



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

DECISIONS FILED
OCTOBER 10, 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 10, 2025

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

629

CA 24-00663

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

DANIEL E. BARNEY AND JULIE A. BARNEY,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

PREFERRED MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL J. LONGSTREET OF
COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BRAND & TAPPLY, LLC, WELLESLEY, MASSACHUSETTS (EVA M. MICHAEL OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered March 20, 2024. The order, insofar as appealed from, granted the motion of defendant Preferred Mutual Insurance Company insofar as it sought summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiffs are the owners of real property on which are situated both their primary residence and a mobile home that they rented out to others. Plaintiffs maintained a homeowners insurance policy for their property with defendant Preferred Mutual Insurance Company (PMIC). After the mobile home was destroyed in a fire, plaintiffs filed a claim for coverage of the damage caused by the fire to the mobile home. PMIC denied coverage of plaintiffs' claim, and plaintiffs thereafter commenced this action alleging, inter alia, that the policy provided coverage for the mobile home located on their property and that PMIC had thus breached the terms of the policy when it failed to adjust or pay for the claim. Plaintiffs now appeal from an order that, among other things, granted that part of PMIC's motion seeking summary judgment dismissing the complaint against it on the basis that the mobile home was not covered under the insurance policy plaintiffs obtained for their property. We affirm.

Plaintiffs contend that the mobile home was entitled to coverage under the insurance policy and that Supreme Court thus erred in granting that part of PMIC's motion seeking summary judgment dismissing the complaint against it. We reject that contention. "In

determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005], *rearg denied* 5 NY3d 825 [2005] [internal quotation marks omitted]; *see Fornino v New York Cent. Mut. Fire Ins. Co.* [appeal No. 2], 218 AD3d 1192, 1193-1194 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]). The policy "must be interpreted according to common speech and consistent with the reasonable expectation of the average insured at the time of contracting, with any ambiguities construed against the insurer and in favor of the insured" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 561 [2021], *rearg denied* 37 NY3d 1228 [2022] [internal quotation marks omitted]; *see Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]; *see also Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 682 [2017]).

We conclude that PMIC met its initial burden on the motion of establishing that the unambiguous language of the policy did not extend coverage to the mobile home located on plaintiffs' property. The policy in effect at the relevant time provided that it "cover[s] the 'residence' on the 'insured premises' " as well as "related private structures on the 'insured premises' which are not attached to 'your' 'residence.'" The policy defines the "insured premises" as the "[d]escribed location" listed on the policy declaration and states that "[i]f 'you' own and reside in the 'residence' shown on the 'declarations' as the described location, the 'insured premises' means . . . that 'residence'; and . . . related private structures and grounds at that location."

Here, PMIC established that the mobile home was not part of the "insured premises" covered by the policy. There is no dispute that the mobile home was not plaintiffs' residence. Further, the mobile home does not constitute a "related private structure" at the insured location. Crucially, the mobile home's address is not listed on the policy declaration as part of the described location insured by the policy. Indeed, the policy declaration lists only the address of plaintiffs' primary residence as the described location, whereas the record is clear that plaintiffs obtained a separate address for the mobile home, that the mobile home is located on a separate road from plaintiffs' residence, and that the mobile home was served by separate utilities. Nor is the mobile home included on the policy endorsement for "related private structures"; the only additional structure listed in that part of the document is a "finished pole barn." It also bears noting that no part of the policy in effect at the time mentions the mobile home. In other words, nothing about the policy indicates that the mobile home is part of the insured premises.

We further conclude that, in opposition to PMIC's showing on the motion, plaintiffs did not raise any triable issues of material fact with respect to whether the mobile home was covered by the insurance policy (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562

[1980])). In light of our determination, plaintiffs' remaining contentions are academic.

Entered: October 10, 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 24-01786

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND KEANE, JJ.

IN THE MATTER OF CITY OF BUFFALO, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DARRYL J. CARR, RESPONDENT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR
RESPONDENT-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (JEREMIAH E. LENIHAN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered June 26, 2024. The order reversed an order of the Buffalo City Court permitting the demolition of certain structures.

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

Memorandum: Respondent appeals from an order of County Court (DiTullio, J.) reversing an order of the Housing Part of Buffalo City Court (Housing Court) that would have permitted him to demolish buildings he owns on two parcels in the Cobblestone Historic District in Buffalo. County Court reversed on the ground that Housing Court was bound by principles of res judicata to deny respondent's request for an emergency demolition order because a different County Court Judge in a prior proceeding between the same parties had determined that Housing Court lacked authority to grant such relief. We affirm.

Initially, we note that, because the rights of the parties were "for all practical purposes finally determined" in Housing Court's order, County Court's order is appealable as of right pursuant to CPLR 5703 (b) notwithstanding the absence of an underlying judgment from Housing Court (*Highlands Ins. Co. v Maddena Constr. Co.*, 109 AD2d 1071, 1072 [4th Dept 1985]; see *People v Willis*, 130 AD3d 1470, 1471 [4th Dept 2015]; *Hayes v City of Amsterdam*, 2 AD3d 1139, 1140 [3d Dept 2003]). We therefore address the merits of respondent's appeal.

"Res judicata, i.e., claim preclusion, 'bars the parties or their privies from relitigating issues that were or could have been raised in [a prior] action' " (*Cook v Estate of Achzet*, 214 AD3d 1369, 1372 [4th Dept 2023], quoting *Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018] [emphasis omitted]). "[U]nder New

York's transactional analysis approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' " (*Matter of Hunter*, 4 NY3d 260, 269 [2005]).

"[A]bsent unusual circumstances or explicit statutory authorization, the provisions of [a] judgment are final and binding on the parties, and may be modified only upon direct challenge" (*Rainbow v Swisher*, 72 NY2d 106, 110 [1988]; see *LoMaglio v LoMaglio*, 104 AD3d 1182, 1183 [4th Dept 2013]). "This principle, so necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again" (*Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]).

"To establish claim preclusion, a party must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions" (*Paramount Pictures Corp.*, 31 NY3d at 73). Here, all the requirements of claim preclusion are met.

In this proceeding, respondent requested an emergency order of demolition with respect to the subject properties in Housing Court in response to a notice to remedy issued against him by the City. The notice concerned collapsing bricks in buildings at the properties, which had been vacant for more than a decade and allegedly posed a danger to the public. Respondent argued that the buildings were in imminent danger of collapse and should be demolished rather than repaired. Housing Court granted an emergency demolition order over petitioner's objection.

In a prior proceeding involving the same parties and same properties, however, County Court (D'Amico, J.) determined on appeal that Housing Court lacked authority to issue an emergency order of demolition at respondent's request. Judge D'Amico ruled that "the procedure for a private party requesting demolition of private property in the City of Buffalo is specifically contained in the Buffalo City Charter and Code Chapter 337, requiring the use of the administrative procedure set forth therein," and that a property owner cannot be granted such relief in Housing Court. Respondent "did not appeal from, or otherwise directly challenge" that order (*Divito v Glennon*, 193 AD3d 1326, 1328 [4th Dept 2021]).

There is no dispute that Judge D'Amico's order was a final judgment on the merits regarding whether Housing Court could preside over respondent's earlier request. With respect to the remaining requirements of claim preclusion, we conclude that this proceeding and the prior proceeding share an identity of both parties and claims, and therefore the ruling in the prior proceeding is entitled to preclusive effect even if it was "erroneously decided, whether due to oversight by the parties or error by the courts" (*Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]; see *LoMaglio*, 104 AD3d at 1183). Under the

circumstances, respondent's request for an emergency order in this proceeding constitutes "an impermissible collateral attack and should have been resolved by either an appeal from or a motion to vacate the [prior order]" (*Divito*, 193 AD3d at 1328).

Although it may be true, as respondent asserts, that the properties have deteriorated significantly over the years since the order was entered in the prior proceeding, the condition of the properties is irrelevant to the issue of Housing Court's authority to issue an emergency demolition order. Because Judge D'Amico had already determined that Housing Court lacked authority to grant a demolition order to respondent in this procedural context, Judge DiTullio properly determined that Housing Court was bound to follow that determination whether it agreed with it or not.

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

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CA 24-02044

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

RUSSELL E. RIGGIO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DYLAN BELSCHER, TAMILA KACZMAREK, DEFENDANTS,
AND ZACHARY KACZMAREK, DEFENDANT-RESPONDENT.

RICHMOND VONA, LLC, BUFFALO (PETER F. BRADY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (JILL R. ALLEN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph C. Lorigo, J.), entered September 24, 2024. The order granted the motion of defendants Zachary Kaczmarek and Tamila Kaczmarek for summary judgment dismissing the complaint and any cross-claims against them.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries that he allegedly sustained when he was assaulted by defendant Dylan Belscher while attending a party at the residence of Zachary Kaczmarek (defendant), which defendant and his mother, defendant Tamila Kaczmarek, co-owned. The complaint alleged, *inter alia*, that defendant was negligent in failing to “warn and protect [plaintiff] against foreseeable criminal activity.” Defendant and his mother (collectively, homeowner defendants) moved for summary judgment dismissing the complaint and any cross-claims against them, and Supreme Court issued an order granting that motion. Plaintiff now appeals from the order insofar as it granted that part of the motion seeking summary judgment dismissing the complaint against defendant. We affirm.

Generally, landowners “have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control” (*D’Amico v Christie*, 71 NY2d 76, 85 [1987]). However, “a possessor of land, whether . . . a landowner or a leaseholder, is not an insurer of the visitor’s safety” (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). Thus, “the possessor cannot be held to a duty to take protective measures unless it is shown that [they] either know[] or ha[ve] reason to know from past experience that there is a

likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor" (*id.* [internal quotation marks omitted]). The duty of landowners to protect visitors from third-party conduct "includes 'minimiz[ing] foreseeable dangers on their property' . . . , including 'foreseeable criminal conduct' " (*Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 998 [2016]; see *Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]; *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]).

Contrary to plaintiff's contention, we conclude that the homeowner defendants met their initial burden with respect to defendant of "mak[ing] a prima facie showing of [his] entitlement to judgment as a matter of law" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, the homeowner defendants established that defendant was not aware of any history of aggression on Belscher's part that would have alerted defendant to a need to protect other guests on the property and that, under these circumstances, Belscher's assault "was not a reasonably foreseeable result of any failure [by defendant] to take preventive measures" (*Pink*, 28 NY3d at 998). We further conclude that, in opposition, plaintiff failed to raise a material issue of fact with respect to defendant's alleged negligence (see generally *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We note that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562).

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

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CA 24-02002

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

DYLAN M. DUNCAN, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOWN OF GREECE, DEFENDANT,
AND COUNTY OF MONROE, DEFENDANT-RESPONDENT.

MAXWELL MURPHY, LLC, BUFFALO (CHRISTOPHER M. BORGATTI OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BRENDON S. FLEMING, ACTING COUNTY ATTORNEY, ROCHESTER (ROBERT J.
SHOEMAKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered June 25, 2024, in a personal injury action. The order granted the motion of defendant County of Monroe to dismiss the complaint against it pursuant to CPLR 3211 and for summary judgment dismissing the complaint against it pursuant to CPLR 3212.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendant County of Monroe to the extent that the complaint, as amplified by the bill of particulars, alleges that the County of Monroe failed to maintain the traffic signal in a reasonably safe condition and created the defective condition by improperly installing the traffic signal and to the extent that plaintiff relies on the doctrine of *res ipsa loquitur*, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages resulting from a motor vehicle accident that took place at an intersection when the vehicle operated by plaintiff was struck by another vehicle traveling through the intersection, perpendicular to plaintiff. Each driver had a green light inasmuch as a pipe holding one of the signal heads in place broke, allowing that signal head to rotate 90 degrees and resulting in at least one of the signal heads in each direction showing a green light. In his complaint, as amplified by the bill of particulars, plaintiff alleged that defendants were negligent in, inter alia, creating the dangerous condition by failing to properly design, install, inspect, maintain and repair the traffic signal. The County of Monroe (defendant) moved to dismiss the complaint against it pursuant to CPLR 3211 (a) (7) and for summary judgment dismissing the complaint against it under CPLR 3212. Plaintiff appeals from an order granting the motion under CPLR 3211

(a) (7) and 3212.

"A municipality has a duty to maintain its streets in a reasonably safe condition" (*Thompson v City of New York*, 78 NY2d 682, 684 [1991], *rearg denied* 79 NY2d 916 [1992]). "[T]he municipality breaches such duty if it permits a dangerous or potentially dangerous condition to exist and cause injury" (*Nowlin v City of New York*, 81 NY2d 81, 88 [1993], *rearg denied* 81 NY2d 1068 [1993]; *see Thompson*, 78 NY2d at 685). Here, to meet its burden on that part of the motion seeking summary judgment, defendant was required to "demonstrate that it maintained the intersection in a reasonably safe condition and that it neither created the alleged defective condition nor had actual or constructive notice of same" (*Carty v Colleran*, 238 AD3d 845, 846 [2d Dept 2025]; *see Kirton v City of New York*, 234 AD3d 439, 440 [1st Dept 2025]; *Regan v City of New York*, 127 AD3d 843, 844 [2d Dept 2015]).

Initially, to the extent that plaintiff contends that defendant had notice of the alleged defective condition, we conclude that defendant met its initial burden by demonstrating that it lacked the requisite notice and that plaintiff failed to raise an issue of fact in opposition (*see Irwin v St. John the Evangelist Church of Greece*, 229 AD3d 1108, 1109 [4th Dept 2024]). We agree with plaintiff, however, that Supreme Court erred in granting that part of the motion seeking summary judgment with respect to the claims that defendant failed to maintain the traffic signal in a reasonably safe condition and that defendant created the defective condition by improperly installing the traffic signal. We therefore modify the order accordingly. Assuming, arguendo, that defendant met its initial burden on those claims, we conclude that plaintiff raised triable issues of fact by submitting the affidavit of his expert (*see generally Cosgrove v River Oaks Rests., LLC*, 161 AD3d 1575, 1577 [4th Dept 2018]). We also agree with plaintiff that questions of fact exist with respect to whether the doctrine of *res ipsa loquitur* applies here (*see McGirr v Shifflet*, 208 AD3d 949, 951 [4th Dept 2022]) and we therefore further modify the order accordingly.

In addition, we agree with plaintiff that the court erred in granting that part of the motion seeking dismissal of the complaint against defendant under CPLR 3211 (a) (7), and we further modify the order accordingly. On a motion to dismiss pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, we conclude that the allegations in the complaint are sufficient to state a cause of action for negligence. We also reject defendant's assertion that negligent installation was not alleged in the complaint inasmuch as the allegations of "negligence and statutory violations" in the complaint were amplified by allegations in the bill of particulars that defendant failed to properly design, install, and tether the traffic signal (*see Brown v Government Empls. Ins. Co.*, 156

AD3d 1087, 1089 n 2 [3d Dept 2017]; *see also Napolitano v Polichetti*,
23 AD3d 534, 534-535 [2d Dept 2005]).

Entered: October 10, 2025

Ann Dillon Flynn
Clerk of the Court

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

667

KA 22-00167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH RUISE, ALSO KNOWN AS JOSEPH L. RUISE,
ALSO KNOWN AS JOSEPH LEE RUISE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SAROD NORI OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Michael M. Mohun, A.J.), rendered January 24, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Genesee County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress physical evidence seized from his person following a warrantless search. We agree. Initially, we note that defendant's challenge to the court's suppression ruling is properly before us inasmuch as the suppression ruling was expressly excluded from the scope of defendant's waiver of the right to appeal (*see People v White*, 61 AD3d 1396, 1397 [4th Dept 2009], *lv denied* 13 NY3d 750 [2009]; *see generally People v Kemp*, 94 NY2d 831, 833 [1999]).

