



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

DECISIONS FILED
NOVEMBER 21, 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
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SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

604

KA 20-01176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAZMINE D.S., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL),
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 July 22, 2020. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating that part of the sentence ordering restitution and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). This case arises from an incident in which defendant killed the victim by stabbing and slashing him 76 times, including a stab injury to his jugular vein. Defendant did not notify anyone of the incident, and the victim's body was not discovered until several weeks later. In an interview with police, defendant admitted that she stabbed the victim, with whom she claimed she had an intimate relationship, but stated that she believed he was still alive when she left his apartment.

Defendant contends that Supreme Court erred in allowing a police witness to narrate certain surveillance footage that was played for the jury. We note that the witness did not identify defendant in the footage (*cf. People v Mosley*, 41 NY3d 640, 647 [2024]), and we conclude that any error in allowing the narration was harmless because the evidence of defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted defendant if the witness's testimony had been excluded (*see People v Robbs*, 233 AD3d 1456, 1458 [4th Dept 2024], *lv denied* 43 NY3d 1058 [2025]).

Defendant next contends that the court did not adequately instruct the jury to disregard statements made by a police officer during an interview with defendant, a recording of which was played

for the jury. Contrary to the People's assertion, defendant preserved her contention by submitting a proposed charge and objecting to the court's modification of the proposed charge (see *People v Fagan*, 24 AD3d 1185, 1186 [4th Dept 2005]). We nevertheless conclude that the court's charge adequately conveyed to the jury the proper standards (see *People v Johnson*, 140 AD2d 954, 954 [4th Dept 1988], *lv denied* 72 NY2d 920 [1988]; see also *People v Harris*, 98 NY2d 452, 493 n 19 [2002]).

We reject defendant's contention that the court erred in declining to sentence her pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (see Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1). Pursuant to the DVSJA, "[t]he court may impose an alternative sentence where it determines, upon a preponderance of the evidence following [a] hearing, that '(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse, inflicted by a member of the same family or household as the defendant . . . ; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh' " (*People v Wendy B.-S.*, 229 AD3d 1317, 1319 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024], quoting Penal Law § 60.12 [1]).

At the DVSJA hearing, defendant testified that the victim had been jealous and controlling and that, on the night of the crime, he attacked her and refused to let her leave. A professor of psychiatry specializing in interpersonal violence also testified at the hearing. The professor opined, based on defendant's prior history as a victim of abuse and her "self-report" of her relationship with the victim, that "domestic violence played a role" on the night of the offense. At the close of the hearing, the court found that defendant's testimony regarding her relationship with the victim lacked credibility and that there was otherwise no evidence of abuse in her relationship with the victim. The court further declined to credit the professor's opinion inasmuch as it was based on defendant's self-report, which the court deemed incredible.

The court had "the benefit of observing defendant's testimony firsthand, including her demeanor and the manner in which she answered questions" (*People v Angela VV.*, 229 AD3d 955, 956-957 [3d Dept 2024], *affd* – NY3d – [2025]), and our independent review of the record has not revealed evidence that would undermine that determination. We therefore defer to the court's credibility determination (see *id.* at 957) and conclude that defendant failed to meet her burden of establishing "by a preponderance of the evidence that 'substantial physical, sexual or psychological abuse . . . was a significant contributing factor to [her] criminal behavior' " (*People v Gause*, 230 AD3d 1573, 1576 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; see *People v Vilella*, 213 AD3d 1282, 1283 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]). Given the circumstances of the crime as well as defendant's prior criminal history, which included three other

incidents in which she was charged for using a blade against a victim, we further conclude that the sentence is not unduly harsh or severe.

We agree with defendant, however, that the record does not contain "sufficient evidence to establish the amount of restitution imposed" (*People v Meyers*, 182 AD3d 1037, 1042 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to Supreme Court for a hearing to determine restitution in compliance with Penal Law § 60.27 (*see id.*).

All concur except OGDEN, J., who dissents and votes to further modify in accordance with the following memorandum: I respectfully dissent inasmuch as I agree with defendant that the sentence imposed is unduly harsh and severe. Defendant had a traumatic childhood, which included physical and sexual abuse. The presentence investigation report reveals that defendant was removed from her mother's care when she was approximately seven years old and that she was sexually abused by her mother's friend when her mother tried to trade sex with defendant and defendant's sister for money and drugs. Defendant attempted suicide after being raped when she was 17 years old. Defendant has a history of suffering with mental illness diagnoses, including bipolar disorder, ADHD, and PTSD. She also has a history of auditory and visual hallucinations and drug abuse. Although defendant did not establish entitlement to relief under the Domestic Violence Survivors Justice Act (DVSJA) (*see* Penal Law § 60.12, as amended by L 2019, ch 31, § 1; L 2019, ch 55, part WW, § 1), the evidence at trial and at the DVSJA hearing supports the conclusion that defendant was reliant on the 73-year-old victim for housing, food, and clothing and that she was, at the time of the instant offense, a victim of domestic violence. After committing the crime, defendant ultimately confessed, accepted responsibility for her actions, and showed remorse at sentencing. I would therefore further modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the sentence of imprisonment imposed to an indeterminate term of 15 years to life in prison (Penal Law § 70.00 [2] [a]; [3] [a] [i]).

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

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CAF 24-00939

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

IN THE MATTER OF THE ADOPTION OF CASON C.

ERRON W., PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

V

JAMES E.C., JR., RESPONDENT-APPELLANT.

IN THE MATTER OF THE ADOPTION OF SAYLOR C.

ERRON W., PETITIONER-RESPONDENT,

V

JAMES E.C., JR., RESPONDENT-APPELLANT.

BROWNLOW LAW, P.C., ROCHESTER (WINSTON R. BROWNLOW OF COUNSEL), FOR
RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County
(Eugene J. Langone, Jr., J.), entered February 16, 2024. The order
determined that the consent of respondent to the adoption of the
subject children by petitioner is not required.

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

Memorandum: Respondent, the biological father of the subject
children, appeals from an order determining, following an evidentiary
hearing, that his consent to the adoption of the children by
petitioner is not required pursuant to Domestic Relations Law § 111
(2) (a). We affirm.

The father contends that Family Court lacked subject matter
jurisdiction over the adoption proceedings inasmuch as the adoption
proceedings amount to a collateral attack on the custody provisions of
a valid foreign divorce decree, specifically, the Texas divorce decree
that, inter alia, provided the father with supervised visitation
rights. We reject that contention. "New York does not recognize an
adoption proceeding as a custody proceeding" (*Mazur v Mazur* [appeal
No. 1], 207 AD2d 61, 67 [4th Dept 1994]; see Domestic Relations Law
§ 75-b; see generally *Matter of Anonymous*, 13 AD2d 885, 886 [3d Dept

1961]), and the adoption proceeding therefore is not a collateral attack on the custody determination in the divorce decree. Further, the court has subject matter jurisdiction over proceedings to adopt children born in other states and to adjudicate disputes between residents and nonresidents (see *Matter of Jarrett*, 230 AD2d 513, 521 [4th Dept 1997], appeal dismissed 90 NY2d 935 [1997], lv denied 91 NY2d 804 [1997], cert denied 524 US 918 [1998]).

Contrary to the father's contention, we conclude that the court properly dispensed with his consent inasmuch as petitioner established by clear and convincing evidence that the father abandoned the children by his "failure for a period of six months to visit the child[ren] and communicate with the child[ren] or person having legal custody of the child[ren], although able to do so" (Domestic Relations Law § 111 [2] [a]; see *Matter of S.M.E. [B.J.D.-H.K.E.]*, 217 AD3d 1427, 1428 [4th Dept 2023]; *Matter of Brianna B. [Swazette S.-Shacoya L.]*, 175 AD3d 1791, 1791-1792 [4th Dept 2019], lv denied 35 NY3d 907 [2020]). Petitioner established that the father made no attempt to contact the children or the mother for over six months preceding the filing of the petitions and that the father failed to pay child support while he was incarcerated. We thus conclude that the father's efforts "were so insubstantial or infrequent that they did not preclude a finding of abandonment" (*S.M.E.*, 217 AD3d at 1428 [internal quotation marks omitted]; see *Matter of J. [Sarajoy V.-Ryan G.]*, 218 AD3d 583, 584 [2d Dept 2023]; *Matter of Sophia [Tammy M.W.-Irhad R.]*, 195 AD3d 1549, 1550 [4th Dept 2021], lv denied 37 NY3d 914 [2021]). The father's incarceration does not excuse his failure to contact or communicate with the children (see *J.*, 218 AD3d at 584; *Matter of Ashton*, 254 AD2d 773, 773 [4th Dept 1998], lv denied 92 NY2d 817 [1998]; *Matter of Clair*, 231 AD2d 842, 842 [4th Dept 1996], lv denied 89 NY2d 806 [1997]). To the extent that the court was presented with conflicting testimony regarding the substance and frequency of contact and communication by the father during the six-month period, the court resolved that credibility issue in favor of petitioner. "[T]he court's credibility determinations are . . . entitled to great deference" (*Brianna B.*, 175 AD3d at 1792 [internal quotation marks omitted]), and we see no basis to disturb the court's determination here. Additionally, the court was entitled to discredit testimony that the mother and petitioner thwarted the father's efforts to contact the children (see *id.*), and we conclude that the record does not support the father's assertion that the mother and petitioner interfered with any such efforts (see *Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], lv denied 6 NY3d 708 [2006]; *Matter of Amanda*, 197 AD2d 923, 924 [4th Dept 1993], lv denied 82 NY2d 662 [1993]; cf. *Matter of Lydia A.C. v Gregory E.S.*, 155 AD3d 1680, 1681 [4th Dept 2017]).

We also reject the father's contention that the court erred by not considering whether the proposed adoption was in the children's best interests. An evaluation of the best interests of the children is not part of the threshold determination of abandonment and, "[w]hile promotion of the best interests of the child[ren] is essential to the ultimate approval of the adoption application, such

interests cannot act as a substitute for a finding of abandonment" (*Matter of Mitchell* [Onondaga Dept. of Social Servs.], 70 AD2d 367, 371 [4th Dept 1979]; see *Matter of Corey L v Martin L*, 45 NY2d 383, 391 [1978]; *Matter of Medina Amor S.*, 50 AD3d 8, 15 [1st Dept 2008], *lv denied* 10 NY3d 709 [2008]).

Finally, we note that, in resolving this appeal, we have not considered any documents or purported changes in factual circumstances brought to this Court's attention for the first time postargument (see generally *Matter of Fichera v New York State Dept. of Env'tl. Conservation*, 159 AD3d 1493, 1495-1496 [4th Dept 2018]).

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

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CA 25-00102

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

MCLP ASSET COMPANY, INC., PLAINTIFF-APPELLANT.

V

ORDER

SEEMA A. ZAVERI, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

FRIEDMAN VARTOLO LLP, GARDEN CITY (STEPHEN J. VARGAS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (ELIZABETH G. ADYMY
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Ontario County
(Craig J. Doran, J.), entered September 18, 2024. The amended order,
inter alia, granted the cross-motion of defendant for leave to amend
her answer.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (see *U.S. Bank N.A. v Ecker* [appeal No. 1], 237 AD3d
1584, 1586 [4th Dept 2025]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545
[4th Dept 2011]).

Entered: November 21, 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 25-00103

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

MCLP ASSET COMPANY, INC., PLAINTIFF-APPELLANT.

V

MEMORANDUM AND ORDER

SEEMA A. ZAVERI, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

FRIEDMAN VARTOLO LLP, GARDEN CITY (STEPHEN J. VARGAS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (ELIZABETH G. ADYMY
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Craig J. Doran, J.), entered November 5, 2024. The order and judgment denied the motion of plaintiff for, inter alia, summary judgment and granted summary judgment to defendant dismissing the complaint.

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

Memorandum: In 2012, a predecessor in interest of plaintiff MCLP Asset Company, Inc. (MCLP) commenced a residential foreclosure action against defendant, among others (2012 action). That action remained dormant and, on March 2, 2016, it was "pre-marked off" Supreme Court's calendar in a clerk's minute entry. On March 2, 2017, pursuant to CPLR 3404, the action was deemed abandoned and was dismissed. The predecessor in interest appealed from the denial of its subsequent motion to vacate the dismissal and restore the 2012 action to the calendar, but the appeal was dismissed on November 30, 2018, for failure to perfect (*see* 22 NYCRR 1250.10 [a]).

Another of MCLP's predecessors in interest, MTGLQ Investors, LP (MTGLQ), commenced the instant foreclosure action on April 2, 2019. Subsequently, defendant moved for, inter alia, summary judgment dismissing the complaint as time-barred. The court granted the motion and dismissed the complaint. On appeal to this Court, we reversed that order and judgment insofar as appealed from and reinstated the complaint, concluding that the 2019 action was not time-barred inasmuch as CPLR 205 (a) applied to extend the statute of limitations (*MTGLQ Invs., LP v Zaveri*, 210 AD3d 1387, 1388-1389 [4th Dept 2022]). It is undisputed that, absent the application of the extension found in CPLR 205 (a), this action would be untimely.

Shortly after we decided the prior appeal, the legislature enacted the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff. Dec. 30, 2022]). FAPA applies "to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10). CPLR 213 (4) applies to, inter alia, actions "upon a mortgage of real property," such as this one. As relevant to this appeal, FAPA amended CPLR 205 to provide that "[t]his section . . . shall not apply to any proceeding governed by [CPLR 205-a]" (CPLR 205 [c], as amended by L 2022, ch 821, § 5). CPLR 205-a, enacted as part of FAPA, provides, in relevant part, that "[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in . . . [CPLR 3404,] . . . the original plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination."

Following the reinstatement of the complaint by this Court, MTGLQ assigned the mortgage to MCLP. MCLP then moved for, among other things, summary judgment on the complaint and to be substituted as plaintiff following MTGLQ's assignment of the mortgage. Defendant cross-moved for leave to amend the answer to assert affirmative defenses alleging that the action is time-barred in light of FAPA's amendment of CPLR 205 and enactment of CPLR 205-a. The court granted the cross-motion and that part of MCLP's motion seeking substitution and adjourned argument on the remainder of the motion to a later date. Following further argument, the court concluded that FAPA was intended to apply retroactively, relying on decisions to that effect issued by the First and Second Departments. It further concluded that MCLP had not met its burden of showing that the retroactive application of FAPA was an unconstitutional deprivation of its right to due process. The court thus denied the remainder of the motion and, upon searching the record pursuant to CPLR 3212 (b), granted summary judgment in favor of defendant, dismissing the complaint as time-barred. MCLP appeals.

MCLP contends that the court erred in concluding that FAPA, particularly CPLR 205-a, applies retroactively. We reject that contention. "Statutes are generally applied prospectively in the absence of express or necessarily implied language allowing retroactive effect" (*Dorfman v Leidner*, 76 NY2d 956, 959 [1990]). "[R]etroactive operation is not favored by the courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]; see *Gottwald v Sebert*, 40 NY3d 240, 258 [2023]). "However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001]). Factors to consider in determining whether a statute should be applied retroactively include, "whether the [l]egislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial

interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be" (*id.*).

We agree with the First, Second, and Third Departments, all of which have concluded that "the [l]egislature's goal, expressed in the language of FAPA and its legislative history, was to see FAPA applied retroactively" (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 45 [1st Dept 2023]; see *FV-1, Inc. v Palaguachi*, 234 AD3d 818, 821-822 [2d Dept 2025]; *Bank of N.Y. Mellon v Richards*, 233 AD3d 1250, 1251-1252 [3d Dept 2024]). The legislature has stated that FAPA "shall take effect immediately" (L 2022, ch 821, § 10), which, although "not alone determinative, . . . does evince[] a sense of urgency" (*Brothers v Florence*, 95 NY2d 290, 299 [2000] [internal quotation marks omitted]). Additionally, as noted above, the legislature further stated that FAPA applies to all foreclosure actions "in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10), which would necessarily give FAPA retroactive effect (see *Genovese*, 223 AD3d at 44).

It also is undisputed that the legislature enacted FAPA to overrule prior judicial interpretations that it concluded were erroneous (see Assembly Mem in Support, Bill Jacket, L 2022, ch 821 at 8; Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 98). Indeed, the legislature specifically found that there was "an ongoing problem with abuses of the judicial foreclosure process and lenders' attempts to manipulate statutes of limitations; that the problem has been exacerbated by recent court decisions which, contrary to the intent of the legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present legislation is to clarify the meaning of existing statutes, and to rectify these erroneous judicial interpretations thereof" (Assembly Mem in Support, Bill Jacket, L 2022, ch 821 at 8; see Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 98). Thus, the legislative history shows that the purpose of FAPA was to "clarify what the law was always meant to say and do" (*Majewski*, 91 NY2d at 585) and to "remediate the impact of" prior court decisions (*Brothers*, 95 NY2d at 300).

With respect to CPLR 205-a in particular, we note that, in drafting that provision, which was modeled on CPLR 205 (a), the legislature did not include the CPLR 205 (a) language "requiring that the court set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation . . . , which had occasioned erroneous judicial interpretations that the court's recitation of the specific conduct . . . is a condition precedent to the bar against an extension of the statute of limitations for a neglect based dismissal" (*Deutsche Bank Natl. Trust Co. v Vista Holding, LLC*, 239 AD3d 830, 833 [2d Dept 2025] [internal quotation marks omitted]). Indeed the legislative history makes clear that in omitting the aforementioned language, the legislature intended to correct those "erroneous judicial interpretations" (Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 107). In enacting CPLR 205-a, the

legislature sought to, inter alia, bring greater clarity in mortgage foreclosure actions concerning what constitutes a neglect to prosecute and thereby promote "the objectives of 'finality, certainty and predictability,' to the benefit of both plaintiffs and defendants" (Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 108). We thus conclude that the legislature intended for CPLR 205-a, like the rest of FAPA, to apply retroactively (see *Deutsche Bank Natl. Trust Co.*, 239 AD3d at 833; *Bank of N.Y. Mellon*, 233 AD3d at 1251-1252; see also *Collins v Bank of N.Y. Mellon*, 227 AD3d 948, 951 [2d Dept 2024]).

We further conclude that CPLR 205-a does not extend the statute of limitations in this action and that the court therefore properly searched the record and granted defendant summary judgment dismissing the complaint (see CPLR 3212 [b]). Indeed, MCLP does not dispute on appeal that, if FAPA applies retroactively, MCLP is not entitled to the extension of time provided for by CPLR 205-a. Specifically, CPLR 205-a (a) (1) provides that the extension is not available to "a successor in interest or an assignee of the original plaintiff . . . unless [the successor in interest or assignee] plead[s] and prov[es] that such assignee is acting on behalf of the original plaintiff," and it is undisputed here that neither MTGLQ nor MCLP pleaded or proved that, in commencing this action, it was acting on behalf of the plaintiff that commenced the 2012 action. Moreover, CPLR 205-a does not apply where, as here, the first action terminated by "a dismissal of the complaint for any form of neglect, including but not limited to those [grounds] specified in . . . [CPLR 3404]" (CPLR 205-a [a] [emphasis added]; see *MTGLQ Invs., LP*, 210 AD3d at 1388). We emphasize that, given the deliberate omission from CPLR 205-a of CPLR 205 (a)'s requirement that the court outline the pattern of delay that established neglect for failure to prosecute, it is of no moment that the court here did not explain its reasons for dismissing the 2012 action under CPLR 3404 (see *Deutsche Bank Natl. Trust Co.*, 239 AD3d at 833).

MCLP contends that the retroactive application of FAPA violates its right to due process. Contrary to defendant's assertion, that issue is properly before us because MCLP served the attorney general with proper notice of its constitutional challenge before this Court (see CPLR 1012 [b]; Executive Law § 71; cf. *Matter of Rochester Police Dept. v Duval*, 232 AD3d 1247, 1248 [4th Dept 2024]). Nevertheless, we reject MCLP's due process contention on the merits (see *Bank of N.Y. Mellon v Del Rio*, 233 AD3d 529, 531-532 [1st Dept 2024]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1069 [2d Dept 2024]). "[A]cts of the [l]egislature are entitled to a strong presumption of constitutionality" that is overcome "only when it can be shown beyond reasonable doubt that [the legislation] conflicts with the fundamental law" (*Cohen v Cuomo*, 19 NY3d 196, 201-202 [2012] [internal quotation marks omitted]). Retroactive legislation will satisfy due process if the retroactive application of the legislation is justified " 'by a rational legislative purpose' " (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 158 [2017], cert denied 584 US 1013 [2018], quoting *Pension Benefit Guar. Corp. v R.A. Gray & Co.*, 467 US 717, 730 [1984]). The legislature enacted FAPA, including CPLR 205-a, to

clarify existing law, overrule erroneous judicial interpretations, and prevent abusive foreclosure practices, and we conclude that "[r]etroactive application of the subject FAPA provisions is supported by a legitimate legislative purpose that is furthered by rational means" (*FV-1, Inc.*, 234 AD3d at 823; see generally *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 375 [2020]).

Moreover, setting aside the question whether the retroactive application of FAPA violates due process generally, we reject MCLP's contention that, in this particular case, retroactive application of CPLR 205-a unconstitutionally deprived MCLP of its settled reliance interest in this Court's prior determination that this action was timely commenced through operation of the savings provision of CPLR 205 (a) (see *MTGLQ Invs., LP*, 210 AD3d at 1388). In considering whether the retroactive application of CPLR 205-a to this case is unconstitutional in light of this Court's pre-FAPA decision concluding that application of the savings provision rendered this action timely, consideration must be given to "whether [FAPA] attaches new legal consequences to events completed before its enactment" (*American Economy Ins. Co.*, 30 NY3d at 147 [internal quotation marks omitted]). We conclude that applying CPLR 205-a retroactively here does not impact MCLP's substantive due process rights with respect to this Court's prior decision inasmuch as it does not "impair rights [MCLP] possessed when [it] acted, increase [MCLP's] liability for past conduct, or impose new duties with respect to transactions already completed" (*Regina Metro. Co., LLC*, 35 NY3d at 365 [internal quotation marks omitted]; see *Landgraf v USI Film Prods.*, 511 US 244, 278-280 [1994]).

More specifically, MCLP wrongly equates this Court's decision in the prior appeal, which allowed the action to proceed through application of the CPLR 205 (a) savings provision, to the "acts," "conduct," or "transactions" that create a vested reliance interest protected by the due process clause (see *Regina Metro. Co., LLC*, 35 NY3d at 365; *American Economy Ins. Co.*, 30 NY3d at 157). However, the bottom-line holding in our prior decision is not the correct event to analyze in considering whether MCLP has a vested reliance interest protected by the due process clause. Rather, the only past "acts," "conduct," or "transactions" on which MCLP could rely to create a constitutionally-protected due process interest concern the right of MCLP's predecessor in interest to take action to avoid dismissal of the 2012 action for neglect to prosecute (see CPLR 205-a, 3404). FAPA's enactment would result in an impermissible retroactive effect only if its application would render improper conduct that was indisputably proper at the time the predecessor in interest acted—i.e., if FAPA rendered dilatory conduct that was not dilatory at the time the 2012 action was dismissed (see generally *Ruth v Elderwood at Amherst*, 209 AD3d 1281, 1284-1285 [4th Dept 2022]). Here, there is no dispute that, either before or after FAPA's enactment, the 2012 action was properly dismissed due to the predecessor in interest's dilatory conduct. FAPA's enactment concerns only the effect of that dilatory conduct and, therefore, there is no deprivation of a substantive right. FAPA's enactment did not impair a due process

right of MCLP's predecessor in interest because at all times the predecessor in interest retained the right to more diligently prosecute the 2012 action to avoid dismissal under CPLR 3404. In essence, we conclude that MCLP does not have a protected reliance interest in its predecessor's dilatory conduct—i.e., MCLP had no due process right to utilize the savings provision to subsequently resuscitate an action that its predecessor in interest neglectfully prosecuted. Thus, retroactive application of CPLR 205-a to the facts here did not "impair rights a party possessed when [the party] acted" (*Regina Metro. Co., LLC*, 35 NY3d at 365 [internal quotation marks omitted]), and MCLP has therefore not been deprived of a substantive right implicating the due process clause. MCLP's contention asserting additional grounds for its constitutional challenge is raised for the first time in its reply brief and therefore is not properly before us (see *Aubertine v Aubertine*, 240 AD3d 1360, 1362 [4th Dept 2025]; *Consumers Beverages, Inc. v Kavcon Dev. LLC*, 227 AD3d 1381, 1384 [4th Dept 2024]; *Edwards v Edwards*, 199 AD3d 1460, 1460 [4th Dept 2021]).

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

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CA 24-00853

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

DONNELL T. RICHARDSON, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC, ESTATE OF KEITH PALMIERI
AND BRUCE WATSON, DEFENDANTS-RESPONDENTS.

