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

618

CAF 23-01977

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

IN THE MATTER OF KRISHEL P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 11.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

619

CAF 23-01978

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

IN THE MATTER OF DARIELL P.E.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANNYSHA E.-C., RESPONDENT-APPELLANT.
(APPEAL NO. 12.)

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

MYKALA PIERCE, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NATHALIE T. MARIN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered August 31, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject child.

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

Same memorandum as in *Matter of Dariell P.E. (Dannysha E.-C.)* ([appeal No. 1] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

620

CAF 24-01785

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

IN THE MATTER OF WHITNEY LEONARD,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

ERICA DAVIS, RESPONDENT-PETITIONER-APPELLANT.

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

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

MICHAEL J. CAPUTO, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered September 11, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner-respondent sole legal and primary physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order that, inter alia, denied her request to permanently relocate to another state with the parties' child and modified the parties' prior order of custody and visitation by granting petitioner-respondent father sole legal and primary physical custody of the child. We affirm.

Where a parent seeks to relocate with a child, Family Court is "required to determine whether the proposed relocation was in the child's best interests by analyzing the factors set forth in . . . *Tropea*" (*Matter of Betts v Moore*, 175 AD3d 874, 874-875 [4th Dept 2019], citing *Matter of Tropea v Tropea*, 87 NY2d 727, 739-741 [1996]). Thus, contrary to the mother's contention and "notwithstanding the fact that the [mother] had already relocated with [the child,]" the court, in considering the mother's petition seeking, inter alia, permission to relocate, was tasked with making "a determination whether the relocation was in the best interests of the child after considering all relevant factors" (*Matter of Moredock v Conti*, 130 AD3d 1472, 1473 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Baxter v Borden*, 122 AD3d 1417, 1417-1418 [4th Dept

2014], *lv denied* 24 NY3d 915 [2015]). We further conclude that the court did not err in addressing the mother's request to relocate with the child before addressing the father's petition seeking modification of the parties' prior order of custody and visitation (*see generally Moredock*, 130 AD3d at 1473).

Contrary to the mother's contention, the court applied the proper standard in reviewing the father's modification petition (*see generally Matter of Hudson v Carter*, 229 AD3d 1097, 1098 [4th Dept 2024]; *Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]). We reject the mother's further contention that the court erred in granting the father sole legal and primary physical custody. "[A] court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (*Matter of Saunders v Stull*, 133 AD3d 1383, 1383 [4th Dept 2015] [internal quotation marks omitted]), and such a determination "will not be disturbed as long as it is supported by a sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]; *see Matter of Clark v Strassburg*, 240 AD3d 1393, 1393 [4th Dept 2025]). Here, the court's custody determination is supported by a sound and substantial basis in the record (*see Matter of Shepherd v Shepherd*, 207 AD3d 1250, 1251 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022]; *Matter of Benson v Smith*, 178 AD3d 1430, 1431 [4th Dept 2019]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

625

CA 24-00040

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

JSC MANAGEMENT GROUP, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WEST GENERAL CONTRACTORS, LLC, DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered January 3, 2024. The order denied plaintiff's motion for partial summary judgment dismissing defendant's fifth, sixth, and tenth counterclaims.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the tenth counterclaim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, allegedly unfinished and unsatisfactory work performed by defendant pursuant to a contract between the parties for the construction of a franchise restaurant in Connecticut (Connecticut contract). Defendant answered and, among other things, asserted multiple counterclaims stemming from an alleged separate agreement between plaintiff and defendant that contemplated the construction of numerous other franchise locations (alleged agreement). In its fifth through tenth counterclaims, defendant sought damages arising from plaintiff's purported breach of the alleged agreement. Plaintiff thereafter moved for partial summary judgment dismissing defendant's fifth, sixth, and tenth counterclaims, which sound in negligent misrepresentation, fraudulent inducement, and implied indemnity, respectively. Supreme Court denied plaintiff's motion in its entirety, and plaintiff appeals.

Contrary to plaintiff's contention, defendant's fifth and sixth counterclaims are not barred by collateral estoppel. "Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Lowes v Anas*, 195 AD3d 1579, 1580 [4th Dept 2021] [internal quotation marks omitted]). As relevant here, although the court

dismissed causes of action for negligent misrepresentation and fraudulent inducement asserted by defendant in a third-party action against two individuals associated with plaintiff, the court's basis for dismissing those causes of action was specific to the posture of that case and the nature of the claims asserted against the third-party defendants. Indeed, in rejecting plaintiff's collateral estoppel argument below, the court noted that the basis for its decision in the third-party action did not directly apply to the main action and defendant's counterclaims. Inasmuch as "[p]reclusion of an issue occurs only if that issue was actually litigated, squarely addressed and *specifically decided* in the prior action" (*Wiltberger v Allen*, 225 AD3d 1273, 1274 [4th Dept 2024] [internal quotation marks omitted]), we conclude that the court properly denied the part of plaintiff's motion seeking summary judgment dismissing defendant's fifth and sixth counterclaims on the basis of collateral estoppel.

We likewise reject plaintiff's contention that the court erred in determining that defendant may assert its fifth and sixth counterclaims in the alternative to a breach of contract counterclaim. A party may assert quasi-contract theories in the alternative "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue" (*Kulback's Inc. v Buffalo State Ventures, LLC*, 197 AD3d 890, 892 [4th Dept 2021] [internal quotation marks omitted]; *see JLO Dev. Corp. v Amalgamated Bank*, 232 AD3d 705, 708 [2d Dept 2024]; *Fisher v A.W. Miller Tech. Sales*, 306 AD2d 829, 831-832 [4th Dept 2003]). Here, defendant asserted two counterclaims for breach of contract: the first counterclaim alleging a breach of the Connecticut contract, and the seventh counterclaim alleging a breach of the alleged agreement. Although the existence of the Connecticut contract is undisputed, the record reflects that there is a bona fide dispute as to the existence and terms of the alleged agreement. As pleaded by defendant, the fifth and sixth counterclaims properly allege quasi-contract theories in the alternative to a purported breach of the alleged agreement (*see generally JLO Dev. Corp.*, 232 AD3d at 708).

We agree with plaintiff, however, that it met its initial burden on the motion with respect to defendant's tenth counterclaim, for implied indemnity, and that defendant failed to raise an issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Cappelletti v Unigard Ins. Co.*, 222 AD2d 1029, 1031-1032 [4th Dept 1995]). We therefore modify the order accordingly.

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

628

CA 24-01191

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

IN THE MATTER OF ALICE R. LANGE, DECEASED.

GREGORY J. LANGE, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

MARSHA A. DIXSON, RESPONDENT-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (KATHLEEN H. MCGRAW OF COUNSEL), FOR PETITIONER-APPELLANT.

HALL RICKETTS GURBACKI, P.C., EAST AURORA (ROBERT H. GURBACKI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Niagara County (John James Ottaviano, S.), entered May 21, 2024. The order, upon reargument, adhered to a prior determination that petitioner lacked standing to petition to compel an accounting pursuant to General Obligations Law § 5-1510.

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

Memorandum: Petitioner commenced this proceeding seeking an order pursuant to General Obligations Law § 5-1510 directing respondent, his sister, to provide a copy of "all bank statements, receipts, disbursements, and transactions" entered into by respondent while acting as agent for the parties' mother (decedent) under a durable power of attorney. Surrogate's Court granted that part of respondent's motion seeking to dismiss the petition on the ground that petitioner lacked standing to seek that accounting. Petitioner thereafter moved for leave to reargue his opposition to respondent's motion, contending that the Surrogate had overlooked General Obligations Law § 5-1510 (3), which authorizes a child of a principal to commence the special proceeding at issue. The Surrogate granted leave to reargue and, upon reargument, adhered to the original determination that petitioner lacked standing. Petitioner appeals, and we now reverse.

Contrary to the conclusion of the Surrogate, the death of decedent did not divest petitioner of standing pursuant to General Obligations Law § 5-1510 (3) to commence this special proceeding. Section 5-1510 (3) identifies, both directly and by reference to section 5-1505 (2) (a) (3), the parties that have standing to seek judicial intervention for the purpose of, among other things,

compelling an accounting of all receipts, disbursements and transactions entered into by an agent on behalf of the principal (*see Matter of Sawkins*, 239 AD3d 1312, 1313 [4th Dept 2025]; *see also* § 5-1510 [2] [e]). Specifically, it provides that "[a] special proceeding may be commenced pursuant to [section 5-1510 (2)] by *any* person identified in [section 5-1505 (2) (a) (3)]"—which includes a personal representative of the estate of a deceased principal—as well as "the agent, the spouse, child or parent of the principal, the principal's successor in interest, *or* any third party who may be required to accept a power of attorney" (§ 5-1510 [3] [emphasis added]). The legislature's use of "any" and the disjunctive "or" in that statutory language evinces its intent to provide a list of equal but alternative petitioners (*see generally Matter of Van Patten v La Porta*, 148 AD2d 858, 860 [3d Dept 1989]). In order to accept the Surrogate's contrary conclusion, i.e., that the death of a principal limits the permissible petitioners to the personal representative of the deceased principal's estate, we would, in effect, have to write such a restriction into the relevant statute. Inasmuch as that would directly contravene the plain language of the statute, we decline to do so (*see Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 546-547 [1984]; *Gawron v Town of Cheektowaga*, 117 AD3d 1410, 1412 [4th Dept 2014]). The Surrogate therefore erred in granting that part of respondent's motion seeking dismissal of the petition on standing grounds.

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

630

CA 24-00894

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

ERIN COTTON, AS ADMINISTRATOR OF THE ESTATE OF
MATTHEW A. COTTON, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

PEMS, TOOL & MACHINE, INC., ALEXANDER M. STONE,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

MITCHELL DRANOW, SEA CLIFF, FOR PLAINTIFF-APPELLANT.

ONDROVIC & PLATEK, PLLC, WHITE PLAINS (JEREMY D. PLATEK OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Julie G. Denton, J.), entered June 6, 2024. The order, among other things, granted the motion of defendants PEMS, Tool & Machine, Inc., and Alexander M. Stone for summary judgment dismissing the complaint against them.

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: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

633

CA 24-01511

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

IN THE MATTER OF DANIELLE DILL, PSY.D.,
EXECUTIVE DIRECTOR OF CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS K., RESPONDENT-APPELLANT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Peter M. Rayhill, J.), entered August 19, 2024. The order, inter alia, granted petitioner's application for authorization to administer psychiatric medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order that, inter alia, granted petitioner's application for an order authorizing the involuntary treatment of respondent. The order has since expired, rendering this appeal moot (*see Matter of Blossom V. [Reddy]*, 230 AD3d 1552, 1552-1553 [4th Dept 2024]; *Matter of Upstate Univ. Hosp. v Bryant W.*, 224 AD3d 1340, 1341 [4th Dept 2024]), and this case does not fall within the exception to the mootness doctrine (*see Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

634

KA 22-01360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAQUAN SUMLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered August 3, 2022. The appeal was held by this Court by order entered June 14, 2024, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (228 AD3d 1350 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law former § 130.35 [1]), burglary in the first degree (§ 140.30 [2]), aggravated criminal contempt (§ 215.52 [1]), criminal contempt in the first degree (§ 215.51 [b] [v]), assault in the third degree (§ 120.00 [1]), burglary in the second degree (§ 140.25 [2]), and stalking in the fourth degree (§ 120.45 [1]).

When the appeal was previously before us, we rejected defendant's other contentions and then considered his contention that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*People v Sumler*, 228 AD3d 1350, 1350-1355 [4th Dept 2024]). In particular, defendant contended that the People's failure to disclose existing disciplinary records of potential law enforcement witnesses for use as impeachment materials (*see* CPL 245.20 [former (1) (k)]) rendered any certificate of compliance (COC) filed pursuant to CPL 245.50 improper and thereby rendered any declaration of trial readiness made pursuant to CPL 30.30 illusory and insufficient to stop the running of the speedy trial clock (*Sumler*, 228 AD3d at 1353). We noted that, in denying the motion to dismiss, the court had determined that the People complied with the discovery mandates of CPL 245.20 (*Sumler*, 228 AD3d at 1354). We also noted,

however, that the People in this case had used a screening committee to review law enforcement disciplinary records, which we had recently held was not authorized by the statute (*id.*). We determined that the court had therefore erred in denying the motion on the basis that the People complied with their discovery obligations under CPL 245.20 (*Sumler*, 228 AD3d at 1354). We further noted that, in light of the court's determination, it had not considered "whether the People exercised due diligence within the meaning of CPL 245.50, that is, whether they made reasonable efforts to comply with [the] statutory directives, and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery" (*id.* [internal quotation marks omitted]; *see People v Bay*, 41 NY3d 200, 211 [2023]). We therefore held the case, reserved decision, and remitted the matter to County Court "to determine the motion after further submissions, if warranted" (*Sumler*, 228 AD3d at 1355).

Upon remittal, the People contended in reliance on the Court of Appeals' intervening decision in *People v King* (42 NY3d 424 [2024]) that the COC prerequisite to declaring trial readiness did not apply inasmuch as they had validly announced that they were ready for trial before the effective date of the relevant amendments to the discovery (CPL art 245) and statutory speedy trial (CPL 30.30) statutes and that the court should deny defendant's motion to dismiss the indictment on statutory speedy trial grounds. Although defendant disputed the People's contention, the court denied the motion, determining in relevant part that, pursuant to *King*, the People remained ready for trial under the circumstances presented and had not been required to file a COC to stop the speedy trial clock.

We reject defendant's contention on resubmission that the court erred in denying the motion on that basis. It is undisputed that the case was commenced and that the People validly announced readiness for trial before CPL article 245 took effect on January 1, 2020. "Because the legislature established the COC requirement as a condition precedent to declaring ready for trial and did not indicate an intent to undo the People's prior readiness statements, there is no basis to apply that requirement prospectively to a case such as the present one where the People were in a trial-ready posture when it went into effect" (*King*, 42 NY3d at 428). In other words, the People "did not revert to a state of unreadiness when article 245 became effective" and "were not required to file a [COC] to stop the speedy trial clock" (*People v Perry*, 236 AD3d 1463, 1464 [4th Dept 2025], *lv denied* 43 NY3d 1011 [2025]; *see King*, 42 NY3d at 428; *People v Fox*, 237 AD3d 1523, 1524 [4th Dept 2025]). Thus, even assuming, arguendo, that the People were required to comply with CPL 245.20 (former [1]) (*see King*, 42 NY3d at 428 n 2), we conclude that any alleged discovery violation did not affect defendant's statutory right to a speedy trial (*see Fox*,

237 AD3d at 1524; *Perry*, 236 AD3d at 1464; *see also* CPL 245.50 [former (3)]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

635

KA 22-01353

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELON L. MCNEIL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Meredith A. Vacca, J.), rendered May 17, 2022. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Blount*, 239 AD3d 1426, 1427 [4th Dept 2025], *lv denied* — NY3d — [2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). County Court followed the Model Colloquy, which "neatly synthesizes [Court of Appeals] precedent and the governing principles" (*Thomas*, 34 NY3d at 567). Defendant's challenges to the court's waiver colloquy lack merit (*see generally id.*).