The record from the suppression hearing, including the body-worn camera footage, establishes that police officers entered an apartment with the tenant's permission in order to search for a person who was the subject of an active arrest warrant. At the time, defendant was sitting at the kitchen table, apparently asleep or unconscious. The tenant told the officers that defendant had the same first name as the subject of the arrest warrant but was not the person they were looking for. The body-worn camera footage showed that an officer attempted

unsuccessfully to wake defendant and thereafter proceeded to search defendant's pockets for his identification. The officer found a cigarette box in defendant's pocket; when he looked into the box, the officer saw that it contained crack cocaine. The officers called an ambulance for defendant, but when the ambulance arrived, the medical personnel were able to wake defendant and determined that he did not need medical care. During his testimony at the suppression hearing, the officer asserted that Mental Hygiene Law § 22.09 permitted him to search defendant inasmuch as he was planning to call an ambulance to transport defendant. The suppression court determined that the officer's search of defendant's person was justified by Mental Hygiene Law § 22.09 and that the search was analogous to a search incident to arrest.

We agree with defendant that the court erred in concluding that the warrantless search of defendant was justified under the circumstances of this case. The People correctly concede that the officer did not believe that defendant had committed a crime before he searched defendant's pockets, and thus the search was not conducted incident to a lawful arrest (see *People v Williams*, 217 AD2d 1007, 1008 [4th Dept 1995]; see generally *People v Reid*, 24 NY3d 615, 618-619 [2014]). Moreover, we cannot conclude that the police officer was acting pursuant to Mental Hygiene Law § 22.09 because, contrary to the People's assertion, there was insufficient evidence that defendant was in danger of harming himself or others (see § 22.09 [b] [2]). We therefore conclude that the court erred in refusing to suppress the physical evidence obtained as a result of the illegal search of defendant's person. As a result, we vacate defendant's guilty plea and, because our conclusion results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (see *People v Solivan*, 156 AD3d 1434, 1436-1437 [4th Dept 2017]; *People v Stock*, 57 AD3d 1424, 1425 [4th Dept 2008]). In light of our determination, we do not address defendant's remaining contentions.

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

684

KA 20-01316

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MALIK CLEA, DEFENDANT-APPELLANT.

ADAM AMIRAUT, 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 July 24, 2020. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, burglary in the first degree (two counts), robbery in the first degree, assault in the first degree, criminal use of a firearm in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the additional consecutive sentences of five years imposed pursuant to Penal Law § 265.09 (2) on counts 1, 2, 3, 5, and 7 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of burglary in the first degree (§ 140.30 [1], [2]), and one count each of robbery in the first degree (§ 160.15 [2]), assault in the first degree (§ 120.10 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). The conviction arose from events in which a man—later identified as defendant—entered the apartment of the victim, engaged in a confrontation with the victim in the kitchen during which the victim sustained severe gunshot wounds to his face and groin and, after an interaction with the victim's girlfriend in another room, exited the apartment with money and drugs.

Preliminarily, we note that the notice of appeal filed by defense counsel does not correctly identify the date on which the judgment was rendered. Nevertheless, inasmuch as that notice of appeal is otherwise accurate, we exercise our discretion, in the interest of justice, and treat that notice of appeal as valid (*see* CPL 460.10 [6]; *People v McCants*, 239 AD3d 1306, 1306 [4th Dept 2025], *lv denied* —

NY3d – [2025])).

Defendant contends that County Court erred in refusing to suppress any physical evidence and statements obtained as a result of his encounter with the police that occurred shortly after the incident. We reject that contention. To the extent that defendant relies on trial testimony in support of his contention, we note that such reliance is improper here because " 'our review is limited to the evidence presented at the suppression hearing' " (*People v Johnson*, 192 AD3d 1612, 1613 [4th Dept 2021]; see *People v Jennings*, 295 AD2d 1000, 1000 [4th Dept 2002], *lv denied* 99 NY2d 536 [2002]; see generally *People v Millan*, 69 NY2d 514, 518 n 4 [1987]; *People v Gonzalez*, 55 NY2d 720, 721-722 [1981], *rearg denied* 55 NY2d 1038 [1982], *cert denied* 456 US 1010 [1982]). The evidence adduced at the suppression hearing, including police testimony and body-worn camera footage, establishes that an officer, a few minutes after being dispatched to the scene of the shooting and based on the description of the suspected perpetrator provided by the girlfriend, sent out a "be-on-the-lookout" (BOLO) radio transmission for a Black male of shorter stature with a beard and wearing a white t-shirt. Within minutes of receiving the BOLO and just one block from the location of the reported incident, the responding officer observed defendant, whose physical characteristics and clothing matched the description of the suspected perpetrator, pacing along a sidewalk, speaking on a cell phone, looking in several directions, and ducking down between parked cars when he noticed the responding officer's patrol vehicle. The responding officer did not observe any other individuals on the street who matched the description provided in the BOLO.

Based upon the totality of those circumstances, we conclude that the responding officer initially had at least the requisite founded suspicion that criminal activity was afoot to justify a common-law inquiry when he exited the patrol vehicle and attempted to approach defendant (see *People v Dogan*, 154 AD3d 1314, 1315 [4th Dept 2017], *lv denied* 30 NY3d 1115 [2018]; *People v Williams*, 30 AD3d 980, 981 [4th Dept 2006], *lv denied* 7 NY3d 852 [2006]). Defendant, however, "fled before the [responding officer] had the opportunity to approach . . . to make such an inquiry and, based on his flight, his temporal and spacial proximity to the scene of the crime, [his furtive behavior,] and his similarity in appearance to the description of the suspect provided by the [girlfriend]," we further conclude that "the police had the requisite reasonable suspicion to justify their pursuit of [defendant]" (*Williams*, 30 AD3d at 981; see *Dogan*, 154 AD3d at 1315; *People v Mitchell*, 118 AD3d 1417, 1417-1418 [4th Dept 2014], *lv denied* 24 NY3d 963 [2014]; see generally *People v Sierra*, 83 NY2d 928, 929 [1994]). When the police noticed blood on defendant's pants after apprehending him in the backyard of the residence where the shooting occurred, their reasonable suspicion ripened into probable cause to arrest defendant (see *People v Schollin*, 255 AD2d 465, 466 [2d Dept 1998], *lv denied* 93 NY2d 878 [1999]; see also *People v Betancourt*, 153 AD2d 750, 752 [2d Dept 1989], *lv denied* 75 NY2d 767 [1989]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (see

People v Danielson, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to defendant's identity as the perpetrator (see *People v Renaldo*, 239 AD3d 1470, 1471 [4th Dept 2025]; *People v Thomas*, 176 AD3d 1639, 1640 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]), particularly in light of the overwhelming circumstantial evidence presented by the People (see *People v Lacey*, 229 AD3d 1270, 1273 [4th Dept 2024], *lv denied* 42 NY3d 971 [2024]; *People v Malone*, 196 AD3d 1054, 1055 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]; *People v Isaac*, 195 AD3d 1410, 1410 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]). Contrary to defendant's related contention, we conclude that the verdict on the count of attempted murder in the second degree is not against the weight of the evidence with respect to the element of intent to cause the victim's death (see *People v Carter*, 188 AD3d 1674, 1674-1675 [4th Dept 2020], *lv denied* 36 NY3d 1096 [2021]).

Defendant also contends that the court, by applying the sentence enhancement provision associated with his conviction of criminal use of a firearm in the first degree (Penal Law § 265.09 [1] [a]; see § 265.09 [2]), erred in imposing an additional consecutive sentence of five years to the sentence imposed on certain counts of the indictment for which he was convicted. We agree.

"A person is guilty of criminal use of a firearm in the first degree when [the person] commits any class B violent felony offense . . . and [the person] either: (a) possesses a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged; or (b) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm" (Penal Law § 265.09 [1]). However, "[w]hen use of or display of a firearm is an element of a class B felony, the use or display of that same firearm cannot also be the predicate for criminal [use] of a firearm in the first degree" (*People v Brown*, 67 NY2d 555, 560 [1986], *cert denied* 479 US 1093 [1987]; see *People v Wegman*, 2 AD3d 1333, 1335 [4th Dept 2003], *lv denied* 2 NY3d 747 [2004]). Furthermore, the statute also includes a sentence enhancement provision (see generally William C. Donnino, *Prac Commentaries*, McKinney's Cons Laws of NY, Penal Law § 265.09). Specifically, the statute provides in relevant part that, "[n]otwithstanding any other provision of law to the contrary, when a person is convicted of criminal use of a firearm in the first degree as defined in [Penal Law § 265.09 (1)], the court shall impose an additional consecutive sentence of five years to the sentence imposed on the underlying class B violent felony offense where the person convicted of such crime displays a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged, in furtherance of the commission of such crime" (§ 265.09 [2]).

As an initial matter, we agree with defendant that, contrary to the People's assertion, his challenge is directed to the legality of the sentence, not to the propriety of the conviction of criminal use of a firearm in the first degree, and thus his challenge does not

require preservation (see *People v Rhodes*, 281 AD2d 225, 227 [1st Dept 2001], *lv denied* 96 NY2d 906 [2001]; see generally *People v Samms*, 95 NY2d 52, 56 [2000]). With respect to the merits, we agree with defendant that the sentence enhancement provision does not apply to his conviction of attempted murder in the second degree under count 1 (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree under count 7 (§ 120.10 [1]) because neither of those offenses were charged in the indictment or to the jury as a predicate for criminal use of a firearm in the first degree under count 8 (§ 265.09 [1] [a]), and thus neither of those offenses constitute "the underlying class B violent felony offense" upon which the court could impose an additional consecutive sentence of five years (§ 265.09 [2]; *cf. Rhodes*, 281 AD2d at 227).

We further agree with defendant that the sentence enhancement provision does not apply to his conviction of burglary in the first degree under count 2 (Penal Law § 140.30 [1]) and robbery in the first degree under count 5 (§ 160.15 [2]). Given that the use or display of a firearm is an element of each of those crimes and "the use or display of that same firearm cannot also be the predicate for criminal [use] of a firearm in the first degree" (*Brown*, 67 NY2d at 560), neither of those crimes may serve as "the underlying class B violent felony offense" upon which the court could impose an additional consecutive sentence of five years (§ 265.09 [2]; see generally *Wegman*, 2 AD3d at 1335; *People v Merriweather*, 298 AD2d 950, 950-951 [4th Dept 2002], *lv denied* 99 NY2d 561 [2002]).

We also agree with defendant that the sentence enhancement provision does not apply to his conviction of burglary in the first degree under count 3 (Penal Law § 140.30 [2]). Although that crime is premised on defendant having caused physical injury to the victim (see *id.*), was charged in the indictment and to the jury as a predicate class B violent felony offense for criminal use of a firearm in the first degree under count 8 (§ 265.09 [1] [a]), and does not include the use or display of a firearm as an element (*cf. Brown*, 67 NY2d at 560), the record does not establish that the jury found that defendant, "in furtherance of the commission of such crime," "display[ed] a loaded weapon from which a shot, readily capable of producing death or other serious injury[,] may be discharged" (§ 265.09 [2] [emphasis added]; *cf. Rhodes*, 281 AD2d at 227-228). Defendant's conviction under Penal Law § 265.09 (1) (a) "did not involve the display of a loaded, operable weapon" (*People v Argueta*, 194 AD3d 857, 861 [2d Dept 2021], *lv denied* 37 NY3d 970 [2021]), and the victim—the only person other than defendant who was present in the room where the shooting occurred—had no recollection of defendant's entry into the apartment or of the events that transpired during the shooting that caused his physical injuries (*cf. § 265.09 [2]; Rhodes*, 281 AD2d at 227-228; see generally Governor's Approval Mem, Bill Jacket, L 1996, ch 650 at 9).

Consequently, we modify the judgment by vacating the additional consecutive sentences of five years imposed pursuant to Penal Law § 265.09 (2) on counts 1, 2, 3, 5, and 7 of the indictment. Finally,

contrary to defendant's contention, we conclude that the sentence, as modified, is not unduly harsh or severe.

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

697

CAF 24-01406

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

IN THE MATTER OF ABIGAIL ANDERSON,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JON C. CINTRON, RESPONDENT-RESPONDENT.

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

CHARLES GREENBERG, AMHERST, FOR RESPONDENT-RESPONDENT.

DEBRA D. WILSON, LOCKPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered July 2, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother, a New York resident, filed a petition seeking to modify a prior order of custody and visitation entered on stipulation of the parties (stipulated order) that continued primary residential placement of the subject child with respondent father, a resident of Texas. The mother filed the modification petition pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which was adopted by New York (see Domestic Relations Law art 5-A) and Texas (see Tex Fam Code Ann § 152.001 et seq.). Without a hearing or a record of the proceedings, Family Court dismissed the modification petition on the ground of lack of jurisdiction. The mother now appeals from the ensuing order.

Inasmuch as the court here made the prior custody determinations, the threshold question before us is whether it ever lost or relinquished its jurisdiction under Domestic Relations Law §§ 76-a, 76-e or 76-f (see generally *Matter of Adams v John*, 227 AD3d 1395, 1396 [4th Dept 2024]; *Matter of Smith v Smith*, 226 AD2d 1095, 1096 [4th Dept 1996]). However, with no record of the proceedings that occurred with respect to the order on appeal, we are unable to determine on this record what provision of the Domestic Relations Law the court relied on in deciding that it lacked jurisdiction, whether the court complied with the procedures of the UCCJEA in making that

determination (*see* § 75-i; *see generally* *Matter of Beyer v Hofmann*, 161 AD3d 1536, 1537 [4th Dept 2018]; *Matter of Wilson v Linn*, 79 AD3d 1767, 1768 [4th Dept 2010]), and whether the court's decision had evidentiary support.

Inasmuch as we cannot discern on this record whether the court complied with the UCCJEA and properly determined that it lacked jurisdiction, we reverse the order, reinstate the modification petition, and remit the matter to Family Court to render a determination in compliance with the UCCJEA after creating an appropriate record (*see Matter of Hiles v Hiles*, 165 AD3d 1394, 1396 [3d Dept 2018]; *see generally* *Wilson*, 79 AD3d at 1768; *Smith*, 226 AD2d at 1096). We note that "the events subsequent to the entry of the order we are reversing may be relevant to and can be considered on remittal" (*Beyer*, 161 AD3d at 1537 [internal quotation marks omitted]). The mother's remaining contention is academic in light of the foregoing.

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

698

CA 24-01268

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

FRANCIS J. MARRANO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KAREN DUSZA AND JOSEPH DUSZA, JR.,
DEFENDANTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (JOSHUA R. LIPPES OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered July 24, 2024. The order, insofar as appealed from, granted that part of the motion of defendants seeking summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion with respect to the cause of action for nuisance insofar as it alleges a nuisance based on the installation of a flood light and reinstating the nuisance cause of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, a prescriptive easement over property owned by defendants that abuts plaintiff's property and over which plaintiff has traversed in order to reach wetlands on which he, for decades, has fished and used for other recreational activities. Although defendants, upon purchasing the property in 2016, initially allowed plaintiff to continue using the path through their backyard, they revoked permission in 2020 and erected a fence to prevent plaintiff from entering their property. In addition to seeking a prescriptive easement, the amended complaint asserted causes of action for nuisance and violation of the relevant zoning ordinance as it relates to the permissible height of fences.