GIOIA & NEUROHR PLLC, WILLIAMSVILLE (ALEX M. NEUROHR OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MARK A. MOLDENHAUER OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 1, 2024. The order granted defendants' motion to dismiss plaintiff's complaint and denied plaintiff's cross-motion for leave to amend the complaint.

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 first, second, and third causes of action against defendant Tops Markets, LLC and by granting that part of the cross-motion with respect to those causes of action upon condition that plaintiff shall serve the proposed amended complaint within 30 days of the date of entry of the order of this Court, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, to recover damages based on allegations that defendants violated Executive Law § 296 and Civil Rights Law §§ 40 and 40-c by engaging in racially discriminatory practices in a place of public accommodation. Plaintiff appeals from an order that granted defendants' motion to dismiss the complaint as time-barred and for failure to state a cause of action and denied plaintiff's cross-motion for leave to amend his complaint.

Contrary to plaintiff's contention, Supreme Court did not err in granting that part of the motion seeking dismissal of plaintiff's fourth cause of action, alleging violations of Civil Rights Law §§ 40 and 40-c. "At or before the commencement of [an] action" for violation of either provision, a plaintiff must serve notice on the Attorney General (§ 40-d; see § 41). Here, it is undisputed that plaintiff did not timely serve the requisite notice on the Attorney General, and thus dismissal of his Civil Rights Law cause of action

was required (see §§ 40-d, 41; *Chun Suk Bak v Flynn Meyer Sunnyside*, 285 AD2d 523, 523 [2d Dept 2001]; *Giaimo & Vreeburg v Smith*, 192 AD2d 41, 45-46 [2d Dept 1993], *appeal dismissed* 82 NY2d 803 [1993]; *Silver v Equitable Life Assur. Socy. of U.S.*, 168 AD2d 367, 368 [1st Dept 1990]).

We reject plaintiff's contention that the court erred in granting that part of the motion seeking to dismiss as untimely the first, second, and third causes of action against defendants Bruce Watson and Estate of Keith Palmieri (Palmieri) insofar as those causes of action alleged violations of Executive Law § 296 based on conduct that occurred before December 1, 2020. A cause of action based on Executive Law § 296 is governed by the three-year statute of limitations under CPLR 214 (2) (see *Goldin v Engineers Country Club*, 54 AD3d 658, 659 [2d Dept 2008], *lv dismissed in part & denied in part* 13 NY3d 763 [2009]; *Henderson v Town of Van Buren*, 15 AD3d 980, 981 [4th Dept 2005], *lv denied* 4 NY3d 710 [2005]; *Karczewski v Sharpe*, 260 AD2d 606, 606 [2d Dept 1999], *lv dismissed* 94 NY2d 858 [1999]). However, where the alleged unlawful discriminatory practice is of a continuing nature the commencement of the limitations period will be delayed until the last discriminatory act (see generally *Clark v State of New York* [appeal No. 2], 302 AD2d 942, 944-945 [4th Dept 2003]). Here, plaintiff filed the complaint on December 1, 2023, and therefore the first, second, and third causes of action are untimely with respect to incidents occurring before December 1, 2020 (see *Goldin*, 54 AD3d at 659). Inasmuch as plaintiff failed to establish that the alleged acts occurring before and during the limitations period were not separate and unrelated incidents, plaintiff is not entitled to invoke the continuing violation doctrine (see generally *Clark*, 302 AD2d at 945).

We agree with plaintiff, however, that the court erred in granting that part of the motion seeking dismissal of the first, second, and third causes of action against defendant Tops Markets, LLC (Tops) for failure to state a cause of action. "On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*McCarthy v Shah*, 162 AD3d 1727, 1728 [4th Dept 2018] [internal quotation marks omitted]). "On such a motion, the complaint must be liberally construed and the facts alleged therein accepted as true and accorded the benefit of every possible favorable inference" (*Diehl v First Cong. Church of Antwerp*, 229 AD2d 906, 906 [4th Dept 1996]; see *Gordon v Murphy*, 213 AD3d 1222, 1223 [4th Dept 2023]; *Stevens v Perrigo*, 122 AD3d 1430, 1430 [4th Dept 2014]). Here, we conclude that the factual allegations in the first, second, and third causes of action sufficiently state causes of action against Tops for violation of the Executive Law (see § 296 [2] [a]; [7], [13]), and we therefore modify the order accordingly. We reject plaintiff's contention that the court erred in granting that part of the motion with respect to his claim under Executive Law § 296 against Palmieri based on his actions in filing a police report. Inasmuch as

that conduct is not a violation of section 296 (see § 296 [2] [a]; [7], [13]), plaintiff failed to state a cause of action against Palmieri (see CPLR 3211 [a] [7]).

We also agree with plaintiff that the court erred in denying the cross-motion insofar as it sought leave to amend the first, second, and third causes of action against Tops, and we therefore further modify the order accordingly. "[P]ermission to amend pleadings should be freely given . . . unless prejudice would result to the nonmoving party or the proposed amendment is plainly lacking merit" (*Deutsche Bank Trust Co. Ams. v Fredonia Temple/Brigham Apts. LLC*, 232 AD3d 1223, 1225 [4th Dept 2024] [internal quotation marks omitted]; see *Niagara Falls Water Bd. v City of Niagara Falls*, 64 AD3d 1142, 1143 [4th Dept 2009]; see generally CPLR 3025 [b]). Here, defendants did not claim any prejudice from the proposed amendments and, in light of our conclusion that plaintiff stated causes of action against Tops in the original complaint, we reject defendants' assertion that the proposed amendments to those causes of action lack merit.

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

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CA 24-00472

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

EDWARD H. BUSH, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF CYNTHIA R. BUSH, DECEASED,
CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF LEWIS, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES, AND LEWIS COUNTY
GENERAL HOSPITAL, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered March 11, 2024. The order denied in part the application of claimant to deem a notice of claim timely served, or in the alternative, for leave to serve a late notice of claim.

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

Memorandum: On September 9, 2022, claimant's decedent was admitted to respondent Lewis County General Hospital (LCGH), a municipal hospital owned by respondent County of Lewis, for treatment of injuries arising from a fall. She was later re-admitted to LCGH for rehabilitation and remained under its care until September 30, 2022. While decedent was a patient at LCGH, she allegedly fell while unattended, resulting in complications that required further surgery. Decedent died from sepsis on November 17, 2022. On November 9, 2023, claimant's counsel sent a demand letter outlining the details of decedent's care at respondents' facilities and the potential claims against respondents for medical malpractice and wrongful death. On January 17, 2024, claimant served a notice of claim, which was rejected as untimely.

Claimant moved for an order allowing the notice of claim to be accepted and deemed timely served or, alternatively, granting leave to serve a late notice of claim. Supreme Court concluded that the notice of claim was timely only with respect to the wrongful death claim and

thus denied the application with respect to all other claims. In appeal No. 1, claimant appeals from that order. Claimant thereafter moved for leave to renew his application insofar as it sought leave to serve a late notice of claim with respect to the medical malpractice claims. Respondents moved for leave to renew their opposition to claimant's prior application, asserting that claimant had mischaracterized the date on which he was appointed executor of decedent's estate and that the notice of claim with respect to the wrongful death claim was untimely when measured from the date he was originally appointed. Respondents further argued that, upon renewal, the court should deny claimant's application for leave to serve a late notice of claim with respect to the wrongful death claim. The court denied claimant's motion for leave to renew, granted respondents' motion for leave to renew and, upon renewal, granted claimant leave to serve a late notice of claim with respect to his claim for wrongful death. In appeal No. 2, claimant appeals and respondents cross-appeal from that order. We affirm in both appeals.

Contrary to claimant's contention in appeal No. 1, the court properly denied that part of claimant's application with respect to the medical malpractice claims. Claimant was required to commence the action not more than one year and 90 days after those claims accrued (see General Municipal Law § 50-i [1]). The claims arose at the time of the "last treatment where there is continuous treatment," which was September 30, 2022 (CPLR 214-a; see *Marlowe v DuPont deNemours & Co.*, 112 AD2d 769, 771 [4th Dept 1985]; see also *Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 337-339 [1997]). Thus, the court properly concluded that it lacked authority to grant claimant's application insofar as it sought leave to serve a late notice of claim with respect to the medical malpractice claims (see General Municipal Law §§ 50-e [5]; 50-i [1]). To the extent that claimant's claims also sound in ordinary negligence, the court likewise lacked authority to grant claimant's application insofar as it sought leave to serve a late notice of those claims (see § 50-i [1]).

With respect to appeal No. 2, we reject claimant's contention on his appeal that the court erred in denying his motion for leave to renew. Claimant failed to show any "facts not offered on the prior [application] that would change the prior determination" (CPLR 2221 [e] [2]).

We reject respondents' contention on their cross-appeal that the court abused its discretion in granting claimant's application insofar as it sought leave to serve a late notice of claim for wrongful death. "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining a defense on the merits" (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016] [internal quotation marks omitted]). "Absent a clear abuse of the court's broad discretion, the

determination of an application for leave to serve a late notice of claim will not be disturbed" (*Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1653-1654 [4th Dept 2018] [internal quotation marks omitted]).

Here, although claimant failed to provide a reasonable excuse for the delay, we conclude that the remaining factors support the court's exercise of discretion in granting claimant's application upon renewal. Claimant's 90-day period within which to serve the notice of claim for wrongful death began to run when he was appointed as the representative of decedent's estate on December 23, 2022 (see General Municipal Law § 50-e [1] [a]; [5]). Claimant's demand letter, however, was not sent until November 9, 2023. Although respondents did not learn of the essential facts constituting the claim within 90 days of claimant's appointment, i.e., March 23, 2023, respondents did acquire that knowledge within a reasonable time thereafter (see *Matter of Diegelman v City of Buffalo*, 148 AD3d 1692, 1694 [4th Dept 2017]; see also *Leonard v Motor Veh. Acc. Indem. Corp.*, 175 AD3d 1795, 1796 [4th Dept 2019]). Moreover, claimant made a sufficient showing that the late notice would not substantially prejudice respondents, and respondents failed to "respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed" (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467 [2016], *rearg denied* 29 NY3d 963 [2017]).

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

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CA 24-01547

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

EDWARD H. BUSH, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF CYNTHIA R. BUSH, DECEASED,
CLAIMANT-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

COUNTY OF LEWIS, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES, AND LEWIS COUNTY
GENERAL HOSPITAL, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES,
RESPONDENTS-RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

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

Appeal and cross-appeal from an order of the Supreme Court, Lewis
County (James P. McClusky, J.), entered July 8, 2024. The order,
inter alia, denied the motion of claimant for leave to renew, granted
the motion of respondents for leave to renew, and granted claimant
leave to serve a late notice of claim sounding in wrongful death.

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

Same memorandum as in *Bush v County of Lewis* ([appeal No. 1] –
AD3d – [Nov. 21, 2025] [4th Dept 2025]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

663

KA 22-01189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FRANK CAMPBELL, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), 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 July 6, 2022. The judgment convicted defendant upon a jury verdict of sexual abuse in the second degree, criminal sexual act in the second degree (two counts), sexual abuse in the third degree (two counts), criminal sexual act in the third degree (three counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of sexual abuse in the second degree (Penal Law § 130.60 [2]), two counts of criminal sexual act in the second degree (former § 130.45 [1]), two counts of sexual abuse in the third degree (§ 130.55), three counts of criminal sexual act in the third degree (former § 130.40 [2]), and one count of endangering the welfare of a child (§ 260.10 [1]). We affirm.

Defendant contends that Supreme Court erred in denying his motion to strike the People's initial certificate of compliance (COC) and dismiss the indictment on statutory speedy trial grounds (see CPL 30.30), arguing that the People's failure to disclose certain material and information necessarily rendered that COC invalid (see CPL 30.30 [former (5)]; 245.50 [former (1)]), thereby also rendering their statement of readiness "illusory and insufficient to stop the running of the speedy trial clock" (*People v Geer*, 224 AD3d 1353, 1354 [4th Dept 2024], *lv denied* 42 NY3d 970 [2024] [internal quotation marks omitted]). Defendant did not allege in his motion papers that the People actually possessed the material and information at issue, or that they failed to exercise due diligence to obtain such material and information, before filing the initial COC, and thus defendant's present contention, to the extent it is premised on such allegations

on appeal, is unpreserved (see generally *People v Guerrero*, 235 AD3d 1276, 1278 [4th Dept 2025]). Additionally, contrary to defendant's contention, the mere allegation that the People had not yet disclosed all initial discovery contemplated by CPL 245.20 (former [1]) before filing an initial COC and declaring readiness for trial does not alone, even if true, affect the validity of either the initial COC or the statement of readiness (see *People v Radford*, 237 AD3d 1511, 1512-1513 [4th Dept 2025], lv denied 43 NY3d 1048 [2025]; see also CPL 245.50 [former (1)]).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in fashioning a *Sandoval* compromise by permitting the prosecutor to inquire into defendant's past convictions and sentences without discussing the underlying facts of each felony offense (see *People v Farley*, 199 AD3d 1463, 1463-1464 [4th Dept 2021], lv denied 37 NY3d 1145 [2021]; see generally *People v Walker*, 83 NY2d 455, 459 [1994]).

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

665

KA 17-00302

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RASHAAD WALKER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT 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 (Thomas J. Miller, J.), rendered February 3, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree (two counts), assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, one count each of murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [2]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's conviction arises from his alleged participation in three drive-by shootings involving three separate victims that occurred within a two-week period and resulted in the death of one of the victims.

Initially, we conclude that defendant failed to preserve for appellate review his contention challenging the People's questioning of the surviving victims (see *People v Settles*, 192 AD3d 1510, 1511 [4th Dept 2021], lv denied 37 NY3d 960 [2021]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Contrary to defendant's contention, County Court did not err in denying that part of his omnibus motion seeking to sever the counts of the indictment related to the each of the three incidents. " 'To effect a severance[, defendant] must either demonstrate that the counts were not joinable under the statutory criteria . . . or seek a discretionary severance' . . . Offenses are joinable if, inter alia, proof of either offense would be material and admissible as

evidence-in-chief at the trial of the other offense" (*People v Smith*, 109 AD3d 1150, 1150-1151 [4th Dept 2013], *lv denied* 22 NY3d 1090 [2014]; see CPL 200.20 [2] [b]; *People v Bryant*, 200 AD3d 1483, 1487 [3d Dept 2021], *appeal dismissed* 38 NY3d 1158 [2022]). As a result of the three drive-by shootings, defendant was indicted on seven counts, including one count of murder in the second degree and assault in the second degree, and three counts of criminal possession of a weapon in the second degree. In denying severance and thereby concluding that the offenses were properly joined under CPL 200.20 (2) (b), the court determined that proof of the offenses related to one incident would be material and admissible as evidence-in-chief at the trial on the others in order to establish motive, intent, identity, or a common scheme or plan. We agree inasmuch as the People sought to present forensic evidence that the same firearm was used in each of the drive-by shootings for which defendant was charged and which occurred within a two-week period (see *People v Johnson*, 235 AD3d 1267, 1268 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025]; see also *People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]; *People v Mullins*, 247 AD2d 885, 886 [4th Dept 1998], *lv denied* 92 NY2d 928 [1998]). Moreover, defendant was the driver in the first incident rather than the actual shooter. Thus, evidence that defendant used the same weapon to shoot another person in the third incident would have been material and admissible evidence at the trial with respect to the first incident to establish that defendant shared the requisite intent with the actual shooter despite only acting as the driver, i.e., that he intended to cause the victim physical injury through the use of a deadly weapon (see generally *People v Hawkins*, 192 AD3d 1637, 1638-1639 [4th Dept 2021]).

We further conclude that the court properly determined that the challenged offenses were also correctly joined in one indictment on the basis that certain offenses, although based upon different incidents, were "defined by the same or similar statutory provisions" (CPL 200.20 [2] [c]). Indeed, the indictment charged defendant with three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), and thus, even though the charges were based on three separate incidents, "[t]here [can be] no dispute that joinder of the offenses [in the same indictment] under [CPL 200.20 (2) (c)] was proper in the first instance" (*People v Mero*, 43 NY3d 407, 412 [2024]; see *People v Thomas*, 208 AD3d 1617, 1618 [4th Dept 2022]). "Where counts have been joined under CPL 200.20 (2) (c), the CPL provides that the trial court has discretion to sever them if doing so would be 'in the interest of justice and for good cause shown' " (*Mero*, 43 NY3d at 412, quoting CPL 200.20 [3]; see *People v Ward*, 104 AD3d 1323, 1323 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]; *People v Reed*, 212 AD2d 962, 962 [4th Dept 1995], *lv denied* 86 NY2d 739 [1995]). Here, defendant failed to make the requisite showing of good cause. Indeed, defendant did not "establish that there was substantially more proof against him on one set of charges and that it was likely that the jury would be unable to consider separately the proof as it related to each offense" (*People v Rogers*, 245 AD2d 1041, 1041 [4th Dept 1997]; see CPL 200.20 [3] [a]), nor did he establish "that he had 'both important testimony to give concerning one

[offense] and a genuine need to refrain from testifying on the other' " (*Rogers*, 245 AD2d at 1041, quoting CPL 200.20 [3] [b]; see *People v Lane*, 56 NY2d 1, 8 [1982]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we also reject defendant's contention that the verdict is against the weight of the evidence (see *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that an acquittal would have been reasonable, we do not conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent that there were "inconsistencies in [witnesses'] testimony, [the inconsistencies] were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*People v Cirino*, 203 AD3d 1661, 1663 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022] [internal quotation marks omitted]; see *People v Jefferson*, 26 AD3d 798, 798-799 [4th Dept 2006], *lv denied* 6 NY3d 895 [2006]).

Contrary to defendant's further contention, the court properly concluded that a jury instruction on manslaughter in the first degree as a lesser included offense of murder in the second degree was not warranted here inasmuch as the relevant victim was shot multiple times at point blank range, resulting in his death. There is no evidence to support a finding that defendant intended to cause serious physical injury to the victim rather than to kill him (see *People v Ramsey*, 59 AD3d 1046, 1047 [4th Dept 2009], *lv denied* 12 NY3d 858 [2009]). We conclude that an instruction on the lesser included offense of manslaughter in the first degree would have improperly directed the jury to "resort to sheer speculation" (*People v Butler*, 84 NY2d 627, 632 [1994], *rearg denied* 85 NY2d 858 [1995] [internal quotation marks omitted]; see *People v Discala*, 45 NY2d 38, 43 [1978]).

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

666

KA 22-00116

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HAROLD E. BROWN, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 16, 2020. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and, upon his plea of guilty, of unlawful fleeing of a police officer in a motor vehicle in the third degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Oneida County Court for resentencing.

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, upon his plea of guilty, of unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25) and resisting arrest (§ 205.30).

Defendant contends that County Court erred in refusing to suppress evidence seized during the execution of search warrants for two cell phones that were recovered from him at the time of his arrest. He specifically focuses on three screenshots of text messages recovered from one of the two cell phones, which a police officer briefly testified at trial contained language reflecting defendant's involvement in narcotic sales. Defendant asserts that the search warrants were overbroad and lacked sufficient particularity. To the extent he contends that the search warrants lacked sufficient particularity due to their failure to reference a specific crime, that contention is unpreserved because defendant "did not challenge the warrant in County Court on that ground," and the court did not expressly decide that issue when denying suppression (*People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]; see CPL 470.05 [2]; *People v*

Navarro, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018])). With respect to defendant's preserved contention, he asserts that the search warrants were overbroad and lacked sufficient particularity because they did not contain any date restrictions on the material to be recovered from the cell phones. He further contends that the court erred in applying the doctrine of severability to temporally narrow the warrant's scope to an eight-hour period on the day of defendant's arrest that encompassed the arrest itself as well as several hours preceding it. Even assuming, *arguendo*, that the omission of date restrictions rendered the warrants overbroad and lacking sufficient particularity, and further assuming, *arguendo*, that the court erred in applying the doctrine of severability (*cf. People v Brown*, 96 NY2d 80, 86 [2001]; *People v Ozkaynak*, 217 AD3d 1376, 1377-1378 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Herron*, 199 AD3d 1476, 1479 [4th Dept 2021])), we conclude that the error is harmless inasmuch as "[t]he proof of [defendant's] guilt is overwhelming, and there is no reasonable possibility that admission of the fruits of the [overbroad search warrants] contributed to the conviction" (*People v Bloom*, 241 AD2d 975, 976 [4th Dept 1997], *lv denied* 90 NY2d 938 [1997]; see *People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Farmer*, 198 AD2d 805, 806 [4th Dept 1993], *lv denied* 83 NY2d 804 [1994])). The evidence at trial—exclusive of the material recovered from the cell phones—overwhelmingly established that defendant possessed narcotics with the intent to sell them (see Penal Law § 220.16 [1]; *Farmer*, 198 AD2d at 806). Specifically, the evidence established that defendant was seen engaging in a hand-to-hand sale of narcotics; that he promptly left the scene, whereupon he led multiple police vehicles on an extended high-speed chase through city streets; and that, upon crashing his vehicle into three civilian vehicles, he fled on foot before the police wrestled him to the ground and arrested him. In his possession were two cell phones, narcotics, and a large amount of cash. Testimony of defendant's own witness established that defendant was unemployed at the time of the underlying incident, and he was not found in possession of any paraphernalia suggesting that the narcotics were for his personal use.

Defendant's contention that the court erred in admitting in evidence at trial the amount of money recovered from him upon his arrest is unpreserved for our review (see CPL 470.05 [2]; see generally *People v DuBois*, 203 AD3d 1621, 1622 [4th Dept 2022], *lv denied* 38 NY3d 1032 [2022])). Defendant's further contention that he was deprived of a fair trial due to instances of prosecutorial misconduct during the prosecutor's summation is unpreserved because defense counsel did not object to any of the purportedly improper comments (see *People v Reynolds*, 211 AD3d 1493, 1494 [4th Dept 2022], *lv denied* 39 NY3d 1079 [2023]; *People v Miller*, 115 AD3d 1302, 1303 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014])). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a])).

Viewing the evidence in light of the elements of the crime of criminal possession of a controlled substance in the third degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007])), we conclude that the verdict is not against the weight of the evidence

with respect to the element of defendant's intent to sell (see *People v Perkins*, 229 AD3d 1223, 1225 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*Bleakley*, 69 NY2d at 495; see *People v McPherson*, 213 AD3d 1261, 1263 [4th Dept 2023], *lv denied* 39 NY3d 1112 [2023]). The jury was entitled to credit the testimony of the People's witnesses over the testimony of defendant's witness, and we perceive no reason to disturb those credibility determinations (see *People v Tetro*, 181 AD3d 1286, 1288 [4th Dept 2020], *lv denied* 35 NY3d 1070 [2020]).

Defendant contends that the court erred in sentencing him at an electronic appearance inasmuch as he did not knowingly, voluntarily, and intelligently waive his right to be personally present at the sentencing proceeding. "[D]efendants have a 'fundamental right to be present at sentencing' in the absence of a waiver" of that right (*People v Estremera*, 30 NY3d 268, 272 [2017], quoting *People v Rossborough*, 27 NY3d 485, 488 [2016]). At the time of defendant's sentencing, in response to the COVID-19 pandemic, certain prohibitions on electronic court appearances had been suspended for sentencing proceedings and a defendant could thus consent to an electronic appearance (see Executive Order [A. Cuomo] No. 202.1 [9 NYCRR 8.202.1]; Executive Order [A. Cuomo] No. 202.76 [9 NYCRR 8.202.76]). Here, the record establishes that defendant refused to consent to an electronic appearance and requested that he be personally present for sentencing. Thus, as the People correctly concede, the court erred in imposing sentence at a virtual sentencing proceeding without defendant's consent to an electronic appearance (see *People v Perkins*, 162 AD3d 1641, 1642 [4th Dept 2018]; cf. *People v Lawhorn*, 206 AD3d 1630, 1630-1631 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing, at which time defendant must be permitted to appear.

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

All concur except BANNISTER and DELCONTE, JJ., who dissent and vote to modify in accordance with the following memorandum:

We respectfully dissent. In our view, the search warrants for defendant's cell phones were unconstitutionally overbroad, and County Court's application of the doctrine of severability was not harmless error.

As our Court recently explained, "[a] person's cell phone now contains at least as much personal and private information as their home and, thus, indiscriminate searches of cell phones cannot be permitted" (*People v Conley*, 234 AD3d 1363, 1365 [4th Dept 2025]; see *People v Ozkaynak*, 217 AD3d 1376, 1377-1378 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Thompson*, 178 AD3d 457, 458-459 [1st Dept

2019]; see generally *Riley v California*, 573 US 373, 386 [2014]). Further, "[a] search warrant must be 'specific enough to leave no discretion to the executing officer' " (*People v Wiggins*, 229 AD3d 1095, 1096 [4th Dept 2024]). To meet the particularity requirement, a warrant authorizing the search of a cell phone "must (1) 'identify the specific offense for which the police have established probable cause,' (2) 'describe the place to be searched,' and (3) 'specify the items to be seized by their relation to designated crimes' " (*People v Saeli* [appeal No. 1], 219 AD3d 1122, 1124 [4th Dept 2023]; see *Wiggins*, 229 AD3d at 1096).