Although defendant further contends that the sentence imposed is unduly harsh and severe, that contention is foreclosed by the valid waiver of the right to appeal (*see People v Washington*, 170 AD3d 1608, 1609 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]; *see generally Lopez*, 6 NY3d at 255-256).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

636

KA 22-00866

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKUS BOONE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered May 2, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from a shooting incident during which defendant possessed a loaded firearm in his home. We affirm.

Defendant contends that, even though his previous conviction was not an element of criminal possession of a weapon in the second degree given his in-home possession of the loaded firearm (*see People v Jones*, 22 NY3d 53, 59 [2013]), the prosecutor may have mistakenly presented evidence to or instructed the grand jury about that previous conviction, which defendant asserts would have rendered the proceeding defective because the grand jury's awareness of the previous conviction may have tainted its consideration of the evidence and made it more likely to indict. We agree with the People, however, that defendant's contention raises "[f]laws of an evidentiary or technical nature [that are] forfeited by a guilty plea" (*People v Hansen*, 95 NY2d 227, 232 [2000]; *see People v Ellis*, 194 AD3d 428, 428 [1st Dept 2021], *lv denied* 37 NY3d 964 [2021]; *People v Palo*, 299 AD2d 871, 871 [4th Dept 2002], *lv denied* 99 NY2d 618 [2003]). It is undisputed that defendant's contention "does not activate a question of jurisdiction" (*Hansen*, 95 NY2d at 231). Moreover, contrary to defendant's assertion, we conclude that his contention "does not present 'a

constitutional defect implicating the integrity of the process' " (*People v Manragh*, 32 NY3d 1101, 1103 [2018]; *see Hansen*, 95 NY2d at 231-233). Defendant "in essence seeks a review of the fact-finding process engaged in by the grand jurors" (*Hansen*, 95 NY2d at 232). However, "[t]o allow such a [claim] to survive here would be fundamentally inconsistent with the plea of guilty, because, at its base, the claim essentially relates to the quantum of proof required to satisfy the factual elements of the crimes considered by the [g]rand [j]ury" (*id.*).

Defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to file a motion to dismiss the indictment on statutory speedy trial grounds by challenging the propriety of the People's original certificate of compliance "survives his guilty plea only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Bovee*, 221 AD3d 1549, 1549-1550 [4th Dept 2023], *lv denied* 41 NY3d 982 [2024] [internal quotation marks omitted]; *see People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see generally People v Parson*, 27 NY3d 1107, 1108 [2016]). To the extent that defendant's contention survives his plea, we conclude that it lacks merit. The record establishes that defendant received a favorable plea bargain, and that defendant received meaningful representation (*see People v Reynolds*, 239 AD3d 1363, 1364 [4th Dept 2025]; *People v Moore*, 229 AD3d 1279, 1280 [4th Dept 2024]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]). Contrary to defendant's assertion, we conclude "that there is nothing 'clear cut about [defendant's] CPL 30.30 claim' . . . and that 'its success would have depended on the resolution of several novel issues' in light of the new discovery laws" (*Moore*, 229 AD3d at 1280, quoting *People v Brunner*, 16 NY3d 820, 821 [2011]). To the extent that defendant's contention is based on matters outside the record, we note that a CPL 440.10 proceeding is the appropriate forum for reviewing his claim (*see People v Stoby*, 232 AD3d 1298, 1299 [4th Dept 2024], *lv denied* 43 NY3d 947 [2025]).

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

637

KA 20-00461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JESSE BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 15, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on May 28, 2025, and the attorneys for the parties on May 14 and June 10, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

638

KA 20-00462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JESSE BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 15, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on May 28, 2025, and the attorneys for the parties on May 14 and June 10, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

639

KA 20-00463

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JESSE BROWN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 15, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on May 28, 2025, and the attorneys for the parties on May 14 and June 10, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

640

KA 23-01282

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD I. UBANWA, DEFENDANT-APPELLANT.

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

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Karen M. Brandt Brown, J.), rendered January 24, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the third degree.

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

Memorandum: Defendant appeals from a judgment that convicted him, upon his guilty plea, of attempted rape in the third degree (Penal Law §§ 110.00, former 130.25 [2]). We affirm.

On appeal, defendant contends that he received ineffective assistance of counsel, which infected the plea bargaining process. Even assuming, arguendo, that defendant validly waived his right to appeal, we note that defendant's contentions on appeal would survive even a valid waiver (*see generally People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]).

"A claim of ineffective assistance of counsel survives a plea of guilty only if the plea bargaining process was infected by [the] allegedly ineffective assistance or [if] defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Johnson*, 229 AD3d 1300, 1302 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024] [internal quotation marks omitted]; *see People v Judd*, 111 AD3d 1421, 1422-1423 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]). A " 'defendant has been afforded meaningful representation when he or she received an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of [defense] counsel' " (*People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]). To prevail on an ineffective assistance of counsel claim "[i]n the plea context, the defendant 'must show that there is a

reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial' " (*People v Hernandez*, 22 NY3d 972, 975 [2013], *cert denied* 572 US 1070 [2014], quoting *Hill v Lockhart*, 474 US 52, 59 [1985]; *see generally Strickland v Washington*, 466 US 668, 694-695 [1984]).

When advising a defendant of the immigration consequences of their guilty plea, "counsel 'must advise [their] client regarding the risk of deportation,' but . . . counsel's duty 'is more limited' where the 'deportation consequences of a particular plea are unclear or uncertain' " (*Hernandez*, 22 NY3d at 975, quoting *Padilla v Kentucky*, 559 US 356, 367-369 [2010]). Thus, "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear" (*Padilla*, 559 US at 369).

The record reflects that defense counsel advised defendant of a risk of adverse immigration consequences and repeatedly facilitated defendant's efforts to obtain advice from defendant's separate immigration counsel, which was ultimately used as a basis for the terms of the plea agreement. While defendant stated during the plea colloquy that he "couldn't fully talk to" his immigration counsel, he also stated during the colloquy that County Court provided him time to do so, and that he did, in fact, speak to immigration counsel about how the proposed plea and sentence would affect his immigration status. Defendant has not shown that a deportation consequence was truly clear, nor that his counsel failed to give him correct advice. Furthermore, defendant expressly advised that he *did not* wish to proceed to trial and wished to accept the People's plea offer. Under these circumstances, defendant has not shown that there is a reasonable probability that, but for defense counsel's alleged errors, defendant would not have pleaded guilty and would have insisted on going to trial (*see Hernandez*, 22 NY3d at 975). Similarly, on this record, we reject defendant's contention that defense counsel's alleged ineffectiveness infected the plea process and rendered defendant's guilty plea involuntary (*see generally Judd*, 111 AD3d at 1423).

To the extent that defendant contends that he was misadvised regarding the potential immigration or deportation consequences of his plea and subsequent Sex Offender Registration Act (Correction Law § 168 *et seq.*) designation, that contention is based on matters outside the record and must therefore be raised by means of a CPL article 440 motion (*see People v Irby*, 158 AD3d 1050, 1051 [4th Dept 2018], *lv denied* 31 NY3d 1014 [2018]; *People v Cook*, 46 AD3d 1427, 1428 [4th Dept 2007], *lv denied* 10 NY3d 809 [2008]). We have reviewed

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

642

KA 24-01587

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMONT TERRY, DEFENDANT-APPELLANT.

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

ASHLEY WILLIAMS, DISTRICT ATTORNEY, GENESEO, FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Jennifer M. Noto, J.), dated July 18, 2024. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk to a level three risk. We reject that contention. " 'The court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument' " (*People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]; *see People v Swartz*, 216 AD3d 1426, 1428 [4th Dept 2023], *lv denied* 40 NY3d 906 [2023]; *People v Sczerbaniewicz*, 126 AD3d 1348, 1349 [4th Dept 2015]). As the court determined, an upward departure was warranted based on crimes defendant committed after his release from prison on the qualifying offense, including failing to register as a sex offender in North Carolina (*see People v Wright*, 215 AD3d 1258, 1259-1260 [4th Dept 2023], *lv denied* 40 NY3d 904 [2023]; *People v Perez*, 158 AD3d 1070, 1071 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]).

Defendant's subsequent criminal history indicates that he "poses an increased risk to public safety" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 14 [2006]; *see generally People v Milks*, 28 AD3d 1163, 1164 [4th Dept 2006]), and we cannot conclude that the court, in weighing the aggravating and mitigating

factors, abused its discretion in granting a two-level upward departure (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

643

KA 22-00868

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKUS BOONE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered May 2, 2022. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arose from the discovery of a loaded firearm during a traffic stop of a vehicle in which defendant was a passenger, which was conducted by law enforcement on the basis of two warrants for defendant's arrest, including a felony arrest warrant issued by a superior court judge apparently sitting as a local criminal court premised on a felony complaint charging defendant with criminal possession of a weapon in the third degree (§ 265.02 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We affirm.

Defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking to suppress any evidence obtained as a result of the traffic stop because the felony arrest warrant that served as a basis for the traffic stop is invalid on its face inasmuch as, in violation of the statutory form prescribed by CPL 120.10 (2), it does not state or contain the name of the local criminal court that purportedly issued it. We agree with the People that defendant failed to preserve that contention for our review.

"To preserve an issue for review, counsel must register an objection and apprise the court of grounds upon which the objection is

based 'at the time' of the allegedly erroneous ruling 'or at any subsequent time when the court had an opportunity of effectively changing the same' " (*People v Cantave*, 21 NY3d 374, 378 [2013], *mot to clarify op denied* 21 NY3d 1070 [2013], quoting CPL 470.05 [2]). "Such protest . . . is sufficient if the party made [their] position with respect to the ruling . . . known to the court" (CPL 470.05 [2]), i.e., "the protest ha[s] to 'be specifically directed at the alleged error' . . . in order to preserve the issue" (*People v Keschner*, 25 NY3d 704, 721 [2015]). Thus, "a party's failure to specify the basis for a general objection renders the argument unpreserved for [appellate] review" (*People v Tonge*, 93 NY2d 838, 839-840 [1999]).

Here, the record establishes that defense counsel, prior to the close of the suppression hearing, confirmed that the felony complaint underlying the felony arrest warrant was filed in City Court, acknowledged that the superior court judge appeared to have signed the felony arrest warrant as a superior court judge sitting as a local criminal court, and conceded that the felony arrest warrant appeared sufficient on its face, but nonetheless indistinctly requested that the court review the facial sufficiency of the felony arrest warrant without directing the court's attention to any particular alleged defect. Despite having the felony arrest warrant before him, defense counsel never specifically contended—as defendant does now—that the felony arrest warrant was invalid on the ground that it failed to meet the requirements of CPL 120.10 (2). We therefore conclude that defendant's contention is not preserved for our review inasmuch as he " 'failed to raise that specific contention in his motion papers or at the [suppression] hearing' " (*People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014]; *see* CPL 470.05 [2]; *People v Oliver*, 87 AD3d 1035, 1037 [2d Dept 2011]). Moreover, as defendant correctly concedes on appeal, the court did not address in its decision whether the felony arrest warrant properly identified the name of the issuing local criminal court, and thus it cannot be said that the issue is preserved for review on the ground that the court, in response to a protest by defendant, "expressly decided the question raised on appeal" (CPL 470.05 [2]; *see People v Parker*, 32 NY3d 49, 57 [2018]; *People v Johnson*, 195 AD3d 1422, 1423 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Murray*, 194 AD3d 1360, 1362 [4th Dept 2021]). We decline to exercise our power to review defendant's challenge to the facial sufficiency of the felony arrest warrant as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *see generally Santos*, 122 AD3d at 1395).

Defendant also contends that, contrary to the court's determination, the traffic stop was unlawful because the felony arrest warrant that served as a basis for the traffic stop is invalid on the ground that the underlying felony complaint is insufficient on its face to establish the requisite reasonable cause (*see* CPL 100.40 [4]; 120.20 [1] [a]; *see also* CPL 70.10 [2]). We reject that contention. Accounting for the single obvious typographical error in the felony complaint (*see People v Llewelyn*, 221 AD3d 1060, 1060-1061 [3d Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *People v Stuart*, 209 AD3d 1044, 1045 [2d Dept 2022], *lv denied* 39 NY3d 1114 [2023]), we conclude upon

our review of the record that the felony complaint is facially sufficient—at minimum with respect to the charge of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) as decided by the court—inasmuch as the factual part of the felony complaint "contain[s] a statement of the complainant alleging facts of an evidentiary character supporting or tending to support the charge[ ]" (CPL 100.15 [3]) that provide "reasonable cause to believe that the defendant committed the offense charged" (CPL 100.40 [4] [b]; *see* CPL 70.10 [2]; *People v Black*, 270 AD2d 563, 565 [3d Dept 2000]; *People v Price*, 234 AD2d 978, 978 [4th Dept 1996], *lv denied* 90 NY2d 862 [1997]).

Defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to file a motion to dismiss the indictment on statutory speedy trial grounds by challenging the propriety of the People's original and supplemental certificates of compliance "survives his guilty plea only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney[']s allegedly poor performance" (*People v Bovee*, 221 AD3d 1549, 1549-1550 [4th Dept 2023], *lv denied* 41 NY3d 982 [2024] [internal quotation marks omitted]; *see People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see generally People v Parson*, 27 NY3d 1107, 1108 [2016]). To the extent that defendant's contention survives his plea, we conclude that it lacks merit. The record establishes that defendant received a favorable plea bargain, and that defendant received meaningful representation (*see People v Reynolds*, 239 AD3d 1363, 1364 [4th Dept 2025]; *People v Moore*, 229 AD3d 1279, 1280 [4th Dept 2024]; *see generally People v Ford*, 86 NY2d 397, 404 [1995]). Contrary to defendant's assertion, we conclude "that there is nothing 'clear cut about [defendant's] CPL 30.30 claim' . . . and that 'its success would have depended on the resolution of several novel issues' in light of the new discovery laws" (*Moore*, 229 AD3d at 1280, quoting *People v Brunner*, 16 NY3d 820, 821 [2011]). To the extent that defendant's contention is based on matters outside the record, we note that a CPL 440.10 proceeding is the appropriate forum for reviewing his claim (*see People v Stoby*, 232 AD3d 1298, 1299 [4th Dept 2024], *lv denied* 43 NY3d 947 [2025]).