Following discovery, defendants moved for, inter alia, summary judgment dismissing the amended complaint. Supreme Court granted that part of the motion seeking summary judgment, and we now modify.

"Unlike title by adverse possession, the determination of an easement by prescription focuses on a party's use of property rather than possession thereof" (*Meyers v Berl*, 213 AD3d 1233, 1234 [4th Dept

2023])). To acquire an easement by prescription, a party must establish by clear and convincing evidence that their use of the property was " 'hostile and under a claim of right; actual; open and notorious; and continuous for the required period of 10 years' " (*Bauman v Bauman*, 236 AD3d 1312, 1315 [4th Dept 2025]; see *Mau v Schusler*, 124 AD3d 1292, 1295 [4th Dept 2015])).

Here, defendants met their initial burden of establishing that plaintiff's use of the property was not hostile and under claim of right (see *Bauman*, 236 AD3d at 1316; *Mau*, 124 AD3d at 1296). Indeed, defendants submitted an affidavit wherein one of the defendants averred that, upon purchasing their property, they gave plaintiff permission to traverse their backyard to reach the wetlands but revoked such permission four years later.

In opposition, plaintiff failed to raise a triable issue of fact with respect thereto (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980])). The only admissible evidence submitted by plaintiff was photographs of defendants' fence, which had no relevance to his cause of action for a prescriptive easement. Although plaintiff's attorney addressed that cause of action in a memorandum of law, the memorandum of law did not constitute admissible evidence because it was unsworn and counsel lacked personal knowledge of the facts (see *McGowan v Villa Maria Coll.*, 185 AD2d 674, 674 [4th Dept 1992]; *Lyndaker v Sherwin Williams, Inc.*, 140 AD2d 979, 979-980 [4th Dept 1988], *lv denied* 72 NY2d 809 [1988])). Thus, we conclude that the court properly granted defendants' motion with respect to the cause of action for a prescriptive easement.

We agree with plaintiff, however, that the court erred in granting the motion with respect to the nuisance cause of action insofar as it relates to defendants' installation of a flood light, and we therefore modify the order accordingly. We note that plaintiff abandoned any other claim of nuisance (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994])). "To establish a claim of private nuisance, a plaintiff must show: 'an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with [the plaintiff's] property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act' " (*Cangemi v Yeager*, 185 AD3d 1397, 1399 [4th Dept 2020]; see *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977], *rearg denied* 42 NY2d 1102 [1977])). The interference "must not be fanciful, slight or theoretical, but certain and substantial, and must interfere with the physical comfort of the ordinarily reasonable person" (*Matteliano v Skitkzi*, 85 AD3d 1552, 1553 [4th Dept 2011], *lv denied* 17 NY3d 714 [2011] [internal quotation marks omitted]; see e.g. *Behar v Quaker Ridge Golf Club, Inc.*, 118 AD3d 833, 835 [2d Dept 2014])).

Here, the amended complaint alleged that a nuisance arose from, among other things, flood lights in defendants' backyard that shined light onto plaintiff's property at night. According to plaintiff, the lights constituted a "substantial, intentional and unreasonable interference" with his property rights. In support of that part of their motion seeking summary judgment, defendants acknowledged that

they installed motion-activated security lights in their backyard but contended in a conclusory fashion that the lights do not "amount to nuisance to a reasonable person." Defendants did not identify where on their property the lights are stationed, nor did they dispute that they shined light onto plaintiff's property. Thus, defendants failed to establish as a matter of law that the lights did not constitute a nuisance. The court therefore erred in granting the motion with respect to the nuisance cause of action insofar as it relates to defendants' installation of a flood light regardless of the sufficiency of plaintiff's opposition papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Finally, we note that plaintiff has abandoned any contention with respect to his third cause of action, which alleged that defendants' fence does not comply with the height requirements set forth in the relevant zoning ordinance.

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

708

KA 25-00094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

NICHOLAS D. FAES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Armen J. Nazarian, A.J.), rendered December 21, 2023. The judgment convicted defendant upon a jury verdict of arson in the second degree and criminal contempt 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 after a jury trial of arson in the second degree (Penal Law § 150.15) and criminal contempt in the first degree (§ 215.51 [c]). The conviction stems from an incident in which defendant set his ex-girlfriend's house on fire after spending the night there in violation of a no-contact order of protection.

We reject defendant's contention that County Court's *Molineux* ruling was an abuse of discretion. It is well settled that evidence of uncharged crimes may be admissible if it is relevant to demonstrate motive, intent, absence of mistake or accident, a common scheme or plan, or the identity of the defendant (see *People v Alvino*, 71 NY2d 233, 241-242 [1987]; *People v Ventimiglia*, 52 NY2d 350, 359 [1981]; *People v Molineux*, 168 NY 264, 293-294 [1901]). The testimony regarding defendant's prior acts of domestic violence toward his ex-girlfriend was properly admitted in evidence "to provide background information concerning the context and history of defendant's relationship with" her (*People v Wertman*, 114 AD3d 1279, 1280 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014] [internal quotation marks omitted]; see *People v Cung*, 112 AD3d 1307, 1310 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014]). The testimony that defendant had previously set fire to his ex-girlfriend's dwelling when he was angry with her "was admissible to establish intent and the absence of mistake or accident" (*People v Brown*, 57 AD3d 1461, 1463 [4th Dept

2008], *lv denied* 12 NY3d 814 [2009], *reconsideration denied* 12 NY3d 923 [2009]; see *People v Ingram*, 71 NY2d 474, 479 [1988]; see also *People v DuBois*, 203 AD3d 1621, 1624 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022]). Although " 'a contrary determination could have been made' " regarding the admissibility of the evidence, we conclude that the determination here did not " 'constitute an abuse of discretion as a matter of law' " (*People v Weinstein*, 42 NY3d 439, 458 [2024], quoting *People v Morris*, 21 NY3d 588, 597 [2013]) and that the court properly concluded that the probative value of the evidence outweighed its prejudicial effect (see *People v Parilla*, 214 AD3d 1399, 1401-1402 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; see generally *Alvino*, 71 NY2d at 242).

We also reject defendant's contention that he received ineffective assistance of counsel. Although defense counsel erred in consenting to the court's sequence for exercising peremptory challenges, which was a violation of CPL 270.15 (2), we nevertheless conclude that the error, on its own, was not "sufficiently egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; cf. *People v Stewart*, 231 AD3d 1480, 1482-1483 [4th Dept 2024], *lv denied* 42 NY3d 1054 [2024]). With respect to several other alleged errors by defense counsel, defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). 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]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of count one of the indictment as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to that count is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Although defendant contends that the testimony of a certain witness lacked credibility, we note that " '[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury' " (*People v Delacruz*, 193 AD3d 1340, 1341 [4th Dept 2021], *lv denied* 38 NY3d 926 [2022]), and we see no reason to disturb the jury's resolution of those issues.

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

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

712

CAF 23-01304

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

IN THE MATTER OF MIONETTE A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANON A.A., RESPONDENT-APPELLANT.

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

DEENA K. MUELLER-FUNKE, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 21, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order 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 terminated his parental rights with respect to the subject child on the ground of permanent neglect.

Contrary to the father's contention, we conclude that petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the father and the child, and that the father nevertheless failed to plan appropriately for the child's future (see Social Services Law § 384-b [7] [a]; *Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1667-1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]; see generally *Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]). With respect to petitioner's diligent efforts, the record demonstrates that, after developing a service plan with the father, petitioner sent the father multiple letters inviting him to attend service plan review meetings and giving referrals for providers, called the father more than 15 times to discuss his progress, attempted to schedule an inspection of the father's home, informed the father that he needed to take additional parenting classes and supplied him with information on them, and provided the father with financial assistance and housing. Although the father also contends that petitioner failed to establish diligent efforts because it did not offer additional financial

assistance to him, we reject that contention inasmuch as the services that petitioner arranged for the father were tailored to address the problems that gave rise to the removal of the child from his care (see *Matter of Aric D.B. [Carrie B.]*, 221 AD3d 1502, 1503 [4th Dept 2023]; see generally *Matter of Sheila G.*, 61 NY2d 368, 385 [1984]).

Furthermore, petitioner established that, despite petitioner's diligent efforts, the father failed to comply with the service plan inasmuch as he, inter alia, refused access to his home, refused to undergo a mental health evaluation, failed to provide proof of income, and failed to complete parenting classes. Moreover, the record reflects that the father has not visited the child since the removal proceedings were initiated, and that he has failed to progress meaningfully to overcome the issues that led to the child's removal from his care. Thus, we conclude that petitioner met its burden of establishing that the child was permanently neglected (see *Aric D.B.*, 221 AD3d at 1503; *Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1566 [4th Dept 2023], lv denied 40 NY3d 905 [2023]; *Matter of Carl B., Jr. [Carl B., Sr.]*, 181 AD3d 1161, 1163 [4th Dept 2020], lv denied 35 NY3d 910 [2020]).

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

716

CA 24-01691

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

THADDEUS HARPER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

BUFFALO CITY SCHOOL DISTRICT, ALSO KNOWN AS
BUFFALO SCHOOL DISTRICT AND/OR BUFFALO PUBLIC
SCHOOLS AND BUFFALO BOARD OF EDUCATION,
DEFENDANTS-RESPONDENTS.

WEITZ & LUXENBERG, P.C., NEW YORK CITY (JASON P. WEINSTEIN OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

MARY B. SCARPINE, GENERAL COUNSEL, BUFFALO PUBLIC SCHOOLS, BUFFALO
(DONYELLE N. ELLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered July 23, 2024. The order, insofar as appealed from, granted those parts of the motion of defendants seeking summary judgment dismissing the second, fourth, fifth and sixth causes of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the second, fourth, fifth, and sixth causes of action are reinstated.

Memorandum: In this action pursuant to the Child Victims Act (see CPLR 214-g), plaintiff claims that when he was a student in the seventh or eighth grade in approximately 1975-1976, he was subjected to sexual abuse by a nonparty music teacher employed by defendants. Plaintiff appeals, as limited by his brief, from an order to the extent that it granted those parts of defendants' motion seeking summary judgment dismissing his second cause of action, alleging negligent supervision of plaintiff while acting in loco parentis, fourth cause of action, alleging negligent hiring of the music teacher, fifth cause of action, alleging negligent supervision and training of the music teacher and negligent training of defendants' other employees, and sixth cause of action, alleging negligent retention of the music teacher. We reverse the order insofar as appealed from.

We agree with plaintiff that Supreme Court erred in dismissing his second and fifth causes of action. "Schools have a duty to adequately supervise students in their care, and may be held liable

for foreseeable injuries proximately related to the absence of adequate supervision" (*Kaul v Brooklyn Friends Sch.*, 220 AD3d 936, 938 [2d Dept 2023] [internal quotation marks omitted]; see *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *BL Doe 5 v Fleming*, 229 AD3d 1076, 1077 [4th Dept 2024]). That duty "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1422 [4th Dept 2021] [internal quotation marks omitted]; see *David v County of Suffolk*, 1 NY3d 525, 526 [2003]). "A plaintiff may succeed on a claim of negligent supervision by establishing 'that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury' " (*BL Doe 5*, 229 AD3d at 1077-1078, quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Where an employee acquires knowledge within the scope of their employment, that "knowledge is imputed to [the employer] and the latter is bound by such knowledge [even if] the information is never actually communicated to [the employer]" (*BL Doe 5*, 229 AD3d at 1080 [internal quotation marks omitted]). "[T]he adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was [a] proximate cause of the plaintiff's injury" (*T.F. v Clarkstown Cent. Sch. Dist.*, 238 AD3d 988, 990 [2d Dept 2025] [internal quotation marks omitted]).

Even assuming, arguendo, that defendants met their initial burden on their motion with respect to the second and fifth causes of action, we conclude that plaintiff raised triable issues of fact whether defendants had sufficiently specific knowledge or notice of the music teacher's conduct. In opposition to the motion, plaintiff submitted an affidavit wherein he averred that on two occasions the music teacher entered the boys' locker room while plaintiff and his classmates were changing and that on each occasion the gym teacher instructed the music teacher to leave. Although the gym teacher denied observing the music teacher in the boys' locker room during his deposition, plaintiff submitted an affidavit that the gym teacher executed in an unrelated case wherein he averred that he had "heard rumors from many students" that the music teacher had a sexual interest in the male students at the school and that he was "suspicious that [the music teacher] may have had inappropriate relationships with students." The affidavit reflects that the gym teacher was "vigilant" and "kept an eye on" the music teacher-meeting weekly with another coach to "see if the other had witnessed any inappropriate behavior" by the music teacher-but nonetheless permitted the music teacher to transport students to and from games and swim meets.

During his deposition the gym teacher indicated that it was possible that those rumors began in the 1970s, which would predate or be contemporaneous with plaintiff's alleged dates of abuse. Plaintiff similarly testified that, while he was not specifically aware of whether the music teacher had sexual relationships with other students, "[t]here were a lot of rumors." Moreover, plaintiff submitted the music teacher's testimony, wherein he testified that he had "always" had students visit him at his home and that other

teachers were aware that students would visit him at his home, where the abuse of plaintiff is, in part, alleged to have occurred.

Plaintiff also submitted an expert affidavit asserting that defendants failed to appropriately train and supervise other teachers and staff to report their knowledge of inappropriate behavior. Defendants' assertions as to the experience and qualifications of plaintiff's expert go to the weight of the expert's opinion, not its admissibility (*see generally Revere v Burke*, 200 AD3d 1607, 1609 [4th Dept 2021]; *Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]; *Latour v Hayner Hoyt Corp.* [appeal no. 2], 13 AD3d 1147, 1148 [4th Dept 2004]).

Viewing the evidence in the light most favorable to the nonmoving party, as we are required to do (*see Jacobson v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]), we agree with plaintiff that he raised triable issues of fact that preclude summary judgment with respect to the second and fifth causes of action.

Regarding the fourth and sixth causes of action, we agree with plaintiff that the court erred in dismissing those causes of action. To establish a claim of negligent hiring or retention, "it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]; *see Kaul*, 220 AD3d at 938). That is because "[t]he employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention of the employee" (*Shapiro*, 208 AD3d at 960 [internal quotation marks omitted]).

In support of their motion, defendants submitted the music teacher's employment applications, wherein he submitted contradictory responses about whether he had been arrested; a reference from the principal of a junior high school where the music teacher had taught, who stated that the music teacher had been "dismissed or denied tenure" and "had a tendency to more or less pal with his seventh grade male students"; and a reference completed by a school counselor employed by a different district, who stated that the music teacher had been "dismissed or denied tenure" and that she would not employ him as a teacher in her school system. Moreover, defendants also submitted the deposition testimony of the chief of human resources employed by defendant Buffalo Board of Education, who testified that, both in the 1970s and today, there would be additional background checks for potential new hires who answered arrest questions inconsistently or had been asked to leave a prior teaching position.

Thus, we conclude that defendants failed to meet their initial burden of establishing that they took "reasonable care in making decisions respecting the hiring and retention of the [music teacher]" (*Shapiro*, 208 AD3d at 960) and the motion must be denied with respect

to the fourth and sixth causes of action without regard to the sufficiency of plaintiff's opposing papers.

Entered: October 10, 2025

Ann Dillon Flynn
Clerk of the Court

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

718

KA 22-00629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES DUNN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 31, 2022. The appeal was held by this Court by order entered July 26, 2024, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (229 AD3d 1220 [4th Dept 2024]). The proceedings were held and completed.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]), burglary in the first degree (§ 140.30 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]), arising out of an incident in which defendant and two accomplices robbed a drug dealer of a handgun after following him into an apartment building. In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of promoting prison contraband in the first degree (§ 205.25 [2]) and conspiracy in the fifth degree (§ 105.05 [1]).