In our view, contrary to the majority's conclusion, defendant's assertion in his omnibus motion that the "search warrant[s] fail[] to contain any objective standards to guide the executing officers" preserved his contentions that the search warrants for his two cell phones lacked sufficient particularity due to both their failure to reference a particular crime and their failure to impose any temporal restriction.

On the merits, we agree with defendant that, inasmuch as the search warrants authorized the examination of "[a]ny and all stored memory" without restriction by reference to any particular crime or date, they were overbroad and, thus, unconstitutional (see *Ozkaynak*, 217 AD3d at 1377; *Thompson*, 178 AD3d at 458; *People v Melamed*, 178 AD3d 1079, 1081 [2d Dept 2019]). Although the applications for the search warrants contained information about alleged specific criminal activity and sought information relating to text messages sent on or about the date of defendant's arrest, the applications were not incorporated into the search warrants, and therefore did not "save the warrant[s] from [their] facial invalidity" (*Wiggins*, 229 AD3d at 1097 [internal quotation marks omitted]; see *Saeli*, 219 AD3d at 1124; *Melamed*, 178 AD3d at 1083).

We further agree with defendant that the court erred in applying the doctrine of severability to the constitutional error by inserting new language into the search warrants that set temporal restrictions. As the Court of Appeals explained in *People v Brown* (96 NY2d 80 [2001]), the doctrine of severability provides that "when a search warrant is partially but not wholly invalid, only the fruits of the invalid portion need be suppressed" (*id.* at 85). The search warrants here were wholly invalid inasmuch as they lacked sufficient particularity (see *Wiggins*, 229 AD3d at 1096-1097; cf. *Ozkaynak*, 217 AD3d at 1377-1378), and the court thus erred by rewriting them.

Finally, we disagree with the majority's conclusion that, in any event, the application of the doctrine of severability was harmless with respect to defendant's conviction of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), which requires proof that defendant knowingly and unlawfully possessed "a narcotic drug with intent to sell it" (*id.*). Defendant was in possession of a small amount of narcotics when he was arrested. Excluding the data recovered from defendant's cell phones, the only evidence that the People offered at trial of defendant's intent to

sell those drugs consisted of the facts that he possessed two cell phones and \$2,301 in cash when he was arrested and that he possessed no paraphernalia suggesting that the drugs were for his personal use. The data recovered from the cell phones, however, consisted of a series of text messages that, according to a police officer's trial testimony, established that defendant was selling drugs on the date of his arrest. Inasmuch as there was no other evidence that defendant was selling—as opposed to buying—the drugs in his possession, "the evidence [of defendant's guilt is] not overwhelming," and the harmless error doctrine is inapplicable (*People v Coffie*, 192 AD3d 1641, 1642 [4th Dept 2021], *lv denied* 37 NY3d 963 [2021]; see *People v DeJesus*, 206 AD3d 1554, 1556 [4th Dept 2022]; see generally *People v J.L.*, 36 NY3d 112, 124 [2020]). Even assuming, arguendo, that the evidence was overwhelming, given the police officer's trial testimony as to the content of the text messages recovered from the cell phones, we conclude that "it cannot be said that 'there is no reasonable possibility that the error affected the jury's verdict' " (*People v Huntsman*, 96 AD3d 1390, 1392 [4th Dept 2012], quoting *People v Douglas*, 4 NY3d 777, 779 [2005]). Therefore, the court's refusal to suppress the evidence seized from defendant's cell phones constitutes reversible error. We would thus modify the judgment by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree and granting defendant's omnibus motion insofar as it seeks to suppress evidence seized following the execution of the search warrants for defendant's two cell phones, and we would grant a new trial on the first count of the indictment.

We agree with the majority that the remainder of defendant's contentions do not warrant further modification or reversal of the judgment.

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

675

CA 24-00940

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

PATRICIA M. CARUSO, INDIVIDUALLY AND AS THE
ADMINISTRATOR OF THE ESTATE OF PHILIP P. CARUSO,
DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ST. ELIZABETH MEDICAL CENTER, SHWE WIN, M.D.,
LEV GOLDINER, M.D., SLOCUM-DICKSON MEDICAL
GROUP, P.C., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

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

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (COURTNEY L.
ALPERT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ST. ELIZABETH MEDICAL
CENTER AND SHWE WIN, M.D.

GALE GALE & HUNT, LLC, FAYETTEVILLE (JOHN K. PENMAN OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS LEV GOLDINER, M.D. AND SLOCUM-DICKSON MEDICAL
GROUP, P.C.

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), entered May 16, 2024, in a medical malpractice action. The order, among other things, granted the motion of defendants Lev Goldiner, M.D., and Slocum-Dickson Medical Group, P.C., for summary judgment and granted in part and denied in part the motion of defendants St. Elizabeth Medical Center, Mohawk Valley Health System, and Shwe Win, M.D., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants Slocum-Dickson Medical Group and Lev Goldiner, M.D. in part and reinstating the malpractice, wrongful death, conscious pain and suffering, and derivative causes of action against them, denying that part of the motion of defendants St. Elizabeth Medical Center, Mohawk Valley Health System and Shwe Win, M.D. with respect to the malpractice, wrongful death, conscious pain and suffering, and derivative causes of action against Win and reinstating those causes of action against Win, denying those parts of that motion with respect to the claims of vicarious liability against St. Elizabeth Medical Center based on Win's conduct and the claims that St. Elizabeth Medical Center deviated from the accepted standard of care by failing to ensure that decedent was seen by a neurologist soon after his

admission or, alternatively, by failing to alert decedent's primary care physician that his order for a neurological consult could not be completed until three days later and reinstating those claims against St. Elizabeth Medical Center and as modified, the order is affirmed without costs.

Memorandum: Plaintiff commenced this action on behalf of decedent seeking damages for his wrongful death and conscious pain and suffering allegedly caused by defendants' delay in detecting and properly treating decedent's stroke following his admission to defendant St. Elizabeth Medical Center (SEMC). Defendants Slocum-Dickson Medical Group (SDMG) and Lev Goldiner, M.D. (collectively, Goldiner defendants), and defendants SEMC, Mohawk Valley Health System and Shwe Win, M.D. (collectively, SEMC defendants) separately moved for summary judgment dismissing the complaint against them. Supreme Court granted the motion of the Goldiner defendants in its entirety, and granted in part the motion of the SEMC defendants by dismissing all claims against those defendants except for certain direct claims against SEMC.

We agree with plaintiff that the court erred in granting the motion of the Goldiner defendants with respect to the malpractice, wrongful death and conscious pain and suffering causes of action against Goldiner, and we therefore modify the order accordingly. "It is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Fargnoli v Warfel*, 186 AD3d 1004, 1005 [4th Dept 2020]). Once such a defendant meets the initial burden, the burden shifts to the plaintiff to raise a triable issue of fact, but "only as to the elements on which the defendant met the prima facie burden" (*Bubar*, 177 AD3d at 1359 [internal quotation marks omitted]; see *Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]). Here, although the court properly determined that the Goldiner defendants met their initial burden on their motion with respect to the issues of deviation from the accepted standard of medical care and causation, plaintiff raised triable issues of fact in opposition through the submission of the affidavit of an expert (see *Cooke v Corning Hosp.*, 198 AD3d 1382, 1383 [4th Dept 2021]; *Thompson v Hall*, 191 AD3d 1265, 1267 [4th Dept 2021]). Indeed, plaintiff's expert raised issues of fact as to when decedent began experiencing symptoms of a stroke and whether, at the time Goldiner was informed about decedent's condition, decedent was still within the period of efficacy for certain treatments such that Goldiner should have promptly ordered those treatments. Where, as here, a nonmovant's expert affidavit "squarely opposes" the affirmation of the moving parties' expert, the result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese*, 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]). This is not a case in which plaintiff's expert "misstate[d] the facts in the record," nor is the affidavit " 'vague, conclusory, [or] speculative' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; see also *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]).

Inasmuch as the causes of action against SDMG alleged vicarious liability for the actions of Goldiner, we further conclude that the court erred in granting the Goldiner defendants' motion with respect to the medical malpractice, wrongful death, and conscious pain and suffering causes of action asserted against SDMG (*cf. Behar v Cohen*, 21 AD3d 1045, 1047 [2d Dept 2005], *lv denied* 6 NY3d 705 [2006]), and we therefore further modify the order accordingly. Additionally, we reject the assertion of the Goldiner defendants, raised as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1181-1182 [4th Dept 2023]; *Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015]), that they are entitled to summary judgment because they established that Goldiner did not share a doctor-patient relationship with decedent. We conclude that questions of fact exist regarding that issue (*see generally Rogers v Maloney*, 77 AD3d 1427, 1428 [4th Dept 2010]; *Croscutt v Aldridge* [appeal No. 2], 309 AD2d 1143, 1144 [4th Dept 2003]).

We also agree with plaintiff that the court erred in granting the motion of the SEMC defendants with respect to the medical malpractice, wrongful death, and conscious pain and suffering causes of action asserted against Win, and we further modify the order accordingly. Even assuming, *arguendo*, that the SEMC defendants met their burden on their motion to that extent, we conclude that plaintiff raised issues of fact whether decedent may have had a better chance of recovery had Win immediately informed Goldiner about decedent's condition and the results of the relevant MRI (*see generally Finnegan v Kasowitz*, 239 AD3d 1337, 1338 [4th Dept 2025]; *Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]). Because Win is not entitled to summary judgment with respect to the malpractice, wrongful death, and conscious pain and suffering causes of action, we conclude that the court erred in granting the motion of the SEMC defendants with respect to the claims against SEMC premised on the theory of vicarious liability for Win's conduct (*cf. Behar*, 21 AD3d at 1047), and we therefore further modify the order accordingly.

Regarding SEMC's direct liability, even assuming, *arguendo*, that the SEMC defendants met their initial burden on their motion to that extent, we nonetheless conclude that plaintiff's expert raised triable issues of fact in opposition as to whether SEMC, through its nursing staff, deviated from the accepted standard of medical care by failing to ensure that decedent received a neurological consult on the day he was admitted to SEMC or, at a minimum, that decedent's primary care physician was informed that there was no such consult available during the weekend and that his order for a neurological consult would not be honored until three days after decedent's admission (*see generally Cooke*, 198 AD3d at 1383; *Thompson*, 191 AD3d at 1267). We therefore further modify the order accordingly.

In light of our determination, we conclude that the court also erred in granting the motions of the Goldiner and the SEMC defendants with respect to the derivative cause of action against them, and we further modify the order accordingly (*see generally O'Mara v Ranalli*,

191 AD3d 1494, 1495 [4th Dept 2021]; *Ingutti v Rochester Gen. Hosp.*,
145 AD3d 1423, 1425 [4th Dept 2016])).

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

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CA 24-01692

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

ROBERT MALONEY AND MARILYN MALONEY,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

DEAN DEROBERTS, M.D., JENA MURPHY, FNP-C,
AND DEROBERTS PLASTIC SURGERY, PLLC, NOW KNOWN AS
SYRACUSE PLASTIC SURGERY PLLC, DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

ADDELMAN CROSS & BALDWIN, PC, BUFFALO (JESSE B. BALDWIN OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Onondaga County
(Rory A. McMahon, J.), entered April 30, 2024, in a medical
malpractice action. The judgment awarded defendants costs and
disbursements.

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

Memorandum: Plaintiffs commenced this action seeking damages for
defendants' alleged medical malpractice in failing to timely diagnose
Robert Maloney (plaintiff) with melanoma. In 2018, plaintiff
underwent a biopsy of a lesion located on his left shin, which was
determined to be benign. Defendants' practice left a voicemail
informing plaintiff of the biopsy results, which plaintiffs indicated
was reassuring and relayed that there was nothing to worry about. The
exact language of the message is unknown, however, because plaintiff
did not retain the cell phone containing the voicemail. After
receiving the biopsy results, plaintiff did not appear for a follow-up
appointment with defendants, and he never returned to their practice.
In 2019, while a patient at a different practice, plaintiff underwent
another biopsy on a lesion located on his left shin. That lesion was
promptly identified as a malignant melanoma. The action proceeded to
a jury trial in which the jury returned a verdict determining that
defendants were not liable to plaintiffs. Plaintiffs appeal from a
judgment entered in favor of defendants. We affirm.

On appeal, plaintiffs contend that the judgment should be
reversed and that they should be granted a new trial based on several
erroneous trial rulings. We reject plaintiffs' contentions. "Since

'[t]rial courts are accorded wide discretion in making evidentiary rulings . . . , absent an abuse of discretion, those rulings should not be disturbed on appeal' " (*Mazella v Beals*, 27 NY3d 694, 709 [2016]; see *People v Carroll*, 95 NY2d 375, 385 [2000]). "To be admissible [at trial], evidence must be relevant and its probative value outweigh the risk of any undue prejudice" (*Mazella*, 27 NY3d at 709; see generally *Jerome Prince, Richardson on Evidence* § 4-101 at 136 [Farrell 11th ed 1995]). Nevertheless, "[a]n error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced"; in other words, there are no grounds for reversal if the ruling is harmless error (CPLR 2002; see *Mazella*, 27 NY3d at 711; *Senyia v Vosseler*, 217 AD3d 1520, 1522 [4th Dept 2023]).

Initially, plaintiffs contend that Supreme Court erred in refusing to preclude testimony from defendants' expert that the cancerous lesion from 2019 was pathologically different from the lesion biopsied in 2018 on the basis that such a theory was not included in defendants' expert disclosure. We reject that contention. Defendants' expert disclosure explained that "[t]he expert will offer opinions regarding the *pathological analysis* of the pathology slides in this case" (emphasis added) and that "the biopsy of plaintiff's shin lesion [in 2018] . . . appears to be a blue nevus," which "differs pathologically from a . . . melanoma." Further, the expert disclosure noted that the expert would "respond to the testimony of plaintiff[s'] experts." In short, defendants' disclosure made clear that their expert would provide precisely the type of pathological testimony that plaintiffs challenged and that he disagreed with plaintiff's expert on the nature of the lesions in 2018 and 2019. We therefore conclude that the court did not err in allowing defendants' expert to testify that the cancerous lesion from 2019 was pathologically different from the lesion biopsied in 2018 inasmuch as that testimony was encompassed by their expert disclosure (see *Neumire v Kraft Foods*, 291 AD2d 784, 786 [4th Dept 2002], *lv denied* 98 NY2d 613 [2002]; cf. *Saraiva v New York State Thruway Auth.*, 234 AD3d 1325, 1327 [4th Dept 2025], *lv denied* 44 NY3d 904 [2025]; see generally *Mazella*, 27 NY3d at 709).

To the extent that plaintiffs contend that the court also erred in refusing to preclude testimony of defendants' expert concerning the location of the lesions on plaintiff's leg because that testimony exceeded the scope of the expert disclosure, we conclude that no expert disclosure was required on that point inasmuch as it was a question of fact that did not require an expert opinion to establish (see *Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]; *O'Neill v Pelusio*, 65 AD2d 914, 914-915 [4th Dept 1978]). Furthermore, we reject plaintiffs' contention that the court erred in precluding them from introducing evidence rebutting the aforementioned testimony of defendants' expert. Rebuttal is "not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove" (*Marshall v Davies*, 78 NY 414, 420 [1879]; see generally *People v Harris*, 98 NY2d 452, 489 [2002]; *Yeomans v Warren*, 87 AD2d 713, 713 [3d Dept 1982]).

Here, there was no basis for plaintiffs to rebut the assertion of defendants' expert that, based on their respective locations, the 2018 lesion and the 2019 lesion were different lesions. Plaintiffs had affirmatively presented evidence about the lesions' locations in their direct case; defendants introduced no evidence on that question that plaintiffs had not already addressed (*see Hutchinson v Shaheen*, 55 AD2d 833, 834 [4th Dept 1976]; *see also Syracuse Airport Metroplex v City of Syracuse*, 249 AD2d 926, 927 [4th Dept 1998]).

Plaintiffs also contend that the court erred in precluding them from presenting testimony from one of defendants' former employees as part of their direct case. We reject that contention. Although "nothing in CPLR article 31 requires a party to generate a witness list per se," "it is within a court's discretion to require a party to disclose the names and addresses of witnesses" (*Hunter v Tryzbinski*, 278 AD2d 844, 844 [4th Dept 2000]; *see* 22 NYCRR 202.37). Compliance with disclosure obligations "must be gauged with reference to the purposes of disclosure," which include a desire to "prevent gamesmanship and unfair surprise at trial" (*Hunter*, 278 AD2d at 845). It is undisputed that plaintiffs never disclosed defendants' former employee on a witness list prior to trial. Ultimately, we cannot say that the court abused its discretion in concluding that the former employee's testimony should be precluded, particularly in light of its determination that defendants would be prejudiced by plaintiffs' failure to disclose the employee as a witness (*see Gerasimowicz v Delis*, 231 AD3d 536, 537 [1st Dept 2024]; *Eros Intl. PLC v Mangrove Partners*, 191 AD3d 464, 465 [1st Dept 2021]; *Slomczewski v Ross*, 148 AD3d 1648, 1649 [4th Dept 2017]). We further conclude that the court did not abuse its discretion in precluding plaintiffs from calling the former employee to testify as a rebuttal witness. Although plaintiffs offered the former employee's testimony to establish certain facts about defendants' office practices, defendants offered no testimony on that specific issue that required rebuttal (*see generally Marshall*, 78 NY at 420). Moreover, we note that the relevancy of the former employee's testimony about defendants' office practices was questionable inasmuch as she could provide testimony only about those office practices in effect years before the alleged negligence occurred.

Plaintiffs next contend that the court erred in requiring them to disclose the identity of an expert witness before that witness took the stand. We reject that contention. CPLR 3101 (d) (1) (i) provides that a party in a medical malpractice action is permitted to omit the name of an expert medical witness from its expert disclosure form, which stems from a " 'concern that medical experts might be discouraged from testifying by their colleagues' " (*Thomas v Alleyne*, 302 AD2d 36, 45 [2d Dept 2002]; *see Mercado v Schwartz*, 209 AD3d 30, 38 [2d Dept 2022]). Nevertheless, the omission of an expert's identity "postpone[s] revelation of [that fact]" only "until the time of trial" (*Thomas*, 302 AD2d at 45; *see Mercado*, 209 AD3d at 38; *Rivera v Albany Med. Ctr. Hosp.*, 119 AD3d 1135, 1137 n 1 [3d Dept 2014]). Under the circumstances of this case, we conclude that the court did not abuse its discretion in requiring plaintiffs to disclose the

identity of their expert shortly before he took the stand.

Plaintiffs also contend that they were deprived of a fair trial by allegedly improper comments made by defense counsel during the course of trial. Plaintiffs failed to object to several of the comments challenged on appeal, and we therefore conclude that their contention with respect to those comments is unpreserved for our review (see *Masmalaj v New York City Economic Dev. Corp.*, 197 AD3d 1294, 1296 [2d Dept 2021]; *Baynes v Maple 3, LLC*, 169 AD3d 749, 750 [2d Dept 2019]; *Lagos v Fucale*, 139 AD3d 908, 908 [2d Dept 2016], *lv dismissed* 28 NY3d 1178 [2017]). Although plaintiffs objected to one of the challenged statements, they successfully requested that the court admonish defense counsel and then failed to object any further. Plaintiffs' failure to request additional relief renders that portion of their contention unpreserved for our review as well (see *Country Park Child Care, Inc. v Smartdesign Architecture PLLC*, 129 AD3d 1636, 1637 [4th Dept 2015]; *Lucian v Schwartz*, 55 AD3d 687, 688-689 [2d Dept 2008], *lv denied* 12 NY3d 703 [2009]).

Plaintiffs contend that the court erred in granting defendants' request for an adverse inference instruction for spoliation of evidence that instructed the jury that plaintiffs had a "culpable state of mind" when they failed to preserve the cell phone containing the voicemail from defendants' practice regarding the 2018 biopsy results. We reject that contention. Here, plaintiff testified that he failed to retain the cell phone containing the voicemail from defendants' practice providing the results of the 2018 biopsy, and he did so at a time when he should have reasonably anticipated that there would be litigation related to his treatment by defendants. There is no dispute that the court defined "culpable state of mind" as being based on plaintiffs' negligence—indeed, it did so specifically to ameliorate plaintiffs' concern that the proposed spoliation charge implied that they intentionally disposed of the cell phone. Contrary to plaintiffs' assertion on appeal, the "culpable state of mind" needed to support a sanction for spoliation includes negligence in cases where, as here, the party seeking a spoliation sanction establishes that the party with control over the missing evidence had an obligation to preserve the evidence at the time it was lost and that the missing evidence is relevant to a party's claims or defense (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547-548 [2015]; see *Storm v Kaleida Health*, 229 AD3d 1239, 1240 [4th Dept 2024]). Given the relevancy of the voicemail to plaintiffs' claims, as well as plaintiffs' admission that they did not retain the cell phone containing the voicemail at a time when they were on notice that it may be needed for litigation (see *Mahiques v County of Niagara*, 137 AD3d 1649, 1652 [4th Dept 2016]), we conclude that the court did not abuse its "broad discretion" in giving the jury the adverse inference instruction here (*Storm*, 229 AD3d at 1241 [internal quotation marks omitted]; see generally *Page v Niagara Falls Mem. Med. Ctr.*, 167 AD3d 1428, 1430 [4th Dept 2018]).

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

Entered: November 21, 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 22-00586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JESSIE ENGLIS, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered March 16, 2022. The judgment convicted defendant upon a nonjury verdict of assault on a peace officer and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree and dismissing count 4 of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault on a peace officer (Penal Law § 120.08; *see* CPL 2.10 [25]) and assault in the second degree (Penal Law § 120.05 [3]). The charges arose from an incident in which defendant, who was a hospitalized inmate, struck a correction officer in the head with a hospital monitor. The correction officer was then further injured when he and other correction officers tried to subdue defendant, who struggled to get free.

Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the element of intent (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although there was evidence to support defendant's contention that he intended to commit suicide rather than to prevent the correction officers "from performing a lawful duty" (Penal Law § 120.08; *see* § 120.05 [3]), there was also evidence establishing that, just prior to the initial assault on the first correction officer, defendant made multiple statements threatening that correction officer and his family and, further, that defendant, who had broken free of his restraints, swung the monitor at the correction officer as he attempted to subdue the

out-of-control defendant. "In recognition of the inherent challenges to demonstrating an actor's mental state," courts have long "accepted that intent may be inferred from conduct as well as the surrounding circumstances" (*People v Rouse*, 34 NY3d 269, 274 [2019] [internal quotation marks omitted]). Moreover, a defendant is "presumed to intend the natural and probable consequences" of their actions (*People v Moreland*, 103 AD3d 1275, 1276 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013] [internal quotation marks omitted]).

Furthermore, despite the fact that defendant may also have been under the influence of anesthesia, a determination whether intoxication is sufficient to negate intent is a question for the trier of fact to resolve in weighing the evidence (*see People v Reibel*, 181 AD3d 1268, 1270 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020], *reconsideration denied* 35 NY3d 1096 [2020]; *People v Fitzrandolph*, 162 AD3d 1537, 1537-1538 [4th Dept 2018], *lv denied* 32 NY3d 937 [2018], *reconsideration denied* 32 NY3d 1111 [2018]). The same is true with respect to an alleged mental health crisis at the time of the incident (*see People v Franco*, 225 AD3d 1284, 1284-1285 [4th Dept 2024], *lv denied* 41 NY3d 1002 [2024]). " 'Competing inferences to be drawn [regarding a defendant's intent], if not unreasonable, are within the exclusive domain of the finder[] of fact,' " and should not be disturbed by this Court (*People v Metales*, 171 AD3d 1562, 1563 [4th Dept 2019], *lv denied* 33 NY3d 1107 [2019], quoting *People v Barnes*, 50 NY2d 375, 381 [1980]). Here, we conclude that "it cannot be said that the [factfinder] failed to give the evidence the weight that it should be accorded" on the issue of defendant's intent (*People v Mike*, 283 AD2d 989, 989 [4th Dept 2001], *lv denied* 96 NY2d 904 [2001]).

We reject defendant's contention that the evidence is legally insufficient to establish that the first correction officer sustained a serious physical injury, as required for a conviction of assault on a peace officer. Assuming, arguendo, that the contention is preserved for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude, after viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), that the evidence is legally sufficient to establish the requisite serious physical injury (*see People v Gonzalez*, 198 AD3d 543, 543 [1st Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Sponburgh*, 61 AD3d 1415, 1416 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]; *see generally Bleakley*, 69 NY2d at 495).