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

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CAF 24-00860

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

IN THE MATTER OF SHARLETA M. ANDERSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TRACY KNOTTS, RESPONDENT-RESPONDENT,
AND NAUJAA ROBINSON, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), entered May 21, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole custody and primary residence of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, awarded petitioner, the mother's godmother, sole custody and primary residence of the three children who are the subject of this proceeding. We affirm.

"[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Matter of Lachenauer v Lachenauer-Myers*, 236 AD3d 1309, 1309 [4th Dept 2025] [internal quotation marks omitted]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]; *Matter of Cross v Cross*, 235 AD3d 1264, 1265 [4th Dept 2025], *lv denied* — NY3d — [2025]). "The extraordinary circumstances analysis must consider the cumulative effect of all issues present in a given case . . . , including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role" (*Lachenauer*, 236

AD3d at 1309-1310 [internal quotation marks omitted]; *see Cross*, 235 AD3d at 1265-1266).

Contrary to the mother's contention, petitioner established that extraordinary circumstances existed based on, among other things, the mother's voluntary relinquishment of physical custody of the children to petitioner, the prolonged separation of the children from the mother, the mother's relinquishment of all parental control during that time, and the psychological attachment the children had to petitioner (*see Cross*, 235 AD3d at 1266; *Matter of Gunther v Brown*, 148 AD3d 889, 890 [2d Dept 2017]; *Matter of Hunte v Arnold*, 147 AD3d 946, 947 [2d Dept 2017]).

We further conclude that Family Court's determination that it is in the best interests of the children to remain in the custody of petitioner has a sound and substantial basis in the record and should not be disturbed (*see generally Matter of Fisher v Fisher*, 148 AD3d 1783, 1784 [4th Dept 2017]). The court weighed the appropriate factors (*see Matter of Hochreiter v Williams*, 201 AD3d 1303, 1304 [4th Dept 2022]; *see generally Fox v Fox*, 177 AD2d 209, 210-211 [4th Dept 1992]), all of which favored petitioner.

Finally, we conclude based on the circumstances of this case that the mother has failed to demonstrate that the record before us is no longer sufficient for determining the best interests of the children (*see Matter of Swan v Morris*, 235 AD3d 878, 880 [2d Dept 2025]; *Matter of Brisard v Brisard*, 211 AD3d 838, 839 [2d Dept 2022], *lv denied* 39 NY3d 910 [2023]; *Matter of Andrea II. v Joseph HH.*, 203 AD3d 1356, 1359-1360 [3d Dept 2022]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

645

CAF 24-00377

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

IN THE MATTER OF BRADLEY A. HART,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STACY L. LONNEVILLE, RESPONDENT-APPELLANT.

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

KELLY M. CICCONE, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Seneca County (Barry L. Porsch, J.), entered January 24, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal custody and physical placement of the subject child.

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

Memorandum: In this Family Court Act article 6 proceeding, respondent mother appeals from an order that, as relevant here, granted petitioner father's petition to modify a prior custody order, awarded the father sole legal custody and physical placement of the child with visitation for the mother, and permitted the father to relocate the child from Seneca County to the State of Kentucky. We affirm.

Contrary to the mother's contention, we conclude that the determination to allow the father to relocate the child to Kentucky is supported by a sound and substantial basis in the record. "A parent seeking permission for a child to relocate with [them] has the burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests" (*Matter of Murphy v Peace*, 72 AD3d 1626, 1626 [4th Dept 2010]). "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]). The relevant factors to be considered include, but are not limited to, "[a] each parent's reasons for seeking or opposing the move, [b] the quality of the relationships between the child and the custodial and noncustodial parents, [c] the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, [d] the degree to which the custodial parent's

and child's life may be enhanced economically, emotionally and educationally by the move, and [e] the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*id.* at 740-741). "[N]o single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" (*id.* at 738), and " 'a court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1769 [4th Dept 2016]).

Here, we conclude that the record supports Family Court's determination that it is in the best interests of the child to allow the father to relocate the child to Kentucky. The record reflects that while living with the mother, the child resided in substandard housing for a prolonged period of time without the mother having any credible plans to remedy the situation. Indeed, the mother testified that she was residing with her boyfriend, the child, and another infant in a camper without a working toilet. Further, while living with the mother, the child did not have his own room and slept on a pull-out couch. Although the mother testified that she had funds saved toward a down payment for a home and hoped to purchase a home in the near future, the record supports the court's determination that the mother lacked a credible plan to improve her living situation, particularly where she had no reliable vehicle, had no working toilet in the camper, and could not explain why her boyfriend did not apply for unemployment benefits when he was not working in the winter.

The testimony further reflected that the father had a household income nearly five times that of the mother, and he recently purchased a new home where the child could have his own room (*see generally Matter of Braga v Bell*, 151 AD3d 1924, 1925-1926 [4th Dept 2017]; *Matter of Thomas v Thomas*, 79 AD3d 1829, 1830 [4th Dept 2010]). The father would also be able to enroll the child in sports and other activities after relocation to Kentucky, and the child would attend the elementary school that the father's oldest daughter—the child's step-sister—currently attends. The mother and the father were the only witnesses to testify, and the court's assessment of their credibility "is entitled to great weight" (*Guillermo*, 137 AD3d at 1769). On this record, and giving due deference to the court's credibility determinations, we cannot say that the court's determination lacked a sound and substantial basis in the record.

Entered: October 3, 2025

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 23-01567

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

IN THE MATTER OF OMARIANA A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

OMAR A., RESPONDENT-APPELLANT.

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered September 28, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, revoked a suspended judgment and terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent father appeals from an order that, inter alia, revoked a suspended judgment and terminated his parental rights with respect to the subject child on the ground of permanent neglect.

We note at the outset that, although the father's notice of appeal refers to an order entered on September 14, 2023 and not the superseding order dated September 28, 2023, we exercise our discretion to deem the notice of appeal as properly taken from the superseding order (*see Matter of Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency*, 147 AD3d 1414, 1414 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]; *see generally* CPLR 5520 [c]).

Contrary to petitioner's assertion that the appeal should be dismissed on the ground that the record is incomplete, we conclude that the omission of certain exhibits from the record does not inhibit this Court's ability to render an informed decision on the issues raised by the father (*cf. Castoria v Bracker*, 236 AD3d 732, 733 [2d Dept 2025]; *McWhinney v Rockland Cider Works, LLC*, 233 AD3d 668, 669 [2d Dept 2024]; *Matter of Charlie C. [Thomas C.]*, 178 AD3d 1450, 1451

[4th Dept 2019]).

We reject the father's contention that Family Court erred in refusing to extend the suspended judgment. We conclude that the father failed to "demonstrate that exceptional circumstances required extension of the suspended judgment" (*Matter of Sky F.-M.J. [Angelica J.]*, 239 AD3d 1343, 1343 [4th Dept 2025] [internal quotation marks omitted]; *see generally* Family Ct Act § 633 [b]; *Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 428 n 3 [2012]; *Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

We further conclude that there is a sound and substantial basis in the record to support the court's determination that petitioner established by a preponderance of the evidence that the father violated the terms of the suspended judgment and that it is in the child's best interests to revoke the suspended judgment and terminate the father's parental rights (*see Matter of Dominic T.M. [Cassie M.]*, 169 AD3d 1469, 1470 [4th Dept 2019], *lv denied* 33 NY3d 902 [2019]; *Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1664 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]).

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

Entered: October 3, 2025

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 23-02022

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

BARBARA J. GAMIERRO, PLAINTIFF-APPELLANT,

V ORDER

THE LUTHERAN CHURCH MISSOURI SYNOD, ET AL.,
DEFENDANTS,
AND THE LUTHERAN CHURCH-MISSOURI SYNOD
EASTERN DISTRICT, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (VICTORIA PHILLIPS OF COUNSEL), AND CONWAY & CONWAY, CHICAGO, ILLINOIS (MEGAN FAHEY MONTY, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JULIA MARCELLE HILLIKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 27, 2023. The order granted the motion of defendant The Lutheran Church-Missouri Synod Eastern District for summary judgment dismissing the complaint and cross-claims against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 15, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

649

CA 23-02023

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

BARBARA J. GAMIERRO, PLAINTIFF-APPELLANT,

V ORDER

THE LUTHERAN CHURCH MISSOURI SYNOD,
DEFENDANT-RESPONDENT,
THE LUTHERAN CHURCH-MISSOURI SYNOD
EASTERN DISTRICT, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

PHILLIPS & PAOLICELLI, LLP, NEW YORK CITY (VICTORIA PHILLIPS OF COUNSEL), AND CONWAY & CONWAY, CHICAGO, ILLINOIS (MEGAN FAHEY MONTY, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE LLP, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 27, 2023. The order granted the motion of defendant The Lutheran Church Missouri Synod for summary judgment dismissing the complaint and cross-claims against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 15, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

650

CA 24-00803

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

IN THE MATTER OF KAI PETER SCHOENHALS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD WILLIAM MORTON, ET AL., RESPONDENTS.

SANTIAGO BURGER LLP, RESPONDENT.

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

SANTIAGO BURGER LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR RESPONDENT.

Appeal from an order and decree (one paper) of the Surrogate's Court, Ontario County (Frederick G. Reed, S.), entered October 20, 2023. The order and decree, inter alia, granted the motion of Santiago Burger LLP, seeking leave to withdraw as counsel for petitioner and to fix compensation.

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

Memorandum: Petitioner appeals from an order and decree granting the motion of Santiago Burger LLP seeking leave to withdraw as counsel for petitioner and approving and fixing attorney compensation. Petitioner contends that Surrogate's Court erred in denying his request for an adjournment to retain new counsel to oppose the motion. "A request for an adjournment is entrusted to the sound discretion of the court, whose determination will not be disturbed absent an abuse or improvident exercise of that discretion" (*Pitts v City of Buffalo*, 19 AD3d 1030, 1030 [4th Dept 2005]; *see McIntosh v Genesee Val. Laser Ctr.*, 121 AD3d 1560, 1562 [4th Dept 2014], *lv denied* 25 NY3d 911 [2015]; *see also Flowers v Harborcenter Dev., LLC*, 169 AD3d 1387, 1387 [4th Dept 2019]). We conclude that the Surrogate did not abuse his discretion in denying petitioner's request for an adjournment. In addition to Santiago Burger LLP, petitioner was represented by different counsel in California, where he lived, and he had ample opportunity before the return date of the motion to retain new counsel in New York. In addition, petitioner demonstrated during the court appearance on the return date of the motion that he was dissatisfied

with Santiago Burger LLP's representation of him, which was simply an additional reason for the Surrogate to grant the motion.

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

653

CA 24-02057

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

LAURA M. SKOTARCZAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL H. SKOTARCZAK, JR., DEFENDANT-APPELLANT.

RJ FRIEDMAN ATTORNEYS, HAMBURG (R.J. FRIEDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

REBECCA J. TALMUD, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered May 31, 2024, in a postjudgment matrimonial proceeding. The order awarded plaintiff attorney's fees in the amount of $12,000.

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

Memorandum: In this postjudgment matrimonial proceeding, defendant husband appeals from an order granting plaintiff wife's application seeking attorney's fees in part and awarding her $12,000 for those fees. Defendant contends that Supreme Court erred in making any award to plaintiff inasmuch as her application was untimely and did not comply with 22 NYCRR 202.16 (k). We reject those contentions.

Although we agree with defendant that plaintiff's application for attorney's fees was not made within the 30-day time limit established by the parties' oral stipulation, the court stated that plaintiff had been granted an extension, and defendant failed to provide any evidence that such an extension was not granted. The stipulation did not preclude extensions granted by the court and did not state that the parties were waiving their statutory rights to attorney's fees under Domestic Relations Law § 237, which provides that "[a]pplications for the award of fees and expenses may be made at any time or times prior to final judgment." " '[A] party may seek the recovery of fees under both the statute and an agreement, unless the agreement contains an express waiver of the right to apply under the statute . . . , [and] provided that the party may not recover twice for the same fees' " (*Momberger v Momberger*, 103 AD3d 971, 972 [3d Dept 2013]). We thus conclude that the court did not err in considering plaintiff's application, even if it was filed after the deadline contained in the parties' oral stipulation.

With respect to defendant's contention that the court erred in considering plaintiff's application because it failed to comport with 22 NYCRR 202.16 (k), we acknowledge that the failure to comply with that regulation permits a court "to deny the motion without prejudice to renewal upon compliance with the provisions of this section" (22 NYCRR 202.16 [k] [5] [ii]). Nevertheless, denial is not required. Even if we were to agree with defendant that plaintiff's application was defective because it was not accompanied by the requisite proof, we would simply deny the application without prejudice and vacate the award, thereby allowing plaintiff to bring another application pursuant to Domestic Relations Law § 237. In the interest of judicial economy, and seeing no basis on the merits to disturb the award (*see generally O'Brien v O'Brien*, 66 NY2d 576, 590 [1985]; *Caricati v Caricati*, 181 AD3d 1279, 1281 [4th Dept 2020]; *Terranova v Terranova*, 138 AD3d 1489, 1489-1490 [4th Dept 2016]), we affirm.

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

654

CA 24-01116

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

CAPYTAL, PLAINTIFF-RESPONDENT,

V ORDER

DJL INCORPORATED/DJL INC/DJL, INC/DJL
AND DAMIEN JOSEPH LEFORBES, DEFENDANTS-APPELLANTS.

JONATHAN E. NEUMAN, FRESH MEADOWS, FOR DEFENDANTS-APPELLANTS.

CARTER LEDYARD & MILBURN LLP, NEW YORK CITY (JACOB H. NEMON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 14, 2024. The order denied the motion of defendants to vacate a default judgment.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

655

CA 24-00979

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

ANGELA BALDO, PLAINTIFF-APPELLANT,

V ORDER

JOHN M. MCDONALD, MICHAEL D. TEAL,
AND KIMBERLY TEAL, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), dated November 30, 2023, in an action pursuant to RPAPL article 15. The order, inter alia, directed plaintiff not to interfere with defendants' use of the subject right-of-way.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes, Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

656

CA 24-01172

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

ANGELA BALDO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN M. MCDONALD, MICHAEL D. TEAL,
AND KIMBERLY TEAL, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

SCHWERZMANN & WISE, P.C., WATERTOWN (KEITH B. CAUGHLIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Lewis County (James P. McClusky, J.), entered March 7, 2024, in an action pursuant to RPAPL article 15. The judgment, inter alia, determined that defendants are entitled to free and reasonable use of a right-of-way over plaintiff's property.

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

Memorandum: In this RPAPL article 15 action, plaintiff sought a judgment that John M. McDonald, Michael D. Teal, and Kimberly Teal (defendants), among others, were required to close and lock a gate on her property, which was subject to a right-of-way allowing defendants a right of ingress and egress. Plaintiff further sought nominal damages for trespass by McDonald in bypassing the gate with snowmobiles or ATVs and a judgment enjoining McDonald and his invitees or other persons claiming under him from future trespass by circumventing the gate. McDonald asserted a counterclaim seeking to enjoin plaintiff from interfering with his right of passage to his property. Plaintiff appeals from a judgment entered upon a nonjury verdict determining that plaintiff was prohibited from locking the gate and from requiring defendants to shut and lock the gate and directing plaintiff not to interfere with defendants' use of the right-of-way.