In appeal No. 1, we previously held the case, reserved decision, and remitted the matter to County Court for a ruling on defendant's renewed motion for a trial order of dismissal (*People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]). Upon remittal, the court denied defendant's motion. Contrary to defendant's contention in appeal No. 1, we conclude that, viewed in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to establish defendant's guilt (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

With respect to defendant's conviction of robbery in the first degree, defendant contends that there was insufficient evidence that the victim sustained serious physical injury. Defendant was charged with robbery in the first degree under the theory that, while forcibly stealing property, he or another participant in the crime "[u]se[d] or threatene[d] the immediate use of a dangerous instrument" (Penal Law § 160.15 [3]). Here, the evidence established that defendant used a BB gun to strike the victim on the back of his head during the robbery. Contrary to defendant's contention, it is irrelevant whether defendant actually caused serious physical injury to the victim inasmuch as the BB gun, as used by defendant, was readily capable of causing serious physical injury and thus constituted a dangerous instrument (*see* § 10.00 [13]; *see generally* *People v Carter*, 53 NY2d 113, 116 [1981]; *People v Nosea*, 212 AD3d 511, 511 [1st Dept 2023], *lv denied* 39 NY3d 1143 [2023]; *People v Ryder*, 146 AD3d 1022, 1025 [3d Dept 2017], *lv denied* 29 NY3d 1086 [2017]). Even assuming, arguendo, that the BB gun was not a dangerous instrument, we conclude that the evidence is legally sufficient to establish that, at the time of the robbery, defendant's accomplices were brandishing knives, which constitute dangerous instruments (*see* *People v Mercer*, 83 AD3d 1526, 1527 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]; *People v Holder*, 177 AD2d 979, 979 [4th Dept 1991], *lv denied* 79 NY2d 1050 [1992]). We also reject defendant's contention that the evidence is legally insufficient to establish his intent to rob the victim. Viewed in the light most favorable to the People, the evidence is legally sufficient to establish that defendant formed the intent to rob the victim when, during the course of the altercation, defendant started struggling with the victim for possession of the handgun and yelled "give me the fucking gun" (*see generally* *Contes*, 60 NY2d at 621; *People v Addison*, 184 AD3d 1099, 1100 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]). Whether defendant's testimony that he intended only to assault the victim should be credited was a question for the jury and is more properly considered in the context of whether the verdict with respect to robbery in the first degree is against the weight of the evidence (*see generally* *People v Acosta*, 208 AD3d 1579, 1582 [4th Dept 2022], *lv denied* 39 NY3d 1076 [2023]; *People v Taylor*, 57 AD3d 1518, 1518 [4th Dept 2008], *lv denied* 12 NY3d 822 [2009]).

With respect to defendant's conviction of burglary in the first degree, we reject defendant's contention that the evidence is not legally sufficient to establish that defendant "knowingly enter[ed] or remain[ed] unlawfully in a dwelling with intent to commit a crime therein" (Penal Law § 140.30). Inasmuch as the evidence established that defendant entered the vestibule of an apartment building and that the vestibule was not remote from the 14 separate apartments in the building, we conclude that there is legally sufficient evidence to establish that defendant entered a dwelling at the time of the robbery (*see* *People v McCray*, 23 NY3d 621, 624 [2014], *rearg denied* 24 NY3d 947 [2014]; *cf. People v Joseph*, 28 NY3d 1003, 1006 [2016]). To the extent defendant contends that his entry into the apartment building was not unlawful inasmuch as the vestibule of the building was a common area and there was no evidence of "no trespassing signs" or a locked door (*see* *People v Smith*, 87 AD3d 920, 920 [1st Dept 2011],

affd 22 NY3d 1092 [2014]; *People v Huggins*, 134 AD3d 854, 855 [2d Dept 2015], *lv denied* 26 NY3d 1146 [2016]), we note that there was evidence establishing that defendant not only entered the building's vestibule but also intentionally forced himself and the victim past the threshold of the second door of the vestibule into the next hallway during the altercation. Inasmuch as that door was locked, defendant clearly entered an area from which the general public was excluded, thereby establishing that he knowingly and unlawfully entered the dwelling (see § 140.30; *Smith*, 87 AD3d at 920).

With respect to defendant's conviction of criminal possession of a weapon in the second degree, we reject defendant's contention that the evidence did not establish that he possessed a firearm—specifically, the handgun he stole from the victim during the robbery that he effectuated with the BB gun. Surveillance video entered in evidence showed defendant holding a handgun, not the BB gun, as he fled the scene of the robbery. Moreover, defendant could be heard on the surveillance video during the robbery telling the victim to give him “the . . . gun.” Thus, although no handgun was recovered by the police, there was sufficient evidence to establish that defendant possessed the handgun that he stole from the victim during the robbery (see *People v Ellison*, 151 AD3d 1905, 1905 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Vigliotti*, 270 AD2d 904, 905 [4th Dept 2000], *lv denied* 95 NY2d 839 [2000], *reconsideration denied* 95 NY2d 970 [2000]; see also *People v Gilmore*, 200 AD3d 1184, 1188-1189 [3d Dept 2021], *lv denied* 38 NY3d 927 [2022]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that an acquittal would not have been unreasonable, we cannot conclude that the jury “failed to give the evidence the weight it should be accorded” (*id.*; see *People v Bennett*, 210 AD3d 1421, 1422 [4th Dept 2022]; *People v McDermott*, 200 AD3d 1732, 1733 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022], *reconsideration denied* 38 NY3d 1009 [2022]).

In appeal No. 2, we previously rejected defendant's substantive contentions but held the case, reserved decision, and remitted the matter to County Court to allow defendant to make any necessary motions upon the determination of his renewed motion for a trial order of dismissal in appeal No. 1 (see *Dunn*, 229 AD3d at 1220-1223). In light of our determination in appeal No. 1, we now affirm the judgment in appeal No. 2.

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

719

KA 22-00630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES DUNN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 31, 2022. The appeal was held by this Court by order entered July 26, 2024, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (229 AD3d 1227 [4th Dept 2024]). The proceedings were held and completed.

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

Same memorandum as in *People v Dunn* ([appeal No. 1] – AD3d – [Oct. 10, 2025] [4th Dept 2025]).

Entered: October 10, 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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KA 23-00325

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TASHAD BEASON, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE 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 (James E. Walsh, Jr., J.), rendered December 19, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the motion dated March 23, 2022, seeking to dismiss the indictment pursuant to CPL 30.30 is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]), defendant contends, inter alia, that Supreme Court erred in denying his motions seeking to dismiss the indictment on statutory speedy trial grounds (*see generally* CPL 30.30 [1] [a]). The People correctly concede that the court (Schiano, Jr., J.) erred in denying the motion dated March 23, 2022, so we now reverse.

"Where a defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action" (*People v Flowers*, 234 AD3d 1347, 1347 [4th Dept 2025], *lv denied* 43 NY3d 1045 [2025]; *see* CPL 30.30 [1] [a]; *People v Shammah*, 229 AD3d 1250, 1250 [4th Dept 2024]). "The statutory period is calculated by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are

ineligible for an exclusion" (*Shammah*, 229 AD3d at 1250 [internal quotation marks omitted]). "Once a defendant has shown the existence of a delay greater than six months, the People bear the burden of proving that certain periods within that time should be excluded" (*id.*).

Here, the People conceded during motion practice that there were 168 days of prereadiness delay chargeable to them. The People announced readiness in July 2021 and, subsequently, a combined *Huntley* and *Mapp* hearing was held on December 8, 2021. After two officers from the Rochester Police Department testified at that hearing, the prosecutor stated that a third officer was "currently not allowed to come to court due to an ongoing investigation by the Attorney General's Office." The prosecutor said that he was unsure of "who" was telling the officer "not to come to court." The court thus adjourned the hearing and, ultimately, the officer testified on January 10, 2022, i.e., 33 days later.

On appeal, the People have correctly conceded that the 33-day adjournment to secure the officer's testimony constitutes "a period of unreasonable delay" and is chargeable to them (*People v Gonzalez*, 266 AD2d 562, 563 [2d Dept 1999], *lv denied* 94 NY2d 920 [2000]; *cf. People v Ricart*, 153 AD3d 421, 422 [1st Dept 2017], *appeal dismissed* 31 NY3d 1074 [2018]), thus resulting in a total of more than six months of delay chargeable to them (*see Shammah*, 229 AD3d at 1250). The People failed to establish that they exercised due diligence, i.e. " 'credible, vigorous activity' to make the witness available" (*People v Figaro*, 245 AD2d 300, 300 [2d Dept 1997], quoting *People v Washington*, 43 NY2d 772, 774 [1977]; *see generally* CPL 30.30 [4] [g]; *People v Zirpola*, 57 NY2d 706, 708 [1982]).

We therefore conclude that defendant's March 23, 2022 motion should have been granted and, as a result, the judgment must be reversed and the indictment must be dismissed. In light of our determination, defendant's remaining contentions are academic.

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

721

KA 24-01859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHANIE A. RIDLEY, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Jason L. Cook, J.), entered November 16, 2023. 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 reversed in the interest of justice and on the law without costs and the matter is remitted to Supreme Court, Yates County, for further proceedings in accordance with the following memorandum: On appeal from an order determining that she is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court erred in assessing points against her under risk factor 2 because the People failed to establish by clear and convincing evidence that she engaged in sexual intercourse with the victim. We reject that contention. Although there is no evidence that defendant herself actually engaged in sexual intercourse with the victim, the court properly determined that the People met their burden by establishing that, under the circumstances of this case, defendant shared the intent of a person who engaged the victim in sexual intercourse (*cf. People v McNeal*, 234 AD3d 1247, 1248 [4th Dept 2025]; *People v Blue*, 186 AD3d 1088, 1090 [4th Dept 2020], *lv denied* 36 NY3d 901 [2020]; *see generally* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7 [2006]).

As the People correctly concede, the court violated defendant's right to due process by sua sponte assessing points under risk factor 14 (release environment: supervision) that were not requested by the People (*see People v Buckmaster*, 240 AD3d 1372, 1372-1373 [4th Dept 2025]; *People v Chrisley*, 172 AD3d 1914, 1914-1915 [4th Dept 2019]; *People v Hackett*, 89 AD3d 1479, 1480 [4th Dept 2011]). Although defendant failed to object to the assessment of points under risk factor 14 when the court rendered its oral decision, we "review defendant's contention in the interest of justice in light of the substantial infringement upon [her] due process and statutory rights"

(*Chrisley*, 172 AD3d at 1915; see *Buckmaster*, 240 AD3d at 1373).

The People nevertheless assert that any error by the court in sua sponte assessing points against defendant is harmless, particularly in light of the court's decision to grant their request for an upward departure to risk level three. We disagree. Even assuming, arguendo, that the harmless error doctrine applies in this context (see *People v Baxin*, 26 NY3d 6, 11 [2015]; *People v Wilke*, 181 AD3d 1324, 1325 [4th Dept 2020]), we conclude that the error here cannot be deemed harmless inasmuch as we further agree with defendant that the court erred in granting the People's request for an upward departure. Specifically, the court failed to comply with the requirement of Correction Law § 168-n (3) that it set forth the findings of fact and conclusions of law upon which it based its decision to grant the People's request for an upward departure (see *People v Flax*, 71 AD3d 1451, 1451-1452 [4th Dept 2010]; *People v Hubel*, 70 AD3d 1492, 1493-1494 [4th Dept 2010]). In its decision, the court merely concluded, under the first part of the relevant three-part analysis, that the People had identified "aggravating . . . circumstances . . . of a kind or to a degree not adequately taken into account by the guidelines" (*People v Gillotti*, 23 NY3d 841, 861 [2014]). At no time in its decision did the court render a determination on the other two parts of the relevant analysis. Rather, after identifying the aggravating circumstances, the court conclusorily granted the People's application for an upward departure, without ever "weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism" (*id.*).

Inasmuch as the failure of the court to set forth the findings of fact and conclusions of law on which it based its decision "preclud[es] meaningful appellate review of the propriety of the court's risk level assessment" (*Flax*, 71 AD3d at 1452 [internal quotation marks omitted]), and given the court's improper assessment of points under risk factor 14, we reverse the order, vacate defendant's risk level determination, and remit the matter to Supreme Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3).

In light of our determination, defendant's remaining contention is academic.

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

722

KA 24-01046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

COREY W. KUHN, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Chauncey J. Watches, J.), rendered April 15, 2024. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking special conditions 23 and 24 as conditions of probation, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the third degree (Penal Law former § 130.25 [2]). Defendant failed to preserve for our review his contention concerning County Court's failure to advise him that he was subject to registration and a risk-level determination under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*; see *People v Jackson*, 26 AD3d 781, 782 [4th Dept 2006], *lv denied* 6 NY3d 849 [2006]; *People v Ginter*, 23 AD3d 1064, 1065 [4th Dept 2005], *lv denied* 6 NY3d 776 [2006]). To the extent that defendant contends that defense counsel was ineffective for failing to advise him of the SORA-related consequences of his plea, that contention concerns matters outside the record and thus must be raised in a motion pursuant to CPL 440.10 (see *People v Gravino*, 62 AD3d 1259, 1259 [4th Dept 2009], *affd* 14 NY3d 546 [2010]; *People v Keane*, 221 AD3d 1586, 1588-1589 [4th Dept 2023]).

Defendant next contends that certain conditions of his probation are not authorized by Penal Law § 65.10. Contrary to the People's assertion, we conclude that defendant's contention does not require preservation inasmuch as his challenges to the conditions in question implicate the legality of the sentence (see *People v King*, 151 AD3d 1651, 1652 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; see generally *People v Letterlough*, 86 NY2d 259, 263 n 1 [1995]). We agree with defendant that the special condition requiring that he "not

purchase, possess, or indulge in the use of alcohol or any products that contain alcohol" is not enforceable and must be stricken because it is not related to the probationary goal of rehabilitation (see *People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]; *People v Mead*, 133 AD3d 1257, 1258 [4th Dept 2015]). For similar reasons, we agree with defendant that the special condition requiring him to "[s]ubmit to any test designed to detect the use of alcohol and/or drugs" is also not enforceable and must be stricken (see *Saraceni*, 153 AD3d at 1560).

We conclude, however, that the special condition requiring that defendant "not associate with any drug users, drug sellers or convicted criminals unless granted prior permission by [his] supervising Probation Officer" is a lawful condition of probation concerning association (see generally Penal Law § 65.10 [2] [b]).

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

723

KA 18-00922

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERBIE D. MICHEL, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered February 16, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a forged instrument 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 criminal possession of a forged instrument in the first degree (Penal Law § 170.30). Preliminarily, as the People correctly concede, defendant's waiver of the right to appeal is invalid because Supreme Court's colloquy and the written waiver "used overbroad language that mischaracterized the waiver as an absolute bar to the taking of an appeal" (*People v Terry*, 217 AD3d 1582, 1582 [4th Dept 2023], lv denied 40 NY3d 1041 [2023] [internal quotation marks omitted]; see *People v Thomas*, 34 NY3d 545, 564-566 [2019], cert denied – US –, 140 S Ct 2634 [2020]).