Defendant contends that Supreme Court erred in denying his request for a subpoena duces tecum to obtain hospital records that pertained to, inter alia, defendant's mental health. We conclude that defendant abandoned his request for those documents. The record does not establish that the court ruled on that specific subpoena, and thus "defendant abandoned [his request] by failing to seek a ruling" (*People v Reyes*, 144 AD3d 1683, 1686 [4th Dept 2016]; *see People v Mulligan*, 118 AD3d 1372, 1376 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]; *see also People v Dove*, 176 AD2d 266, 267-268 [2d Dept 1991], *lv denied* 79 NY2d 946 [1992]). In any event, we conclude that any

error in refusing to issue the subpoena is harmless inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that he would have been acquitted had the court issued the subpoena (*cf. People v Wildrick*, 83 AD3d 1455, 1457 [4th Dept 2011], *lv denied* 17 NY3d 803 [2011]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's further contention, the court did not err in failing to conduct an inquiry when defendant sought substitution of his second assigned counsel. There was no "seemingly serious request" for substitution to warrant any court inquiry (*People v Sides*, 75 NY2d 822, 824 [1990]; *see People v Porto*, 16 NY3d 93, 99-100 [2010]). Moreover, to the extent that defendant's alleged complaints were not addressed when his first counsel was relieved of representation, they lacked factual support and merit (*see People v Tatum*, 204 AD3d 1400, 1401-1402 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]).

Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We further reject defendant's contention that the court erred in refusing to entertain his pro se CPL 330.30 motion. "[T]he decision to entertain [pro se] motions [filed by a represented defendant] lies within the sound discretion of the trial court" (*People v Rodriguez*, 95 NY2d 497, 500 [2000]; *see People v Johnson*, 195 AD3d 1420, 1421 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]).

We agree with defendant, however, that the conviction of assault in the second degree cannot stand. As the People correctly concede, this Court has previously determined that assault in the second degree "is an inclusory concurrent count of assault on a [peace] officer" (*People v Felong*, 192 AD3d 1664, 1666 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]). Moreover, as charged here, assault in the second degree "is a lesser included offense of assault on a [peace] officer" (*id.*; *see* CPL 1.20 [37]; *see generally People v Glover*, 57 NY2d 61, 63-64 [1982]). As a result, that part of the judgment convicting defendant of assault in the second degree must be reversed and count 4 of the indictment dismissed (*see Felong*, 192 AD3d at 1666).

Finally, we note that the uniform sentence and commitment sheet incorrectly states that defendant was convicted upon a plea of guilty, and thus it must be amended to reflect that the conviction was entered after a nonjury trial (*see People v McLamore*, 191 AD3d 1413, 1415 [4th Dept 2021], *lv denied* 37 NY3d 958 [2021]).

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

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KA 19-01645

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TASHEONIA M. HILLS, DEFENDANT-APPELLANT.

KATHRYN M. FESTINE, UTICA, 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 (Robert Bauer, J.), rendered February 11, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]) arising from her conduct in repeatedly stabbing her mother and thereby causing her death. We affirm.

Defendant contends that the verdict is against the weight of the evidence because the jury erred in rejecting the affirmative defense of lack of criminal responsibility by reason of mental disease or defect (Penal Law § 40.15). "A defendant will be absolved of criminal liability under [section] 40.15 if, 'at the time of [the criminal] conduct, as a result of mental disease or defect, [she] lacked substantial capacity to know or appreciate either . . . [t]he nature and consequences of such conduct [or] [t]hat such conduct was wrong' " (*People v Gilbert*, 199 AD3d 1048, 1048-1049 [3d Dept 2021]). While the People are required to prove the elements of the charged crimes beyond a reasonable doubt, the defendant has the burden of proving the elements of the affirmative defense by a preponderance of the evidence (*see People v Kohl*, 72 NY2d 191, 193-194 [1988]). "When there is conflicting expert evidence on the issue of criminal responsibility, the jury is generally free to accept or reject, in whole or in part, the opinion of any expert, at least in the absence of a serious flaw in the expert's testimony" (*People v Gillie*, 185 AD3d 1539, 1540 [4th Dept 2020], *lv denied* 35 NY3d 1094 [2020] [internal quotation marks omitted]; *see Gilbert*, 199 AD3d at 1049).

Initially, we agree with defendant that a different verdict would not have been unreasonable based on the testimony of two defense expert witnesses that defendant lacked substantial capacity to know and appreciate the nature and consequences of her actions (see *People v Leppanen*, 218 AD3d 995, 1000-1001 [3d Dept 2023], *lv denied* 40 NY3d 1081 [2023]; *Gillie*, 185 AD3d at 1539-1540; see generally *People v Danielson*, 9 NY3d 342, 348 [2007]). Nevertheless, viewing the evidence in light of the elements of the crimes as charged to the jury (see *Danielson*, 9 NY3d at 349), including the charge on the defense of lack of criminal responsibility by reason of mental disease or defect, we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant and her mother had a history of disputes, and defendant also had a history of manipulation and poor anger management. Although defendant's experts opined that defendant's odd behavior in the weeks immediately preceding the murder reflected psychotic symptoms, the People's expert opined that defendant never exhibited any psychotic symptoms. The People's expert further opined that defendant's borderline personality disorder and her anger toward her mother explained the crime. In support of his opinion, the People's expert relied upon, *inter alia*, defendant's behavior shortly after the murder, including her interview with the police; her statements in that interview; and her apology to a relative when defendant returned to the scene of the crime, which evidenced that she knew that her conduct was wrong. Contrary to defendant's contention, the testimony of the People's expert was not infected by a serious flaw (see *Gillie*, 185 AD3d at 1540; *People v Fitzrandolph*, 162 AD3d 1537, 1538 [4th Dept 2018], *lv denied* 32 NY3d 937 [2018], *reconsideration denied* 32 NY3d 1111 [2018]). It was for the jury to resolve the conflict in the expert testimony with respect to whether defendant had the substantial capacity to know and appreciate the nature and consequences of her actions, and we perceive no basis to disturb the jury's rejection of defendant's affirmative defense (see *Leppanen*, 218 AD3d at 1001; *Gilbert*, 199 AD3d at 1056-1057).

Finally, the sentence is not unduly harsh or severe.

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent because I conclude that the sentence imposed for the conviction of murder in the second degree (Penal Law § 125.25 [1]) is unduly harsh and severe under the circumstances of this case. "[S]ociety derives no legitimate benefit from imprisoning a person for longer than is warranted" (*People v Brisman*, 43 NY3d 322, 331 [2025]). A sentence must account for the nature of the crime and the circumstances of defendant while also providing an incentive and opportunity for defendant to achieve and demonstrate rehabilitation in the future (see *People v Franklin*, 206 AD3d 1610, 1613 [4th Dept 2022], *lv denied* 38 NY3d 1150 [2022]). Here, the record is replete with evidence that defendant was struggling with mental health issues at the time of the crime. Although the jury rejected the affirmative defense of lack of criminal responsibility by reason of mental disease or defect (see

Penal Law § 40.15), the record makes clear that defendant's mental health impacted her ability to fully understand her actions. In my view, defendant's recent mental health history indicates that a lengthy prison sentence would be unduly harsh (see *People v Demilio*, 227 AD3d 1098, 1101 [2d Dept 2024], *lv denied* 42 NY3d 1035 [2024]), and I believe that her actions before that time demonstrate that she is capable of rehabilitation in the future. I would therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for murder in the second degree to an indeterminate term of imprisonment of 15 years to life (see Penal Law §§ 70.00 [2] [a]; [3] [a] [i]; 125.25 [1]).

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

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KA 23-00336

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HARVEY ALEXANDER, JR., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SABRINA BREMER OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 29, 2022. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree and criminal possession of a weapon on school grounds.

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 weapon on school grounds under count 2 of the indictment and dismissing that count and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal possession of a weapon on school grounds (Penal Law § 265.01-a). The conviction arises from defendant's possession of a firearm at Strong Memorial Hospital (Hospital). Defendant contends that Supreme Court erred in denying his motion for a trial order of dismissal because section 265.01-a does not apply to the Hospital, even if it is affiliated with the University of Rochester (U of R). We reject that contention. Subject to exceptions not relevant here, "[a] person is guilty of criminal possession of a weapon on school grounds when [they] knowingly [have in their] possession a . . . firearm in or upon a building or grounds, used for educational purposes, of any school, college, or university" (*id.*). The evidence established that the Hospital is used by U of R as a teaching hospital in which students perform clinical work and that U of R's School of Dentistry and School of Nursing is located within the Hospital. We conclude from the language used in the statute as construed "according to its natural and most obvious sense" (*Kirshtein v AmericU Credit Union*, 65 AD3d 147, 150 [4th Dept 2009] [internal quotation marks omitted]), that the Hospital is a building used for educational purposes and is encompassed by section 265.01-a.

We agree with defendant, however, that the evidence is legally insufficient to support the conviction under section 265.01-a because there is no evidence that defendant knew he was in a building used for educational purposes (see generally *People v Ryan*, 82 NY2d 497, 502-503 [1993]). "A verdict is legally sufficient when, viewing the facts in a light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*id.*). As relevant here, a person is guilty of criminal possession of a weapon on school grounds when the person knows that the building is used for educational purposes (see Penal Law § 265.01-a; see generally *Ryan*, 82 NY2d at 502-503; *People v Nesmith*, 231 AD2d 941, 941 [4th Dept 1996], *lv denied* 89 NY2d 1039 [1997]). The only evidence presented by the People regarding defendant's knowledge that the Hospital was a building used for educational purposes was two photographs of signs at the Hospital that could have alerted defendant that the Hospital was used by U of R for educational purposes. The People produced no evidence that defendant actually saw the signs at the Hospital, and "a jury cannot be allowed to make inferences which are based not on the evidence presented, but rather on unsupported assumptions drawn from evidence equivocal at best" (*People v Taylor*, 158 AD3d 1095, 1100 [4th Dept 2018], *lv denied* 32 NY3d 941 [2018], *reconsideration denied* 32 NY3d 1178 [2019] [internal quotation marks omitted]; see generally *People v Szurgot*, 239 AD3d 1444, 1447 [4th Dept 2025]). Given the lack of evidence that defendant knew the Hospital was a building used for educational purposes, we conclude that the conviction of criminal possession of a weapon on school grounds under count 2 of the indictment is not supported by legally sufficient evidence, and we therefore modify the judgment accordingly.

In light of our determination, defendant's further contention that the verdict with respect to criminal possession of a weapon on school grounds is against the weight of the evidence is moot (see *People v Desius*, 188 AD3d 1626, 1628 [4th Dept 2020], *lv denied* 36 NY3d 1096 [2021]; *People v Terry*, 169 AD3d 938, 940 [2d Dept 2019], *lv denied* 33 NY3d 1109 [2019]).

We decline defendant's request, however, to vacate the remaining sentence and remit the matter to Supreme Court for resentencing inasmuch as there is nothing in the record demonstrating that the court was influenced by the conviction for criminal possession of a weapon on school grounds when it sentenced defendant on count 1 of the indictment (*cf. People v Camilloni*, 92 AD2d 745, 746 [4th Dept 1983]).

Finally, contrary to defendant's contention, we conclude that the sentence imposed on the remaining count is not unduly harsh or severe.

Entered: November 21, 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 25-00044

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

CORBIN ANDERSON, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THOMAS G. NEUBAUER, THOMAS G. NEUBAUER, II,
KAILA ROSE VEACH, DEFENDANTS-RESPONDENTS,
DEANNA CATHERINE MORRIS AND JOHN F. MORRIS,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (EMILY M. COBB OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

THE LAW OFFICES OF STEVE BOYD, P.C., BUFFALO (LEAH COSTANZO OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 22, 2024, in a case involving a motor vehicle accident. The order denied the motion of defendants Deanna Catherine Morris and John F. Morris for summary judgment dismissing the complaint and all cross-claims against them.

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

Memorandum: In this negligence case arising from a multi-vehicle automobile accident, Deanna Catherine Morris and John F. Morris (defendants) appeal from an order that denied without prejudice their motion for summary judgment dismissing the complaint and all cross-claims against them. Even assuming, arguendo, that defendants met their initial burden on the motion, we conclude that defendants' motion is premature (*see Michael P. v Dombroski*, 211 AD3d 1469, 1473 [4th Dept 2022]). A party opposing summary judgment on the basis that additional discovery is needed must "demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Lowes v Anas*, 195 AD3d 1579, 1580 [4th Dept 2021] [internal quotation marks omitted]; *see Bratge v Simons*, 173 AD3d 1623, 1624 [4th Dept 2019]; *see also* CPLR 3212 [f]). To meet that burden, the party opposing the motion as premature must "make an evidentiary showing supporting [the conclusion that facts essential to justify opposition may exist but cannot then be stated, and] mere speculation or conjecture [is] insufficient" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014]; *see also Dunn v*

Covanta Niagara I, LLC [appeal No. 2], 181 AD3d 1340, 1341 [4th Dept 2020]). In opposing defendants' motion, plaintiff established that not a single party, aside from plaintiff, had been deposed in the case (see *Michael P.*, 211 AD3d at 1473; *Schlichting v Elliquence Realty, LLC*, 116 AD3d 689, 690 [2d Dept 2014]). We conclude that Supreme Court properly denied defendants' motion without prejudice (see *Ruggio v PCCB, Inc.*, 59 AD3d 999, 999 [4th Dept 2009]; *Fellows v County of Onondaga*, 2 AD3d 1462, 1462 [4th Dept 2003]; see generally CPLR 3212 [f]).

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

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KA 22-01818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ARTIS ANDERSON, JR., DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK 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 (Thomas E. Moran, J.), rendered September 22, 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 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, his waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Cunningham*, 213 AD3d 1270, 1270 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]). We reject defendant's claim that his " 'waiver [of the right to appeal] is . . . invalid on the ground that [Supreme Court] did not specifically inform [him during the oral colloquy] that his general waiver of the right to appeal encompassed the court's suppression ruling[]' " (*People v Williams*, 237 AD3d 1581, 1582 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025]; *see People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]; *People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]). Defendant's valid waiver of the right to appeal thus encompasses his challenge to the court's suppression ruling (*see Edmonds*, 229 AD3d at 1278; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]).

To the extent that defendant contends that he received ineffective assistance of counsel because defense counsel did not

understand that the appeal waiver encompassed the suppression ruling, that contention involves matters outside the record on appeal and must be raised via a motion pursuant to CPL 440.10 (see generally *People v Kosmetatos*, 178 AD3d 1433, 1434 [4th Dept 2019], lv denied 35 NY3d 994 [2020]).

All concur except BANNISTER and DELCONTE, JJ., who concur in the result in the following memorandum: We concur in the result reached by the majority. In our view, however, the record does not establish that defendant knowingly and voluntarily waived an appellate challenge to the suppression ruling. We further conclude that defendant's challenge to the suppression ruling lacks merit.

It is well settled that our responsibility as an appellate court is to " 'oversee the process and to review the record to ensure that the defendant's waiver of the right to appeal reflects a knowing and voluntary choice' " (*People v Thomas*, 34 NY3d 545, 559 [2019], cert denied – US –, 140 S Ct 2634 [2020], quoting *People v Callahan*, 80 NY2d 273, 280 [1992]). We must look at "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background" of the defendant to determine whether the record demonstrates that the defendant understood the appeal waiver's consequences (*id.* at 559-560 [internal quotation marks omitted]). In other words, "[o]ur requisite analysis for determining the validity of the waiver remains focused on whether all the relevant circumstances reveal a knowing and voluntary waiver" (*id.* at 563).

Both the Court of Appeals and our Court have expressed that using the Model Colloquy to explain the consequences of the appeal waiver is the better practice (see *id.* at 567; *People v Seeman*, 188 AD3d 1670, 1670 [4th Dept 2020]; see also NY Model Colloquies, Waiver of Right to Appeal). In relevant part, the Model Colloquy provides defendants with the following information: "By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, [including a claimed error in the denial of your (specify, e.g., motion to suppress),] and to consider whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?"

The prior version of the Model Colloquy included a footnote suggesting that courts specifically inform defendants about the waiver of appellate review of major aspects of their cases, such as the denial of a suppression motion (see NY Model Colloquies, Waiver of Right to Appeal, n 1). In light of the Court of Appeals' decision in *Thomas* (34 NY3d 545), however, the language of that footnote was moved to the body of the colloquy, as reflected in the quotation above (see NY Model Colloquies, Waiver of Right to Appeal, n 1). That change reflects how important it is for the courts, in certain circumstances, to identify for defendants the major aspects of their cases that will

be precluded from appellate review upon waiving the right to appeal (see *id.*; see also *id.* at n 3). The current version of the Model Colloquy further makes clear that there will be cases in which the court's failure to so advise a defendant may render the appeal waiver unknowing and involuntary with respect to that aspect of the defendant's case. Upon our review of the record in this case, we conclude that Supreme Court's failure to specifically inform defendant that an appeal waiver would preclude appellate review of the suppression ruling rendered the waiver unknowing and involuntary as to that issue.

By way of background, defendant's conviction of attempted criminal possession of a weapon in the second degree arises from an incident in which he brought a firearm into an apartment that he and a female guest were occupying pursuant to a short-term rental agreement through Airbnb. The owner of the property watched via a security camera as defendant carried the firearm into the apartment, which violated the rental terms. Consequently, the property owner called Airbnb to cancel defendant's reservation and then called the police for assistance ejecting defendant and the female guest. The police officers took defendant and the guest into custody outside of the apartment. The property owner then searched the apartment to ensure that no personal effects of defendant or the guest had been left behind. Hidden under the mattress in the bedroom, the property owner found the firearm that he had watched defendant bring into the apartment.

Defendant was thereafter indicted on a single count of criminal possession of a weapon in the second degree. He sought suppression of the firearm on the ground that it was obtained as a result of his unlawful arrest and an unlawful search of the apartment. The court refused to suppress the firearm, and defendant subsequently agreed to waive his right to appeal and entered a guilty plea to a reduced charge of attempted criminal possession of a weapon in the second degree.

At the plea proceeding, in explaining the scope of the appeal waiver to defendant, the court emphasized that "some things. . . are so important that we won't let you waive your right to appeal on those issues," and then, as outlined in the Model Colloquy, it gave three examples, namely, the court's jurisdiction, defendant's "competency . . . to plead guilty," and the legality of the sentence. The court then stated: "And there's some others, okay?" However, the court never articulated what it meant by the term "others," and the court did not specifically inform defendant that his appeal waiver would encompass a challenge to the suppression determination.

We recognize that this Court has previously concluded that appeal waivers were sufficiently comprehensive to cover challenges to suppression rulings although the courts did not expressly mention suppression rulings during the waiver colloquies (see e.g. *People v Jackson*, 198 AD3d 1317, 1318 [4th Dept 2021], *lv denied* 37 NY3d 1096 [2021]). The Court of Appeals reached that same conclusion in *Thomas* (34 NY3d at 564). In that case, the defendant entered a guilty plea

one day after the court issued an adverse suppression ruling (see *id.* at 553). During the colloquy, the court informed the defendant that if he waived the right to appeal, he would "give up the right . . . to challenge to a higher court what is taking place right now, the plea and what will take place in about two weeks when you are sentenced" (*id.* [internal quotation marks omitted]). The court also ensured that the defendant had been given a full opportunity to consult with defense counsel about a written appeal waiver, which enumerated specific appellate rights that survive a waiver of appeal, and that the defendant understood the consequences of signing the written waiver (see *id.*). Under those circumstances, the Court of Appeals concluded that the waiver was knowing and voluntary and that it was intended to cover the adverse suppression ruling (see *id.* at 564).

In contrast, defendant's suppression hearing in the instant case was held over a year before, and a decision denying suppression was issued some six months before his plea proceeding. Furthermore, the court's colloquy created ambiguity as to the scope of the appeal waiver because, in addition to three enumerated issues that would survive the appeal waiver, the court stated that there are "other[]" issues that are "so important" to defendant's case that they would also survive the appeal waiver, yet the court did not specify what those other issues are. We note that the record contains a written waiver of the right to appeal signed by both defendant and defense counsel, but the court did not inquire whether defendant had reviewed it, signed it, and understood it; in any event, the document does not explain that the appeal waiver encompasses an appellate challenge to the suppression ruling. The written appeal waiver therefore does not cure the ambiguity that was created by the oral colloquy (see *People v Outley*, 232 AD3d 1284, 1285 [4th Dept 2024], *lv denied* 43 NY3d 946 [2025]; *People v Durie*, 216 AD3d 1449, 1450 [4th Dept 2023]). We emphasize that the ambiguity could have been easily cured had the court mentioned, as suggested in the Model Colloquy, that the appeal waiver included appellate review of the suppression ruling.

Given the ambiguous colloquy, and the fact that the court's suppression determination was certainly the major aspect of defendant's case inasmuch as suppression of the firearm would have resulted in the only charge against defendant being dismissed, it was reasonable for defendant to erroneously conclude that the court's refusal to grant suppression of the firearm was "so important" to his case that it was one of those "other[]" issues that would be subject to appellate review despite his waiver of the right to appeal (emphasis added). Indeed, defendant's misunderstanding of the scope of the appeal waiver is apparent from the record. At sentencing, defense counsel – the same attorney who counseled defendant on his appeal waiver – requested that the court stay sentencing so that defendant could appeal the suppression ruling. Without explaining that defendant had waived the right to appellate review of the suppression ruling, the court simply denied the request for a stay. After imposing the sentence, the court immediately told defendant that he had "the ability to appeal" and further explained that his attorney would file a notice of appeal on his behalf, that it would not cost defendant anything, and that he may be entitled to assigned counsel.

Those exchanges at sentencing strengthened the inference that defendant retained the right to challenge the suppression ruling on appeal, and the record reflects that defendant and defense counsel in fact believed that appellate review of the suppression ruling was *not* foreclosed by the appeal waiver. Thus, on this record, we conclude that defendant's appeal waiver was not knowing and voluntary with respect to an appellate challenge to the suppression ruling (*cf. Thomas*, 34 NY3d at 565).

In regard to the merits of defendant's challenge to the court's refusal to suppress the firearm, we conclude that the record supports the court's determination that the property owner terminated the rental prior to the search and, thus, that defendant lost his reasonable expectation of privacy in the apartment (*see generally People v D'Antuono*, 306 AD2d 890, 890 [4th Dept 2003], *lv denied* 100 NY2d 593 [2003], *reconsideration denied* 100 NY2d 641 [2003], *cert denied* 541 US 994 [2004], *reh denied* 541 US 1083 [2004]).

Defendant's additional argument that the search was invalid under *Payton v New York*, i.e., a "warrantless and nonconsensual entry into a suspect's home in order to make a[n] . . . arrest" (445 US 573, 576 [1980]), is also without merit. Here, it is undisputed that defendant was taken into custody *outside* of the apartment, and thus *Payton* and its progeny do not apply to the facts in this case (*see People v Garvin*, 30 NY3d 174, 180-182 [2017], *cert denied* 586 US 814 [2018]). We therefore conclude that the court properly refused to suppress the firearm.

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

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KA 22-00370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISAAC ELMORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered October 14, 2021. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, criminal use of a firearm in the first degree, criminal possession of a weapon in the second degree (two counts), assault in the second degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), assault in the second degree (§ 120.05 [2]), and resisting arrest (§ 205.30). The conviction arises from two separate incidents: the first occurring when defendant fired a gun multiple times at three people, with one shot striking a bystander; and the second occurring on a later date when defendant brandished a gun and was arrested by the police.

Defendant's contention that the indictment should be dismissed for a speedy trial violation on the ground that the People's certificate of compliance was invalid and, thus, their statement of readiness illusory, is not preserved for our review "inasmuch as he did not move, in writing, for dismissal on that ground" (*People v Elmore*, 211 AD3d 1536, 1538 [4th Dept 2022], *lv denied* 42 NY3d 938 [2024]; see CPL 210.20 [1] [g]; 210.45 [1]; *People v Gates*, 238 AD2d 729, 731 [3d Dept 1997], *lv denied* 90 NY2d 905 [1997]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Contrary to defendant's contention, County Court did not abuse its discretion in denying his oral requests to be provided with the services of an investigator inasmuch as defendant failed to establish that such services were " 'necessary to his defense' " (*People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; see generally *People v Pike*, 63 AD3d 1692, 1693 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *People v Drumgoole*, 234 AD2d 888, 890 [4th Dept 1996], *lv denied* 89 NY2d 1011 [1997]). We further note that, to the extent defendant contends that the court denied his request for investigative services because of bias against him, defendant has made no showing that the court displayed actual bias (see generally *People v Anderson*, 220 AD3d 1223, 1227 [4th Dept 2023], *lv denied* 42 NY3d 1051 [2024]; *People v Sides*, 215 AD3d 1250, 1252 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]).