In an appeal from a nonjury civil trial, "the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31

NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). "Nonetheless, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Unger v Ganci* [appeal No. 2], 200 AD3d 1604, 1605 [4th Dept 2021] [internal quotation marks omitted]; *see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]). We conclude that a fair interpretation of the evidence supports Supreme Court's determination.

"A right of way along a private road belonging to another person . . . is merely a right to pass with the convenience to which [the easement holders have] been accustomed" (*Lewis v Young*, 92 NY2d 443, 449 [1998] [internal quotation marks omitted]). "[I]n the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress and egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder[s'] right of passage is not impaired" (*id.*). The landowner may alter the right-of-way "so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder[s], and does not significantly lessen the utility of the right of way" (*id.* at 452; *see Shelmerdine v Myers*, 143 AD3d 1200, 1201 [3d Dept 2016], *lv denied* 29 NY3d 920 [2017], *rearg dismissed* 30 NY3d 1050 [2018]).

Plaintiff's deed provided that her property was subject to the "rights of others to use the woods road running through the said parcel." Likewise, the easements granted to defendants gave them the right to use the roadway for access to and egress from their properties. The relevant deeds did not specifically set forth the width or boundaries of the easement. The evidence at trial established that it was one of defendants' predecessors, not plaintiff's predecessor, who constructed the gate in the late 1980s and distributed keys to the gate to the other easement holders and, eventually, to plaintiff's predecessor. The evidence at trial further established that, from the time the gate was erected, it was common practice for the easement holders to drive around the locked gate with smaller vehicles, such as snowmobiles and ATVs, and to sometimes leave the gate open or unlocked to allow guests access to defendants' properties.

Once plaintiff purchased her property, she sought to alter the easement by requiring defendants to close the gate and lock it at all times and by prohibiting defendants from circumventing the gate with small vehicles. Plaintiff, however, did not demonstrate a need to close and lock the gate for security (*cf. Mester v Roman*, 25 AD3d 907, 908 [3d Dept 2006]; *see generally Shelmerdine*, 143 AD3d at 1201) and did not demonstrate that defendants exceeded the scope of their easements by bypassing the gate on foot and with small vehicles when the gate was locked. Conversely, defendants established that locking the gate at all times and not allowing them to go around the gate with small vehicles would be burdensome and not in accordance with "the convenience to which [they have] been accustomed" (*Lewis*, 92 NY2d at 449 [internal quotation marks omitted]; *see Shelmerdine*, 143 AD3d at

1201; *Marek v Woodcock*, 277 AD2d 864, 866 [3d Dept 2000], *lv dismissed* 96 NY2d 792 [2001]), as shown by "the conduct of the parties both prior to and subsequent to the grant" of the easement (*Lewis*, 92 NY2d at 454).

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

657

CA 24-00360

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

HSBC BANK USA, NATIONAL ASSOCIATION AS
INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS
OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-4,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PETER D. DUBYNA, JR., ALSO KNOWN AS
PETER DUBYNA, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

DR. RASHAD KHAN, THIRD-PARTY INTERVENOR.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF L. CARROLL OF COUNSEL), FOR DEFENDANT-APPELLANT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (JASON J. OLIVERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SMITH DOMINELLI & GUETTI, LLC, ALBANY (JAY A. SMITH OF COUNSEL), FOR THIRD-PARTY INTERVENOR.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered January 17, 2024, in a mortgage foreclosure action. The order, inter alia, granted the application of plaintiff for a judgment of foreclosure and sale.

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

Memorandum: Peter D. Dubyna, Jr., also known as Peter Dubyna, Jr. (defendant) appeals from an order that, inter alia, granted plaintiff's motion for a judgment of foreclosure and sale (foreclosure motion); denied defendant's amended order to show cause seeking to, among other things, vacate a judgment of foreclosure; and ratified and validated the sale of defendant's property to plaintiff. We affirm.

Defendant contends that he did not receive proper notice of the foreclosure motion, that the foreclosure motion was a nullity, and that the ensuing judgment of foreclosure and sale was void as a result. We reject those contentions. Supreme Court agreed that defendant did not receive proper notice of the foreclosure motion and thus issued an order granting defendant the opportunity to respond to

that motion on the merits. Inasmuch as "the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just" (CPLR 2001), the court was well within its authority to correct any error caused as a result of the incorrect return date upon just terms and to permit defendant an opportunity to address the merits of the foreclosure motion. On the merits, we conclude that the court properly granted the foreclosure motion pursuant to RPAPL 1351. Defendant's contentions regarding the propriety of an order granting plaintiff's motion for, inter alia, summary judgment on the complaint and for the appointment of a referee, which was entered upon defendant's default, are not properly before us (*see generally Matter of Patience T. [Christopher T.]*, 173 AD3d 1761, 1762 [4th Dept 2019]).

We have reviewed defendant's remaining contentions and conclude that none warrant modification or reversal of the order on appeal.

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

658

CA 24-00362

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

HBSC BANK USA, NATIONAL ASSOCIATION AS
INDENTURE TRUSTEE FOR THE REGISTERED NOTEHOLDERS
OF RENAISSANCE HOME EQUITY LOAN TRUST 2006-4,
PLAINTIFF-RESPONDENT,

V ORDER

PETER D. DUBYNA, JR., ALSO KNOWN AS
PETER DUBYNA, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

DR. RASHAD KHAN, THIRD-PARTY INTERVENOR.

WOODRUFF LEE CARROLL P.C., SYRACUSE (WOODRUFF L. CARROLL OF COUNSEL), FOR DEFENDANT-APPELLANT.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (JASON J. OLIVERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SMITH DOMINELLI & GUETTI, LLC, ALBANY (JAY A. SMITH OF COUNSEL), FOR THIRD-PARTY INTERVENOR.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered January 17, 2024, in a mortgage foreclosure action. The order, inter alia, upheld and validated a foreclosure and sale held on June 6, 2022.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

660

KA 22-00360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HECTOR ROJAS-APONTE, DEFENDANT-APPELLANT.

IAN A. RENNIE, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered January 28, 2022. The appeal was held by this Court by order entered February 2, 2024, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (224 AD3d 1264 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of predatory sexual assault against a child (Penal Law former § 130.96). When the appeal was previously before us, we rejected defendant's other contentions and also considered defendant's contention that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 30.30 (*People v Rojas-Aponte*, 224 AD3d 1264, 1264-1266 [4th Dept 2024]). We noted that, in support of the motion, defendant had asserted that the People's failure to turn over disciplinary records concerning the law enforcement witness who later testified at trial rendered the People's certificate of compliance invalid (*see* CPL 245.20 [former (1) (k) (iv)]; *see generally* CPL 245.50 [former (1)]) and that, therefore, the People's statement of readiness was also invalid (*see* CPL 245.50 [former (3)]; *Rojas-Aponte*, 224 AD3d at 1265). We further noted, however, that "[b]efore the People filed a response to the motion, the court issued a letter decision in which it denied the motion, concluding that 'the People's method of reviewing [law enforcement] disciplinary records (i.e., having a group of assistant district attorneys review all records prior to dissemination) is not in any way improper,' and thus that there was no basis for concluding that the People failed to comply with their discovery obligations or that the certificate of compliance was invalid" (*Rojas-Aponte*, 224 AD3d at 1265). We agreed with defendant that the court erred in denying his

motion on the ground that the People's method of review of law enforcement disciplinary records fulfilled their obligation under CPL 245.20 former (1) (k) (iv) (*Rojas-Aponte*, 224 AD3d at 1265-1266). In particular, we determined that "[t]he statute does not authorize the use of a screening panel to decide what evidence and information should be disclosed, or to otherwise act as a substitute for the disclosure of the required material" (*id.* at 1266).

Nonetheless, inasmuch as the court had not allowed the People an opportunity to respond to defendant's motion and had not addressed the issue whether the People complied with their obligations under CPL 245.20 former (1) (k) (iv) by producing the evidence and information required under that statute, including with respect to any law enforcement disciplinary records constituting impeachment material, we held the case, reserved decision, and remitted the matter to County Court "to afford the People an opportunity to file a response to the motion, and to then determine the motion by ruling on the abovementioned outstanding issue . . . , including whether the prosecution . . . exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery" (*Rojas-Aponte*, 224 AD3d at 1266 [internal quotation marks omitted]; *see People v Bay*, 41 NY3d 200, 211 [2023]). After appropriately adhering to that directive, the court (Cuffy, J.) denied the motion upon determining that, although the People discovered for the first time following remittal that the law enforcement witness had a disciplinary record arising from a single, decades-old incident in which she made a physical arrest that was later deemed without probable cause, the People had nonetheless exercised due diligence and made reasonable inquiries to ascertain the existence of that material prior to filing the certificate of compliance. We now affirm.

Under the terms of the statute in effect at the time of defendant's motion, "the key question in determining if a proper [certificate of compliance] has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211, quoting CPL 245.50 [former (1)]; *see also* CPL 245.20 [former (2)]; 245.50 [former (3)]). Due diligence "is a familiar and flexible standard that requires the People 'to make reasonable efforts' to comply with statutory directives" (*Bay*, 41 NY3d at 211). "Reasonableness, then, is the touchstone" (*id.* at 211-212). "An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" (*id.* at 212). Although "[t]here is no rule of 'strict liability' " and thus "the statute does not require or anticipate a 'perfect prosecutor[,]' . . . the plain terms of the statute make clear that while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.*). In assessing due diligence, "courts should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing

material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" (*id.*).

Here, even assuming, arguendo, that the law enforcement witness's disciplinary records were subject to automatic discovery as having met both the relevancy prong and the possessory prong of the statute (*see* CPL 245.20 [former (1)]; *see generally People v Walker*, 232 AD3d 1214, 1215-1216 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]), we conclude, upon our review of the relevant factors, that the People met their burden of establishing that they had "exercise[d] due diligence and made reasonable inquiries prior to filing the . . . [certificate of compliance] despite a . . . missing disclosure" (*Bay*, 41 NY3d at 213; *see People v Odusanya*, 235 AD3d 1299, 1301-1302 [4th Dept 2025], *lv denied* 43 NY3d 965 [2025]; *People v Lawrence*, 231 AD3d 1497, 1500-1501 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *People v Watkins*, 224 AD3d 1342, 1344 [4th Dept 2024], *lv denied* 41 NY3d 986 [2024]). The record establishes that, in this somewhat complex case involving sexual abuse of multiple child victims, the disclosure and investigation of which were delayed, the People made reasonable efforts to comply with the statutory requirements and disclosed to defendant voluminous discovery material (*see Odusanya*, 235 AD3d at 1301; *Lawrence*, 231 AD3d at 1500). Although the People discovered for the first time following our remittal that the law enforcement witness had a disciplinary record arising from a prior incident, the People adequately explained that they had followed their policy in place at the time they filed the certificate of compliance of seeking such substantiated disciplinary records from law enforcement agencies and that the relevant local police department, despite the People's efforts, had failed to provide any disciplinary record for the law enforcement witness (*see Odusanya*, 235 AD3d at 1301-1302; *Watkins*, 224 AD3d at 1344; *see generally Bay*, 41 NY3d at 212). Under the circumstances of this case, we conclude that "it would not have been particularly obvious to the People that [any disciplinary record] was missing" (*Odusanya*, 235 AD3d at 1302; *see Lawrence*, 231 AD3d at 1500) and that "it was reasonable for the [People] to have concluded that no [disciplinary record for the law enforcement witness] existed at the time of the filing of the [certificate of compliance]" (*Watkins*, 224 AD3d at 1344). We therefore conclude that the court did not err in denying defendant's motion to dismiss the indictment pursuant to CPL 30.30.

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

661

KA 23-01686

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON S. HARRISON, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Arthur B. Williams, J.), rendered September 12, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [3]). We affirm. Assuming, arguendo, that defendant's waiver of the right to appeal is invalid or otherwise does not encompass his challenge to the severity of the sentence (*see People v Odle*, 233 AD3d 1502, 1503 [4th Dept 2024], *lv denied* 43 NY3d 965 [2025]; *People v Ramos-Perez*, 188 AD3d 1741, 1742 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]; *People v Nicpon*, 170 AD3d 1501, 1501 [4th Dept 2019]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

662

KA 21-01461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT I. SAWYER, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (MORGAN R. MAYER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (David A. Renzi, J.), rendered August 23, 2021. The judgment convicted defendant upon a jury verdict of burglary in the first degree, attempted robbery in the first degree, conspiracy in the fourth degree, criminal possession of a weapon in the second degree and menacing 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 burglary in the first degree (Penal Law § 140.30 [4]), attempted robbery in the first degree (§§ 110.00, 160.15 [4]), conspiracy in the fourth degree (§ 105.10 [1]), criminal possession of a weapon in the second degree (§ 265.03 [1] [b]) and menacing in the second degree (§ 120.14 [1]). We affirm.

Defendant's contention that County Court erred in allowing a witness to testify that defendant had allegedly committed uncharged crimes outside the scope of the *Molineux* ruling and that he had been incarcerated with the victim is not preserved for our review inasmuch as defendant did not object at the time of that testimony (*see People v Green*, 196 AD3d 1148, 1151 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021], *reconsideration denied* 37 NY3d 1161 [2022]).

Defendant's contention that the evidence is legally insufficient to support his conviction because there was insufficient corroboration of the accomplice testimony is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not "specifically directed at the ground[ ] advanced on appeal" (*People v Moore*, 232 AD3d 1299, 1300 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *see People v Gray*, 86 NY2d 10, 19 [1995]). Defendant's contention that the People failed to present legally sufficient

evidence of defendant's liability for criminal possession of a weapon because there was no evidence that he possessed the gun is similarly unpreserved for our review (*see Gray*, 86 NY2d at 19). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*Moore*, 232 AD3d at 1300 [internal quotation marks omitted]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

664

KA 24-00094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL TILLMAN, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 2, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because County Court coerced him into accepting the plea. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve his contention for our review (*see People v Jackson*, 233 AD3d 1520, 1520 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *People v Racona*, 227 AD3d 1544, 1544-1545 [4th Dept 2024], *lv denied* 42 NY3d 1081 [2025]), and we decline to exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that the court erred in refusing to suppress tangible evidence obtained pursuant to a search warrant. Inasmuch as defendant did not challenge the warrant in the suppression court on the specific grounds raised on appeal, his contention is not preserved for our review (*see People v Socciarelli*, 203 AD3d 1556, 1558 [4th Dept 2022], *lv denied* 38 NY3d 1035 [2022]; *People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014]). We

decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

668

CAF 24-00131

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

IN THE MATTER OF JAMAR T. ZWIEFACH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEBORAH HEITZMANN, RESPONDENT-RESPONDENT.