Defendant's contention that he was denied effective assistance of counsel because defense counsel did not advise him that he was ineligible for participation in the judicial diversion program relies on matters outside the record on appeal and must therefore be raised by motion pursuant to CPL 440.10 (see *People v Chavis*, 218 AD3d 1368, 1370 [4th Dept 2023], lv denied 40 NY3d 1012 [2023]; *People v Vail*, 174 AD3d 1365, 1366 [4th Dept 2019]). With respect to defendant's claim that defense counsel was ineffective in allowing defendant to plead guilty before the court issued its suppression ruling, defendant failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's decision not to await the suppression ruling before defendant accepted the plea offer (see *People v Morris*, 117 AD3d 1580, 1580-1581 [4th Dept 2014]; *People v*

Granger, 96 AD3d 1667, 1668 [4th Dept 2012], *lv denied* 19 NY3d 1102 [2012]). We conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

We reject defendant's contention that the court failed to conduct a minimal inquiry into his requests for new counsel. "[A] defendant may be entitled to new assigned counsel upon showing 'good cause for a substitution,' such as a conflict of interest or other irreconcilable conflict with counsel" (*People v Sides*, 75 NY2d 822, 824 [1990]; *see People v Medina*, 44 NY2d 199, 207 [1978]). "Where a defendant makes a 'seemingly serious request[]' for new assigned counsel, the court is obligated to 'make some minimal inquiry' " (*People v Graham*, 153 AD3d 1634, 1634 [4th Dept 2017], *lv denied* 30 NY3d 1060 [2017], quoting *Sides*, 75 NY2d at 824-825; *see People v Williams*, 235 AD3d 1245, 1247 [4th Dept 2025], *lv denied* 43 NY3d 1059 [2025]). Here, the court "afforded defendant the opportunity to express his objections concerning [defense counsel], and . . . thereafter reasonably concluded that defendant's . . . objections had no merit or substance" (*People v Singletary*, 63 AD3d 1654, 1654 [4th Dept 2009], *lv denied* 13 NY3d 839 [2009] [internal quotation marks omitted]; *see Williams*, 235 AD3d at 1247; *Graham*, 153 AD3d at 1635).

We reject defendant's contention that the court erred in sentencing him as a second felony offender. In the context of a hearing conducted pursuant to CPL 400.21, the People have the burden of proving beyond a reasonable doubt the existence of the previous felony conviction and, once they have met that burden, "it is then incumbent upon the defendant to allege and prove facts underlying [a] claim [by the defendant] that the conviction was unconstitutionally obtained" (*People v Harris*, 61 NY2d 9, 15 [1983]). Upon our review of the record, we conclude that defendant failed to establish that the plea giving rise to the prior felony conviction was obtained unconstitutionally (*see* CPL 400.21 [7] [b]; *Harris*, 61 NY2d at 15; *People v Thompson*, 107 AD3d 1609, 1610-1611 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]).

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

725

KA 24-00430

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN P. SOTO, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM 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 (Frederick G. Reed, A.J.), rendered February 8, 2024. The judgment convicted defendant upon a jury verdict of assault in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of two counts of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is not supported by the weight of the evidence. We reject those contentions.

The conviction arises from allegations that defendant struck two victims in the head with a large rock, thereby causing them physical injury. The trial evidence established that on the morning of the incident in question defendant and another man drove to the residence of the man's ex-girlfriend. The two victims, who employed the ex-girlfriend and could see her residence from their place of employment, confronted the man, who became belligerent. The victims attempted to subdue the man and, during that event, defendant struck each of the two victims in the head with the same large rock. The victim of the offense charged in count 1 of the indictment (first victim) was hit once, and the victim of the offense charged in count 2 (second victim) was hit three times.

Defendant contends that neither victim sustained a physical injury, and that defendant's actions were not a cause of any injury to the first victim. Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). On appeal, the People do not contest that the victims did not suffer

impairment of physical condition but contend that the evidence established that they experienced substantial pain. " '[S]ubstantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]), and issues regarding substantial pain are generally "questions for the trier of fact" (*People v Guidice*, 83 NY2d 630, 636 [1994]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and [their] pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Being hit in the head with a large rock is "an experience that would normally be expected to bring with it more than a little pain" (*Chiddick*, 8 NY3d at 447). The testimony of both victims established that the pain was "not trivial" (*id.*; see *People v Henderson*, 77 AD3d 1311, 1311 [4th Dept 2010], *lv denied* 17 NY3d 953 [2011]; cf. *People v Thorpe*, 218 AD3d 1124, 1127 [4th Dept 2023]; *Haynes*, 104 AD3d at 1143-1144). They both suffered from severe headaches, the first victim sought medical attention for his injuries, and both consumed copious amounts of ibuprofen to numb the pain. The first victim ranked the pain as a 6 out of 10, and the second victim ranked the pain as an "8 to 10" out of 10. Although the second victim did not seek medical attention, his testimony regarding his desire to avoid doctors mitigates that factor (see generally *Guidice*, 83 NY2d at 636).

The victims' description of their pain levels, corroborated by their overuse of ibuprofen to numb the pain and the first victim's visit to a medical professional, established that they were in substantial pain (see generally *Chiddick*, 8 NY3d at 447). Indeed, the testimony reflects that the victims' pain here was more significant than the pain level at issue in *Chiddick*, where the victim testified that his pain level was "in between '[a] little' and 'a lot' " (*id.*; cf. *Thorpe*, 218 AD3d at 1127).

With respect to the causation element of count 1, the evidence at trial established that the first victim was struck in the head and that, upon turning to look, he observed defendant holding a large rock. He also observed defendant strike the second victim three times in the head. Video evidence and eyewitness testimony established that defendant was holding a large rock in his hand immediately after the incident.

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

Defendant further contends that he was denied his right to a fair

trial by prosecutorial misconduct during summation. Even assuming, arguendo, that the prosecutor improperly vouched for two witnesses (see *People v Griffin*, 125 AD3d 1509, 1510 [4th Dept 2015]; cf. *People v Roman*, 85 AD3d 1630, 1632 [4th Dept 2011], lv denied 17 NY3d 821 [2011]), we conclude that the two statements that defendant contends constituted improper vouching were "not so egregious as to deny defendant a fair trial" (*People v White*, 291 AD2d 842, 843 [4th Dept 2002], lv denied 98 NY2d 656 [2002]; see *People v Lyon*, 77 AD3d 1338, 1339 [4th Dept 2010], lv denied 15 NY3d 954 [2010]). With respect to defendant's contention that the prosecutor made a comment improperly speculating about facts not in evidence, defendant's objection to that comment was sustained and the jury was instructed that it must base its decision solely on the evidence presented at trial. "Inasmuch as defendant did not object further or move for a mistrial, 'the curative instructions must be deemed to have corrected the error to . . . defendant's satisfaction' " (*People v Kellam*, 237 AD3d 1518, 1519 [4th Dept 2025], quoting *People v Heide*, 84 NY2d 943, 944 [1994]; see *People v Mencil*, 206 AD3d 1550, 1554 [4th Dept 2022], lv denied 38 NY3d 1152 [2022]).

Defendant's remaining challenge to the prosecutor's summation is not preserved for our review (see *People v Heverly*, 230 AD3d 1534, 1537 [4th Dept 2024], lv denied 42 NY3d 1053 [2024]; *People v Smith*, 187 AD3d 1652, 1655 [4th Dept 2020], lv denied 36 NY3d 1054 [2021]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

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

726

KA 23-02151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT SURLS, DEFENDANT-APPELLANT.

DANIEL J. MASTRELLA, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 29, 2015. The judgment convicted defendant upon a jury verdict of assault in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress all statements made after defendant invoked his right to remain silent is granted, and a new trial is granted.

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

We agree with defendant that Supreme Court erred in refusing to suppress statements he made to the police because defendant unambiguously invoked his right to remain silent, which the police thereafter failed to scrupulously honor. "If a person who is subject to police interrogation indicates in any manner, at any time prior to or during questioning, that [they] wish[] to remain silent, the interrogation must cease" (*People v Colon*, 185 AD3d 1510, 1511 [4th Dept 2020], *lv denied* 35 NY3d 1093 [2020] [internal quotation marks omitted]; see generally *Miranda v Arizona*, 384 US 436, 479 [1966]). The assertion of the right to remain silent "must be unequivocal and unqualified" (*People v Morton*, 231 AD2d 927, 928 [4th Dept 1996], *lv denied* 89 NY2d 944 [1997]; see *People v Zacher*, 97 AD3d 1101, 1101 [4th Dept 2012], *lv denied* 20 NY3d 1015 [2013]). "Whether a defendant's assertion of that right was unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding [that assertion,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*Colon*, 185 AD3d at 1511-1512 [internal

quotation marks omitted])). "Once invoked, the right to remain silent must be scrupulously honored" (*id.* at 1512 [internal quotation marks omitted]).

Here, after the police told defendant that they considered him a suspect in the underlying shooting and asked him "for his side of the story," defendant continually stated that "he didn't want to talk about that and [that] he'd rather take his chances." We conclude that defendant thereby unequivocally invoked his right to remain silent (*see People v Brown*, 266 AD2d 838, 838 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999]) inasmuch as "[n]o reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police" (*Colon*, 185 AD3d at 1512). Indeed, the actions of the police in response to defendant's statement demonstrated that they understood his statement to be an unequivocal invocation of his right to remain silent—i.e., they promptly ceased their questioning of defendant and left the interrogation room for a prolonged period of time (*see People v Douglas*, 8 AD3d 980, 981 [4th Dept 2004], *lv denied* 3 NY3d 705 [2004]). Defendant's responses to a police officer when the officer resumed the interrogation—which occurred about an hour and a half after the prior questioning ceased—did not negate defendant's prior unequivocal invocation of his right to remain silent because the police officer failed to reread the *Miranda* warnings to defendant before resuming the interrogation and therefore failed to scrupulously honor his right to remain silent (*see People v Marrero*, 199 AD3d 1471, 1474 [4th Dept 2021], *lv denied* 38 NY3d 929 [2022]; *Brown*, 266 AD2d at 838; *see generally People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985]).

We thus conclude that the court erred in refusing to suppress all statements made by defendant after he invoked his right to remain silent. Inasmuch as there is a reasonable possibility that the erroneous admission of defendant's inculpatory statements contributed to the verdict, the error in refusing to suppress all of those statements cannot be considered harmless, and reversal is required (*see People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Lipton*, 238 AD3d 1504, 1506 [4th Dept 2025]).

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

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

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CAF 24-00200

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

IN THE MATTER OF GABRIEL S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

THOMAS S., RESPONDENT-APPELLANT.

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 4, 2023, in a proceeding pursuant to Social Services Law § 384-b. The order 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 Social Services Law § 384-b proceeding, respondent father appeals from an order that terminated his parental rights with respect to the subject child. We affirm.

Contrary to the father's contention, petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the father's relationship with the child, including during the period of his incarceration (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1397 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1164 [4th Dept 2020]; *Matter of Callie H. [Taleena W.]*, 170 AD3d 1612, 1613 [4th Dept 2019], *lv denied* 35 NY3d 905 [2020]). With respect to the period of the father's incarceration, the father's caseworker testified that she sent him monthly letters, which included a toll free phone number and an address where she could be contacted, a list of services, and warnings regarding the possibility of termination of parental rights (*see Callie H.*, 170 AD3d at 1613).

Contrary to the father's further contention, petitioner established that, despite its diligent efforts, the father failed to plan appropriately for the child's future (*see id.* at 1614). The father failed to comply with services offered to him before his incarceration, and once incarcerated, he failed to communicate with

his caseworker (see generally *Matter of Shanequia P.*, 302 AD2d 890, 891 [4th Dept 2003]). We conclude that "there is no evidence that he had a realistic plan to provide an adequate and stable home for the child[]" (*Natalee F.*, 194 AD3d at 1398). Finally, we reject the father's contention that his release from prison warrants remittal for a new dispositional hearing (see generally *Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], lv denied 36 NY3d 902 [2020]; *Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013]).

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

729

CAF 24-00387

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

IN THE MATTER OF AALIYAH A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICKY A., RESPONDENT-APPELLANT.

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

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

KAITLYN G. HOERNER, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered February 26, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudged that he neglected the subject child. We affirm.

Initially, we note that "[t]he fact that the father is not aggrieved by the dispositional portion of the order [because he waived his right to a dispositional hearing and consented to the disposition] does not bar his appeal from that part of the order with respect to the finding of neglect, which followed a fact-finding hearing" (*Matter of Jack S. [Franklin O.S.]*, 173 AD3d 1842, 1842 [4th Dept 2019] [internal quotation marks omitted]; see *Matter of John O. [Cassandra P.]*, 230 AD3d 1385, 1386 [3d Dept 2024]; *Matter of Dorika S. [Leopold G.]*, 225 AD3d 1171, 1171-1172 [4th Dept 2024], lv denied 42 NY3d 906 [2024]).

Contrary to the contention of the father, however, we conclude that the evidence established his neglect of the subject child by a preponderance of the evidence. "In reviewing a determination of neglect, [this Court] must accord great weight and deference to the determination of Family Court, including its drawing of inferences and assessment of credibility, and . . . should not disturb its determination unless clearly unsupported by the record" (*Matter of*

Shaylee R., 13 AD3d 1106, 1106 [4th Dept 2004]; see *Matter of Bryan O. [Zabiullah O.]*, 153 AD3d 1641, 1642 [4th Dept 2017]; *Matter of Emily W. [Michael S.—Rebecca S.]*, 150 AD3d 1707, 1709 [4th Dept 2017]). “[T]he court was entitled to draw the strongest inference [against the father] that the opposing evidence permits based on [his] failure to testify at the fact-finding hearing” (*Matter of Baby B.W. [Tracy B.H.]*, 148 AD3d 1786, 1787-1788 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017] [internal quotation marks omitted]; see *Jack S.*, 173 AD3d at 1844). Here, the evidence at the hearing established that the father struck the child’s mother on at least one occasion while both were near the child, who was medically fragile and born with physical abnormalities, including the development of intestines on the outside of her body. Petitioner thus established by a preponderance of the evidence that the child’s “physical, mental or emotional condition . . . [was] in imminent danger of becoming impaired” as a result of the incident of domestic violence between her parents (*Nicholson v Scoppetta*, 3 NY3d 359, 368 [2004]; see Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]), and that there was a “causal connection between the basis for the neglect petition and the circumstances that allegedly produce[d] the . . . imminent danger of impairment” (*Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016] [internal quotation marks omitted]; see *Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014]). Further, the evidence established that the father had permitted the child to be cared for by the child’s mother, whom the father knew to be an unsuitable caregiver in light of the mother’s substance abuse (see *Trinity E.*, 137 AD3d at 1591; *Matter of Claudina E.P. [Stephanie M.]*, 91 AD3d 1324, 1324 [4th Dept 2012]; *Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1612 [4th Dept 2010], *lv denied* 15 NY3d 705 [2010]).

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

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CA 24-00840

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

MATTHEW IGNATOWSKI, PLAINTIFF,

V

MEMORANDUM AND ORDER

LEDGESTONE VILLAGE LLC, DEFENDANT.

LEDGESTONE VILLAGE LLC,
THIRD-PARTY PLAINTIFF-RESPONDENT,

V

LJ CONSTRUCTION, INC.,
THIRD-PARTY DEFENDANT-APPELLANT.

BAXTER & SMITH, P.C., BUFFALO (BRYAN R. FORBES OF COUNSEL), FOR
THIRD-PARTY DEFENDANT-APPELLANT.