Contrary to defendant's contention, the court did not abuse its discretion in denying his request for an adjournment of the trial. It is well settled that " '[t]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*People v Diggins*, 11 NY3d 518, 524 [2008]; see *People v Spears*, 64 NY2d 698, 699-700 [1984]), but in "particular situations, when the protection of fundamental rights has been involved in requests for adjournments," the court's discretion is "more narrowly construed" (*Spears*, 64 NY2d at 700). Even in such situations, however, " '[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Peterkin*, 81 AD3d 1358, 1360 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]). Under the circumstances of this case, we conclude that the court did not abuse its discretion inasmuch as defendant "did not demonstrate that the requested adjournment was necessitated by factors outside his control" (*People v DeValle*, 194 AD3d 1411, 1412 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]), did not establish that the request was not "a delaying tactic" (*People v Fagan*, 12 AD3d 1080, 1081 [4th Dept 2004]), and failed to establish any prejudice that would result (see *People v Migranyan*, 237 AD3d 1109, 1109 [2d Dept 2025], *lv denied* 44 NY3d 983 [2025]).

Defendant's contention that he was denied his right to a public trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution because of alleged problems with the quality of the audio and visual streaming broadcast of his court proceedings in the court's viewing room, which was being used because of the COVID-19 pandemic, is not preserved for our review inasmuch as defendant "did not request a *Hinton* hearing on the issue" (*People v Dozier*, 238 AD3d 1523, 1525 [4th Dept 2025]; see *People v Everson*, 158 AD3d 1119, 1123 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018], *reconsideration denied* 31 NY3d 1147 [2018], *cert denied* 586 US 1198 [2019]; see generally *People v Hinton*, 31 NY2d 71, 73-76 [1972], *cert denied* 410 US 911 [1973]).

Defendant's contention that the evidence is not legally sufficient to support the element of intent with respect to the counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25

[1]) and criminal use of a firearm in the first degree (§ 265.09 [1] [a]) is not preserved inasmuch as his motion for a trial order of dismissal made at the close of proof was not "specifically directed" at the issue (*People v Gray*, 86 NY2d 10, 19 [1995] [internal quotation marks omitted]; see *People v Hines*, 97 NY2d 56, 62 [2001], rearg denied 97 NY2d 678 [2001]). In any event, intent "may be inferred from conduct as well as the surrounding circumstances" (*People v Rouse*, 34 NY3d 269, 274 [2019] [internal quotation marks omitted]), and the evidence that defendant pointed a loaded firearm at three individuals and then fired three shots in their direction " 'supports an inference that, rather than acting recklessly, defendant fired shots with the intent to kill one or more' " of the individuals (*People v Blackshell*, 178 AD3d 1355, 1356 [4th Dept 2019], lv denied 35 NY3d 968 [2020]; see *People v Forsythe*, 230 AD3d 1544, 1545 [4th Dept 2024], lv denied 42 NY3d 1079 [2025]; *People v Brown*, 120 AD3d 954, 956 [4th Dept 2014], lv denied 24 NY3d 1118 [2015]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), criminal use of a firearm in the first degree (§ 265.09 [1] [a]), assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [3]) with respect to the shooting incident, and resisting arrest (§ 205.30) as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree (§ 265.03 [3]) with respect to the brandishing incident as charged to the jury (see *Danielson*, 9 NY3d at 349), we conclude that "an acquittal would have been unreasonable . . . , and thus the verdict [with respect to that count] is not against the weight of the evidence" (*People v Weezorak*, 134 AD3d 1590, 1590 [4th Dept 2015], lv denied 27 NY3d 970 [2016] [internal quotation marks omitted]; see *People v Kreutter*, 121 AD3d 1534, 1535-1536 [4th Dept 2014], lv denied 25 NY3d 990 [2015]; see generally *Bleakley*, 69 NY2d at 495).

Defendant's contention that the court erred in not giving an Allen charge is not preserved for our review inasmuch as defendant failed to request an Allen charge (see CPL 470.05 [2]; *People v Wilmet*, 239 AD3d 1436, 1437 [4th Dept 2025], lv denied 44 NY3d 985 [2025]). In any event, the instruction provided by the court in response to a jury note " 'did not coerce or compel the jury to reach a verdict' " (*People v Afrika*, 278 AD2d 942, 942 [4th Dept 2000]) but, rather, was properly "open ended and encouraging" (*People v Brooks*, 183 AD3d 1231, 1232 [4th Dept 2020], lv denied 35 NY3d 1043 [2020]; see generally *People v Pagan*, 45 NY2d 725, 726-727 [1978]).

Defendant failed to preserve for our review his contention that the United States Supreme Court's holding in *Erlinger v United States* (602 US 821 [2024]) renders his sentencing as a second violent felony offender unconstitutional (see CPL 470.05 [2]; *People v Hernandez*, 43

NY3d 591, 597 [2025]; see generally *People v Finkelstein*, 28 NY3d 345, 348 [2016]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

The sentence is not unduly harsh or severe.

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

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

713

CA 24-00783

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

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES INC.,
ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-R5,
PLAINTIFF-APPELLANT-RESPONDENT,

V

MEMORANDUM AND ORDER

PETER F. TESTA, DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

GREENBERG TRAURIG, LLP, GARDEN CITY (STEVEN LAZAR OF COUNSEL), FOR
PLAINTIFF-APPELLANT-RESPONDENT.

DONALD H. MICHALAK, FREDONIA, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Chautauqua County (Ronald D. Ploetz, A.J.), entered March 28, 2024. The order denied the motion of plaintiff for summary judgment, and granted the cross-motion of defendant Peter F. Testa insofar as it sought summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Supreme Court, Chautauqua County, for further proceedings in accordance with this memorandum and as modified the order is affirmed without costs.

Memorandum: In this mortgage foreclosure action, plaintiff appeals and defendant Peter F. Testa (defendant) cross-appeals from an order that denied plaintiff's motion seeking, inter alia, summary judgment against defendant on its complaint, granted defendant's cross-motion to the extent that it sought summary judgment dismissing the complaint with prejudice as barred by the statute of limitations pursuant to CPLR 213 (4), and dismissed the complaint with prejudice.

Contrary to plaintiff's contention on its appeal, defendant met his initial burden of establishing that the action is untimely (see *U.S. Bank Trust N.A. v Holmes*, 233 AD3d 1480, 1480 [4th Dept 2024]; *Deutsche Bank Natl. Trust Co. v Adrian*, 157 AD3d 934, 935 [2d Dept 2018] [*Adrian*]). "The statute of limitations in an action to foreclose on a mortgage 'begins to run once the debt has been accelerated by a demand' " (*Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]; see *Business Loan Ctr., Inc. v Wagner*, 31 AD3d 1122, 1123 [4th Dept 2006]). " 'Acceleration occurs, inter alia, by the commencement of a foreclosure action' " (*Federal Natl. Mtge.*

Assn., 188 AD3d at 74; see *U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018]), and " 'once a mortgage debt is accelerated, the entire amount is due and the [s]tatute of [l]imitations begins to run on the entire debt' " (*Federal Natl. Mtge. Assn.*, 188 AD3d at 74 [emphasis omitted]; see *Wilmington Sav. Fund Socy., FSB v Gustafson*, 160 AD3d 1409, 1410 [4th Dept 2018]). Here, in support of the cross-motion, defendant submitted plaintiff's complaint in a prior foreclosure action with respect to the same mortgage, which was filed on April 11, 2007, and declared "that the whole of the principal sum secured hereby become immediately due and payable." Thus, defendant established that the mortgage debt was accelerated on that date and that the six-year statute of limitations applicable to mortgage foreclosure actions (see CPLR 213 [4]) had expired by the time plaintiff commenced the instant action on November 16, 2018 (see *Federal Natl. Mtge. Assn.*, 188 AD3d at 74; *Adrian*, 157 AD3d at 935).

In opposition, plaintiff did not "raise a question of fact whether the statute of limitations was tolled or otherwise inapplicable or whether . . . plaintiff actually commenced the action within the applicable period" (*U.S. Bank Trust N.A.*, 233 AD3d at 1480). Plaintiff's purported voluntary discontinuance of the prior foreclosure action in 2012, which occurred after the action had been dismissed sua sponte for failure to prosecute, did not reset the statute of limitations. Plaintiff relies on the rule with respect to voluntary discontinuance set out in *Freedom Mtge. Corp. v Engel* (37 NY3d 1, 32 [2021]), but we note that the Legislature abrogated that rule by enacting the Foreclosure Abuse Prevention Act (FAPA), which provides, in relevant part, that "[i]n any action on an instrument described under [CPLR 213 (4)], the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute" (CPLR 3217 [e]; see L 2022, ch 821, § 8; *Bank of N.Y. Mellon v Stewart*, 216 AD3d 720, 723 [2d Dept 2023]).

Contrary to plaintiff's further contention, we conclude that, "[a]lthough the Legislature did not explicitly state that FAPA should apply retroactively, it clearly indicated that it should" (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 44 [1st Dept 2023]; see *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1067-1068 [2d Dept 2024] [*Dagrín*]; see generally *Jacobus v Colgate*, 217 NY 235, 240 [1916] [citation omitted]). The plain language of the legislation requires FAPA to be retroactively applied, with section 10 providing that FAPA applies "to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10; see *Dagrín*, 233 AD3d at 1068). Additionally, "FAPA is remedial in nature . . . , and the 'take-effect-immediately' language and the statements in the legislative memoranda in support of FAPA evince a sense of urgency" (*Genovese*, 223 AD3d at 45). It is an "axiom of statutory interpretation, and an exception to the presumption against

retroactive application, that 'remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose' " (*Matter of Mia S. [Michelle C.]*, 212 AD3d 17, 22 [2d Dept 2022], lv dismissed 39 NY3d 1118 [2023]).

We also conclude that the retroactive application of FAPA to this action does not infringe upon plaintiff's rights to substantive and procedural due process and does not violate the Contract Clause or Takings Clause of the United States Constitution (see US Const, art I, § 10 [1]; Amend V). Pursuant to its own terms, FAPA took effect immediately upon its passage and applied "to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10), and was enacted to overrule existing law that had "allow[ed] noteholders to abuse the foreclosure process by manipulating and extending the statute of limitations to the detriment of homeowners," contrary to legislative intent (*U.S. Bank N.A. v Lynch*, 233 AD3d 113, 117 [3d Dept 2024], appeal dismissed 43 NY3d 985 [2025]; see *Deutsche Bank Natl. Trust Co. v Goldwasser*, 237 AD3d 1291, 1293 [3d Dept 2025] [*Goldwasser*]). Retroactive legislation will satisfy due process if " 'the retroactive application of the legislation is . . . justified by a rational legislative purpose' " (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 158 [2017], cert denied 584 US 1013 [2018], quoting *Pension Benefit Guaranty Corporation v R.A. Gray & Co.*, 467 US 717, 730 [1984]) and here, inasmuch as the remedial legislation is "rationally related to the legitimate legislative purpose of providing a mechanism for parties to resolve their disputes with finality," we conclude "that retroactive application of FAPA to foreclosure actions where a final judgment has not been enforced does not violate plaintiff's due process rights" (*Goldwasser*, 237 AD3d at 1293-1294; see *Bank of N.Y. Mellon v Del Rio*, 233 AD3d 529, 531-532 [1st Dept 2024]; *Dagrín*, 233 AD3d at 1069).

The Contract Clause prohibits states from enacting laws "impairing the Obligation of Contracts" (US Const, art I, § 10 [1]; see *American Economy Ins. Co.*, 30 NY3d at 149; *Matter of Raynor v Landmark Chrysler*, 18 NY3d 48, 58 [2011]). Here, plaintiff "has identified no contractual provision that entitled it to [unilaterally] revoke a prior acceleration of the mortgage loan debt" and reset the statute of limitations by the mere voluntary discontinuance of an action, and, thus, has failed to establish any violation of the Contract Clause (*FV-1, Inc. v Palaguachi*, 234 AD3d 818, 822 [2d Dept 2025]; see *Goldwasser*, 237 AD3d at 1294; *Dagrín*, 233 AD3d at 1069-1071). Similarly, inasmuch as plaintiff did not have the right to unilaterally revoke a prior acceleration of the mortgage loan debt and reset the statute of limitations by the mere voluntary discontinuance of an action, FAPA did not impair a vested right in violation of the Takings Clause (see *Dagrín*, 233 AD3d at 1071; *US Bank N.A. v Williams*, 80 Misc 3d 258, 266-267 [Sup Ct, Putnam County 2023]).

Finally, we agree with defendant on his cross-appeal that, inasmuch as Supreme Court properly granted defendant's cross-motion and dismissed the complaint with prejudice, it should have issued a

judgment on defendant's counterclaim pursuant to RPAPL article 15, cancelling and discharging the mortgage in the real property records (see RPAPL 1501 [4]; *Batavia Townhouses, Ltd. v Council of Churches Hous. Dev. Fund Co.*, 189 AD3d 20, 29 [4th Dept 2020], *affd* 38 NY3d 467 [2022]; see also *Deutsche Bank Natl. Trust Co. v Sylvestre*, 238 AD3d 980, 982 [2d Dept 2025]). We therefore modify the order and remit the matter to Supreme Court to grant an appropriate judgment (see *Batavia Townhouses, Ltd.*, 189 AD3d at 29-30).

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

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

717

CA 24-01616

PRESENT: WHALEN, P.J., SMITH, NOWAK, AND HANNAH, JJ.

GSMS 2015-GC34 COMMERCE COURT, LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CALAMAR CONSTRUCTION MANAGEMENT, INC.,
DEFENDANT-APPELLANT.

MCCARTER & ENGLISH, LLP, NEW YORK CITY (PHILLIP S. PAVLICK OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Edward Pace, J.), entered March 11, 2024. The order, inter alia, granted the motion of plaintiff insofar as it sought leave to conform the pleadings to the evidence.

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

Memorandum: Defendant appeals from an order that, inter alia, granted plaintiff's motion insofar as it sought leave to conform the pleadings to the evidence. "The right to appeal from an intermediate order terminates with the entry of a final judgment" (*City of Syracuse v COR Dev. Co., LLC*, 147 AD3d 1510, 1510 [4th Dept 2017] [internal quotation marks omitted]; see *Matter of Aho*, 39 NY2d 241, 248 [1976]). Because the record of this case in the New York State Courts Electronic Filing System establishes that a final judgment was entered on August 26, 2025, of which we take judicial notice (see *1591 Second Ave. LLC v Metropolitan Transp. Auth.*, 202 AD3d 582, 583 [1st Dept 2022]), defendant's appeal from the intermediate order must be dismissed (see *McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]; see generally *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

724

KA 21-00898

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM COMBS, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE OF COUNSEL), 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 June 2, 2021. The judgment convicted defendant upon a jury verdict of assault in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). The conviction stems from defendant's use of a firearm to shoot his then-girlfriend in the arm during an argument over money. At trial, the victim testified that defendant was standing four to six feet away from her when he pulled the trigger, and a recording of two open-line 911 calls made by the victim during the altercation was admitted in evidence. The evidence also established that, when a police officer arrived at the scene in response to the 911 calls, defendant pointed the gun at the officer before running away. Defendant testified that the gun accidentally discharged when he attempted to take it away from the victim.

Defendant contends that Supreme Court erred in admitting in evidence the recording of the 911 calls made by the victim, for two reasons. First, defendant contends that the People failed to establish that the recording had not been altered, and thus failed to lay a proper foundation for admission of the evidence. Defendant's general objection to the admission of the 911 calls on the basis that they lacked a proper foundation was insufficient to preserve the specific contention now advanced on appeal with respect to alteration (*see People v Everson*, 100 NY2d 609, 610 [2003]; *People v Vidal*, 26 NY2d 249, 254 [1970]; *People v Howard*, 234 AD3d 1366, 1367 [4th Dept

2025], *lv denied* 43 NY3d 944 [2025]; see generally CPL 470.05 [2]), 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]). Second, during oral argument on appeal, defendant contended for the first time that the victim did not have the cell phone to her ear and thus could not verify that the recording accurately reflected what the 911 operator had said during the calls. Defendant also failed to preserve that contention for our review (see CPL 470.05 [2]) and, considering that it is unclear from the record whether the victim could hear the operator, whose statements in any event were not prejudicial to defendant, we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant also failed to preserve his further contention concerning the court's jury instructions (see *People v Morales*, 160 AD3d 1414, 1417-1418 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (CPL 470.15 [6] [a]).

Viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude "that the jury failed to give the evidence the weight it should be accorded" (*People v Maull*, 167 AD3d 1465, 1467 [4th Dept 2018], *lv denied* 33 NY3d 951 [2019] [internal quotation marks omitted]; see generally *Bleakley*, 69 NY2d at 495).

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

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

730

CA 24-01525

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

JERRY MURPHY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS
MILLARD FILLMORE SUBURBAN HOSPITAL,
DEFENDANT-RESPONDENT.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (J. David Sampson, A.J.), entered August 30, 2024. The order, among other things, denied the motion of plaintiff seeking, inter alia, to strike the answer, granted that part of the cross-motion of defendant for a protective order and directed plaintiff to send letters to his treating physicians rescinding prior letters containing language that Supreme Court deemed "confusing, misleading and/or intimidating."

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and compelling defendant to disclose its staffing plan, staffing schedule and attendance records of employees who worked in the intensive care unit during the month of November 2017, and by denying that part of the cross-motion seeking a protective order, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages resulting from a large pressure ulcer that allegedly developed on his lower back during the 20 days he was admitted to a hospital operated by Kaleida Health, doing business as Millard Fillmore Suburban Hospital (defendant). The amended complaint, as amplified by the bill of particulars, alleges that defendant was negligent and deviated from the applicable standard of care in a number of ways, including by failing to provide a complete and proper physical exam, failing to take steps to minimize the risk of developing ulcers, and failing to properly monitor plaintiff and his condition.

During discovery, plaintiff requested that defendant provide him with its staffing plan, staffing schedule, and attendance records of employees who worked in the intensive care unit (ICU) during the month

of November 2017, which covered his 20-day admission. Defendant objected to the demand on grounds that it was vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant information. According to defendant, the records requested by plaintiff were irrelevant because, among other reasons, there were "no allegations of improper staffing in the bill of particulars."

Plaintiff thereafter served an amended bill of particulars alleging that defendant was negligent "in failing to properly hire, staff, train, educate, supervise and/or monitor its agents, servants, and/or employees, thereby exposing the [p]laintiff to serious physical injuries." Four days after serving the amended bill of particulars, the propriety of which is not challenged by defendant, plaintiff moved to strike the answer due to defendant's refusal to comply with his discovery request. In the alternative, plaintiff asked for other "appropriate relief," which Supreme Court interpreted as including an order compelling defendant to disclose the requested staffing records.

Defendant opposed the motion and cross-moved for a protective order with respect to the requested staffing records, an order requiring plaintiff to rescind correspondence forwarded to treatment providers for whom defense counsel has sought speaking authorizations pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), and an order precluding plaintiff from sending litigation-related correspondence to his past and present treating providers. The court denied the motion in its entirety and granted the cross-motion in part. Specifically, the court granted a protective order to defendant and directed plaintiff to send correspondence to his treating physicians rescinding all prior letters containing language that the court "deemed to be confusing, misleading and/or intimidating."

With respect to plaintiff's request for the ICU staffing records, CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." As the Court of Appeals has advised, "[w]hat is material and necessary is left to the sound discretion of the lower courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000] [internal quotation marks omitted]). " 'The test is one of usefulness and reason' " (*id.*).

Here, defendant's staffing plan, staffing schedule and time records for the ICU for the month of November 2017 are material and necessary to the prosecution of plaintiff's negligence and malpractice causes of action. More specifically, the numbers of doctors, nurses and physician assistants who were working in the ICU when plaintiff allegedly developed his ulcer are relevant to his claim in the amended bill of particulars that defendant failed to hire enough medical personnel to staff the ICU (see *Grant v PALJR, LLC*, 64 AD3d 750, 751 [2d Dept 2009]; *Parise v Good Samaritan Hosp.*, 36 AD3d 678, 680 [2d Dept 2007]). It is also material and necessary for plaintiff to know which employees were scheduled to be on duty in the ICU during the 20 days of his admission and which ones actually showed up for work.

In granting the protective order, the court stated, *inter alia*, that "[w]ithout the patient census, which has not been requested, the staffing records are meaningless." There is no indication in the record, however, that plaintiff did not independently know how many other patients were in the ICU with him, which could obviate the need for a census. In any event, as plaintiff points out, the note of issue had not yet been filed, and plaintiff therefore still had the opportunity to request a patient census prior to the close of discovery, assuming for the sake of argument that a census was required to render the staffing records useful to plaintiff.

We therefore conclude that the court abused its discretion in denying plaintiff's motion to the extent that it sought an order compelling defendant to disclose the requested records, and in granting defendant's cross-motion to the extent that it sought a protective order for such records, and we therefore modify the order accordingly. Because defendant's failure to comply with the discovery request was not willful, contumacious or in bad faith, however, we conclude that there was no basis for the court to strike defendant's answer (*see Harms v TLC Health Network*, 215 AD3d 1295, 1296 [4th Dept 2023]), especially considering that plaintiff's motion was filed only four days after he amended the bill of particulars to allege that the ICU was inadequately staffed.

Plaintiff further contends that the court abused its discretion in granting that part of defendant's cross-motion seeking an order directing plaintiff to rescind a letter he sent to his primary care physician regarding an Arons speaking authorization later executed by plaintiff (*see Arons*, 9 NY3d at 415-416). In the letter, plaintiff stated that he was required "to provide defense counsel with authorizations permitting them to . . . request an interview with you concerning the care and treatment you have rendered to me regarding the injuries sustained in the above-referenced incident." After advising the physician that he was under no obligation to speak to defense counsel, plaintiff added: "I am writing to advise you that in the event defense counsel does contact you in connection with this matter, I would prefer that you choose not to speak with them. I value and wish to protect the confidentiality of our physician-patient relationship." Finally, plaintiff stated, "Should you choose to disregard my request, I ask that you notify me of the date and time of your correspondence with defense counsel so that I may attend the interview."

Although plaintiff did not send a copy of the letter to defendant, opposing counsel somehow learned of its content. Defendant contended in its cross-motion that the letter was "nothing more than an improper attempt to undermine Arons and a defendant's ability to defend itself by unduly prejudicing and interfering with [defendant's] right to conduct *ex parte* interviews with plaintiff's treating providers." As a remedy, defendant asked the court to direct plaintiff to rescind any litigation-related correspondence to treating physicians from whom defendant has sought speaking authorizations.

Defendant sought other relief that was not granted and is not at issue on this appeal.

In opposition to the cross-motion, plaintiff argued that Arons did not create a *right* for a defendant's attorney to conduct a private interview with a plaintiff's treating physicians and that there is nothing wrong with a party asking a nonparty witness to refrain from voluntarily providing information to other parties in the litigation. Plaintiff did not address the other language in the letter that defendant alleged constituted an improper attempt to discourage ex parte interviews, such as plaintiff's request to be present for any informal interview of the physician by defendant's attorney.

The court generally agreed with defendant, concluding that the letter was confusing and misleading to the extent that plaintiff stated that he wished to protect the confidentiality of the physician-patient relationship. The court further concluded that the phrase "[s]hould you choose to disregard my request" (i.e., that the physician not speak to opposing counsel) was intimidating and thus improper. The order thus directed plaintiff "to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the [c]ourt has deemed to be confusing, misleading and/or intimidating." On appeal, plaintiff contends that there was nothing confusing, misleading, intimidating or improper about his letter, and that the court therefore abused its discretion in directing him to rescind it. We find no abuse of discretion in the court's ruling.

Prior to 1996, when the Health Insurance Portability and Accountability Act of 1996 ([HIPAA] 42 USC § 1320d et seq.) was enacted by Congress, a defendant's attorney in New York was permitted to conduct post-note-of-issue ex parte interviews with the plaintiff's treating physicians in actions where the plaintiff waived the physician-patient privilege by placing their medical condition at issue (see generally *Koump v Smith*, 25 NY2d 287, 293 [1969]). That practice was called into question by the Privacy Rule (45 CFR parts 160, 164) "promulgated by the United States Department of Health and Human Services" pursuant to HIPAA (*Matter of Miguel M. [Barron]*, 17 NY3d 37, 41-42 [2011], *rearg denied* 17 NY3d 872 [2011]), which forbids physicians from disclosing a patient's protected health information "without the patient's authorization" (*id.* at 42).

In *Arons*, the Court of Appeals held that defense attorneys may permissibly engage in informal ex parte conversations with the treating physicians of any plaintiff who has executed HIPAA-compliant authorizations. As we noted in *Sims v Reyes* (195 AD3d 133, 136 [4th Dept 2021]), "few disputes concerning the specific wording of an authorization have made their way to the appellate courts," perhaps due in part to plaintiffs' use of the standard authorization form adopted by the Office of Court Administration (OCA). Here, the dispute does not concern language in the Arons authorization, but instead language in the letter plaintiff sent to his primary care physician regarding the HIPAA authorization.