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

KATHRYN M. FESTINE, UTICA, FOR RESPONDENT-RESPONDENT.

A.J. BOSMAN, BLOSSVALE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered November 24, 2023, in proceedings pursuant to Family Court Act articles 4 and 6. The order, inter alia, modified the parenting time of petitioner.

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

Memorandum: Petitioner father commenced these proceedings pursuant to Family Court Act articles 4 and 6 seeking downward modification of his child support obligations and alleging that respondent, who is the maternal grandmother and sole custodian of the subject children, violated the parties' prior order of custody and visitation by interfering with his visitation rights. The father now appeals from an order that, inter alia, dismissed the frustrated visitation defense that he raised in his downward modification petition, denied his violation petition, and modified the visitation provisions of the parties' prior order of custody and visitation. We affirm.

The father contends that Family Court erred in modifying the visitation provisions of the prior order because neither petition sought that relief. We reject that contention. The court may modify a prior order of custody or visitation "[e]ven without an application for [that relief]" so long as the parties were " 'adequately apprised prior to the hearing that custody was at issue, and . . . had sufficient opportunity to present any testimony and evidence relevant to the issue' " (*Matter of Warren v Miller*, 132 AD3d 1352, 1353 [4th Dept 2015]; *see Matter of Heintz v Heintz*, 28 AD3d 1154, 1155 [4th Dept 2006]). "Once [the court] determine[s] that [the prior order is] not feasible, it [becomes] incumbent upon [the court] to determine

a[n] . . . arrangement based upon the best interests of the [children] despite the absence of a petition definitively seeking [that relief]" (*Warren*, 132 AD3d at 1353 [internal quotation marks omitted]; *see generally* CPLR 3017 [a]). Here, although neither of the father's petitions expressly sought modification of the prior visitation schedule, the father expressly requested, both before and at the hearing on those petitions, that the court modify the prior visitation schedule inasmuch as it was unworkable due to, among other things, his employment schedule. Indeed, the hearing and the father's testimony focused on the practicality of the prior visitation schedule, the quality of the father's recent visits with the children, the reason for the father's failure to exercise visitation pursuant to the prior order, and how future visits might be conducted. We therefore conclude that the father himself "demonstrated his understanding of the court's intent to determine the issue of [visitation] by . . . presenting testimony . . . in support of his request therefor and . . . specifically requesting" that the existing schedule be modified, permitting the court to reach the issue absent a specific request in the father's petitions (*Warren*, 132 AD3d at 1353-1354).

Contrary to the father's further contention, the court did not err in dismissing his violation petition or in denying that part of his modification petition seeking a reduction of child support payments based on respondent's alleged frustration of his visitation with the children. Both petitions alleged that respondent interfered with the father's ability to exercise visitation. With respect to the issue of child support, a noncustodial parent may seek the suspension of that parent's child support obligation on the ground that the custodial party "has unjustifiably frustrated the noncustodial parent's right of reasonable access" (*Matter of Colicci v Ruhm*, 20 AD3d 891, 892 [4th Dept 2005] [internal quotation marks omitted]). The noncustodial parent must establish "deliberate frustration" or "active interference" by the custodial party (*Ledgin v Ledgin*, 36 AD3d 669, 670 [2d Dept 2007] [internal quotation marks omitted]). The father failed to make that showing; indeed, the record reflects that his failure to fully exercise his visitation was due to his own conduct, not that of respondent (*see Matter of Curley v Klausen*, 110 AD3d 1156, 1157 [3d Dept 2013]; *cf. Colicci*, 20 AD3d at 892; *see generally Matter of Lew v Lew*, 214 AD3d 732, 734 [2d Dept 2023]). For the same reasons, we conclude that the father "failed to establish by clear and convincing evidence that [respondent] willfully violated the terms of the custody order with respect to . . . visitation" (*Matter of Baker v Mackey*, 196 AD3d 1161, 1162 [4th Dept 2021] [internal quotation marks omitted]).

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

669

CAF 23-01993

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

IN THE MATTER OF PARIS M. AND PATIENCE J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DARRIN S., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), dated October 23, 2023, in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had abused the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals from an order of fact-finding determining, following a hearing, that he abused his girlfriend's child and derivatively abused the child's sibling. Respondent contends that petitioner failed to establish by a preponderance of the evidence that the alleged abuse occurred inasmuch as the out-of-court allegations that he sexually abused the child were not sufficiently corroborated. Contrary to respondent's contention, Family Court did not err in determining that the child's out-of-court statements alleging that respondent sexually abused her on multiple occasions "were sufficiently corroborated by other evidence tending to support their reliability" (*Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1435 [4th Dept 2011]; *see* Family Ct Act § 1046 [a] [vi]). "Courts have considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse . . . , and [t]he legislature has expressed a clear intent that a relatively low degree of corroborative evidence is sufficient in" child protective proceedings (*Matter of Skyler D. [Joseph D.]*, 185 AD3d 1515, 1516 [4th Dept 2020] [internal quotation marks omitted]). Here, the sibling's accounts of the preferential treatment respondent provided to the child and the reason why the child and the sibling ran away from their mother's home "[gave] sufficient indicia of reliability to [the child's] out-of-court statements" (*Matter of*

Janiece B. [James D.B.], 93 AD3d 1335, 1335 [4th Dept 2012] [internal quotation marks omitted]; *see Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987], *rearg denied* 71 NY2d 890 [1988]). The allegations of sexual abuse were further corroborated by a prior determination that respondent was a level two sex offender (*see Matter of Keniya G. [Avery P.]*, 144 AD3d 532, 533 [1st Dept 2016]). Moreover, the court had the opportunity to assess the child's credibility inasmuch as the court admitted in evidence a recording of the child's forensic interview, in which she described the incidents of abuse (*see Matter of Kristina S. [Michael S.]*, 160 AD3d 1057, 1058 [3d Dept 2018]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

671

CAF 24-00529

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

IN THE MATTER OF TRACY L. MOSES,
PETITIONER-RESPONDENT,

V ORDER

INDIA S. MCFARLAND AND MARKEEF ROYAL,
RESPONDENTS-APPELLANTS.

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT INDIA S. MCFARLAND.

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR RESPONDENT-APPELLANT MARKEEF ROYAL.

KELLY M. CICCONE, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Monroe County (Alecia J. Mazzo, J.), dated September 26, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal custody and primary residence of the subject children.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

672

CA 24-01216

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

KEY EQUITY OF NEW YORK, INC., PLAINTIFF-RESPONDENT,

V ORDER

AHMED AZZAM, AS TRUSTEE OF THE AZZAM FAMILY REVOCABLE TRUST, DEFENDANT-APPELLANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered July 24, 2024, in an action arising from a lease of real property. The judgment awarded plaintiff $706 plus interest.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

673

TP 25-00359

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

IN THE MATTER OF CARLOS WHITE, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald G. O'Geen, A.J.], entered February 25, 2025) to review a determination of respondent. The determination withheld petitioner's good behavior allowance.

It is hereby ORDERED that said amended petition is unanimously dismissed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination, upon the May 2024 recommendation of the Time Allowance Committee (TAC), to withhold 1 year, 8 months, and 20 days of petitioner's good behavior allowance based on his failure to complete certain treatment requirements. Even assuming, arguendo, that the amended petition raised a substantial evidence issue and thus that the proceeding was properly transferred to this Court (*see generally Matter of Alvarez v Fischer*, 94 AD3d 1404, 1405 [4th Dept 2012]), we conclude that the amended petition must be dismissed.

Subsequent to the determination challenged by petitioner, the TAC recommended, and respondent affirmed, that all but 5 months and 9 days of petitioner's good behavior allowance should be restored to him based on his compliance with the treatment requirements. That subsequent determination renders petitioner's challenge to the earlier determination moot (*see generally Matter of Gonzalez v Department of Corr. & Community Supervision*, 107 AD3d 1283, 1283 [3d Dept 2013];

Matter of Staples v Goord, 263 AD2d 943, 943-944 [3d Dept 1999], *lv denied* 94 NY2d 755 [1999], *rearg denied* 94 NY2d 900 [2000]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

674

CA 24-01679

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

SIMON SZLAPAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE L.C. WHITFORD, CO., INC., DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE LAW OFFICE OF MICHAEL JAMES PRISCO, MASSAPEQUA (MICHAEL J. PRISCO OF COUNSEL), AND NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, AKRON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered September 26, 2024, in a Labor Law and common-law negligence action. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries that he sustained while working on a bridge replacement project. Defendant, the project's general contractor, subcontracted with plaintiff's employer to drill micropiles to support the bridge's foundation. Plaintiff was assisting two coworkers when he was struck by a breakout wrench during the drilling process.

Defendant moved for summary judgment dismissing the complaint. Supreme Court denied the motion with respect to the Labor Law § 200 and common-law negligence causes of action except insofar as those causes of action were based on alleged OSHA violations or an inherent defect theory of liability based on actual or constructive notice. Defendant now appeals from the order to the extent that it denied the motion, and we reverse the order insofar as appealed from.

Preliminarily, we note that plaintiff's assertion that there is a question of fact whether there was a dangerous condition at the worksite that defendant had actual or constructive notice of is not properly before this Court. Claims for worksite injuries alleging liability under Labor Law § 200 and common-law negligence " 'fall into two broad categories: namely, those where workers are injured as a

result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed' " (*Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014]). Inasmuch as plaintiff did not cross-appeal from that part of the order granting the motion with respect to the Labor Law § 200 and common-law negligence causes of action insofar as they alleged dangerous or defective premises conditions at the worksite, plaintiff's contention is beyond our "scope of review . . . [, which] is generally limited to those parts of the [order] that have been appealed and that aggrieve the appealing party" (*Hecht v City of New York*, 60 NY2d 57, 61 [1983]; *see Barker v Gervera*, 236 AD3d 1318, 1326 [4th Dept 2025]).

We agree with defendant that the court erred in denying defendant's motion with respect to the portions of plaintiff's Labor Law § 200 and common-law negligence causes of action alleging negligence in the manner in which work was performed. It is well settled that " '[w]here the alleged defect or dangerous condition arises from the contractor's methods and the [defendant] exercises no supervisory control over the operation, no liability attaches to the [defendant] under the common law or under Labor Law § 200' " (*Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271-1272 [4th Dept 2014], quoting *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *D'Antuono v Goodyear Tire & Rubber Co. Chem. Div.*, 231 AD2d 955, 955 [4th Dept 1996]).

Here, defendant established as a matter of law that it " 'did not *actually* direct or control' " the work of drilling the micropiles (*Abreu v Frocione Props., LLC*, 199 AD3d 1452, 1453 [4th Dept 2021]). Contrary to plaintiff's assertion, " '[t]here is no direction or control if the [general contractor merely] informs the worker what work should be performed . . . [;] there is direction and control [only where the general contractor] specifies how that work should be performed' " (*Byrd v Roneker*, 90 AD3d 1648, 1650 [4th Dept 2011]). "Similarly, 'a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons' " (*Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1476 [4th Dept 2011], *lv dismissed in part & denied in part* 17 NY3d 843 [2011]; *see McCune v Black Riv. Constructors*, 225 AD2d 1078, 1079 [4th Dept 1996]), or even the " 'monitoring and oversight of the timing and quality of the work' " (*Matter of Mitchell v NRG Energy, Inc.*, 125 AD3d 1542, 1544 [4th Dept 2015]; *see Enderlin v Herbert Indus. Insulation*, 224 AD2d 1020, 1020-1021 [4th Dept 1996]) are insufficient to raise a triable issue of fact whether defendant exercised direction and control over the manner of plaintiff's work.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

677

CA 24-00380

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

CHANTEL BROOKS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF X.H., DECEASED, AND ON BEHALF OF DARRELL L. HARRIS, PERSONALLY, PLAINTIFF-RESPONDENT,

V ORDER

MOHAWK VALLEY HEALTH SYSTEM, FAXTON-ST. LUKE'S HOSPITAL, DAVID MCMURRAY, D.O., WOMEN'S AND CHILDREN'S HEALTH CENTER/ST. ELIZABETH'S HOSPITAL, MARK BRISTOL, M.D., BENJAMIN FLINN, M.D., PHYU THWE, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (COURTNEY L. ALPERT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT F. JULIAN, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered January 26, 2024, in a medical malpractice action. The order, insofar as appealed from, denied those parts of the motion of defendants seeking to dismiss the complaint against defendants-appellants.

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: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

678

CA 24-01199

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

JMH 200 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER JAGIELLO, DEFENDANT,
PHYLLIS FATIMA MORRELL, BUFFALO BOARD OF
EDUCATION, BUFFALO CITY SCHOOL DISTRICT AND
LAFAYETTE INTERNATIONAL HIGH SCHOOL, FORMERLY
KNOWN AS LAFAYETTE HIGH SCHOOL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY B. SCARPINE, GENERAL COUNSEL, BUFFALO CITY SCHOOL DISTRICT, BUFFALO (SHAUNA L. STROM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered July 26, 2024, in a personal injury action. The order denied the motion of plaintiff to resettle and clarify a prior decision of the court.

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

Same memorandum as in *JMH 200 Doe v Jagiello* ([appeal No. 2] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

679

CA 24-01202

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

JMH 200 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER JAGIELLO, DEFENDANT,
PHYLLIS FATIMA MORRELL, BUFFALO BOARD OF EDUCATION, BUFFALO CITY SCHOOL DISTRICT AND LAFAYETTE INTERNATIONAL HIGH SCHOOL, FORMERLY KNOWN AS LAFAYETTE HIGH SCHOOL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY B. SCARPINE, GENERAL COUNSEL, BUFFALO CITY SCHOOL DISTRICT, BUFFALO (SHAUNA L. STROM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered July 24, 2024, in a personal injury action. The order, insofar as appealed from, granted in part the motion of defendants Phyllis Fatima Morrell, Buffalo Board of Education, Buffalo City School District and Lafayette International High School, formerly known as Lafayette High School, for summary judgment.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g), alleging that she was sexually abused by a physical education teacher, defendant Christopher Jagiello, during her attendance at defendant Lafayette International High School, formerly known as Lafayette High School (school), in defendant Buffalo City School District (district), while defendant Phyllis Fatima Morrell was its principal. As against the school, the district, Morrell, and defendant Buffalo Board of Education (collectively, defendants), plaintiff alleged, inter alia, that defendants had fraudulently concealed the abuse, that they had negligently hired, retained, and supervised Jagiello, and that they had negligently inflicted emotional distress upon her. Defendants moved for summary judgment dismissing plaintiff's complaint against them. By order entered July 24, 2024, Supreme Court granted defendants' motion in part; specifically, the court dismissed plaintiff's claims of negligent hiring and fraudulent concealment,

denied the motion with respect to plaintiff's claims of negligent retention and supervision, and dismissed plaintiff's claim of negligent infliction of emotional distress to the extent that it was pleaded as a separate cause of action, thereby permitting plaintiff to seek damages from defendants for emotional distress as related to her surviving claims of negligence. In appeal No. 1, plaintiff appeals from an order denying her motion to resettle and clarify the court's oral decision, made prior to the July 24, 2024 order. In appeal No. 2, plaintiff appeals from the July 24, 2024 order.