ADDELMAN CROSS & BALDWIN, P.C., BUFFALO (JESSE B. BALDWIN OF COUNSEL),
FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 7, 2024. The order granted the motion of defendant-third-party plaintiff insofar as it sought conditional summary judgment with respect to liability on the common-law indemnification cause of action.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages arising from injuries he allegedly sustained while using a table saw to cut vinyl flooring planks on a construction site. At the time of the accident, plaintiff was an employee of third-party defendant LJ Construction WNY LLC, incorrectly sued as LJ Construction, Inc. (LJ Construction), a general contractor engaged in the construction of a six-unit residential apartment building on property owned by defendant Ledgestone Village LLC (Ledgestone), an entity formed solely for the purpose of holding title to the property. Ledgestone and LJ Construction both were solely owned by the same individual (owner).

After plaintiff commenced this action against Ledgestone, asserting causes of action for common-law negligence and the violation of Labor Law §§ 200 and 241 (6), Ledgestone filed a third-party

complaint against LJ Construction asserting causes of action for common-law indemnification and contribution on the basis that LJ Construction was the negligent party and controlled and supervised plaintiff's work. Supreme Court granted Ledgestone's ensuing motion insofar as it sought conditional summary judgment with respect to liability on the common-law indemnification cause of action. LJ Construction appeals, and we affirm.

Common-law indemnity is an equitable doctrine that imposes indemnity obligations upon the party at fault for bringing about an injury where another party is held vicariously liable for that injury (see *Rosado v Proctor & Schwartz*, 66 NY2d 21, 24 [1985]; see also *McCarthy v Turner Constr. Inc.*, 17 NY3d 369, 375 [2011]). Inasmuch as common-law indemnification is meant to shift the loss of an innocent party to the party at fault, it is not available to a party whose negligence contributed to the injury (see *Divens v Finger Lakes Gaming & Racing Assn., Inc., LP*, 151 AD3d 1640, 1643 [4th Dept 2017]), or one that directed or supervised the injury-causing activity (see *Lostracco v Lewiston-Porter Cent. Sch. Dist.*, 224 AD3d 1248, 1249 [4th Dept 2024]). Consequently, a party seeking common-law indemnification must establish that "it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy*, 17 NY3d at 377-378). However, "[a]n owner's or contractor's general authority to coordinate the [injury-causing] work and monitor its progress and safety conditions is not a basis for denying common-law indemnification" (*Colyer v K Mart Corp.*, 273 AD2d 809, 810 [4th Dept 2000]; see also *Niethe v Palombo*, 283 AD2d 967, 968 [4th Dept 2001]).

Here, contrary to LJ Construction's contention on appeal, in support of the motion, Ledgestone made a prima facie showing that it did not supervise or control the injury-causing work. Ledgestone submitted evidence that it was an entity created two weeks prior to the accident solely for the purpose of holding title to the property. At the time of the accident, Ledgestone also did not have any employees (see *DePillo v Greater Auburn Land Co.*, 236 AD2d 863, 864 [4th Dept 1997]), and it is undisputed that the person who owned Ledgestone, the only member of that entity, was not present at the worksite before or during the accident (see *Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985-986 [4th Dept 2001]).

Additionally, we conclude that Ledgestone satisfied its initial burden of showing that LJ Construction did, in fact, exercise actual supervision or control over the work that resulted in plaintiff's injury. Specifically, Ledgestone established that LJ Construction hired plaintiff, gave him work orders on the jobsite, and furnished all equipment and supplies at the worksite where it was solely responsible for directing and controlling plaintiff's work. Ledgestone also established that LJ Construction hired and employed every person working at the site on the day of the accident, including plaintiff and plaintiff's supervisor. Indeed, LJ Construction had hired both plaintiff and his supervisor prior to Ledgestone's existence. Further, on the day of the accident, plaintiff took orders from that supervisor, an LJ Construction employee and foreman, who was

responsible for running the job and also training plaintiff on how to use the table saw. The supervisor also set up the table saw that caused the injury and instructed plaintiff on how to use the table saw to cut the flooring planks. Thus, LedgeStone submitted ample evidence establishing that LJ Construction actually supervised and directed the injury-causing work (see *DePillo*, 236 AD2d at 863-864; see also *Damon v Starkweather*, 185 AD2d 633, 633-634 [4th Dept 1992]).

We further conclude that, in opposition, LJ Construction failed to raise a genuine issue of material fact with respect to whether LedgeStone—and not it—actually controlled, directed or supervised the injury-producing work (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Specifically, we reject LJ Construction's contention that there are questions of fact whether the owner was acting on behalf of LedgeStone or LJ Construction when he purportedly exercised supervision and control over the injury-producing work. Among other things, the owner's actions included: directing plaintiff when and where to work on the property, purchasing the table saw that caused the accident, observing the table saw on the jobsite, and having the final authority with regard to replacing any worn or defective equipment such as the unguarded table saw. In our view, none of those facts supports the conclusion that the owner, individually, directly controlled or supervised the injury-producing work, let alone that he was acting solely on behalf of LedgeStone. For example, even assuming, arguendo, that the owner was acting on behalf of LedgeStone, we conclude that the fact that the owner directed plaintiff where to go and told him generally what tasks to perform does not establish actual supervision or control, inasmuch as "[a]n owner's or contractor's general authority to coordinate the [injury-causing] work and monitor its progress and safety conditions is not a basis for denying common-law indemnification" (*Lostracco*, 224 AD3d at 1249; see *Colyer*, 273 AD2d at 810; see also *Niethe*, 283 AD2d at 968). That the owner, at times, told plaintiff generally what tasks to perform is not the same as controlling, directing or supervising "the manner in which plaintiff performed his work" (*DePillo*, 236 AD2d at 864). Most importantly, there is no evidence that the owner told plaintiff what tasks to perform or how to perform them on the day of the accident (see *id.*).

We have considered LJ Construction's remaining contentions and conclude that they are without merit.

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

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CA 24-01425

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

RHONDA GORDON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SEB DEVELOPMENT, LLC, DEFENDANT-APPELLANT,
AND COZZWILL, INC., DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (AARON C. GORSKI OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF
COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF GERARD E. O'CONNOR, BUFFALO (ROBERT H. FLYNN OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 21, 2024. The order granted the motion of defendant Cozzwill, Inc., for summary judgment and dismissed the complaint against it.

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

Memorandum: Plaintiff commenced this consolidated action seeking damages for injuries she sustained when she slipped and fell on ice while walking into her workplace. The subject property was owned by defendant SEB Development, LLC (SEB). SEB had a verbal agreement with defendant Cozzwill, Inc. (Cozzwill) for Cozzwill to perform repair and maintenance at the property, including snow and ice removal services. Cozzwill moved for summary judgment seeking, inter alia, dismissal of the complaint against it. Supreme Court granted the motion, and plaintiff and SEB each appeal. We reverse.

Although "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]), there are three exceptions to that rule (*see id.* at 140), only the third of which plaintiff and SEB rely on as a basis for liability. That exception applies "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.*).

Here, viewing the evidence in the light most favorable to

plaintiff and SEB as the nonmovants on summary judgment and affording them the benefit of every available inference (see *Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019]; *De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]), we conclude that Cozzwill failed to meet its initial burden on its motion inasmuch as its own submissions raise triable issues of fact whether its contractual duty entirely displaced SEB's duty to maintain the premises (see *Butler v Vestal Parkway Plaza, LLC*, 239 AD3d 1177, 1178-1180 [3d Dept 2025]; *Martins v Stickle*, 227 AD3d 798, 800 [2d Dept 2024]). Moreover, even assuming, arguendo, that Cozzwill met its initial burden on the motion, we further conclude that SEB and plaintiff raised a triable issue of fact whether the agreement was an exclusive and comprehensive agreement (see *Hanmer v Bell Atl.*, 302 AD2d 996, 996 [4th Dept 2003]; see generally *Kerwin v Fusco*, 138 AD3d 1398, 1400 [4th Dept 2016]). The inspection of the property and direction to undertake snow removal efforts and repairs of the property were made by a person who was both a co-owner of SEB and the sole owner of Cozzwill, and it is for the trier of fact to determine on whose behalf that person was acting when he engaged in those activities.

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

735

KA 22-01646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID DIAZ, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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
(Judith A. Sinclair, J.), rendered September 6, 2022. The judgment
convicted defendant, upon a plea of guilty, of assault in the first
degree and reckless assault of a child.

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

Memorandum: On appeal from a judgment convicting him, upon his
plea of guilty, of assault in the first degree (Penal Law § 120.10
[3]) and reckless assault of a child (§ 120.02), defendant contends
that his waiver of the right to appeal is invalid and his sentence is
unduly harsh and severe. We affirm. Defendant knowingly,
voluntarily, and intelligently waived his right to appeal (see
generally People v Thomas, 34 NY3d 545, 559-564 [2019], *cert denied* –
US –, 140 S Ct 2634 [2020]) and that waiver encompasses his challenge
to the severity of the sentence (see *People v Lopez*, 6 NY3d 248, 255
[2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: October 10, 2025

Ann Dillon Flynn
Clerk of the Court

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

736

KA 23-00473

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

GORDON C. ROMANCHIK, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (RICHARD SULLIVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered December 21, 2022. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm.

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Hoose*, 236 AD3d 1294, 1295-1296 [4th Dept 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 "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439 [4th Dept 2010], lv denied 15 NY3d 920 [2010], quoting *Lopez*, 6 NY3d at 256; see *People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], lv denied 43 NY3d 930 [2025]). The court also confirmed defendant's understanding that the waiver was "not an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; see *People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], lv denied 42 NY3d 1079 [2025]; *Edmonds*, 229 AD3d at 1277). Indeed, using the appropriate model colloquy (see NY Model Colloquies, Waiver of Right to Appeal; see generally *Thomas*, 34 NY3d at 567), the court properly explained that defendant retained the right to take an appeal but that

his conviction and sentence would "normally . . . be final" because he was giving up the right to appellate review of "most claims of error," including the severity of the sentence, except for a "limited number of claims" that would survive the appeal waiver, such as the voluntariness of the plea, the validity of the appeal waiver, the legality of the sentence, and the jurisdiction of the court (see *Figueroa*, 230 AD3d at 1582; *Edmonds*, 229 AD3d at 1277). Defendant's assertion that the oral colloquy was defective because it omitted certain information contained in the model colloquy regarding the appellate process is without merit inasmuch as "there is no mandatory litany that must be used in order to obtain a valid waiver of appellate rights" (*People v Johnson*, 14 NY3d 483, 486 [2010]; see *Thomas*, 34 NY3d at 563; *People v Correia*, 240 AD3d 1440, 1441 [4th Dept 2025]). Contrary to defendant's further assertions, the waiver of the right to appeal was not rendered invalid on the ground that "some of defendant's responses to the court's inquiries were monosyllabic" (*Hoose*, 236 AD3d at 1295 [internal quotation marks omitted]) and " '[t]he fact that the appeal waiver was not reduced to writing is of no moment where, as here, the oral waiver was adequate' " (*People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]; see *Lopez*, 6 NY3d at 257; *People v Thomas*, 237 AD3d 1557, 1558 [4th Dept 2025]).

Defendant next contends that, because he did not recite the elements of the crime to which he pleaded guilty and gave monosyllabic responses to the court's questions during the plea allocution, the plea colloquy does not establish that he understood the nature of that crime and thus casts doubt upon the voluntariness of his plea. Those contentions " 'are actually [challenges] addressed to the factual sufficiency of the plea allocution' " (*People v Wilson*, 159 AD3d 1542, 1544 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]), which are encompassed by the valid waiver of the right to appeal (see *Hoose*, 236 AD3d at 1296; *People v Kosmetatos*, 178 AD3d 1433, 1433-1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]).

To the extent that defendant challenges the actual voluntariness of his plea, that contention, although not precluded by the valid waiver of the right to appeal (see *Thomas*, 34 NY3d at 558), is not preserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction (see *People v Rodriguez*, 156 AD3d 1433, 1434 [4th Dept 2017], *lv denied* 30 NY3d 1119 [2018]; see also *People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). The narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply in this case. Defendant said "[n]othing . . . during the plea colloquy itself" that negated an element of the pleaded-to crime or otherwise called into doubt the voluntariness of his plea (*People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; see *Edmonds*, 229 AD3d at 1276) and therefore, contrary to defendant's suggestion, the court had no duty to conduct further inquiry with respect to the plea (see *Lopez*, 71 NY2d at 666). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (see

CPL 470.15 [3] [c]; *Edmonds*, 229 AD3d at 1276).

Entered: October 10, 2025

Ann Dillon Flynn
Clerk of the Court

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

737

KA 22-01669

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SAMUEL MCCULLOUGH, DEFENDANT-APPELLANT.

JULIA CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE 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 (Judith A. Sinclair, J.), rendered September 27, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree and dismissing count 1 of the indictment, and as modified the judgment is affirmed.

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

Defendant—a passenger in a vehicle stopped by the police—was found in possession of two bags of crack cocaine, weighing 6.512 grams in the aggregate. As defendant contends, and the People correctly concede, the evidence adduced at trial is legally insufficient to establish that the defendant intended to sell the narcotics (see *People v Nellons*, 133 AD3d 1258, 1259 [4th Dept 2015]). However, contrary to the parties' contentions, the top count cannot be reduced to criminal possession of a controlled substance in the seventh degree, inasmuch as criminal possession of a controlled substance in the seventh degree is an inclusory concurrent count of criminal possession of a controlled substance in the fourth degree, of which defendant was also convicted (see CPL 300.30 [4]; 300.40 [3] [b]; *People v Luciano*, 152 AD3d 989, 991 [3d Dept 2017], *lv denied* 30 NY3d 1020 [2017]; *People v Mann*, 231 AD2d 914, 914-915 [4th Dept 1996], *lv denied* 89 NY2d 866 [1996]). The top count must therefore be dismissed

altogether (see CPL 300.40 [3] [b]; *Luciano*, 152 AD3d at 991). We thus modify the judgment by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree and dismissing that count of the indictment.

Finally, contrary to defendant's contention, the sentence imposed upon his conviction of criminal possession of a controlled substance in the fourth degree is not unduly harsh or severe.

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

738

KA 22-01930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TROY DERBY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered December 21, 2021. The judgment convicted defendant upon a jury verdict of murder in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm.

Defendant contends that he was denied a fair trial because the prosecutor engaged in misconduct during the People's opening statement by remarking that defendant had not denied the accusations against him during his interrogation after he waived his *Miranda* rights. As defendant correctly concedes, he failed to preserve that contention for our review inasmuch as defense counsel did not object to the remark (see *People v McGuire*, 218 AD3d 1357, 1358 [4th Dept 2023]; *People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Vick*, 173 AD3d 1776, 1777 [4th Dept 2019], *lv denied* 34 NY3d 955 [2019]). In any event, the contention is without merit. Insofar as the prosecutor improperly characterized defendant's selective silence after he agreed to speak with police as evidence of his consciousness of guilt (see generally *People v Williams*, 25 NY3d 185, 194 [2015]), we conclude that such impropriety was not so egregious as to deprive defendant of a fair trial (see generally *People v Trifunovski*, 199 AD3d 1344, 1346 [4th Dept 2021], *lv denied* 38 NY3d 931 [2022]; *Vick*, 173 AD3d at 1778). Insofar as the prosecutor's statement could have been interpreted to have improperly shifted the burden of proof to defendant to deny the allegations

against him (see *People v Diotte*, 63 AD3d 1281, 1282-1283 [3d Dept 2009]), the single and isolated remark did not deprive defendant of a fair trial inasmuch as Supreme Court "clearly and unequivocally instructed the jury that the burden of proof on all issues [with respect to the crimes charged] remained with the prosecution" (*People v Matthews*, 27 AD3d 1115, 1116 [4th Dept 2006] [internal quotation marks omitted]; see *People v Spencer*, 108 AD3d 1081, 1081 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]; *People v Peterson*, 71 AD3d 1419, 1420 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010], *reconsideration denied* 21 NY3d 1008 [2013]). Any impropriety is harmless in light of the overwhelming evidence of defendant's guilt and the lack of any reasonable possibility that defendant otherwise would have been acquitted (see *People v Ott*, 200 AD3d 1642, 1645 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]; see generally *People v Crimmins*, 36 NY2d 230, 237 [1975]). In light of our conclusion, we reject defendant's further contention that defense counsel's failure to object to the isolated instance of prosecutorial misconduct constituted ineffective assistance of counsel (see *Vick*, 173 AD3d at 1778; *People v Funk*, 166 AD3d 1487, 1488-1489 [4th Dept 2018], *lv denied* 32 NY3d 1172 [2019]).