We agree with the court's interpretation of plaintiff's letter, which is clearly intended to discourage his doctor from speaking informally to defendant's attorney. In *Sims*, we determined that the trial court did not abuse its discretion in compelling the plaintiff to execute revised Arons authorizations that are consistent with OCA's standard form. At the heart of the dispute in *Sims* was the following language in the authorizations, which is not included in OCA's standard form: " 'If you [physicians] decide to meet with their lawyers, I [the plaintiff] would ask that you let me know, because I would like the opportunity to be present or to have my attorneys present' " (195 AD3d at 135). Almost identical language is included in plaintiff's letter to his primary care physician, and we can discern no reason for allowing plaintiff to include language in his letter that is prohibited in an authorization. It stands to reason that the court here did not abuse its discretion in directing plaintiff to rescind the letter he sent to his primary care physician.

Another problem with the letter is that it includes a request from plaintiff that the physician not speak to defendant's attorney. Even assuming, arguendo, that a plaintiff may express a preference in the authorization (or a letter) that a treating physician not speak to opposing counsel (see *Charlap v Khan*, 41 Misc 3d 1070, 1085 [Sup Ct, Erie County 2013]), we note that plaintiff in this case expressed his preference in the form of a request ("Should you choose to disregard my request . . ."). In our view, a plaintiff who signs an authorization allowing a treating physician to speak to defense counsel about the plaintiff's medical condition at issue should not be allowed to send a letter separately to the same physician requesting that the physician not speak to defense counsel. Permitting plaintiffs to make such a request would undermine the purpose of the Arons authorization and, at the very least, be confusing to the physician (see *Arons*, 9 NY3d at 409, quoting *Kish v Graham*, 40 AD3d 118, 129 [4th Dept 2007, Pine, J., dissenting], rev'd 9 NY3d 393 [2007]).

Adding to the confusion is the statement "I value and wish to protect the confidentiality of our physician-patient relationship," which may lead the physician to conclude that, notwithstanding plaintiff's execution of the speaking authorization, plaintiff was not actually waiving the physician-patient privilege or the privacy protections afforded by HIPAA. While that language, standing alone, may not have warranted rescission of plaintiff's letter, it lends support to the court's determination that the letter, as written, constitutes an impermissible "attempt to circumvent the Court of Appeals' holding in *Arons*."

We also note that the letter as written might lead the physician to believe, wrongly, that plaintiff has a right to attend any informal interview with defense counsel. The Court of Appeals made it clear in *Arons* that a defendant's attorney may ask treating physicians to participate in ex parte interviews, which by definition do not involve the plaintiff. While a physician may insist that the plaintiff be present for such an interview, that is a decision for the physician alone to make. Just as a defendant's attorney has no right to

interview the physician informally (see *Sims*, 195 AD3d at 136 n), a plaintiff has no right to attend the interview (the plaintiff has only the right to ask the physician for permission to attend an interview).

Based on the above, we cannot conclude that the court abused its discretion in directing plaintiff "to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the [c]ourt has deemed to be confusing, misleading and/or intimidating."

Finally, we note our disagreement with the dissent's assertion that the court lacked subject matter jurisdiction over this dispute because defendant was seeking an advisory opinion regarding the propriety of plaintiff's Arons letter. Of course, courts may not issue judicial decisions that "can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). Thus, an action " 'may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur' " (*Cuomo v Long Is. Light Co.*, 71 NY2d 349, 354 [1988]).

Here, however, the court was presented with a real dispute between the parties regarding a letter that plaintiff sent to his primary care physician that was clearly intended to discourage cooperation with defense counsel. That is to say, the dispute involves an event that already occurred (plaintiff's sending of the improper letter), not an event that may never occur (the physician refusing to agree to an ex parte interview with defense counsel), and plaintiff did not suggest below (or even in his briefs on appeal) that defendant was seeking an advisory opinion or that the court otherwise lacked subject matter jurisdiction. We thus conclude that the controversy is justiciable (see generally *Matter of Fossella v Dinkins*, 66 NY2d 162, 166-167 [1985]).

Although it is true that defendant did not establish below that the physician actually received the letter or was dissuaded from speaking to defense counsel by the confusing and intimidating language contained therein, we believe that requiring such proof to establish the court's subject matter jurisdiction would be setting the bar too high for legal challenges to improperly worded Arons authorizations or letters, especially where, as here, the challenged language is clearly intended to discourage the physician from cooperating with opposing counsel. In many cases where the improper language serves its intended purpose, defendants would not be in a position to know why a treating physician refused to speak to defense counsel. Of course, defendants could seek an explanation from the physician at a formal deposition as to why the physician refused an informal interview, but that would be contrary to the purpose of Arons, where the Court of Appeals expressed a preference for "informal discovery practices in litigation—in particular, private interviews of fact witnesses" over costly and time-consuming depositions (9 NY3d at 406).

All concur except CURRAN, J., who dissents in part and votes to further modify in accordance with the following memorandum: I

respectfully dissent. While I agree with the modifications made by the majority to the order on appeal, I vote to further modify the order by denying defendant's cross-motion to the extent it sought an order requiring plaintiff to rescind correspondence forwarded to treatment providers, for whom defense counsel has sought "HIPAA-compliant authorizations" pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), which contained language Supreme Court "deemed to be confusing, misleading and/or intimidating." In my view, in the absence of any showing that defendant had been prejudiced or detrimentally affected by plaintiff's letter, the cross-motion with respect to the letter merely sought an advisory opinion and, thus, the court lacked subject matter jurisdiction to grant that portion of the cross-motion.

It is well settled that "[t]he courts of New York do not issue advisory opinions for the fundamental reason that in this State '[t]he giving of such opinions is not the exercise of the judicial function' " (*Cuomo v Long Is. Light Co.*, 71 NY2d 349, 354 [1988], quoting *Self-Insurer's Assn. v State Indus. Commn.*, 224 NY 13, 16 [1918, Cardozo, J.]). An advisory opinion is one that "ha[s] no immediate effect and may never resolve anything" (*id.* [internal quotation marks omitted]; see *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). "It is therefore settled law that an action may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur" (*Cuomo*, 71 NY2d at 354 [internal quotation marks omitted]). The parties in an action "cannot by agreement confer subject matter jurisdiction upon [a] court where there is none" (*County of Monroe v City of Rochester*, 39 AD3d 1272, 1273 [4th Dept 2007] [internal quotation marks omitted]; see *Cuomo*, 71 NY2d at 351). Indeed, "a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action" (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008] [internal quotation marks omitted]; see *Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]).

Here, the majority and I agree that there is no record evidence that plaintiff's treatment provider ever received the letter that, according to defendant, contains misleading and confusing language. Moreover, there is no evidence that defendant ever reached out to plaintiff's treatment provider to schedule an interview, let alone any evidence that the treatment provider, or any other provider, refused to meet with defendant. Defendant also does not expressly contend on appeal—and the majority does not so conclude—that the letter constituted a revocation of the "HIPAA-compliant authorization" required by *Arons*. At most, defendant asserted in the cross-motion that the letter was an "attempt to undermine *Arons*" and an "attempt to discourage and impose conditions on permissible interviews" (emphasis added). Thus, at best, the issue presented by defendant involves a future event that "may never occur," the resolution of which has no immediate effect (*Cuomo*, 71 NY2d at 354 [internal quotation marks omitted]; see *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d

233, 240 [1984])).

At its heart, this appeal involves nothing more than one letter addressed to one provider that, as the majority notes, defendant "somehow learned" existed, but which defendant never even bothered to confirm had been received by the provider. The majority does not cite any authority supporting its invocation of judicial power with respect to the mere existence of a letter that no one contends has had any legal significance, and it can be comfortably contended that no such precedent exists. The majority nevertheless concludes that the mere existence or sending of the letter creates a justiciable controversy. But the mere sending of the letter in itself does not cause any harm to defendant, and neither defendant nor the majority identifies any such harm.

Contrary to that point, the majority concludes that, because defendant may never know that a treating physician declined an interview due to plaintiff's discouragement, it must act on the existence, or sending, of the letter alone. But that conclusion simply highlights the speculative harm alleged by defendant here inasmuch as it is undoubtedly true that the treating physician may decline an interview for that reason, or for no reason at all, just as that physician might agree to an interview because of a request from defendant, an insurance carrier or a fellow medical professional. There is simply no reason to exercise judicial power here when defendant has failed to demonstrate that it is in a worse position now than before the letter existed or was sent.

The majority's expression of general agreement "with the court's *interpretation* of plaintiff's letter" (emphasis added), and its *sua sponte* raising of "[a]nother *problem* with the letter" (emphasis added), give an air of an advisory commentary premised on speculation, which should in itself dissuade the majority from acting here. Unfortunately, the majority accepts defendant's invitation to opine on a matter—which has undoubtedly delayed the underlying medical malpractice action—all to no perceptible effect.

Ultimately, defendant's request that plaintiff rescind his letter is nothing more than a request for the court to opine on the language of the letter before defendant has suffered any concrete injury in fact or aggrievement to support its request. Consequently, I conclude that the court lacked subject matter jurisdiction to grant that part of the cross-motion seeking an order requiring plaintiff to rescind his letter, and thus should have denied that part of the cross-motion (*see generally Board of Educ. of Palmyra-Macedon Cent. Sch. Dist. v Flower City Glass Co., Inc.*, 160 AD3d 1497, 1498 [4th Dept 2018]).

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

742

CAF 24-01141

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

IN THE MATTER OF KEVIN V.

WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SARA L. AND RYEN V., RESPONDENTS-APPELLANTS.

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

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

JACQUELINE A. MCCORMICK, LYONS, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CATONSVILLE, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered June 25, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, determined that respondents had severely abused the subject child and transferred the guardian and custody rights of the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondents, the subject child's mother and father, separately appeal from an order that, inter alia, adjudged the child to be severely abused within the meaning of Social Services Law § 384-b (8) and terminated their parental rights without conducting a hearing. We reverse.

We agree with respondents that Family Court erred in summarily terminating their parental rights based exclusively upon the testimony adduced during a prior Family Court Act article 10 proceeding. As an initial matter, in this proceeding petitioner never formally moved for summary judgment on the amended petition or for a finding that reasonable efforts to return the child to his home were no longer required (*see* Family Ct Act § 1039-b [a]), and thus the court erred in summarily granting that relief (*see id.*; Family Ct Act § 165, CPLR 2214, 3212; *see generally* *Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]).

Even if we were to construe the amended petition here to be the

functional equivalent of a notice of motion seeking summary judgment, we conclude that the court did not have the authority, in the context of this Social Services Law § 384-b proceeding, to retroactively make a finding of severe abuse under Family Court Act § 1051 (e) based upon the evidence adduced during the prior article 10 abuse proceeding. As relevant here, Family Court Act § 1051 (e) provides that in an article 10 abuse case, the court may "[i]n addition to a finding of abuse, . . . enter a finding of severe abuse or repeated abuse, . . . which shall be admissible in a proceeding to terminate parental rights pursuant to [Social Services Law § 384-b (4) (e)] . . . If the court makes such additional finding of severe abuse or repeated abuse, the court shall state the grounds for its determination, which shall be based upon clear and convincing evidence."

Thus, while it is true that a court is permitted to make a severe abuse finding as part of the disposition in an article 10 abuse case (*see generally id.*), that did not occur here. Indeed, in the context of the underlying article 10 proceeding, petitioner did not seek a determination that respondents severely abused the child, and the court made no such determination. Moreover, the entirety of the court's findings in the article 10 matter were based upon a preponderance of the evidence—not clear and convincing evidence as required by the statute (*see id.*). Finally, we note that the court improperly issued an order of disposition in this case before conducting a dispositional hearing (*see* Family Ct Act § 631; Social Services Law § 384-b [8] [f]). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition.

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

751

CA 24-00980

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

DIAMOND GONZALEZ, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND POIZE, INC., DEFENDANT-RESPONDENT.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

TIVERON LAW, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 5, 2024, in a personal injury action. The order and judgment granted the motion of defendant Poize, Inc., for summary judgment and dismissed the complaint against said defendant.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied in part and the first cause of action is reinstated against defendant Poize, Inc.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly suffered when she was struck by a vehicle operated by an intoxicated driver. Plaintiff's first two causes of action were asserted against Poize, Inc. (defendant), among others. Defendant moved for summary judgment dismissing the complaint against it, and Supreme Court granted the motion. Plaintiff now appeals, as limited by her brief, from the resulting order and judgment insofar as it granted that part of defendant's motion with respect to the first cause of action, which asserted that defendant was responsible for her injuries inasmuch as it sold or provided alcohol to the driver at a time when she was visibly intoxicated, in violation of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65 (2). We reverse the order and judgment insofar as appealed from.

We agree with plaintiff that defendant failed to meet its initial burden on that part of the motion with respect to the first cause of action. Under the General Obligations Law, anyone "who shall, by unlawful selling to or unlawfully assisting in procuring liquor for [an] intoxicated person, have caused or contributed to such intoxication" is liable for injuries caused to third parties by reason

of the intoxicated person's intoxication (§ 11-101 [1]), including injuries resulting from intentional torts (see *Sahr v Schmidli*, 236 AD2d 785, 785 [4th Dept 1997]). Here, plaintiff alleges that defendant's provision of alcohol to the driver was unlawful under Alcoholic Beverage Control Law § 65 (2), which provides that "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away, any alcoholic beverages to . . . [a]ny visibly intoxicated person."

We conclude that defendant failed to meet its initial burden of establishing that the driver was not visibly intoxicated at the time she was served in defendant's bar (see *Calagiovanni v Carello*, 177 AD3d 1286, 1286 [4th Dept 2019]). In support of the motion, defendant submitted evidence that, throughout the evening preceding the accident, plaintiff and a group of others—including the driver—were out celebrating and consumed alcohol. Just before they went to defendant's bar, the entire group had been denied entry into another establishment because some members of the group were visibly intoxicated. At defendant's bar, the group was served and consumed more alcohol. Although defendant's owner and employees testified that defendant's employees as a general practice do not allow visibly intoxicated persons to drink alcohol and that the employees were trained to recognize visibly intoxicated people, no one could specifically recall seeing the driver, nor could they describe the driver's level of intoxication on the night at issue (see *Bauseman v Pamdh Enters., Inc.*, 220 AD3d 561, 561 [1st Dept 2023]; *Calagiovanni*, 177 AD3d at 1286). In fact, none of the deposition testimony submitted by defendant was from an individual physically present inside the bar at the time the driver was allegedly served. Because defendant's submissions were insufficient to demonstrate entitlement to judgment as a matter of law that the driver was not visibly intoxicated at the time she was served, the burden never shifted to plaintiff to demonstrate the existence of material issues of fact that require a trial of the action (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

All concur except DELCONTE and KEANE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we disagree with the majority's conclusion that defendant failed to meet its initial burden with respect to that part of its motion seeking summary judgment dismissing plaintiff's statutory cause of action against it.

"The visibly intoxicated standard [under Alcoholic Beverage Control Law § 65 (2)] was specifically crafted to limit the tavern keeper's exposure and to preclude the imposition of a regulatory or monetary penalty when he or she had no reasonable basis for knowing that the consumer was intoxicated" (*Romano v Stanley*, 90 NY2d 444, 449 [1997] [internal quotation marks omitted]). As the proponent of the motion, it was incumbent upon defendant to establish, *prima facie*, that it "did not procure or sell alcohol to [the driver], . . . that [the driver] was not visibly intoxicated when she was furnished alcohol" (*Abate v Black Wolf*, 219 AD3d 1118, 1119 [4th Dept 2023]), or that its sale of alcohol to the driver had no reasonable or practical

connection to plaintiff's alleged injuries (see *Oursler v Brennan*, 67 AD3d 36, 43 [4th Dept 2009]; see also *Sherwood v Otto Jazz, Inc.*, 142 AD3d 1160, 1160 [2d Dept 2016]).

Contrary to the majority, we conclude that defendant met its initial burden on the motion by submitting uncontradicted deposition testimony "in which its employees averred that they had no recollection that [the driver] was visibly intoxicated while she was . . . at [defendant]'s establishment" (*Kish v Farley*, 24 AD3d 1198, 1199 [4th Dept 2005]; see *Giordano v Zepp*, 163 AD3d 781, 782 [2d Dept 2018]). Specifically, defendant's employees testified that staff are trained to recognize visibly intoxicated persons; that bartenders do not allow visibly intoxicated persons to drink alcohol; and that bouncers do not allow visibly intoxicated persons to enter the bar, that they make rounds inside the establishment in order to observe the patrons and determine if anyone is visibly intoxicated, and that they signal the bartenders to stop serving alcohol to patrons who are visibly intoxicated. Additionally, a bouncer testified that he recalled conducting "rounds inside the establishment" on the night of the incident and that he observed the patrons, as was his routine, but did not "signal[] to the bartenders that anyone was intoxicated."

We further conclude that, in opposition, plaintiff failed to raise a triable issue of fact whether the driver had been served alcohol by defendant when she was visibly intoxicated inasmuch as she failed to present any evidence that the driver "exhibited signs of intoxication at the time she was served in [defendant's] establishment[]" (*Romano*, 90 NY2d at 450; cf. *Calagiovanni v Carello*, 177 AD3d 1286, 1286-1287 [4th Dept 2019]). We would, therefore, affirm.

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

760

KA 21-00768

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANDRE J. ANDERSON, DEFENDANT-APPELLANT.

TINA L. HARTWELL, PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 9, 2019. The judgment convicted defendant upon a jury verdict of murder in the first degree (two counts), arson in the first degree and arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [vii], [x]; [b]), one count of arson in the first degree (§ 150.20 [1]), and one count of arson in the second degree (§ 150.15).

Although defendant contends that his conviction of murder in the first degree under count 2 of the indictment is not supported by legally sufficient evidence, his general motion to dismiss at the close of the People's case did not preserve for our review his specific challenge on appeal (*see People v Bubis*, 204 AD3d 1492, 1493-1494 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). In any event, we conclude that the contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 (*see generally Bleakley*, 69 NY2d at 495).

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

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

762

TP 25-00486

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

IN THE MATTER OF BRETT RAWLS, PETITIONER,

V

MEMORANDUM AND ORDER

BARBARA GUINN, AS ACTING COMMISSIONER,
NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE, RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (LARRY E. WATERS, JR., OF
COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Michael Siragusa, A.J.], entered March 17, 2025) to review a determination of respondent. The determination, among other things, affirmed the finding by the Erie County Department of Social Services that petitioner had committed an intentional program violation resulting in an overpayment of public assistance and an overissuance of Supplemental Nutritional Assistance Program benefits.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner seeks to annul the determination of respondent that, inter alia, affirmed the decision of a social services agency, following an administrative disqualification hearing (see 18 NYCRR 359.7), finding that petitioner received an overpayment of public assistance and an overissuance of Supplemental Nutritional Assistance Program (SNAP) benefits as a result of an intentional program violation.

We conclude that substantial evidence supports respondent's determination that the agency established by clear and convincing evidence that petitioner committed an intentional program violation in obtaining public assistance payments and SNAP benefits (see 18 NYCRR 359.3; *Matter of Smith v Wing*, 1 AD3d 933, 933-934 [4th Dept 2003]; *Matter of Williams v Perales*, 156 AD2d 697, 697-698 [2d Dept 1989]; *Matter of Velasquez v Perales*, 151 AD2d 766, 767 [2d Dept 1989]). The agency established at the hearing that petitioner, knowing he was

required to disclose any employment and income, disclosed income from one employer but failed to disclose income from another employer (see *Smith*, 1 AD3d at 934; *Velasquez*, 151 AD2d at 767). Contrary to petitioner's contention, it is readily inferable from his conduct that he acted intentionally (see *Smith*, 1 AD3d at 934). The testimony of petitioner that he did not intentionally conceal his additional employment and income presented a credibility issue for respondent to resolve (see *id.*).

Finally, contrary to petitioner's further contention, we conclude that he is not entitled to attorneys' fees pursuant to the New York State Equal Access to Justice Act (CPLR art 86) inasmuch as he is not a prevailing party (see CPLR 8601 [a]; 8602 [f]; see generally *Matter of Glosenger v Perales*, 83 NY2d 984, 989 [1994]).

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

764

KA 23-00838

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID LLOYD, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 7, 2022. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: 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]), defendant contends that Supreme Court erred in refusing to suppress physical evidence obtained as the result of a traffic stop because there was no evidence connecting him to the gun found after the stop. We agree with the People that defendant failed to preserve that contention for our review inasmuch as he did not raise that ground as a basis for suppression in his omnibus motion (see *People v Carter*, 142 AD3d 1342, 1342 [4th Dept 2016]; *People v Schluter*, 136 AD3d 1363, 1363 [4th Dept 2016], *lv denied* 27 NY3d 1138 [2016]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

Defendant further contends that he was denied effective assistance of counsel. To the extent that defendant's contention survives his guilty plea, we conclude that it is without merit. "A claim of ineffective assistance of counsel survives a plea of guilty only if the plea bargaining process was infected by [the] allegedly ineffective assistance or [if] defendant entered the plea because of [the] attorney['s] allegedly poor performance" (*People v Johnson*, 229 AD3d 1300, 1302 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024] [internal quotation marks omitted]; see *People v Judd*, 111 AD3d 1421, 1422-1423 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]). "[I]n the context of a guilty plea, a defendant has been afforded meaningful

representation when [they] received an advantageous plea and nothing in the record casts doubt upon the apparent effectiveness of [defense] counsel" (*People v Dale*, 142 AD3d 1287, 1290 [4th Dept 2016], lv denied 28 NY3d 1144 [2017] [internal quotation marks omitted]). Here, defense counsel secured a favorable plea bargain for defendant, including a sentence of only one year more than the minimum term of imprisonment, and nothing in the record casts doubt on the apparent effectiveness of counsel (see *Johnson*, 229 AD3d at 1302).

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

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

765

KA 24-00045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

GARY HARDY, JR., DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered November 16, 2023. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

767

TP 25-00640

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

IN THE MATTER OF JAMES R. CHARTRAND, PETITIONER,

V

MEMORANDUM AND ORDER

THE DIVISION OF THE NEW YORK STATE POLICE, RESPONDENT.

DAVID A. LONGERETTA, UTICA, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Lewis County [William F. Ramseier, J.], entered November 9, 2023) to review a determination of respondent. The determination dismissed petitioner from employment.

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

Memorandum: Petitioner, a former New York State Trooper, commenced this CPLR article 78 proceeding seeking to annul respondent's determination finding him guilty of various disciplinary charges arising from off-duty conduct including sexual misconduct and driving while intoxicated or, in the alternative, to vacate the penalty of dismissal from employment. Contrary to petitioner's contentions, we conclude that the determination is supported by substantial evidence (*see Matter of Franklin v D'Amico*, 117 AD3d 1432, 1432-1434 [4th Dept 2014]; *Matter of Hricik v McMahon*, 247 AD2d 935, 935-936 [4th Dept 1998]) and that the penalty is not shocking to one's sense of fairness (*see Franklin*, 117 AD3d at 1434; *Matter of Panek v Bennett*, 38 AD3d 1251, 1252 [4th Dept 2007]; *see generally Matter of Arroyo v O'Neill*, 35 NY3d 1030, 1031 [2020]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

768

CA 24-01566

PRESENT: WHALEN, P.J., LINDLEY, MONTOUT, NOWAK, AND KEANE, JJ.

MAWUNYO ATATSI, CLAIMANT-RESPONDENT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 138680.)

LEWIS JOHS AVALONE AVILES, LLP, ISLANDIA (AMY E. BEDELL OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CHERYL KITTON, P.C., BELLMORE (CHERYL H. KITTON OF COUNSEL), FOR
CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered August 23, 2024, in a personal injury action. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the claim to the extent that it alleges that defendant had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Claimant, a student at the University at Buffalo (University), commenced this personal injury action seeking damages for injuries that she allegedly sustained when she slipped and fell on an accumulation of water located on an interior stairwell in her dormitory. Defendant moved for summary judgment dismissing the claim, and the Court of Claims denied that motion. Defendant appeals, and we modify.

" 'In seeking summary judgment dismissing the [claim], defendant had the initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it' " (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]). We agree with defendant that it met its initial burden with respect to the issue of actual notice by submitting evidence that it was not aware of the allegedly dangerous condition, and claimant failed to raise a triable issue of fact in opposition (*see Quigley v Burnette*, 100 AD3d 1377, 1378 [4th Dept 2012]). We therefore conclude that the court erred in denying the motion to that extent, and we modify the order accordingly.

Contrary to defendant's contention, however, it failed to meet

its initial burden on the motion with respect to the issue of constructive notice. It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, the evidence submitted by defendant demonstrated that the University's custodial staff did not keep records regarding when the stairwell was last cleaned or inspected (see *Salvania v University of Rochester*, 137 AD3d 1607, 1609 [4th Dept 2016]), and while defendant adduced evidence as to the University's general cleaning practices, it did not submit any evidence that those general practices were followed on the date of the accident (see *King*, 81 AD3d at 1415; *Johnson v Panera, LLC*, 59 AD3d 1118, 1118 [4th Dept 2009]).