As an initial matter, inasmuch as the order in appeal No. 1 denied a motion to clarify the court's oral decision and involves the court's power to "cure mistakes, defects and irregularities that do not affect substantial rights of [the] parties" (*Matter of Torpey v Town of Colonie, N.Y.*, 107 AD3d 1124, 1126 [3d Dept 2013] [internal quotation marks omitted]), we conclude that no appeal lies therefrom and that appeal No. 1 must be dismissed (*see generally Wilmot v Kirik*, 237 AD3d 1535, 1535 [4th Dept 2025]).

In appeal No. 2, contrary to plaintiff's contention, the court did not err by purportedly dismissing a cause of action related to the concept of in loco parentis (*see generally Williams v Weatherstone*, 23 NY3d 384, 403 [2014]). The order in appeal No. 2 did not state that it was, in fact, dismissing such a cause of action. Instead, as the court correctly explained at oral argument, in loco parentis describes a duty of care applied in specific circumstances to those who "intend[ ] to assume the responsibility to support and care for [a] child" (*Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *see generally BL Doe 2 v Fleming*, 229 AD3d 1086, 1089 [4th Dept 2024]). Thus, although the concept may be applicable to plaintiff's claims for negligent retention and supervision, it is not a distinct cause of action.

We likewise reject plaintiff's contention that the court erred in dismissing her claim regarding fraudulent concealment of the abuse. Insofar as that claim related to plaintiff's allegations that defendants negligently retained and supervised Jagiello, we note that, as set forth above, the court denied defendants' motion with respect to the claims of negligent retention and supervision, and we conclude that any overlapping claim of fraudulent concealment was properly dismissed as duplicative (*see PB-20 Doe v St. Nicodemus Lutheran Church*, 228 AD3d 1233, 1238-1239 [4th Dept 2024]). To the extent that the claim regarding fraudulent concealment instead related to an allegation that defendants had actual knowledge of the abuse and took action to ensure it was not discovered (*see generally Zumpano v Quinn*, 6 NY3d 666, 675 [2006]), or that defendants knowingly misrepresented or omitted certain facts (*see generally PB-20 Doe*, 228 AD3d at 1238), we conclude that defendants met their initial burden on their motion, and that plaintiff failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff, during oral argument on the motion underlying the order in appeal No. 2, did not oppose the court's treatment of any

claim of negligent infliction of emotional distress as duplicative of her negligence claims, and instead as a measure of damages thereon. Under these circumstances, plaintiff failed to preserve for our review her contention that the court erred in dismissing the claim of negligent infliction of emotional distress to the extent that it was asserted as a separate cause of action (*see Ostrander v Mullen*, 233 AD3d 1484, 1486 [4th Dept 2024]).

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

680

CA 24-00869

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

IN THE MATTER OF THE CANANDAIGUA NATIONAL
BANK AND TRUST COMPANY, AS SUCCESSOR CO-TRUSTEE
OF RESIDUARY TRUST UNDER WILL OF ALLEN EBER
DATED OCTOBER 27, 1969, PETITIONER-RESPONDENT;

DAVID EBER, APPELLANT; MEMORANDUM AND ORDER

WENDY EBER, EBER BROS. & CO., INC., DANIEL KLEEBERG,
AUDREY HAYS AND LISA STEIN, RESPONDENTS.

HODGSON RUSS LLP, ROCHESTER (ERIC J. WARD OF COUNSEL), FOR APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

NIXON PEABODY LLP, ROCHESTER (RICHARD A. MCGUIRK OF COUNSEL), FOR RESPONDENT WENDY EBER.

BROOK & ASSOCIATES, PLLC, NEW YORK CITY (BRIAN C. BROOK OF COUNSEL), FOR RESPONDENTS EBER BROS. & CO., INC., DANIEL KLEEBERG, AUDREY HAYS AND LISA STEIN.

Appeal from an order of the Surrogate's Court, Monroe County (Michael L. Dollinger, A.S.), entered April 24, 2024, in a proceeding to terminate a trust. The order denied the motion of David Eber to intervene and to vacate a prior order.

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

Memorandum: Petitioner, Canandaigua National Bank and Trust Company (CNB), as the successor co-trustee of the residuary trust under the will of Allen Eber (decedent), commenced this accounting proceeding pursuant to Surrogate's Court Procedure Act article 22 in March 2017 to terminate the trust. In June 2017, Surrogate's Court issued a final order of judicial settlement on the account discharging the trustees and terminating the trust (2017 Order). Appellant, David Eber (David), now appeals from a subsequent 2024 order denying his motion to intervene and to vacate the 2017 Order. We affirm.

The subject trust was created upon decedent's death in 1970 to hold and administer the controlling stock of respondent Eber Bros. & Co., Inc. (Eber Bros.), including its subsidiaries (collectively, Eber Bros. entities), for the benefit of decedent's three children—Sally,

Mildred and Lester. By its terms, the trust would terminate upon the death of all three children or the sale of substantially all of its stock. Mildred passed away in 1973, upon which her share of the trust passed automatically to her daughter, respondent Audrey Hays (Audrey). Sally passed away in 2014, upon which her share of the trust passed automatically to her two children, respondents Daniel Kleeberg (Daniel) and Lisa Stein (Lisa).

Through a series of transactions beginning in 2010, Lester and his daughter, respondent Wendy Eber (Wendy), improperly transferred substantially all of the trust's assets to separate entities owned or controlled by Lester. David, Lester's son, was not involved in those transactions. In December 2016, Daniel, Lisa and Audrey commenced a federal action in the Southern District of New York against, inter alia, Lester, Wendy and Eber Bros., seeking damages and equitable relief for Lester's alleged fraudulent self-dealing.

In February 2017, CNB commenced the instant proceeding for a final accounting terminating the trust on the basis that the Eber Bros. entities stock had only nominal value. The proceeding named the trust's four income beneficiaries—Lester, Daniel, Lisa and Audrey, as well as CNB's co-trustee—as respondents, but did not name the trust's contingent income beneficiaries, Wendy and David. There were no objections to the special proceeding, and on June 1, 2017, the Surrogate issued the 2017 Order terminating the trust.

Lester passed away in April 2020. The federal action continued and, on March 25, 2021, Daniel, Lisa and Audrey were awarded partial summary judgment on liability against Lester's estate. Following the damages trial, the Federal District Court issued a final judgment on April 7, 2023 that, inter alia: voided the transactions Lester and Wendy had undertaken with respect to the Eber Bros. entities; directed CNB to distribute one third of the Eber Bros. entities stock to Audrey, one third to Lester's estate, one sixth to Daniel and one sixth to Lisa; directed Lester's estate to repay $15,409,197.62 to the Eber Bros. entities; and directed Wendy to repay $3,864,143.11 to the Eber Bros. entities. Daniel then took over the operations of the active Eber Bros. subsidiary, and Wendy and Lester's estate settled the judgment against them by, inter alia, transferring the Eber Bros. entities stock that CNB was directed to distribute to Lester's estate to Audrey, Daniel and Lisa.

On December 1, 2023, David filed a motion by order to show cause in this proceeding seeking, inter alia, to intervene as a necessary party pursuant to CPLR 1012 and, thereafter, to vacate the 2017 Order pursuant to CPLR 5015 (a) (3) or (4). Daniel, Lisa, Audrey, CNB and Wendy opposed the motion on, inter alia, the ground that the motion was not timely. As noted, the Surrogate denied the motion, and David now appeals. We affirm.

In order for a nonparty to be entitled to relief under a motion to vacate an order or judgment issued in an action pursuant to CPLR 5015 (a) (3) or (4), it must first be granted leave to intervene in that action, either as of right pursuant to CPLR 1012, or by

permission pursuant to CPLR 1013 (*see generally U.S. Bank N.A. v Tait*, 234 AD3d 889, 890 [2d Dept 2025]; *Bank of Am., N.A. v Moore*, 224 AD3d 727, 728 [2d Dept 2024]; *NYCTL 1996-1 Trust v King*, 304 AD2d 629, 631 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003]). "Intervention under CPLR 1012 and 1013 requires a timely motion" (*T & V Constr. Corp. v Pratti*, 72 AD3d 1065, 1066 [2d Dept 2010]; *see* CPLR 1012 [a]; 1013; *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]), and the determination whether the motion is timely lies within the discretion of the trial court (*see Resetarits Constr. Corp. v Norfolk S. Ry. Co.*, 229 AD3d 1362, 1363 [4th Dept 2024]; *Poblocki v Todoro*, 55 AD3d 1346, 1347 [4th Dept 2008]). "In examining the timeliness of [a] motion [to intervene], courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party" (*Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201; *see Jones v Town of Carroll*, 158 AD3d 1325, 1328 [4th Dept 2018], *lv dismissed* 31 NY3d 1064 [2018]). "Another factor is the extent of the time lag between the making of the motion and the proposed intervenor's acquisition of knowledge of the circumstances upon which the motion for leave to intervene is based" (*U.S. Bank, N.A. v Tsimbalisty*, 181 AD3d 749, 750 [2d Dept 2020]; *see Genzler v JPMorgan Chase Bank, N.A.*, 228 AD3d 838, 840 [2d Dept 2024], *lv dismissed in part & denied in part* 43 NY3d 984 [2025]).

Here, David was informed of the 2017 Order by counsel for Daniel, Lisa and Audrey no later than August 2020, and he was further aware that significant assets from the trust had been improperly transferred by Lester and Wendy no later than March 2021, when the Federal District Court granted that part of the motion of Daniel, Lisa and Audrey for partial summary judgment on liability against Lester's estate. Nonetheless, David did not seek to intervene in this proceeding until December 2023, after the federal action was finally concluded. During the period of David's delay, Daniel, Lisa and Audrey expended significant time and resources in pursuing litigation and settlement, and the final resolution of the federal action. The relief sought by David would potentially unwind those years of litigation and, further, vitiate the settlement, which included significant stock transfers and tax payments. Under these facts, we conclude that the Surrogate did not abuse his discretion in denying David's motion as untimely (*see Wilmington Sav. Fund Socy., FSB v Smalls*, 228 AD3d 705, 706-707 [2d Dept 2024]; *Federal Natl. Mtge. Assn. v Thomas*, 209 AD3d 841, 843 [2d Dept 2022]; *U.S. Bank N.A. v Nakash*, 195 AD3d 651, 655 [2d Dept 2021]; *cf. Jones*, 158 AD3d at 1328).

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

682

KA 17-00924

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. KOHMESCHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered March 20, 2017. The appeal was held by this Court by order entered June 14, 2024, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (228 AD3d 1334 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), contending that the evidence of serious physical injury is legally insufficient to support the conviction. We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had reserved decision but failed to rule (*People v Kohmescher*, 228 AD3d 1334, 1335-1336 [4th Dept 2024]). Upon remittal, the court (Randall, J.) denied the motion. We affirm.

We reject defendant's contention that the evidence is insufficient to establish that the victim of the assault suffered a serious physical injury as defined in the Penal Law, namely, a "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00 [10]). Here, the blow inflicted by defendant with the butt of a shotgun resulted in protracted impairment inasmuch as the victim sustained a fracture to his orbital wall that required surgical intervention, resulting in the insertion of a permanent titanium plate underneath his right eye, was unable to see out of his right eye for approximately seven months, and

has permanently impaired vision (*see People v Baker*, 156 AD3d 1485, 1485 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018], *reconsideration denied* 31 NY3d 1145 [2018]; *People v Joyce*, 150 AD3d 1632, 1633 [4th Dept 2017], *lv denied* 31 NY3d 1118 [2018]; *see generally People v Felong*, 192 AD3d 1664, 1666 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]).

We further conclude, after 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]), that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). "Issues of credibility are primarily for the jury's determination" (*People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *see People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]). Here, the victim's testimony "was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285 [4th Dept 2007], *lv denied* 8 NY3d 982 [2007]; *see Edwards*, 159 AD3d at 1426), and we see no basis for disturbing the jury's credibility determinations.

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

685

KA 21-01731

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON P. WARREN, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRAEDAN M. GILLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered November 18, 2021. The judgment convicted defendant, upon a jury verdict, of driving while ability impaired.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]).

Defendant contends that his speedy trial rights were violated inasmuch as the People failed to timely comply with certain discovery obligations. We reject that contention. This case was commenced before CPL article 245 took effect on January 1, 2020, and the People announced readiness for trial on September 20, 2019. Prior to January 1, 2020, "[n]othing in the speedy trial statute linked CPL article 240's discovery obligations to the People's readiness for trial under CPL 30.30" (*People v Bay*, 41 NY3d 200, 207 [2023]). Thus, to the extent that the People violated their discovery obligations under CPL former 240.20, County Court had the discretion to impose an appropriate sanction (*see* CPL former 240.70 [1]), but any such discovery violation did not implicate CPL 30.30 (*see Bay*, 41 NY3d at 207; *People v McCullars*, 126 AD3d 1469, 1471 [4th Dept 2015], *lv denied* 25 NY3d 1167 [2015]; *People v Runion*, 107 AD2d 1080, 1080 [4th Dept 1985]). Contrary to defendant's further contention, the People's September 20, 2019 statement of readiness was not illusory based on their failure to comply with certain discovery obligations under CPL former article 240 (*see People v Alicea*, 109 AD2d 1083, 1083 [4th Dept 1985], *affd* 66 NY2d 529 [1985]). The case was therefore in a trial-ready posture as of January 1, 2020 (*see People v King*, 42 NY3d 424, 428 [2024]), and "the People were not required to file a certificate

of compliance . . . to stop the speedy trial clock" (*People v Perry*, 236 AD3d 1463, 1464 [4th Dept 2025], *lv denied* 43 NY3d 1011 [2025]). Assuming, arguendo, that the People were required to comply with the discovery obligations set forth in CPL 245.20 and that they thus committed a discovery violation in failing to turn over certain evidence in a timely manner, we note that the court imposed an appropriate sanction under CPL 245.80 (*see Perry*, 236 AD3d at 1464).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the traffic infraction 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 People v Scott*, 189 AD3d 2110, 2111 [4th Dept 2020], *lv denied* 36 NY3d 1123 [2021]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence included the arresting officer's testimony that when he encountered defendant, defendant's eyes were bloodshot and watery, his breath smelled of alcohol, and he failed a series of field sobriety tests (*see Scott*, 189 AD3d at 2111).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

689

CAF 23-01830

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

IN THE MATTER OF NATALIO B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE P., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Nevaeh W. (Nicole P.)* ([appeal No. 6] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

690

CAF 23-01831

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

IN THE MATTER OF NOVA J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE P., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Nevaeh W. (Nicole P.)* ([appeal No. 6] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

691

CAF 23-01832

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

IN THE MATTER OF NAUDIA J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE P., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Nevaeh W. (Nicole P.)* ([appeal No. 6] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

692

CAF 23-01835

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

IN THE MATTER OF NATALIE J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE P., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Nevaeh W. (Nicole P.)* ([appeal No. 6] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

693

CAF 23-01836

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

IN THE MATTER OF NOEL J.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE P., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent neglected the subject child.