Defendant next contends that the court erred in admitting in evidence a letter allegedly written by defendant to his accomplice. Contrary to defendant's challenge to the relevance of the letter, we conclude that, inasmuch as the letter could reasonably be interpreted as both "an attempt to obtain a false alibi from the [accomplice]" (*People v McKoy*, 217 AD3d 1396, 1398 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]) and a threat against a "prosecution witness . . . prior to trial" (*People v Iannone*, 2 AD3d 1283, 1284 [4th Dept 2003], *lv denied* 2 NY3d 741 [2004]), it "comes within the broad category of conduct evidencing a 'consciousness of guilt' and, therefore, [was] admissible and relevant on the question of . . . defendant's guilt" (*People v Leyra*, 1 NY2d 199, 208 [1956]). "Any ambiguity as to whether [the letter] demonstrated consciousness of guilt, as opposed to a fear of wrongful conviction, presented a factual issue for the jury" (*People v Griffin*, 109 AD3d 740, 740 [1st Dept 2013], *lv denied* 22 NY3d 1199 [2014]; see generally *People v Yazum*, 13 NY2d 302, 304-305 [1963]). We further conclude that the probative value of the letter "is not outweighed by any undue prejudice to defendant" (*People v Richardson*, 206 AD3d 1590, 1592 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022] [internal quotation marks omitted]; see *People v Carlson*, 184 AD3d 1139, 1140 [4th Dept 2020], *lv denied* 35 NY3d 1064 [2020]).

Defendant's further contention that the evidence is legally insufficient to establish the elements of murder in the first degree and criminal possession of a weapon in the second degree is unpreserved for our review inasmuch as his generic "motion for a trial order of dismissal . . . [was] not specifically directed at the error[s] alleged on appeal" (*People v Bell*, 176 AD3d 1634, 1634 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019] [internal quotation marks omitted]; see *People v Cooley*, 220 AD3d 1189, 1189 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]; see generally *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, "we necessarily review the evidence adduced as

to each of the elements of [the] crime[s] in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Boyd*, 234 AD3d 1331, 1332 [4th Dept 2025], *lv denied* 43 NY3d 1044 [2025] [internal quotation marks omitted]; see *People v Stephenson*, 104 AD3d 1277, 1278 [4th Dept 2013], *lv denied* 21 NY3d 1020 [2013], *reconsideration denied* 23 NY3d 1025 [2014]). Here, viewing the evidence in light of the elements of murder in the first degree and criminal possession of a weapon in the second degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]), and we see no basis for disturbing the jury's credibility determinations in this case (see generally *Bleakley*, 69 NY2d at 495).

Defendant's sentence is not unduly harsh or severe. Defendant failed to preserve for our review his contention that, in sentencing him, the court penalized him for exercising his right to a trial, inasmuch as he failed to raise that contention at sentencing (see *People v Ortega*, 233 AD3d 1526, 1528 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]; *People v Chourb*, 232 AD3d 1272, 1274 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]) and, in any event, the record is devoid of evidence that defendant was given a lengthier sentence because he exercised his right to a trial (see *People v Martinez*, 26 NY3d 196, 200 [2015]; *People v Huddleston*, 160 AD3d 1359, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]).

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

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

739

KA 24-00682

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTY A. WHEELER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Steuben County (Jason L. Cook, J.), rendered April 19, 2024. The judgment convicted defendant upon her plea of guilty of driving while ability impaired by drugs.

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

Memorandum: Defendant appeals from a judgment convicting her upon a plea of guilty of driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]). To the extent that defendant contends that her plea was not voluntarily, knowingly, or intelligently entered, she failed to preserve that contention for our review because she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Hill*, 128 AD3d 1479, 1480 [4th Dept 2015], *lv denied* 26 NY3d 930 [2015]; *People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]). Furthermore, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]; *see Hill*, 128 AD3d at 1480).

Under the terms of defendant's plea agreement, she was placed on a one-year period of interim probation, which, if successfully completed, would be followed by two more years of probation, and she would be permitted to withdraw her plea and the felony charge to which she pleaded guilty would be reduced to a misdemeanor. County Court explained during the plea colloquy that defendant would be entitled to the reduction only if she was "successful" in complying with the conditions of the interim probation. The court provided her with a written copy of those conditions, which defendant acknowledged and signed. At the end of the period of interim probation, a probation

department report stated that defendant had not been successful, based on violations of two of the written conditions. The court offered defendant an opportunity to review and respond to the probation report, but defendant stated that the court should move forward with sentencing. The court then determined that, because defendant had violated the conditions of her interim probation, she would not be entitled to withdraw the felony plea and sentenced her to a five-year term of probation.

To the extent that defendant contends that the court failed to conduct a sufficient inquiry before it concluded that she was unsuccessful on interim probation, defendant failed to preserve that contention for our review (*see People v Butler*, 151 AD3d 1959, 1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]). In any event, that contention lacks merit. The record establishes that, in accordance with the procedure set forth in CPL 400.10 (3), the court "advise[d] [defendant] of the factual contents of any report or memorandum it ha[d] received" regarding the alleged violations of interim probation (*id.*), allowed defendant to respond to those allegations, and conducted a summary hearing that "was of sufficient depth to enable the court to determine that defendant failed to comply with the terms and conditions of [her] interim probation supervision" (*People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008] [internal quotation marks omitted]; *see People v Wissert*, 85 AD3d 1633, 1633-1634 [4th Dept 2011], *lv denied* 17 NY3d 956 [2011]).

Although defendant now contends that the court improperly delegated its fact-finding function to the probation department in making its determination, she failed to preserve that contention for our review inasmuch as she did not object on that ground when the court gave her an opportunity to do so (*see People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *People v Koons*, 187 AD3d 1638, 1639 [4th Dept 2020]; *People v Dissottle*, 68 AD3d 1542, 1544 [3d Dept 2009], *lv denied* 14 NY3d 799 [2010]). In any event, that contention lacks merit. The court was not required to conduct an evidentiary hearing to determine the veracity of the probation report, particularly where, as here, defendant did not dispute the facts therein (*see generally People v Alberghotti*, 17 NY3d 748, 750 [2011]; *People v Tengbeh*, 189 AD3d 2151, 2152 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]).

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

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

740

KA 21-01006

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN K. DYER, ALSO KNOWN AS BRIAN KEITH DYER,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered June 21, 2021. The judgment convicted defendant upon a nonjury verdict of assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). The conviction arises out of an incident in which defendant struck the victim in the back of the head with a ceramic statue. We affirm.

Defendant's contention that the evidence is legally insufficient to support the conviction of assault in the second degree, inasmuch as the People did not disprove the defenses of justification and intoxication beyond a reasonable doubt, is not preserved for our review because defendant failed to move for a trial order of dismissal on those grounds (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Haynes*, 133 AD3d 1238, 1239 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). In any event, we conclude that the contention is without merit (*see generally People v Barrett*, 188 AD3d 1736, 1738-1739 [4th Dept 2020]; *People v Moreno*, 31 AD3d 1214, 1214 [4th Dept 2006], *lv denied* 7 NY3d 869 [2006]). Additionally, viewing the evidence in light of the elements of assault in the second degree in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), and giving "[g]reat deference . . . to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Massey*, 140 AD3d 1736, 1738 [4th Dept 2016], *lv denied* 28 NY3d 972 [2016])

[internal quotation marks omitted]), we reject defendant's further contention that the court failed to give the evidence the weight it should be accorded when it rejected his justification and intoxication defenses (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention that the verdict with respect to criminal possession of a weapon in the third degree is repugnant is unpreserved for our review because defendant failed to raise it before the jury was discharged (*see People v Franco*, 225 AD3d 1284, 1284 [4th Dept 2024], *lv denied* 41 NY3d 1002 [2024]).

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

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

741

CAF 22-01390

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

IN THE MATTER OF JAMES M. LITWINSKI, JR.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JENNIFER M. ADINOLFE, RESPONDENT-RESPONDENT.

IN THE MATTER OF JENNIFER M. ADINOLFE,
PETITIONER-RESPONDENT,

V

JAMES M. LITWINSKI, JR., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT-RESPONDENT AND
PETITIONER-RESPONDENT.

DEBORAH K. JESSEY, CLARENCE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Donna M. Castiglione, R.), dated July 25, 2022, in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted the cross-petition of respondent-petitioner to modify a prior order of custody and visitation.

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

Memorandum: Petitioner-respondent father commenced this proceeding pursuant to Family Court Act article 6 by filing a petition seeking, inter alia, to preemptively preclude respondent-petitioner mother from relocating outside of the subject child's current school district in Erie County and to modify a prior order of custody and visitation, pursuant to which the mother had sole legal custody of the child, by awarding the parties joint custody and adding Friday visitation to the father's weekend time with the child. The mother filed a cross-petition seeking to modify the prior order because she was engaged to be married and planned on moving to Chautauqua County to be closer to her place of employment, thereby requiring alteration of the visitation schedule to accommodate the new distance between the residences and avoid unnecessary travel by the child on school nights.

The father, as limited by his brief, appeals from that part of an order following a fact-finding hearing that granted the mother's cross-petition by adjusting the father's visitation schedule. We now affirm, but our reasoning differs from that of Family Court.

As the court properly recognized, the mother, in effect, sought court approval of her proposed relocation from Hamburg in Erie County to Brocton in Chautauqua County, which would require the child to change school districts from the one contemplated in the prior order (see *Matter of Gillard v Gillard*, 241 AD2d 966, 967 [4th Dept 1997]). The court nonetheless first determined that the mother was required to establish a change in circumstances and then adopted the position taken by the mother's counsel at the hearing that this was not a relocation case governed by the standard set forth in *Matter of Tropea v Tropea* (87 NY2d 727 [1996]) because the proposed move was minor and would not significantly impact the father's visitation time. That was error.

Initially, contrary to the father's contention and the court's determination, the mother "was not required to establish a change in circumstances sufficient to warrant a modification of the existing order of custody and visitation, inasmuch as she sought permission to relocate with the child" (*Matter of Rodriguez v Young*, 232 AD3d 1279, 1279 [4th Dept 2024], *lv denied* 43 NY3d 902 [2025]; see *Matter of Betts v Moore*, 175 AD3d 874, 874-875 [4th Dept 2019]; *Lauzonis v Lauzonis*, 120 AD3d 922, 923 [4th Dept 2014]; *Matter of Chancer v Stowell*, 5 AD3d 1082, 1083 [4th Dept 2004]).

Where, as here, a custodial parent seeks judicial approval of a relocation plan to move away from the area in which the noncustodial parent resides that could hinder visitation by the noncustodial parent, the *Tropea* standard governs and provides that the "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" (*Tropea*, 87 NY2d at 739; see *Matter of Granger v Misercola*, 21 NY3d 86, 90 [2013]). Contrary to the position of the mother's counsel and the court's reasoning, the Court of Appeals has made clear that the comprehensive analysis required by *Tropea* applies "even where the move would leave the noncustodial parent with what may be considered 'meaningful access,' " because "there is still a need to weigh the effect of the quantitative and qualitative losses that naturally will result against such other relevant factors as the custodial parent's reasons for wanting to relocate and the benefits that the child may enjoy or the harm that may ensue if the move is or is not permitted" (*Tropea*, 87 NY2d at 739). A court should therefore "consider and give appropriate weight to all of the factors that may be relevant to the determination," including "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of

preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*id.* at 740-741). "In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests" (*id.* at 741).

Although the court did not fully engage in the requisite *Tropea* analysis, the record is sufficient to permit us to do so (see *Betts*, 175 AD3d at 875; *Matter of Mineo v Mineo*, 96 AD3d 1617, 1618 [4th Dept 2012]). Upon our review of the relevant factors (see generally *Tropea*, 87 NY2d at 740-741), we conclude that the mother met her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests (see *Matter of Townsend v Mims*, 167 AD3d 1584, 1584 [4th Dept 2018], *lv denied* 32 NY3d 919 [2019]). The mother established that the proposed relocation would enhance the child's life economically, emotionally, and educationally, inasmuch as, among other things, the mother and the child would unite under a single household with the mother's new husband, with whom the child was well familiar, thereby allowing for the consolidation of household expenses and alleviating some of the time and financial costs associated with the mother's commute by permitting her to reside closer to her place of employment (see *id.*; *Matter of Hoppe v Hoppe*, 165 AD3d 1422, 1424-1425 [3d Dept 2018], *lv denied* 32 NY3d 912, 913 [2019]; *Mineo*, 96 AD3d at 1619; *Matter of Bobroff v Farwell*, 57 AD3d 1284, 1286 [3d Dept 2008]). Additionally, the testimony at the hearing established that the mother had confirmed with the school district in Brocton that it would be able to provide the same services, such as occupational and speech therapy, that the child was receiving at his current school, and there is no indication in the record that the quality of the education provided by the school district in Brocton is inferior to that provided by the school district in Hamburg (see *Mineo*, 96 AD3d at 1619; *Bobroff*, 57 AD3d at 1286; *Carlson v Carlson*, 248 AD2d 1026, 1027-1028 [4th Dept 1998]). The testimony of both the mother and the father further established that, although the relocation would require alteration of the visitation schedule, the relationship between the father and the child would be preserved and the impact on the quantity and quality of the child's future contact with the father would be minimal inasmuch as the court, at the mother's behest, provided a liberal parental access schedule to the father including, but not limited to, extended weekend visitation and the same summer and holiday visits (see *Matter of Robert C. E. v Felicia N. F.*, 197 AD3d 100, 104-105 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *Mineo*, 96 AD3d at 1619; *Carlson*, 248 AD2d at 1027-1028; see generally *Tropea*, 87 NY2d at 739, 741). We note that, as modified, the visitation schedule greatly reduces the number of exchanges of the child between the parties, thereby simplifying the child's weekday schedule and minimizing opportunities for discord between the parties (see *Matter of Jones v Jamieson*, 162 AD3d 1720, 1721 [4th Dept 2018]).

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

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CAF 23-01935

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

IN THE MATTER OF MYEL T.-F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BROOK T., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), dated November 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: In these consolidated proceedings pursuant to Family Court Act article 10, respondent mother appeals from four orders of fact-finding and disposition, each of which, inter alia, adjudged that she neglected one of her children. Contrary to the mother's contention in each appeal, petitioner established by a preponderance of the evidence that she neglected the children.