Defendant further contends that it met its initial burden with respect to the issue of proximate cause by establishing that claimant could not identify the cause of her fall without engaging in undue speculation (see *Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]; *Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014]). We reject that contention. Here, defendant submitted claimant's deposition testimony, wherein she testified that, although she did not observe any water on the stairs before her fall, she felt a "slippery substance" under her feet, which she "assumed" was water because of the snowy weather. However, defendant also submitted the deposition testimony of claimant's friend, who observed claimant moments after the fall. The friend testified that she observed water on the stairs, which "looked like it was melted snow," and that claimant's pants were wet after her fall. That testimony, together with claimant's testimony, renders any other cause of the fall "sufficiently remote or technical to enable the [factfinder] to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Artesa v City of Utica*, 23 AD3d 1148, 1148 [4th Dept 2005] [internal quotation marks omitted]; see *Alexander v State of New York*, 193 AD3d 1328, 1330 [4th Dept 2021]; *Paternostro v Advance Sanitation, Inc.*, 126 AD3d 1376, 1377 [4th Dept 2015]).

Inasmuch as defendant failed to meet its initial burden with respect to the issues of constructive notice and causation, the motion must be denied to that extent without regard to the sufficiency of claimant's opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1760 [4th Dept 2019]).

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

770

CA 24-00420

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

IN THE MATTER OF JOSEPH ROESCH,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

OFFICE OF THE EXECUTIVE DIRECTOR, ACTING
EXECUTIVE DIRECTOR OF STARC-OAKVIEW, NEW YORK
STATE OFFICE OF MENTAL HEALTH AND OFFICE OF
COMMISSIONER FOR OFFICE OF MENTAL HEALTH,
RESPONDENTS-RESPONDENTS.

JOSEPH ROESCH, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (James P. McClusky, J.), entered October 25, 2023, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner, who is civilly confined at a facility operated by respondent New York State Office of Mental Health (OMH) pursuant to article 10 of the Mental Hygiene Law, commenced this CPLR article 78 proceeding seeking to annul a determination that denied his objections to restrictions placed on his ability to correspond with certain individuals, including incarcerated individuals and registered sex offenders, as well as to a requirement that his nonlegal outgoing mail be left unsealed so that his treatment team could ensure that he was not corresponding with individuals on the restricted list. Supreme Court properly dismissed the petition.

We reject petitioner's contention that the restrictions violate Mental Hygiene Law § 33.02 (b). We further reject petitioner's contention that the determination is arbitrary and capricious (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). "In the context of civilly confined individuals, administrative decisions . . . will not be considered arbitrary or capricious when they have 'a sound basis in reason and [are] supported by legitimate concerns regarding the security of the

institution and the welfare of the residents therein' " (*Matter of Pratt v New York State Off. of Mental Health*, 153 AD3d 1065, 1066 [3d Dept 2017]; see *Matter of Brown v Sawyer*, 85 AD3d 1614, 1615-1616 [4th Dept 2011]). Here, petitioner's medical records provide a rational basis to support OMH's conclusion that the restrictions were imposed for legitimate treatment reasons to support petitioner's welfare.

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

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

771

CA 24-01528

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

IN THE MATTER OF PARK AVENUE ESTATES, LLC
AND DARRYL CARR, PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO AND CITY OF BUFFALO
PERMIT & INSPECTION SERVICES,
RESPONDENTS-RESPONDENTS.

SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 28, 2024, in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted the motion of respondents to dismiss the petition and dismissed the petition.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and respondents are granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: In this proceeding pursuant to CPLR article 78, petitioners, Park Avenue Estates, LLC and Darryl Carr, appeal from a judgment that, inter alia, granted the pre-answer motion of respondents, City of Buffalo (City) and City of Buffalo Permit & Inspection Services, to dismiss the petition. Supreme Court granted the motion on the ground that petitioners failed to exhaust administrative remedies. As limited by their brief, petitioners appeal from the judgment to the extent that it granted the motion, and we reverse the judgment insofar as appealed from.

Preliminarily, we note that the properties at issue in this proceeding are the same properties involved in our prior decision confirming the City's determination to condemn the properties (*Matter of Carr v City of Buffalo*, 225 AD3d 1236, 1237 [4th Dept 2024], lv denied 42 NY3d 912 [2025]). They are also the same properties involved in our prior decision affirming an order denying Carr's request for *permission* to demolish buildings on the properties in the

context of code violation proceedings (*Matter of City of Buffalo v Carr*, — AD3d —, 2025 NY Slip Op 05586, *1-2 [4th Dept 2025]). Because the City has not yet commenced a proceeding to acquire the properties (see EDPL 401 [a] [3]), Carr still holds title to the two properties.

Petitioners commenced this proceeding after a two-alarm fire erupted at one of the subject properties, causing more damage to the already deteriorating buildings contained therein. Based on the fire damage, the Commissioner of the City of Buffalo Permit & Inspection Services (Commissioner) determined that various buildings on the property affected by the fire must be stabilized at petitioners' expense in order to protect the public. Petitioners opposed stabilization and contended that the Commissioner was required to order an emergency demolition of the buildings on both properties pursuant to section 113-15 of the City of Buffalo Code, which provides that "[e]very wooden or frame building with a brick or other front [that is] damaged by fire or otherwise to an amount not greater than ½ of its value may be repaired or rebuilt; but if such damage shall amount to more than ½ of such value thereof, exclusive of the foundation, then such building shall not be repaired or rebuilt but must be taken down."

The Commissioner denied petitioners' request for an emergency demolition order, determining that the relevant structure affected by the fire is a "heavy timber structure (Type IV Construction as defined in Chapter 6 of the Building Code of NYS), as such section 113-15 is not applicable." Petitioners asked the Commissioner to reconsider her determination, but that request was ignored, prompting them to commence this proceeding.

In the petition, petitioners alleged that the Commissioner's determination was arbitrary and capricious and that the Commissioner's failure to enforce the City Code "is a failure to execute a duty imposed on the Commissioner." In their pre-answer motion to dismiss, respondents asserted that petitioners failed to exhaust their administrative remedies by not seeking permission from the City's Preservation Board to demolish the properties (see generally *Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 887 [4th Dept 2021]). The court agreed with respondents on that point, but we do not.

Petitioners sought from the Commissioner an emergency demolition order under City Code § 113-15, which compels demolition of fire-damaged properties under certain conditions. Demolition under section 113-15 is not contingent upon approval of the Preservation Board, and respondents have identified no other administrative remedies petitioners were required to pursue before commencing this proceeding.

We note that the petition seeks, inter alia, relief in the nature of mandamus under CPLR 7803 (1), which lies "where a petitioner seeks to compel the performance of a ministerial act [imposed] by law" (*Cameron Transp. Corp.*, 197 AD3d at 885 [internal quotation marks omitted]). Inasmuch as petitioners are seeking to compel the performance of an alleged ministerial act imposed upon the

Commissioner by the City Code and because there are no further administrative remedies that petitioners were required to pursue, there was no legal basis for the court to grant the motion on the ground that petitioners failed to seek permission from the Preservation Board to demolish the relevant buildings.

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

772.1

CA 24-01073

PRESENT: WHALEN, P.J., LINDLEY, MONTOUT, NOWAK, AND KEANE, JJ.

THOMAS HORNING, INDIVIDUALLY AND ON BEHALF
OF J.B. WISE BLOCK, LLC AND ITS MEMBERS DERIVATIVELY,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THOMAS MILLAR, EASTERN MARKET DEVELOPMENT LLC,
VINA BONNER, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR
DEFENDANT-RESPONDENT EASTERN MARKET DEVELOPMENT LLC.

Appeal from a judgment of the Supreme Court, Jefferson County
(Gregory R. Gilbert, J.), entered January 2, 2024. The judgment,
inter alia, dismissed plaintiff's cause of action for a declaratory
judgment against defendants Thomas Millar and Eastern Market
Development LLC.

It is hereby ORDERED that the judgment so appealed from is
unanimously modified on the law by vacating the second decretal
paragraph dismissing the declaratory judgment cause of action against
defendant Eastern Market Development LLC and that part of the fifth
decretal paragraph dismissing the declaratory judgment cause of action
against defendant Thomas Millar, and by granting judgment in favor of
those defendants as follows:

It is ADJUDGED and DECLARED that defendants Thomas
Millar and Eastern Market Development LLC were valid members
of J.B. Wise Block, LLC under the operating agreement at the
time they voted to sell the property owned by J.B. Wise
Block, LLC and thus any action taken based upon their vote
was not void,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action alleging, inter
alia, that defendants Thomas Millar and Eastern Market Development LLC
(Eastern Market) (collectively, defendants) breached the operating
agreement of J.B. Wise Block, LLC (company) in several respects and
that one such breach made defendants' membership interest invalid at

the time they voted to sell the property owned by the company, thereby rendering void any action taken based upon their vote. Plaintiff now appeals from a judgment entered after a bench trial that, inter alia, dismissed the breach of contract and declaratory judgment causes of action against Eastern Market and dismissed the declaratory judgment cause of action against Millar.

Where, as here, the appeal follows a nonjury trial, "the Appellate Division has 'authority . . . as broad as that of the trial court . . . and . . . may render the judgment it finds warranted by the facts' " (*Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018], quoting *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; see *Buchmann v State of New York*, 214 AD3d 1412, 1413 [4th Dept 2023])). "Nonetheless, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Unger v Ganci* [appeal No. 2], 200 AD3d 1604, 1605 [4th Dept 2021] [internal quotation marks omitted]; see *Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Davis v Hinds*, 215 AD3d 1242, 1243 [4th Dept 2023])). Moreover, when conducting such a review, we must view the record "in the light most favorable to sustain the judgment" (*Farace v State of New York*, 266 AD2d 870, 871 [4th Dept 1999]; see *A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286 [4th Dept 2014])).

Upon conducting that review, we conclude that there is a fair interpretation of the evidence supporting Supreme Court's well-reasoned determinations. We note only that, contrary to plaintiff's contention that Millar breached the paragraph of the operating agreement requiring payment of the company's preexisting debts, we conclude, albeit for a reason different from that of the court, that plaintiff failed to prove that Millar breached that paragraph inasmuch as the evidence did not establish that the company had such debts prior to the effective date of the operating agreement. We have considered plaintiff's remaining specific contentions, and we conclude that they do not require a different result.

The court nonetheless erred in dismissing the cause of action seeking declaratory judgment against defendants rather than declaring the rights of the parties (see *Pless v Town of Royalton*, 185 AD2d 659, 660 [4th Dept 1992], *affd* 81 NY2d 1047 [1993]; *Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]; *Jones v Town of Carroll*, 225 AD3d 1271, 1273 [4th Dept 2024], *lv dismissed* 42 NY3d 1045 [2024])). We therefore modify the judgment accordingly.

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

772

CA 24-01074

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

THOMAS HORNING, INDIVIDUALLY AND ON BEHALF
OF J.B. WISE BLOCK, LLC, AND ITS MEMBERS DERIVATIVELY,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

J.B. WISE PROFESSIONAL BUILDING LLC, VINA BONNER,
JAMES M. BONNER, MARK J. BONNER AND WILLIAM BONNER,
DEFENDANTS-RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

MARK J. BONNER, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Jefferson County
(Gregory R. Gilbert, J.), entered May 23, 2024. The order, inter
alia, granted the motion of defendant Mark J. Bonner for summary
judgment dismissing the complaint against him and dismissed the
complaint in its entirety.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion is denied,
those parts of the ordering paragraph rescinding any and all prior
directives to hold the proceeds of sale and directing the release of
all funds held in escrow not otherwise encumbered to the parties now
entitled thereto are vacated, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action pursuant to Debtor
and Creditor Law article 10 seeking, inter alia, to set aside the
transfer of certain property. Defendant Mark J. Bonner (Mark) moved
to dismiss the complaint against him pursuant to CPLR 3211 or, in the
alternative, for summary judgment dismissing the complaint against him
pursuant to CPLR 3212. Supreme Court, by focusing on the parties'
evidentiary showings in its decision (see generally CPLR 3211 [c];
Michael P. v Dombroski, 211 AD3d 1469, 1470-1471 [4th Dept 2022];
Smithers v County of Oneida, 138 AD3d 1504, 1504 [4th Dept 2016]) in
effect granted the motion insofar as it sought summary judgment with
respect to Mark and also in effect searched the record and granted
summary judgment to the remaining, nonmoving defendants by dismissing
the complaint in its entirety (see CPLR 3212 [b]; *Mohamed v Blackowl*,
116 AD3d 678, 678-679 [2d Dept 2014]). Plaintiff appeals from the
order that, inter alia, granted the motion, and we now reverse.

We agree with plaintiff that the court, by repeatedly reasoning in the first instance that plaintiff had not adduced sufficient evidence to sustain his causes of action, erred in placing the initial burden of proof on plaintiff with respect to Mark's motion (see *Pelow v Tri-Main Dev.*, 303 AD2d 940, 940 [4th Dept 2003]; *Kasinski v Questel*, 99 AD2d 396, 398 [4th Dept 1984], *appeal dismissed* 62 NY2d 977 [1984]). "[W]hile the ultimate burden of proof at trial will fall upon the plaintiff[], a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form" (*Can Man Carting, LLC v Spiezio*, 165 AD3d 1029, 1030 [2d Dept 2018] [internal quotation marks omitted]). "[T]he issue [on a motion for summary judgment] is not whether [the] plaintiff[] can ultimately establish liability, but, rather, whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial" (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]). Here, we conclude that Mark failed to meet his initial burden on the motion inasmuch as he merely pointed to gaps in plaintiff's proof (see *Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]; *Kasinski*, 99 AD2d at 398). Mark's "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Finally, we conclude that none of Mark's contentions require a different result.

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

774

CA 25-00614

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

LALORNA TILLET, PLAINTIFF-RESPONDENT,

V

ORDER

PROGRESSIVE MAX INSURANCE COMPANY,
DEFENDANT-APPELLANT.

LAW OFFICE OF JENNIFER S. ADAMS, WILLIAMSVILLE (PAUL G. HANSON OF
COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (James
A. Vazzana, J.), entered October 31, 2024. The order, insofar as
appealed from, denied that part of the motion of defendant seeking to
dismiss the complaint.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

775

KA 18-01538

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON M. ANDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 14, 2018. 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: In appeal No. 1, 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]). In appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]).

With respect to appeal No. 1, as the People correctly concede, defendant's waiver of the right to appeal is invalid because Supreme Court's colloquy "used overbroad language that mischaracterized the waiver as an absolute bar to the taking of an appeal" (*People v Jones*, 236 AD3d 1410, 1410 [4th Dept 2025] [internal quotation marks omitted]; see *People v Thomas*, 34 NY3d 545, 565-566 [2019], cert denied — US —, 140 S Ct 2634 [2020]; *People v Green*, 227 AD3d 1372, 1372 [4th Dept 2024], lv denied 42 NY3d 926 [2024]). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence. Nevertheless, we reject defendant's contention, in appeal No. 1, that the sentence is unduly harsh and severe.

In appeal No. 2, defendant raises no contentions with respect to the judgment, except to contend that he did not validly waive his right to appeal. Given the absence of any contentions that the judgment should be reversed or modified, we conclude that defendant's

contention regarding the validity of his waiver of the right to appeal is academic, and we therefore dismiss the appeal from the judgment in appeal No. 2 (see *People v Lewis*, 232 AD3d 1316, 1316 [4th Dept 2024]; *People v Parrilla*, 227 AD3d 1419, 1419-1420 [4th Dept 2024]; see generally *People v Montreal* [appeal No. 2], 213 AD3d 1255, 1256 [4th Dept 2023]).

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

776

KA 22-01186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON M. ANDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (PAUL SKIP LAISURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 31, 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 said appeal is unanimously dismissed.

Same memorandum as in *People v Anderson* ([appeal No. 1] – AD3d – [Nov. 21, 2025] [4th Dept 2025]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

777

KA 23-01078

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOHAAN LITTLEJOHN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 24, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Zukic*, 240 AD3d 1192, 1193 [4th Dept 2025], *lv denied* 44 NY3d 995 [2025]), and the valid waiver forecloses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

780

KA 24-00448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRANCE BOYD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered February 7, 2024. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress a gun that was recovered from a sealed bag found under the driver's seat of the vehicle in which he had been a rideshare passenger because the search was constitutionally invalid. We affirm.

Preliminarily, we note that defendant did not have automatic standing to challenge the search of the vehicle inasmuch as "the People did not charge defendant with criminal possession of a weapon based on the statutory presumption in Penal Law § 265.15 (3)" (*People v Tillman*, 283 AD2d 944, 944 [4th Dept 2001], *lv denied* 96 NY2d 925 [2001]). As relevant here, "standing to seek suppression of evidence requires the defendant to establish, by [the] defendant's own evidence or by relying on the People's evidence . . . , that [they] had a legitimate expectation of privacy in the place or item that was searched" (*People v Ramirez-Portoreale*, 88 NY2d 99, 109 [1996]). "The suppression court must identify the object of [the] defendant's expectation of privacy, determine whether [the] defendant exhibited an expectation of privacy in it, and evaluate whether the circumstances would lead society to regard [the] defendant's expectation as reasonable" (*id.*), considering "such factors as whether the defendant took precautions to maintain privacy and whether the defendant had the

right to exclude other persons from access" (*id.* at 111 [internal quotation marks omitted]). "While the mere surrender of property to a third party will not always terminate a legitimate expectation of privacy . . . , the burden [i]s on [the] defendant to establish under the[] facts that [they] had such an expectation" (*People v Whitfield*, 81 NY2d 904, 906 [1993]; *see People v Febo*, 167 AD3d 451, 452 [1st Dept 2018], *lv denied* 33 NY3d 948 [2019]). "It is well settled that the suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" (*People v Sylvester*, 129 AD3d 1666, 1667 [4th Dept 2015], *lv denied* 26 NY3d 1092 [2015] [internal quotation marks omitted]; *see People v Twillie*, 28 AD3d 1236, 1237 [4th Dept 2006], *lv denied* 7 NY3d 795 [2006]).

Here, defendant's "moving papers [were] devoid of any allegation that [he] had a legitimate expectation of privacy" in the bag from which the gun was recovered (*People v Clark*, 28 AD3d 1231, 1232 [4th Dept 2006] [internal quotation marks omitted]; *see People v Rodriguez*, 219 AD3d 1115, 1115 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]) and, contrary to defendant's contention, the evidence introduced at the hearing failed to establish that defendant maintained any expectation of privacy in the bag after he handed it over to a backseat passenger (*see Whitfield*, 81 NY2d at 906; *Febo*, 167 AD3d at 452). The court thus properly determined that defendant failed to meet his burden of establishing standing to challenge the search of the subject bag (*see Whitfield*, 81 NY2d at 906; *Febo*, 167 AD3d at 452).

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

781

KA 21-01197

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FRANKLIN CHAMBERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered August 18, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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 attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [4]). We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal (*see People v Rosado-Thomas*, 181 AD3d 1166, 1167 [4th Dept 2020], *lv denied* 35 NY3d 1048 [2020]). Defendant contends that his guilty plea was involuntary because, during the plea colloquy, County Court referenced his right to a trial, not his right to a jury trial (*see generally Boykin v Alabama*, 395 US 238, 243 [1969]). Although that contention survives the unchallenged appeal waiver (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* – US –, 140 S Ct 2634 [2020]; *People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]), defendant failed to preserve his contention for our review because he did not move to withdraw his guilty plea or to vacate the judgment of conviction on that ground (*see People v Cunningham*, 213 AD3d 1270, 1271 [4th Dept 2023], *lv denied* 39 NY3d 1110 [2023]; *People v Thompson*, 206 AD3d 1628, 1629 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]). In any event, defendant's contention is without merit (*see People v Hinkle*, 240 AD3d 1428, 1429 [4th Dept 2025]; *People v Barnes*, 206 AD3d 1713, 1714 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]).

Defendant also contends that the court should have suppressed identification evidence on the ground that the show-up voice identification procedures that were conducted by the police shortly

after the incident in question were unduly suggestive. Defendant's unchallenged waiver of the right to appeal forecloses our review of that contention (see *People v Reynolds*, 236 AD3d 1475, 1475 [4th Dept 2025]; *Rosado-Thomas*, 181 AD3d at 1167).

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

782

KA 24-01219

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DUSTIN A. LOVELAND, DEFENDANT-APPELLANT.

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

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO, NEW YORK PROSECUTORS TRAINING INSTITUTE, ALBANY (KAREN FISHER MCGEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Kevin Van Allen, J.), rendered July 16, 2024. The judgment convicted defendant, upon a guilty plea, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in setting the expiration date for the order of protection without "taking into account [the] jail time credit to which defendant is entitled" (*People v Mingo*, 38 AD3d 1270, 1271 [4th Dept 2007] [internal quotation marks omitted]; see *People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *People v Coleman*, 145 AD3d 1641, 1642 [4th Dept 2016], *lv denied* 29 NY3d 947 [2017]). We agree. Although defendant failed to preserve that contention for our review (see *People v Nieves*, 2 NY3d 310, 315-317 [2004]), we exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.12 (5).

We conclude that the sentence is not unduly harsh or severe.

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

783

KA 24-01068

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES SCOTT, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 15, 2024. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm. Defendant's contention that County Court erred in denying his severance motion is forfeited by the plea and does not survive his unchallenged waiver of the right to appeal (see *People v McMillan*, 227 AD3d 1413, 1413 [4th Dept 2024]; *People v Guldi*, 152 AD3d 540, 544 [2d Dept 2017], *lv denied* 30 NY3d 1019 [2017]; *People v Hunter*, 49 AD3d 1243, 1243 [4th Dept 2008]). Defendant's waiver of the right to appeal also encompasses his challenge with respect to the severity of his sentence (see generally *People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

785

KA 22-01787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RONALD DENT, DEFENDANT-APPELLANT.

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

RONALD DENT, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Thomas E. Moran, J.), rendered July 11, 2022. The judgment convicted
defendant upon a jury verdict of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him
upon a jury verdict of assault in the first degree (Penal Law § 120.10
[1]). We affirm.

Contrary to defendant's contention in his main brief, Supreme
Court did not err in refusing to charge the jury on the defense of
justification. "The defense of justification provides that a person
may use physical force to defend [themselves] against an assailant's
'imminent use of unlawful physical force,' but does not authorize the
use of 'deadly physical force . . . unless . . . [t]he [person]
reasonably believes that [the assailant] is using or about to use
deadly physical force' " (*People v Castillo*, 42 NY3d 628, 631 [2024],
quoting Penal Law § 35.15 [1], [2] [a]; see *People v T.P.*, — NY3d —,
—, 2025 NY Slip Op 03642, *1 [2025]; *People v Swanton*, 216 AD3d 1441,
1442 [4th Dept 2023]). "Justification has both a subjective
requirement, that 'defendant . . . actually believed . . . [they were]
threatened with the imminent use of deadly physical force,' and an
objective requirement, that defendant's 'reactions were . . . those of
a reasonable [person] acting in self-defense' " (*Castillo*, 42 NY3d at
631, quoting *People v Collice*, 41 NY2d 906, 907 [1977]). "When
considering a request for a justification charge, courts examine the
evidence in the light most favorable to the defendant, and must
provide the instruction if there is any reasonable view of the

evidence that defendant was justified in [their] actions" (*id.*; see *People v Heiserman*, 39 NY3d 988, 990 [2022]; *People v Rayford*, 213 AD3d 1337, 1338 [4th Dept 2023]). " '[W]hen no reasonable view of the evidence would support a finding of [justification], the court is under no obligation to submit the question to the jury' " (*Heiserman*, 39 NY3d at 990, quoting *People v Watts*, 57 NY2d 299, 301 [1982]; see *People v Brown*, 33 NY3d 316, 321 [2019], *rearg denied* 33 NY3d 1136 [2019]; *People v Rivera-Mateo*, 208 AD3d 1578, 1579 [4th Dept 2022], *lv denied* 39 NY3d 964 [2022]). Here, viewing the record in the light most favorable to defendant, we conclude that there is no reasonable view of the evidence that defendant was anything other than the initial aggressor in his use of deadly physical force and, thus, "he is not entitled to a jury instruction on justification" (*Brown*, 33 NY3d at 325; see *People v Taylor*, 134 AD3d 508, 509 [1st Dept 2015], *lv denied* 28 NY3d 1075 [2016]; *People v Caldwell*, 98 AD3d 1272, 1273 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]; *People v Robinson*, 283 AD2d 989, 991 [4th Dept 2001], *lv denied* 96 NY2d 906 [2001]). For the same reasons, we reject the additional contention of defendant in his main brief that the court erred in denying his motion to set aside the verdict pursuant to CPL 330.30 (1) on the ground that the court should have given a justification charge.