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

Same memorandum as in *Matter of Nevaeh W. (Nicole P.)* ([appeal No. 6] — AD3d — [Oct. 3, 2025] [4th Dept 2025]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

694

CAF 23-01837

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

IN THE MATTER OF NEVAEH W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NICOLE P., RESPONDENT-APPELLANT.
(APPEAL NO. 6.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 9, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that respondent neglected the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, as limited by her brief, respondent mother appeals in appeal No. 6 from an order of fact-finding and disposition insofar as it determined that she neglected her eldest child, and, in appeal Nos. 1 through 5, she appeals from orders of fact-finding and disposition insofar as they determined that she neglected her younger children. We affirm in each appeal.

As a preliminary matter, we note that the eldest child reached the age of majority during the pendency of these appeals. Nevertheless, due to the consequences that could flow from the finding of neglect, the mother's challenge to the adjudication of neglect as to the eldest child remains properly before us (*see Matter of Cameron J.S. [Elizabeth F.]*, 214 AD3d 1355, 1356 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]).

A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of [the child's] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate

. . . medical . . . care, though financially able to do so" (Family Ct Act § 1012 [f] [i] [A]), or "in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, . . . including the infliction of excessive corporal punishment . . . or by any other acts of a similarly serious nature requiring the aid of the court" (§ 1012 [f] [i] [B]). "The statute thus imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011] [internal quotation marks omitted]; *see Matter of Barry G., Jr. [Barry G.]*, 221 AD3d 1596, 1596 [4th Dept 2023], *lv denied* 41 NY3d 904 [2024]; *Matter of Olivia W. [Courtney W.]*, 184 AD3d 1080, 1080-1081 [4th Dept 2020]).

Here, contrary to the mother's contention, we conclude that there is a sound and substantial basis in the record to support Family Court's determination that petitioner established by a preponderance of the evidence that the mother neglected the eldest child (*see generally Cameron J.S.*, 214 AD3d at 1356). The evidence presented at the fact-finding hearing established, among other things, that the mother medically neglected the eldest child by failing to follow mental health treatment recommendations to address the eldest child's behavioral issues (*see Olivia W.*, 184 AD3d at 1081; *Matter of Dustin P.*, 57 AD3d 1480, 1481 [4th Dept 2008]) and by responding inappropriately to the eldest child's asthma attacks, including withholding her inhaler on at least one occasion (*see Matter of Kinara C. [Jerome C.]*, 89 AD3d 839, 840 [2d Dept 2011]; *see generally Matter of Autumn O. [Noah O.]*, 158 AD3d 696, 698 [2d Dept 2018]). The evidence further established that the mother neglected the eldest child by inflicting excessive corporal punishment on her during a series of confrontations between them (*see Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021]; *see also Matter of Amarion M. [Faith W.]*, 214 AD3d 1457, 1458 [4th Dept 2023], *lv denied* 39 NY3d 915 [2023]; *Matter of Kayla K. [Emma P.-T.]*, 204 AD3d 1412, 1413 [4th Dept 2022]). Moreover, the evidence established that the eldest child's physical, mental or emotional condition was impaired by the mother (*see Amarion M.*, 214 AD3d at 1458; *Balle S.*, 194 AD3d at 1395). We accord great weight and deference to the court's determinations, including its drawing of inferences and assessment of credibility, and we will not disturb those determinations where, as here, they are supported by the record (*see Matter of Benjamin H. [Ermal H.]*, 238 AD3d 1513, 1514 [4th Dept 2025]).

Contrary to the mother's further contention, we conclude that the court's determination that petitioner established by a preponderance of the evidence that the mother neglected the younger children is supported by a sound and substantial basis in the record (*see*

generally id. at 1513). Petitioner presented evidence of multiple instances in which the mother engaged in acts of domestic violence with the eldest child in the presence of the younger children, whose physical, mental, and emotional health had thereby been impaired or was in imminent danger of becoming impaired (*see id.* at 1513-1514; *Matter of Raymond D.*, 45 AD3d 1415, 1416 [4th Dept 2007]; *see generally* Family Ct Act § 1012 [f] [i]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

696

CAF 23-02038

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

IN THE MATTER OF AUSTIN JOHNSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SHERRY PRITCHARD, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Jason D. Flemma, J.), entered September 27, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent sole legal and physical custody with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the third ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order that, among other things, modified the parties' prior orders of custody and visitation. In relevant part, the order continued sole legal and physical custody of the subject child with respondent mother and ordered the father to engage in counseling with a family counselor and, "when the counselor deems it appropriate, [the child] shall attend (virtually or in person as deemed appropriate by the counselor) family counseling with" the father.

"A rebuttable presumption that a noncustodial parent will be granted visitation is an appropriate starting point in any initial determination regarding custody and/or visitation" (*Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]; *see Matter of Nwawka v Yamutuale*, 107 AD3d 1456, 1457 [4th Dept 2013], *lv denied* 21 NY3d 865 [2013]). Here, Family Court determined that, although the relationship between the father and the child was strained, there was no showing that visitation between the father and the child "would be harmful to the child's welfare" (*Granger*, 21 NY3d at 91; *see Matter of Merkle v Henry*, 133 AD3d 1266, 1268 [4th Dept 2015]).

We agree with the father that the court erred in directing the father to engage in counseling as a condition of visitation and in delegating its authority to the counselor to determine when a resumption of visitation would be appropriate. It is well settled that " '[a]lthough a court may include a directive to obtain

counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation' " (*Matter of Bonilla-Wright v Wright*, 213 AD3d 1289, 1291 [4th Dept 2023]; *see Matter of Sharlow v Hughes*, 213 AD3d 1200, 1202 [4th Dept 2023]; *Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]). In addition, a court may not give counselors "the authority to determine if and when visitation would occur" (*Rice*, 167 AD3d at 1530; *see Matter of Roskwitalski v Fleming*, 105 AD3d 1432, 1433 [4th Dept 2013]). We therefore modify the order by vacating the third ordering paragraph, and we remit the matter to Family Court to set forth, if warranted, an appropriate visitation schedule, after a further hearing if necessary.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

699

CA 24-00755

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

CHUCK TOMASELLI, DOING BUSINESS AS
C. LEWIS TOMASELLI ARCHITECTS,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MALAGESE AND MJN ONE, LLC,
DEFENDANTS-APPELLANTS.

DAVID A. LONGERETTA, UTICA, FOR DEFENDANTS-APPELLANTS.

DETRAGLIA LAW FIRM, UTICA (GUSTAVE J. DETRAGLIA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered April 25, 2024. The judgment granted plaintiff money damages upon confirmation of an arbitration award.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of contract based upon defendants' alleged failure to pay for architectural services rendered by plaintiff. Although plaintiff subsequently moved to compel arbitration pursuant to the purported contract following nearly two years of litigation, it is undisputed that plaintiff withdrew that motion after defendants voluntarily agreed to resolve the dispute by arbitration. Following an arbitration proceeding before an arbitrator selected by the parties, the arbitrator rendered an arbitration award in favor of plaintiff. Defendants now appeal from an order of Supreme Court that, inter alia, granted plaintiff's motion to confirm the arbitration award and denied defendants' cross-motion to vacate the arbitration award. We affirm.

As a preliminary matter, we note that the order was subsumed in a final judgment entered shortly after entry of the order, and thus the proper appealable paper is the judgment rather than the order (*see* CPLR 5501 [a] [1]; 5512 [a]; *LPCiminelli, Inc. v JPW Structural Contr., Inc.*, 217 AD3d 1380, 1380 [4th Dept 2023]; *see generally Matter of Aho*, 39 NY2d 241, 248 [1976]). Although defendants, by their notice of appeal served and filed after entry of the judgment, have taken an appeal from the order, we conclude that the appeal must be deemed taken from the judgment inasmuch as the appeal is timely, no

prejudice has resulted, and the judgment has been furnished to us (*see* CPLR 5512 [a]; *Tumminia v Staten Is. Univ. Hosp.*, — AD3d —, —, 2025 NY Slip Op 03352, *2-3 [2d Dept 2025]; *see generally* Mark Davies, Marianne Stecich & Risa I. Gold, New York Civil Appellate Practice § 6:3 [3d ed 8 West's NY Prac Series July 2025 update]). The appeal from the judgment brings up for review the propriety of the order (*see* CPLR 5501 [a] [1]; *Wilson v Schindler Haughton El. Corp.*, 118 AD2d 777, 777 [2d Dept 1986]).

Defendants contend for the first time on appeal that they are entitled to vacatur of the arbitration award on the ground that the arbitrator lacked authority to conduct the arbitration because plaintiff had previously waived the right to arbitrate by commencing the action. Initially, defendants failed to preserve that contention for our review inasmuch as they did not raise it in opposition to the motion to confirm or in support of the cross-motion to vacate (*see Matter of Gerber Homes & Additions, LLC [Lang]*, 153 AD3d 1596, 1598 [4th Dept 2017]; *Matter of Sidney Philip Gilbert Assoc. [Taisei Constr. Corp.]*, 213 AD2d 281, 281 [1st Dept 1995], *lv denied* 86 NY2d 704 [1995]). In any event, defendants waived their challenge to the arbitration award. Plaintiff's commencement of the action and participation in the litigation for nearly two years "in effect g[a]ve[defendants] a choice of forums" by which they could either "insist on arbitration or ignore arbitration and litigate" (David D. Siegel & Patrick M. Connors, New York Practice § 595 at 1161 [6th ed 2018]; *see generally Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 [2007]; *Laur & Mack Contr. Co. v DiCienzo*, 234 AD2d 999, 999 [4th Dept 1996]). Defendants, however, "cannot have things both ways" by agreeing to and fully participating in arbitration instead of litigation while thereafter resisting the arbitration award "on the ground that [plaintiff's] very commencement of [the] court action waived [arbitration]" (Siegel & Connors § 595 at 1161-1162; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]; *Matter of Commerce & Indus. Ins. Co. v Nester*, 90 NY2d 255, 261-264 [1997]; *see generally Binghamton Civ. Serv. Forum v City of Binghamton*, 44 NY2d 23, 28-29 [1978]). Indeed, where, as here, "a party participates in an arbitration proceeding, without availing [themselves] of all [their] reasonable judicial remedies, [they are] . . . not . . . allowed thereafter to upset the remedy emanating from that alternative dispute resolution forum" (*Commerce & Indus. Ins. Co.*, 90 NY2d at 262). Defendants made "a strategic and knowing decision to proceed with [the] case in the arbitral forum" and cannot now seek to "cancel the outcome of the very arbitration in which [they] voluntarily and fully participated" because allowing "such unilateral advantage and forum-hedging would undermine arbitration principles and policies" (*id.* at 264; *see generally* Siegel & Connors § 595 at 1161-1162).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

702

CA 24-01520

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

CDE GLOBAL, INC., PLAINTIFF-RESPONDENT,

V ORDER

BRIAN BARNDT, CIRCULAR USA, INC., CIRCULAR GROUP, LTD., AND EOIN HERON, DEFENDANTS-APPELLANTS.

THE GLENNON LAW FIRM P.C., ROCHESTER (LAUREN A. VALLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

EVERSHEDS SUTHERLAND (US) LLP, NEW YORK CITY (AMY R. ALBANESE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Emilio Colaiacovo, J.), entered August 21, 2024. The order, insofar as appealed from, denied in part the motion of defendants to dismiss portions of the amended complaint.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

704

KA 22-00588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY NESMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered September 24, 2021. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), robbery in the first degree, robbery in the second degree, and assault in the second degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]), four counts of assault in the second degree (§ 120.05 [2], [12]), and one count each of robbery in the first degree (§ 160.15 [3]) and robbery in the second degree (§ 160.10 [2] [a]) arising from an incident in which defendant unlawfully entered the residence of two victims and attacked them with a cane. Defendant failed to preserve for our review his contention that the indictment must be dismissed on the ground that the prosecutor misled the grand jurors regarding photo array procedures used with respect to one of the victims (*see* CPL 210.35 [5]; *see generally People v Agee*, 57 AD3d 1486, 1486-1487 [4th Dept 2008], *lv denied* 12 NY3d 813 [2009]). Defendant sought dismissal of the indictment only on the general ground that the grand jury proceeding was defective, and defendant failed to set forth the specific ground for dismissal now set forth on appeal (*see People v Brown*, 81 NY2d 798, 798 [1993]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that his conviction of burglary in the first degree (Penal Law § 140.30 [3]), robbery in the first degree (§ 160.15 [3]), and two counts of assault in the second degree (§ 120.05 [2]) is

not supported by legally sufficient evidence to establish that defendant used a " '[d]angerous [i]nstrument' " (§ 10.00 [13]). Although a cane is not inherently dangerous, here it was used to strike the victims about the head and arms and thus was an instrument readily capable of causing serious physical injury (*see People v Carter*, 53 NY2d 113, 116-117 [1981]; *People v Becker*, 298 AD2d 986, 986 [4th Dept 2002], *lv denied* 99 NY2d 555 [2002]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct on summation is unpreserved for our review inasmuch as defendant failed to object to the statements he now challenges on appeal (*see People v Moorhead*, 224 AD3d 1225, 1227 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]; *People v Coggins*, 198 AD3d 1297, 1301 [4th Dept 2021], *lv denied* 38 NY3d 1032 [2022]). In any event, to the extent the prosecutor's remarks were improper, they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020] [internal quotation marks omitted]).

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

Defendant's contention that the sentencing procedure pursuant to which he was adjudicated a persistent violent felony offender is unconstitutional in light of the United States Supreme Court's decision in *Erlinger v United States* (602 US 821 [2024]) is unpreserved for our review (*see People v Hernandez*, 43 NY3d 591, 597 [2025]; *see generally People v Cabrera*, 41 NY3d 35, 42-46 [2023]). 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 considered defendant's remaining contentions on appeal and conclude they do not warrant reversal or modification of the judgment.