Pursuant to Family Court Act § 1046 (a) (iii), "proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug, or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program." Thus, neglect may be presumed where a parent "chronically and persistently misuses" alcohol or drugs to the point that it substantially impairs their judgment while the child is entrusted to their care (*Matter of Kenneth C. [Terri C.]*, 145 AD3d

1612, 1613 [4th Dept 2016]; see *Matter of Chassidy CC.* [Andrew CC.], 84 AD3d 1448, 1449 [3d Dept 2011]; *Matter of Arthur S.* [Rose S.], 68 AD3d 1123, 1123-1124 [2d Dept 2009]). "In other words, '[t]he presumption contained in Family [Court] Act § 1046 (a) (iii) operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established' " (*Matter of Paolo W.*, 56 AD3d 966, 967 [3d Dept 2008], lv dismissed 12 NY3d 747 [2009]; see *Matter of Samaj B.* [Towanda H.-B.-Wade B.], 98 AD3d 1312, 1313 [4th Dept 2012]).

Here, petitioner met its burden of proof with respect to all four of the subject children by establishing that the mother had a history of regular cocaine abuse and testified positive for drug use multiple times during the course of the neglect proceedings, including while she was pregnant with and on the day of the birth of the youngest of the subject children (see *Matter of Kameron R.* [Alexis R.], 222 AD3d 1430, 1432 [4th Dept 2023]; *Matter of Anastasia P.* [Kirstin P.], 198 AD3d 1356, 1356-1357 [4th Dept 2021]; *Matter of Noah C.* [Greg C.], 192 AD3d 1676, 1677 [4th Dept 2021]). Contrary to the mother's contention, there is a causal link between her drug abuse and her ability to care for the children inasmuch as the mother's use of illicit substances caused her to leave three of the subject children for extended periods of time without adequate resources or supervision, during which periods they lacked electricity and were left with incapacitated babysitters and one child wandered outside alone (see *Chassidy CC.*, 84 AD3d at 1449-1450; cf. *Matter of Delanie S.* [Jeremy S.], 165 AD3d 1639, 1639-1640 [4th Dept 2018]).

In opposition, the mother failed to rebut the presumption of neglect inasmuch as she offered no evidence to show that she was voluntarily engaged in a drug rehabilitative program prior to the hearing (see Family Ct Act § 1046 [a] [iii]; *Matter of Nyheem E.* [Jamila G.], 134 AD3d 517, 519 [1st Dept 2015]; *Matter of Joel S.* [Charles C.], 110 AD3d 442, 442 [1st Dept 2013]) and, contrary to the mother's further contention, "the presumption of neglect that arises under Family [Court] Act § 1046 (a) (iii) cannot be rebutted by evidence that the children were well cared for and not in danger" (*Matter of Jonathan E.* [John E.], 149 AD3d 1197, 1200 [3d Dept 2017]; see *Matter of Jack S.* [Franklin O.S.], 173 AD3d 1842, 1843 [4th Dept 2019]; *Arthur S.*, 68 AD3d at 1124).

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

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CAF 23-01936

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

IN THE MATTER OF TREYSE T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BROOK T., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

GARY MULDOON, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), dated November 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Myel T.-F. (Brook T.)* ([appeal No. 1] – AD3d – [Oct. 10, 2025] [4th Dept 2025]).

Entered: October 10, 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 23-01937

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

IN THE MATTER OF KYE T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BROOK T., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

SAM FADUSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), dated November 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Myel T.-F. (Brook T.)* ([appeal No. 1] – AD3d – [Oct. 10, 2025] [4th Dept 2025]).

Entered: October 10, 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 23-01938

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

IN THE MATTER OF HARLYM T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BROOK T., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

DAVID J. PAJAK, ALDEN, 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 (Brenda M. Freedman, J.), dated November 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Myel T.-F. (Brook T.)* ([appeal No. 1] – AD3d – [Oct. 10, 2025] [4th Dept 2025]).

Entered: October 10, 2025

Ann Dillon Flynn
Clerk of the Court

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

747

CAF 24-01632

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

IN THE MATTER OF LARA L.M., PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TRINA L.C., RESPONDENT-APPELLANT.

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

DONNA M. CATHY, WATERLOO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), dated September 6, 2024, in a proceeding pursuant to Family Court Act article 8. The order granted petitioner an order of protection against respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 8, respondent appeals from an order of protection issued after a fact-finding hearing and upon a related decision made after the hearing that found that she committed a family offense against petitioner. We affirm.

Initially, we note that, while the order on appeal has expired, the appeal is not moot "because the order still imposes significant enduring consequences upon respondent, who may receive relief from those consequences upon a favorable appellate decision" (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]; see *Matter of Shephard v Ray*, 137 AD3d 1715, 1716 [4th Dept 2016]).

With respect to the merits, "[a] petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Washington v Davis*, 207 AD3d 1078, 1079 [4th Dept 2022], *lv denied* 39 NY3d 902 [2022] [internal quotation marks omitted]; see Family Ct Act § 832). Here, we agree with respondent that Family Court did not specify the criminal statute upon which it based its finding that respondent had committed a family offense. However, upon exercising our independent review power (see *Matter of Tara N. P.-T. v Emma P.-T.*, 204 AD3d 1414, 1415 [4th Dept 2022]; *Matter of Telles v DeWind*, 140 AD3d 1701, 1701 [4th Dept 2016]), we conclude, contrary to respondent's contention, that the record is sufficient to establish, by a preponderance of the evidence, that respondent committed the family offense of harassment in the

second degree under Penal Law § 240.26 (1) (see *Tara N. P.-T.*, 204 AD3d at 1415; *Telles*, 140 AD3d at 1702). The determination of whether a family offense was committed is a factual issue to be resolved by the court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed where, as here, it is supported by the record (see *Washington*, 207 AD3d at 1079).

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

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

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CA 25-00160

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

MICHELLE WITHERS, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KATHRYN ROBLEE, DEFENDANT-RESPONDENT.

BRENNA BOYCE, PLLC, HONEOYE FALLS (DAVID C. SIELING OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MCCABE, COLLINS, MCGEOUGH, FOWLER, LEVINE & NOGAN LLP, HAMBURG (TAMARA M. HARBOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Diane Y. Devlin, J.), entered August 5, 2024, in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this premises liability action seeking damages for injuries she sustained when she fell on property owned by defendant. The complaint, as amplified by the bill of particulars, alleges that the fall was caused by a "mis-leveled concrete slab . . . on the owner's side of the garage" at defendant's residence that caught plaintiff's heel as she was walking. During her deposition, plaintiff testified that she fell when "[s]omething caught [her] heel" while she was walking backward from the gravel driveway onto the concrete in the garage, that she landed inside the garage, and that she did not know what caught her heel. Defendant moved for summary judgment dismissing the complaint on the ground that, inter alia, plaintiff was unable to identify the cause of her fall. Supreme Court granted the motion, and we now reverse.

" 'In a slip and fall case, a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall' without engaging in speculation" (*Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014]; see *Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]). Here, we conclude that defendant failed to establish as a matter of law that the cause of plaintiff's fall was speculative (see *Rinallo*, 138 AD3d at 1441; *Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365

[4th Dept 2012])). " 'Although [mere] conclusions based upon surmise, conjecture, speculation or assertions are without probative value . . . , a case of negligence based wholly on circumstantial evidence may be established if the plaintiff[] show[s] facts and conditions from which the negligence of the defendant[] and the causation of the accident by that negligence may be reasonably inferred' " (*Dixon*, 118 AD3d at 1488; see *Seelinger v Town of Middletown*, 79 AD3d 1227, 1229-1230 [3d Dept 2010])).

In support of her motion for summary judgment, defendant submitted plaintiff's pleadings and deposition testimony. Although plaintiff testified that she did not know what caught her heel and caused the fall, she also stated that she fell in the immediate vicinity of the entry to the garage from the gravel driveway and landed inside the garage. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we conclude that the testimony and the allegations in the bill of particulars regarding the mis-leveled concrete slab "render[ed] any other potential cause of her fall 'sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " (*Nolan v Onondaga County*, 61 AD3d 1431, 1432 [4th Dept 2009]; see *Seelinger*, 79 AD3d at 1230). Defendant "failed to address plaintiff['s] allegations in the . . . bill of particulars regarding an unsafe premises condition and, therefore, . . . [she] failed to meet [her] initial burden on the motion" (*Brongo v Town of Greece*, 233 AD3d 1442, 1443 [4th Dept 2024]; see generally *Costen v Cohen*, 124 AD3d 819, 819-820 [2d Dept 2015])).

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

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CAF 25-00261

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

IN THE MATTER OF CYNTHIA M., GWEN M., NOVA M.,
JAMES M., EMMITT C., JEMMA M., ROCKY M., AND
TRENTON M.

CHAUTAUQUA COUNTY DEPARTMENT OF MENTAL HYGIENE
AND SOCIAL SERVICES, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

EMILY W., AND JAMES L.M., RESPONDENTS-RESPONDENTS.

MARY S. HAJDU, ESQ., ATTORNEY FOR THE CHILDREN
GWEN M. AND NOVA M., APPELLANT.

NANCY A. DIETZEN, ESQ., ATTORNEY FOR THE CHILDREN
JAMES M., JEMMA M., ROCKY M., AND TRENTON M.,
APPELLANT.

BEVERLY D. UNGERER, ESQ., ATTORNEY FOR THE
CHILDREN, CYNTHIA M. AND EMMITT C., APPELLANT.

NANCY A. DIETZEN, FREDONIA, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

BEVERLY D. UNGERER, LAKEWOOD, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR
PETITIONER-APPELLANT.

TODD G. MONAHAN, LITTLE FALLS, FOR RESPONDENT-RESPONDENT EMILY W.

Appeals from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered February 13, 2025, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent James L.M. had neglected and derivatively neglected the subject children by engaging in domestic violence and dismissed the petition against respondent Emily W.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and facts by granting the amended petitions against respondents insofar as they seek a determination that each of the subject children is a neglected child as defined in Family Court Act § 1012 (f) (i) (A), and as modified the order is

affirmed without costs and the matter is remitted to Family Court, Chautauqua County, for a dispositional hearing in accordance with the following memorandum: In these proceedings pursuant to Family Court Act article 10, petitioner and the subject children appeal from an order following a fact-finding hearing that, inter alia, dismissed the respective amended petitions alleging that respondent father and respondent mother neglected the children, except insofar as it determined that the father neglected Cynthia M., Gwen M., James M., Emmitt C., Jemma M., Rocky M., and Trenton M. by engaging in domestic violence against the children and against the mother in the presence of the children and derivatively neglected Nova M. as a result of such domestic violence.

Initially, we reject petitioner's contention that Family Court erred in denying its mid-hearing motion seeking recusal. "Absent a legal disqualification, . . . a [j]udge is generally the sole arbiter of recusal" (*Matter of Murphy*, 82 NY2d 491, 495 [1993]), and it is well established that a court's recusal decision will not be overturned absent an abuse of discretion (*see People v Moreno*, 70 NY2d 403, 405-406 [1987]; *Matter of Indigo S. [Rajea S.T.]*, 213 AD3d 1205, 1205-1206 [4th Dept 2023]). Here, "[a]lthough some of the comments [about petitioner's handling of the matter and its witnesses] would have been better left unsaid, nothing in the record reveals that any bias on the court's part unjustly affected the result to the detriment of [petitioner] or that the court [had] a predetermined outcome of the case in mind" (*Matter of Allison v Seeley-Sick*, 199 AD3d 1490, 1491-1492 [4th Dept 2021] [internal quotation marks omitted]; *see Indigo S.*, 213 AD3d at 1206). While the court's " 'intemperate remarks reflected a lack of patience [with petitioner] that is not appropriate in this delicate [and serious] matter' involving the well-being of the subject children," we perceive no abuse of discretion by the court in denying petitioner's recusal motion (*Indigo S.*, 213 AD3d at 1206; *see Allison*, 199 AD3d at 1492).

We nonetheless agree with petitioner and the children that the court should have granted the respective amended petitions against respondents insofar as they seek a determination that each of the children is a neglected child as defined in Family Court Act § 1012 (f) (i) (A). We therefore modify the order accordingly, and we remit the matter to Family Court, Chautauqua County, for a dispositional hearing with respect to each respondent.

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 [their] parent or other person legally responsible for [their] care to exercise a minimum degree of care . . . in supplying the child with adequate . . . education . . . , or medical[or] dental . . . care, though financially able to do so or offered financial or other reasonable means to do so" (Family Ct Act § 1012 [f] [i] [A]). "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 Family Ct Act § 1046 [b] [i]).

Here, notwithstanding the deference we must accord to the court's findings (see *Matter of Justyce M. [Shavon E.]*, 77 AD3d 1407, 1408 [4th Dept 2010], *lv dismissed* 16 NY3d 726 [2011], *lv denied* 16 NY3d 710 [2011]; *Matter of Breanna R.*, 61 AD3d 1338, 1340 [4th Dept 2009]), we conclude that petitioner met its burden of establishing by a preponderance of the evidence that respondents neglected the children on several bases (see Family Ct Act § 1012 [f] [i] [A]). Contrary to the court's determination, the evidence of respondents' " 'failure to follow through with necessary treatment for [Rocky M.'s] serious medical condition support[s] [a] finding of medical neglect" against them (*Matter of Kal-El F. [Damon H.]*, 232 AD3d 1277, 1278 [4th Dept 2024]; see *Matter of Jamiar W. [Malipeng W.]*, 84 AD3d 1386, 1387 [2d Dept 2011]). Similarly, the evidence establishes that respondents' failure to take Jemma M. to medical appointments for most of the first year of her life, particularly in light of her prematurity, condition and weight at birth, and subsequent developmental delays, caused impairment of her physical and emotional condition sufficient to support a finding of medical neglect with respect to her (see *Kal-El F.*, 232 AD3d at 1278; *Matter of Josephine BB. [Rosetta BB.]*, 114 AD3d 1096, 1097-1099 [3d Dept 2014]). Moreover, contrary to the court's related determination, the evidence presented by petitioner, including medical records, establishes that respondents were financially able or had other reasonable means to provide adequate medical care (see Family Ct Act § 1012 [f] [i] [A]). The evidence further establishes that respondents neglected Cynthia M., Gwen M., Emmitt C. and Rocky M. by failing to provide adequate dental care (see *Matter of Fay GG. [John GG.]*, 97 AD3d 918, 919-920 [3d Dept 2012]; *Matter of Ciara Z.*, 58 AD3d 915, 918 [3d Dept 2009]; *Matter of Alyssa L.D.*, 56 AD3d 1184, 1185 [4th Dept 2008], *lv denied* 12 NY3d 703 [2009]). Additionally, contrary to the court's determination, petitioner presented un rebutted evidence of excessive school absences for Cynthia M., Gwen M., James M., and Emmitt C., which is sufficient to establish respondents' educational neglect of those children (see *Matter of Tu'Real A.E.B. [Patricia S.]*, 237 AD3d 1532, 1533 [4th Dept 2025], *lv dismissed* 44 NY3d 962 [2025]; *Matter of Airionna C. [Shernell E.]*, 118 AD3d 1430, 1431 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014], *lv dismissed* 24 NY3d 951 [2014]; *Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1137 [4th Dept 2013]). Finally, we conclude that the evidence of neglect with respect to the aforementioned children "demonstrates such an impaired level of . . . judgment as to create a substantial risk of harm for any child in [respondents'] care," thus warranting a finding of derivative neglect with respect to Nova M. and Trenton M. (*Matter of Olivia W. [Courtney W.]*, 184 AD3d 1080, 1081 [4th Dept 2020] [internal quotation marks omitted]; see *Tu'Real A.E.B.*, 237 AD3d at

1533; *Matter of Dayshaun W. [Jasmine G.]*, 133 AD3d 1347, 1348 [4th
Dept 2015]).

Entered: October 10, 2025

Ann Dillon Flynn
Clerk of the Court