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

705

KA 21-00054

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENYATTA AUSTIN, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 23, 2020. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree (two counts), assault in the second degree (two counts) 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, after a nonjury trial, of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1]) stemming from an incident where two victims were shot and killed around midnight in the City of Buffalo. We reject defendant's contention that his conviction is not supported by legally sufficient evidence of his presence at and general involvement in the shooting. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the fact finder on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001], quoting *People v Williams*, 84 NY2d 925, 926 [1994]; *see People v Robbs*, 233 AD3d 1456, 1456-1457 [4th Dept 2024]).

Here, we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the factfinder (*see Robbs*, 233 AD3d at 1457; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, cell phone evidence established that defendant was present in the area where the shooting occurred at the time it occurred, and surveillance video showed that a vehicle matching the appearance of a

vehicle driven by defendant was in that area prior to the shooting. Trial testimony from defendant's girlfriend reflected that, shortly after the time of the shooting, defendant drove the vehicle to his girlfriend's residence, where he stated to her that he had just been involved in a shootout in Buffalo. Defendant's girlfriend testified that, when he arrived at her residence, defendant was carrying a black duffle bag, and trial evidence established that the police thereafter recovered a rifle from her home, which was wrapped with a bandana containing DNA consistent with the DNA of defendant. Defendant's girlfriend also testified that prior to the shooting the vehicle was undamaged, but on the morning after the shooting, the vehicle had a newly broken driver-side window and three bullet holes in it. Further, another witness testified that, on the evening after the shooting, she observed a man matching defendant's description standing next to a vehicle matching the description of the vehicle defendant had been driving at the time of the shooting. The witness testified that the vehicle had a broken driver-side window, and that she heard the man state that the victims of the shooting should not have been out so late, and that he "didn't mean for that to happen to them." Contrary to defendant's contention, the evidence did not merely establish defendant's presence near the crime scene, but also his complicity in the crimes of which he was convicted (*see People v Hancock*, 229 AD3d 1229, 1230-1231 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]; *see generally People v Reed*, 97 AD3d 1142, 1143 [4th Dept 2012], *affd* 22 NY3d 530 [2014], *rearg denied* 23 NY3d 1009 [2014]; *Robbs*, 233 AD3d at 1457; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659-1660 [4th Dept 2010]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

706

KA 25-00041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL DIAZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Julie M. Hahn, J.), dated October 7, 2024. The order affirmed an order of the Rochester City Court entered December 13, 2022, which denied defendant's petition seeking to modify a prior determination that he is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order of Monroe County Court affirming an order of Rochester City Court that denied defendant's petition pursuant to Correction Law § 168-o (2) for a downward modification of his previously imposed classification as a level two risk pursuant to the Sex Offender Registration Act ([SORA] § 168 *et seq.*).

Initially, we note that "[a]n appeal may be taken to the appellate division as of right from an order of a county court . . . which determines an appeal from a judgment of a lower court" (CPLR 5703 [b]), and here County Court determined the appeal from an order of City Court, not a judgment. "Nevertheless, where[,] [as here,] the rights of the parties are for all practical purposes finally determined, we conclude that this appeal as of right pursuant to CPLR 5703 (b) is properly before us" (*People v Willis*, 130 AD3d 1470, 1471 [4th Dept 2015] [internal quotation marks omitted]; *see Highlands Ins. Co. v Maddena Constr. Co.*, 109 AD2d 1071, 1071-1072 [4th Dept 1985]). Having concluded that the appeal is properly before us, we affirm.

A defendant subject to SORA requirements may petition "for an order modifying the level of notification. The petition shall set forth the level of notification sought, together with the reasons for seeking such determination. The sex offender shall bear the burden of

proving the facts supporting the requested modification by clear and convincing evidence" (Correction Law § 168-o [2]; *see People v David W.*, 95 NY2d 130, 140 [2000]; *People v Ross*, 210 AD3d 1444, 1444 [4th Dept 2022], *lv denied* 39 NY3d 908 [2023]; *People v Higgins*, 55 AD3d 1303, 1303 [4th Dept 2008]). "[T]he relevant inquiry regarding Correction Law § 168-o (2) applications is whether conditions have changed subsequent to the initial risk level determination warranting a modification thereof" (*People v Bentley*, 186 AD3d 1135, 1136 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020] [internal quotation marks omitted]). Here, defendant failed to establish that he completed sex offender treatment (*see Ross*, 210 AD3d at 1444; *Bentley*, 186 AD3d at 1136), defendant did not successfully complete probation supervision (*see generally People v Lashway*, 226 AD3d 1270, 1272 [3d Dept 2024]), and defendant failed to properly complete annual SORA registration (*see People v Anthony*, 171 AD3d 1412, 1414 [3d Dept 2019]). Under the circumstances, City Court did not abuse its discretion in denying defendant's petition, and we decline to exercise our discretion to reverse County Court's order and grant the petition.

Defendant's remaining contention, regarding the adequacy of the recommendation prepared by the Board of Examiners of Sex Offenders, is unpreserved for our review (*see People v Leach*, 192 AD3d 1507, 1508 [4th Dept 2021]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

709

KA 23-01488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD V. COON, DEFENDANT-APPELLANT.

BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANTHONY J. DIMARTINO, JR., DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Melinda H. McGunnigle, A.J.), rendered June 22, 2023. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). We affirm. Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see generally People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Edmonds*, 229 AD3d 1275, 1278 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]).

Defendant's valid waiver of the right to appeal forecloses his challenge to County Court's adverse suppression ruling (*see Thomas*, 34 NY3d at 564-565; *People v Sanders*, 25 NY3d 337, 339-342 [2015]; *Edmonds*, 229 AD3d at 1278).

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

710

TP 25-00077

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

IN THE MATTER OF BERNABE ENCARNACION, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Melissa Lightcap Cianfrini, A.J.], entered January 6, 2025) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an incarcerated individual rule.

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

Memorandum: Petitioner commenced this proceeding seeking to annul a determination, following a tier III disciplinary hearing, that he violated a certain incarcerated individual rule. After Supreme Court transferred this proceeding to this Court pursuant to CPLR 7804 (g), the Attorney General advised this Court that respondent has issued an administrative order reversing the determination and that all references to the disciplinary proceeding have been expunged from petitioner's record. Because petitioner has obtained the relief that he could be granted in this proceeding, the proceeding is dismissed as moot (*see Matter of Smith v Annucci*, 173 AD3d 1685, 1685 [4th Dept 2019]; *Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

711

CAF 24-00850

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

IN THE MATTER OF HAILEY H. AND CALEB T.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRANDY F., RESPONDENT-APPELLANT.

MULLEN ASSOCIATES LLC, BATH (ALAN P. REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (SANDRA J. PACKARD OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

JESSICA B. SERRETT, GENEVA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Jacqueline E. Sisson, A.J.), entered April 22, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that terminated her parental rights to the subject children on the ground of mental illness.

Initially, contrary to the assertion of petitioner and the attorneys for the children, we conclude that the mother's notice of appeal was timely filed inasmuch as the record establishes that the mother was served with the order appealed from only by email. Inasmuch as the mother "was served the order by [Family Court] via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that [s]he was served by any of the methods authorized by the statute, . . . the time to take an appeal did not begin to run and . . . it cannot be said that the [mother's] appeal is untimely" (*Matter of Grayson S. [Thomas S.]*, 209 AD3d 1309, 1311 [4th Dept 2022]; *see generally Matter of Bukowski v Florentino*, 210 AD3d 1520, 1521 [4th Dept 2022]).

With respect to the merits, we reject the mother's contention

that petitioner failed to meet its burden on the petition. Indeed, petitioner met its burden of establishing by clear and convincing evidence that the mother was presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the children, who had each been in the care of an authorized agency for over one year immediately prior to the filing of the petition (*see* Social Services Law § 384-b [4] [c]). "[T]ermination of parental rights on the ground of mental illness 'requires a two-part determination at the fact-finding stage, first of the parent['s] condition and capacity, including consideration of measures on the part of the [s]tate to maintain the family setting, and second of the anticipated effect for the foreseeable future if the child is returned to the [parent's] care' " (*Matter of Albert S. [Albert S.]*, 238 AD3d 1510, 1511 [4th Dept 2025]). Here, the testimony of petitioner's expert psychologists established that the mother suffers from posttraumatic stress disorder, bipolar disorder, and borderline personality disorder, and that " 'the child[ren] would be in danger of being neglected if [they were] returned to her care at the present time or in the foreseeable future' " (*Matter of Landin F. [Jodi G.]*., 222 AD3d 1405, 1406 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]; *see Matter of Jason B. [Phyllis B.]*, 160 AD3d 1433, 1434 [4th Dept 2018], *lv denied* 32 NY3d 902 [2018]).

Finally, we reject the mother's contention that the court abused its discretion in declining to hold a dispositional hearing (*see Matter of Michael S. [Rebecca S.]*, 165 AD3d 1633, 1633-1634 [4th Dept 2018], *lv denied* 32 NY3d 915 [2019]).

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

714

CA 24-01179

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

MONTEREY ROAD 5382, LLC, PLAINTIFF-APPELLANT,

V ORDER

LILLY BROADCASTING, LLC, AND LILLY BROADCASTING HOLDINGS, LLC, DEFENDANTS-RESPONDENTS.

MILLER MAYER, LLP, ITHACA (ANTHONY N. ELIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FOX ROTHSCHILD LLP, BLUE BELL, PENNSYLVANIA (MICHAEL K. TWERSKY, ADMITTED PRO HAC VICE, OF COUNSEL), AND SCHLATHER, STUMBAR, PARKS & SALK, LLP, ITHACA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Jason L. Cook, J.), entered July 1, 2024. The order granted the motion of defendants to dismiss the complaint.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

715

CA 24-01357

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

IN THE MATTER OF JOHN R., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, RESPONDENT-RESPONDENT.

ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Danielle M. Fogel, J.), entered July 25, 2024, 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.

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 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]).

Petitioner failed to preserve for our review his contention that respondent failed to establish by sufficient evidence that he suffers from a mental abnormality, inasmuch as he did not move for a directed verdict on the specific grounds raised on appeal (*see generally Matter of State of New York v Robert R.*, 217 AD3d 1413, 1414 [4th Dept 2023]). To the extent that petitioner contends that the weight of the

evidence does not support Supreme Court's finding that he suffers from a mental abnormality (*see* Mental Hygiene Law § 10.03 [i]), we reject that contention insofar as respondent's evidence at the hearing consisted of, inter alia, the report and testimony of a licensed psychologist who opined that petitioner currently suffers from unspecified paraphilic disorder, alcohol use disorder, and other specified personality disorder (narcissistic traits), which predispose him to commit sex offenses and result in his having serious difficulty in controlling such conduct (*see Matter of Luis S. v State of New York*, 166 AD3d 1550, 1551-1552 [4th Dept 2018], *appeal dismissed* 35 NY3d 985 [2020]; *see also Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]; *Matter of Derek G. v State of New York*, 174 AD3d 1360, 1360-1361 [4th Dept 2019]). Although petitioner "presented expert testimony that would support a contrary finding, that merely raised a credibility issue for the court to resolve, and its determination is entitled to great deference" (*Luis S.*, 166 AD3d at 1554). We reject petitioner's related contention that basing the determination that he suffers from a mental abnormality in part upon a diagnosis of unspecified paraphilic disorder does not comport with the requirements of due process (*see id.* at 1552-1553).

We similarly reject petitioner's contention that the determination that he remains a dangerous sex offender requiring confinement is otherwise against the weight of the evidence (*see* Mental Hygiene Law § 10.03 [e]). Respondent's expert concluded that, as a result of petitioner's mental condition, disease, or disorder, he had such a strong predisposition to commit sex offenses and such an inability to control his behavior that he is likely to commit sex offenses if not confined to a secure treatment facility. Among other things, the testimony at the hearing established that petitioner had never completed sex offender treatment, minimized his past conduct, and generally lacked an insight into his condition (*see Matter of Kerry K. v State of New York*, 225 AD3d 1122, 1124 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; *Matter of Francisco R. v State of New York*, 214 AD3d 1409, 1410 [4th Dept 2023]). Again, "[t]he court was 'in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented,' " and we see no reason to disturb the court's decision to credit the testimony of respondent's expert regarding petitioner's continued need for confinement (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]).

Entered: October 3, 2025 Ann Dillon Flynn
Clerk of the Court

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

728

CAF 24-00593

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

IN THE MATTER OF STEPHEN C. PINE,
PETITIONER-APPELLANT,

V ORDER

JEAN M. KIRK, RESPONDENT-RESPONDENT.

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

RYAN JAMES MULDOON, AUBURN, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Seneca County (Barry L. Porsch, J.), entered March 26, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of an order of custody and visitation with respect to the subject child.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

732

CA 24-01454

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

ZANTAZ ENTERPRISE ARCHIVE SOLUTION, LLC,
FORMERLY KNOWN AS CAPAX DISCOVERY, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

THE BANK OF NOVA SCOTIA, DEFENDANT-APPELLANT.

DAVIS WRIGHT TREMAINE LLP, NEW YORK CITY (BARRY S. GOLD OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS, LLP, BUFFALO (STEVEN W. KLUTKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered July 30, 2024. The order denied the motion of defendant to dismiss the second amended complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 10, 2025,

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

734

CA 24-01403

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

JAMIE DILL, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 135192.)

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Stephanie Saunders, J.), entered July 17, 2024. The order, insofar as appealed from, denied the cross-motion of claimant for partial summary judgment.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

748

CA 24-01271

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

ROBERT GROSS AND LORI E. WEIDNER,
PLAINTIFFS-APPELLANTS,

V ORDER

BUILDING SOLUTIONS, INC., AND TODD R. HUBER,
AS PRESIDENT, DEFENDANTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered July 2, 2024, in a negligence, nuisance, and trespass action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Entered: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

749

CA 24-01885

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

GABRIELLE A. MATTINA, PLAINTIFF-APPELLANT,

V ORDER

JAMES S. ALFIERI AND AMY FRANCES MILLARD,
CO-ADMINISTRATORS OF THE ESTATE OF
JAMES J.B. ALFIERI, DECEASED,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered April 29, 2024, in a postjudgment matrimonial proceeding. The order, inter alia, granted that part of the motion of defendants 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: October 3, 2025

Ann Dillon Flynn
Clerk of the Court

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

750

CA 24-00943

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

TIMOTHY SHEA AND EILEEN SHEA,
PLAINTIFFS-RESPONDENTS,

V ORDER

TAREK OTERO AND IRIS & WILLIAM, LLC,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BUCHANAN INGERSOLL & ROONEY PC, PITTSBURGH, PENNSYLVANIA (STEPHEN W. KELKENBERG OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered March 29, 2024, in an action pursuant to RPAPL article 15. The order, inter alia, granted the application of plaintiffs for a preliminary injunction enjoining violation of an easement agreement.

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: October 3, 2025

Ann Dillon Flynn
Clerk of the Court