Contrary to defendant's further contention in his main brief, he was not entitled to be present, or to have defense counsel present, at a proceeding where the People sought a material witness order. "Neither the defendant nor the prosecution is entitled to notice of an application for a material witness hearing, and neither party has standing to contest or to participate in a hearing on an application made by the other" (*People v Fermin*, 150 AD3d 876, 878 [2d Dept 2017], *lv denied* 30 NY3d 1060 [2017] [internal quotation marks omitted]; see *People v Phillips*, 203 AD3d 1636, 1637 [4th Dept 2022]; *People v Brown*, 195 AD2d 967, 967 [4th Dept 1993], *lv denied* 82 NY2d 804 [1993]). Here, the material witness proceeding was held only to determine what steps should be taken to secure the witness's testimony and, contrary to defendant's assertion, the court did not pressure the witness to alter her testimony, nor did the hearing veer into "the content of the witness's testimony or any legal or factual issue that might involve the opposing party in the underlying criminal case" (*People v Mauro*, 49 AD3d 268, 269 [1st Dept 2008], *lv denied* 10 NY3d 961 [2008]; see generally *People v Bond*, 95 NY2d 840, 843 [2000]).

Contrary to defendant's contentions in his pro se supplemental brief, we conclude that the conviction is supported by legally sufficient evidence (see *People v Bleakley*, 69 NY2d 490, 495 [1987]) and, upon viewing the evidence in light of the elements of the crime of which defendant was convicted as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

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

786

CAF 24-01351

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

IN THE MATTER OF JOSHUA BEMAN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

KRISTEN HAND, RESPONDENT-RESPONDENT.

BRIAN P. DEGNAN, BATAVIA, FOR PETITIONER-APPELLANT.

Appeal from a corrected order of the Family Court, Allegany County (Thomas P. Brown, J.), entered May 6, 2024, in a proceeding pursuant to Family Court Act article 6. The corrected order, among other things, dismissed the petition for modification of a prior order of custody and visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father appeals from a corrected order entered after a hearing that dismissed his petition for modification of a prior order of custody and visitation. We affirm.

Initially, we note that the prior order provided that the father could seek modification of the custody and visitation provisions of that order without first demonstrating a change in circumstances (*see generally Matter of Hudson v Carter*, 229 AD3d 1097, 1098 [4th Dept 2024]; *Matter of Coley v Steiz*, 215 AD3d 830, 831 [2d Dept 2023]; *Matter of Mauro NN. v Michelle NN.*, 172 AD3d 1493, 1494 [3d Dept 2019]). The subject modification petition sought, *inter alia*, increased visitation, including overnight visitation. Contrary to the father's contention, Family Court did not err in dismissing his petition. In determining whether a requested custody modification is in the best interests of a child, "the court must consider all factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each [party] to provide for the child's emotional and intellectual development and the wishes of the child" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]; *see Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Matter of Pritty-Pitcher v Hargis*, 221 AD3d 1546, 1547 [4th Dept 2023], *lv dismissed in part & denied in part* 41 NY3d 974 [2024], *cert denied* – US –, 145 S Ct 290 [2024]). It is well settled that "a court's determination regarding custody [and visitation issues], based upon a first-hand assessment of the credibility of the witnesses after

an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of DeVore v O'Harra-Gardner*, 177 AD3d 1264, 1266 [4th Dept 2019] [internal quotation marks omitted]; see *Matter of Thayer v Thayer*, 67 AD3d 1358, 1359 [4th Dept 2009]). Here, we perceive no basis to disturb the court's credibility assessments and factual findings, and we conclude that, contrary to the father's contention, a sound and substantial basis in the record supports the court's determination that the father failed to establish that the requested modifications would be in the best interests of the child (see *Matter of Doner v Flora*, 229 AD3d 1158, 1158 [4th Dept 2024]; *Matter of Kakwaya v Twinamatsiko*, 159 AD3d 1590, 1591 [4th Dept 2018], lv denied 31 NY3d 911 [2018]; see generally *Matter of Moses v Williams*, 138 AD3d 861, 862 [2d Dept 2016]).

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

787

CAF 24-01128

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

IN THE MATTER OF AHREN B.-N.

ONEIDA COUNTY DEPARTMENT OF FAMILY AND
COMMUNITY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GARY B.-N., RESPONDENT-APPELLANT.

JOHN ROWLEY, SPENCER, FOR RESPONDENT-APPELLANT.

MARYANGELA SCALZO, UTICA, FOR PETITIONER-RESPONDENT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered May 24, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. We affirm.

Contrary to the father's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome problems that prevent the discharge of the child into their care, and informing the parent[] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; see § 384-b [7] [f]). The petitioning agency is not required, however, to "guarantee that the parent succeed in overcoming [their] predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; see *Matter of Jamie M.*, 63 NY2d 388, 393 [1984]). Rather, the parent must "assume a measure of initiative and responsibility" (*Jamie M.*, 63 NY2d at 393). Here, petitioner established by clear and convincing evidence (see § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen the father's relationship with the child (see *Matter of Janette G. [Julie G.]*, 181 AD3d 1308,

1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020])). Specifically, petitioner developed a plan for services that addressed the father's needs—i.e., designed to address the specific reasons that led to the removal of the child from the father's care. Petitioner provided the father with access to counseling to address his mental health and domestic violence issues, scheduled regular visitation with the child, and offered him parental education to address petitioner's concerns on proper home safety and sanitation, and on how to ensure that the child was receiving adequate nutrition (see *Matter of Kiara F. [Evan F.]*, 231 AD3d 1489, 1491 [4th Dept 2024]; *Matter of Briana S.-S. [Emily S.]* [appeal No. 2], 210 AD3d 1390, 1391-1392 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023])). We further note that petitioner made those efforts despite evidence that the father was uncooperative with the agency, which frustrated petitioner's meaningful efforts to assist him (see *Kiara F.*, 231 AD3d at 1491; see generally *Matter of Star Leslie W.*, 63 NY2d 136, 144 [1984])).

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

788

CAF 24-00475

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

IN THE MATTER OF AMBUR FORTNEY, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LAVAUN RIVERS, RESPONDENT-RESPONDENT.

IN THE MATTER OF AMBUR FORTNEY, PETITIONER-APPELLANT,

V

DUSTIN MILLER, RESPONDENT-RESPONDENT.

IN THE MATTER OF AMBUR FORTNEY, PETITIONER-APPELLANT,

V

LAVAUN RIVERS AND DUSTIN MILLER,
RESPONDENTS-RESPONDENTS.

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

BRIAN J. EHRHARD, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Herkimer County (Robert E. Pronteau, R.), entered February 20, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied in part the petition to modify an existing custody order.

It is hereby ORDERED that the appeal from the order insofar as it concerns custody of the subject child is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioner mother filed a petition seeking modification of an existing custody order and two separate petitions alleging that respondent father and respondent maternal grandmother, respectively, violated that custody order. The mother appeals from an order that, among other things, denied her modification petition in part and dismissed the violation petitions.

Initially, we dismiss as moot the appeal from the order insofar as it concerns custody of the subject child because a subsequent order has been entered rendering the mother's challenge with respect to the child moot (*see Matter of Beavers v Beavers*, 239 AD3d 1424, 1425 [4th Dept 2025]; *Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576

[4th Dept 2014]]).

We reject the mother's contention that Family Court erred in dismissing the violation petitions and in refusing to find the father and the maternal grandmother in civil contempt of court for violating the existing custody order. We conclude that the mother failed to establish by clear and convincing evidence the elements necessary to support a finding of civil contempt (*see generally El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]).

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

789

CA 24-01274

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

ZAKKIYYA CARTER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ALICIA FLOOD, SHALONNA WATTS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ZAKKIYYA CARTER, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered May 8, 2024. The order denied plaintiff damages following an inquest.

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

Memorandum: Plaintiff appeals pro se from an order that denied her damages following an inquest. The record on appeal, however, does not contain sufficient information to determine whether damages were properly denied following the inquest inasmuch as the transcript of the inquest and any exhibits entered during the inquest were not included as part of the record. The appeal must be dismissed based on plaintiff's failure to provide an adequate record to permit meaningful appellate review (*see Walker v County of Monroe*, 216 AD3d 1429, 1429 [4th Dept 2023]). Plaintiff, "as the appellant, . . . must suffer the consequences of submitting an incomplete record" (*Curto v Zittel's Dairy Farm*, 106 AD3d 1482, 1484 [4th Dept 2013] [internal quotation marks omitted]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

790

CA 24-01300

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

MICHELLE POLIZZI AND ANTHONY POLIZZI,
PLAINTIFFS-RESPONDENTS,

V

ORDER

EMANUEL GAMBACORTA, D.D.S., P.C., DOING BUSINESS AS
GAMBACORTA DENTAL ASSOCIATES, DEFENDANT,
AND MICHAEL LAMASTRA, D.D.S., DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (ANDREA N. CONJERTI OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered July 10, 2024. The order, insofar as appealed from, denied in part the motion of defendant Michael LaMastra, D.D.S., for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 29, 2025,

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

792

CA 24-01546

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

HOGANWILLIG, PLLC, PLAINTIFF-APPELLANT,

V

ORDER

SWORMVILLE FIRE CO., INC., DEFENDANT-RESPONDENT.

TIVERON LAW PLLC, AMHERST (EDWARD P. YANKELUNAS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered August 26, 2024. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

797

KA 23-01092

PRESENT: WHALEN, P.J., BANNISTER, GREENWOOD, NOWAK, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIAM L. HOULE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 23, 2023. The appeal was held by this Court by order entered March 14, 2025, decision was reserved and the matter was remitted to Ontario County Court for further proceedings (236 AD3d 1296 [4th Dept 2025]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on that part of defendant's omnibus motion seeking inspection of the grand jury minutes and dismissal of the indictment on the ground that the grand jury proceeding was defective (*People v Houle*, 236 AD3d 1296, 1298 [4th Dept 2025]). In that prior decision, we rejected defendant's remaining contentions.

Upon remittal, the court denied the abovementioned part of defendant's omnibus motion. Defendant does not raise any contentions with respect to that denial and has thus abandoned any such contentions (see *People v White*, 206 AD3d 1620, 1621 [4th Dept 2022], *lv denied* 38 NY3d 1136 [2022], *reconsideration denied* 39 NY3d 943 [2022]; *People v Blair*, 129 AD3d 1514, 1515 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015], *reconsideration denied* 26 NY3d 1038 [2015]). We therefore affirm the judgment.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

798

KA 23-00500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TAJI S. HUNT, DEFENDANT-APPELLANT.

ADAM AMIRALT, 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 (Robert Bauer, J.), rendered November 29, 2022. The judgment convicted defendant upon a jury verdict of falsely reporting an incident in the second degree and exposure of a person.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, *inter alia*, falsely reporting an incident in the second degree (Penal Law § 240.55 [1]). We affirm.

We reject defendant's contention that the verdict with respect to the count of falsely reporting an incident in the second degree is against the weight of the evidence. In determining whether a verdict is against the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" and, if so, "then [we] must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, even assuming, *arguendo*, that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), upon acting, in effect, as a second jury by independently reviewing the evidence in light of the elements of the crime of falsely reporting an incident in the second degree as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *Danielson*, 9 NY3d at 348-349), we conclude that the verdict with respect to that crime is not against the weight of the evidence (*see People v DeShields*, 169 AD3d 823, 823-824 [2d Dept 2019], *lv denied* 33 NY3d 1030 [2019]; *see generally Bleakley*, 69 NY2d at 495). As County Court instructed the jury, "[a] person is guilty of falsely reporting an incident in the

second degree when, knowing the information reported, conveyed or circulated to be false or baseless, [the person] . . . [i]nitiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire . . . under circumstances in which it is not unlikely that public alarm or inconvenience will result" (Penal Law § 240.55 [1]). The testimony, video surveillance footage, and other exhibits admitted in evidence at trial established that defendant, minutes after being released from a police station following his arrest on unrelated charges, reentered the vestibule of the police station, knocked on the locked internal door, and then went over to a pull station on the wall marked "FIRE ALARM" and activated it, thereby causing the fire alarm to sound. There were, however, no signs of any fire at the police station. Contrary to defendant's assertion, we conclude that such evidence, coupled with defendant's subsequent statement to the police apologizing "for pulling the fire alarm" while knowing "that there was not a fire" in order to express his anger toward the police for his earlier arrest, supports the inference that defendant initiated a false report or warning of an alleged occurrence or impending occurrence of a fire while knowing that the information reported was false or baseless (see § 240.55 [1]; see generally *DeShields*, 169 AD3d at 823-824). Furthermore, although firefighters dispatched to the police station were aware that they were responding to a false alarm, we conclude that "[b]y communicating the report of [a] fire in a manner that required the fire department to respond, defendant made it 'not unlikely' that public alarm or inconvenience would result" because, among other things, "requiring [an] unnecessary response to an alarm may inconvenience and indeed endanger the public[] by placing rapidly moving emergency vehicles on public roads and keeping firefighters from attending a genuine emergency elsewhere" (*People v Bayes*, 78 NY2d 546, 550 [1991]).

Defendant further contends that the court erred in denying his request to charge falsely reporting an incident in the third degree as a lesser included offense of falsely reporting an incident in the second degree. We reject that contention.

To establish entitlement to a charge on a lesser included offense, "a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that [they] committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]; see *People v Van Norstrand*, 85 NY2d 131, 135 [1995]; *People v Glover*, 57 NY2d 61, 63 [1982]; see also CPL 1.20 [37]; 300.50 [1]). With respect to the first prong, it is undisputed that the requested charge of falsely reporting an incident in the third degree (Penal Law § 240.50 [1]) is a lesser included offense of falsely reporting an incident in the second degree (§ 240.55 [1]) inasmuch as "it is theoretically impossible to commit the greater crime without at the same time committing the lesser" (*Glover*, 57 NY2d at 64; see generally *People v Green*, 56 NY2d 427, 430-431 [1982], *rearg denied* 57 NY2d 775 [1982]; 1 Howard G. Leventhal, *Charges to the Jury and Requests to Charge in a Criminal Case in New York* § 36:18 [Nov. 2024 Update]).

The issue whether the court erred in refusing to charge the requested lesser included offense thus turns on the second prong, i.e., " 'whether on any reasonable view of the evidence it is possible for the trier of . . . fact[] to acquit the defendant on the higher count and still find [them] guilty on the lesser one' " (*People v Hull*, 27 NY3d 1056, 1058 [2016] [emphasis omitted]). "In assessing whether there is a 'reasonable view of the evidence,' the proof must be looked at 'in the light most favorable to [the] defendant' " (*People v Rivera*, 23 NY3d 112, 120-121 [2014], quoting *People v Martin*, 59 NY2d 704, 705 [1983]). The "inquiry is not directed at whether persuasive evidence of guilt of the greater crime exists . . . but [instead is directed at] whether, under any reasonable view of the evidence, it is possible for the trier of fact[] to acquit [the] defendant on the higher count and still find [them] guilty of the lesser one" (*Van Norstrand*, 85 NY2d at 136). Under that standard, "when an instruction on a lesser-included offense would direct the jury to resort to sheer speculation, it should not be given" (*People v Butler*, 84 NY2d 627, 632 [1994], *rearg denied* 85 NY2d 858 [1995] [internal quotation marks omitted]).

Here, viewing the evidence in the light most favorable to defendant (see *Rivera*, 23 NY3d 120-121), we conclude that, although there was some generalized testimony from the firefighters that people could use a pull station to report other emergencies and that the fire department was responsible for responding to more than just fires, nothing in the record supports the view that defendant, in undertaking the particular criminal conduct in this case, falsely reported some emergency other than a fire (see generally *Glover*, 57 NY2d at 64). The record establishes that defendant activated a pull station marked "FIRE ALARM" and that he thereafter specifically apologized to the police "for pulling the fire alarm" while knowing "that there was not a fire" (emphases added) in order to express his anger toward the police, without any indication that he had sought to falsely report a non-fire emergency. As the court properly determined, in the absence of evidence that defendant falsely reported some emergency other than a fire, there is no reasonable view of the evidence that would support a finding, without "resort[ing] to sheer speculation," that defendant committed the lesser offense but not the greater (*Butler*, 84 NY2d at 632 [internal quotation marks omitted]; see *People v McNeill*, 107 AD3d 1430, 1430 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]; *People v Saunders*, 292 AD2d 780, 781 [4th Dept 2002], *lv denied* 98 NY2d 681 [2002]).

Finally, although we agree with defendant that, contrary to the People's assertion, his release to parole supervision does not render his challenge to the severity of the sentence moot because he remains under the control of the Parole Board until his sentence has terminated (see *People v Maye*, 194 AD3d 1421, 1422 [4th Dept 2021];

People v Paul, 139 AD3d 1383, 1384 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]), we nevertheless conclude that the sentence is not unduly harsh or severe.

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

799

KA 24-00349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL J. RIVERA PEREZ, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, KEEM APPEALS, PLLC,
SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered December 21, 2023. The judgment convicted defendant upon a nonjury verdict of criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [7], [8]). Contrary to defendant's contention, County Court did not err in failing to grant summarily that part of his omnibus motion seeking to suppress a firearm and ammunition underlying his conviction (see CPL 710.60 [2] [a]), inasmuch as the People sufficiently controverted the allegations within the motion (see *People v Weaver*, 49 NY2d 1012, 1013-1014 [1980]; see generally *People v Hall*, 53 AD3d 1080, 1081 [4th Dept 2008], *lv denied* 11 NY3d 855 [2008]). We likewise reject defendant's related contention that the court erred in denying that part of the motion after a suppression hearing. A police officer found the relevant evidence while searching defendant's residence pursuant to a search warrant, the validity of which defendant does not dispute. That search warrant explicitly permitted the police to search and seize "[a]ny and all items which are capable of retaining blood, hair, fiber, or serological evidence," a particular pair of shorts, and other specified items associated with the alleged abuse being investigated. During the search, the police officer found a soft-covered gun case in the master bedroom that was capable of holding the items referenced in the search warrant. According to testimony at the suppression hearing, the officer opened the soft case in order to look for those materials, and he immediately observed the firearm and ammunition inside. Under those circumstances, we conclude that the

search warrant provided the executing officers lawful access to anything that might contain the items referenced in the search warrant and that the officers discovered the firearm and ammunition in plain view within the scope of the warrant (see *People v Brown*, 96 NY2d 80, 90 [2001]).

Contrary to defendant's further contention, we conclude that his conviction is supported by legally sufficient evidence inasmuch as the People established that defendant had constructive possession of the firearm and ammunition. In reviewing the legal sufficiency of the evidence, we must "determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Williams*, 84 NY2d 925, 926 [1994]). Here, testimony at trial reflected that, at the time of the search, defendant shared the bedroom where the weapon and ammunition were found with his then-wife and thus "exercis[ed] dominion and control over the area from which [they were] seized" (*People v Delancy*, 81 AD3d 1446, 1446 [4th Dept 2011], lv denied 17 NY3d 794 [2011]), and his then-wife testified that the weapon and ammunition belonged to defendant (see generally *People v Tuff*, 156 AD3d 1372, 1376 [4th Dept 2017], lv denied 31 NY3d 1018 [2018]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (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]).

Contrary to defendant's further contention, we conclude that the imposition of the fine and term of probation is not unduly harsh and severe.

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

800

KA 22-01214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES YOUNG, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 25, 2022. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96), arising from defendant's repeated sexual abuse of his girlfriend's daughter (child), who was 9 and 10 years old when the abuse allegedly occurred between June 2019 and mid-April 2020.

Defendant contends that County Court, in violation of *People v Molineux* (168 NY 264 [1901]), erred by permitting the People to elicit testimony from the girlfriend that, at defendant's direction, she too sexually abused the child and that she sent defendant videos and photos of that abuse upon defendant's demand. We reject that contention. The court properly concluded that the testimony did not constitute *Molineux* evidence, and thus its admission did not violate that exclusionary rule, inasmuch as it was "relevant to the very same crime for which . . . defendant

[was] on trial" (*People v Frumusa*, 29 NY3d 364, 370 [2017], *rearg denied* 29 NY3d 1110 [2017]; *see People v Hymes*, 174 AD3d 1295, 1296 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]; *People v Perkins*, 196 AD3d 1107, 1108-1109 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]). The court also properly concluded in the alternative that, even if the testimony constituted *Molineux* evidence, it was admissible inasmuch as it was "relevant to complete the narrative of the events charged in the indictment . . . and to provide necessary background information" (*People v Morris*, 21 NY3d 588, 594 [2013]; *see generally People v Hu Sin*, — NY3d —, —, 2025 NY Slip Op 03100, *2-4 [2025]), and "the probative value of the evidence outweigh[ed] the potential for prejudice to . . . defendant" (*People v Leonard*, 29 NY3d 1, 7 [2017]; *see generally Hu Sin*, — NY3d at —, 2025 NY Slip Op 03100, *3).

Defendant next contends, and the dissent agrees, that the evidence is legally insufficient to establish that he perpetrated the charged acts of sexual conduct over a period of not less than three months in duration (*see Penal Law former §§ 130.96, 130.75* [1] [b]). We reject that contention.

A verdict is legally sufficient when, viewing the facts in the light most favorable to the People, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]; *see People v Kancharla*, 23 NY3d 294, 302 [2014]). "A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained [their] burden of proof" (*Danielson*, 9 NY3d at 349; *see Kancharla*, 23 NY3d at 302). " 'This deferential standard is employed because the courts' role on legal sufficiency review is simply to determine whether enough evidence has been presented so that the resulting verdict was lawful' " (*People v Li*, 34 NY3d 357, 363 [2019]). "Importantly, [i]n determining the legal sufficiency of the evidence for a criminal conviction[,] we indulge all reasonable inferences in the People's favor, mindful that a jury faced with conflicting evidence may accept some and reject other items of evidence" (*id.* at 364 [internal quotation marks omitted]). "It is the 'province of the jury' to assess witness credibility . . . , and we therefore assume on a legal sufficiency review that the jury credited the People's witnesses" (*id.*; *see People v Allen*, 36 NY3d 1033, 1034 [2021]; *People v Gordon*, 23 NY3d 643, 649 [2014]; *People v Hampton*, 21 NY3d 277, 288 [2013]).

As relevant here, "[a] person is guilty of predatory sexual assault against a child when, being [18] years old or more, [the person] commits the crime of . . . course of sexual conduct against a child in the first degree . . . and the victim is less than [13] years old" (Penal Law former § 130.96). "A person is guilty of course of sexual conduct against a child in the first degree when, over a period of time not less than three months in duration . . . [the person], being [18] years old or more, engages in two or more acts of sexual conduct, which include at least one act of sexual intercourse, oral sexual conduct, anal sexual conduct or aggravated sexual contact, with a child less than [13] years old" (former § 130.75 [1] [b]).

Contrary to defendant's contention and the dissent's conclusion, upon viewing the evidence in the appropriate light, we conclude that "a fair reading of the child's testimony, in context, establishes that" defendant engaged in sexual conduct with the child for the first time soon after the girlfriend and the child moved into defendant's residence, which occurred directly after the child's completion of third grade, i.e., in June or July 2019, and thereafter on numerous occasions on an approximately weekly basis until the last incident occurred "[a] couple days before" defendant was arrested in April 2020 (*People v Paramore*, 288 AD2d 53, 53 [1st Dept 2001], *lv denied* 97 NY2d 759 [2002]; see *People v Brown*, 194 AD3d 1398, 1399 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]). Although the child did not pinpoint a precise start date for the sexual conduct, she expressly stated that such conduct began only after she moved into defendant's residence, and the context of the child's testimony—particularly her responses to the prosecutor's questions establishing the move-in date and to the immediately ensuing line of questions about "the first time" the sexual conduct occurred and how the abuse "started"—demonstrates that the sexual conduct began shortly after defendant had access to the child alone, i.e., during the beginning of her summer recess from school (see *Paramore*, 288 AD2d at 53). Indeed, the child testified that some of the sexual conduct occurred when she was alone with defendant in the residence, and the girlfriend's testimony confirmed that she had regularly worked daytime hours during the summer recess months of 2019 and that the child would "hang out with" defendant when the child was out of school and the girlfriend was working. We thus conclude that, viewing the evidence in the light most favorable to the People, there is a valid line of reasoning and permissible inferences from which a rational jury could have found that the sexual conduct began in June or July 2019 and continued until mid-April 2020, i.e., that it occurred over a period of at least three months (see *Brown*,

194 AD3d at 1399; *Paramore*, 288 AD2d at 53; see also *People v Judkins*, 41 AD3d 1046, 1047 [3d Dept 2007], *lv denied* 9 NY3d 962 [2007]; *People v Raymo*, 19 AD3d 727, 729 [3d Dept 2005], *lv denied* 5 NY3d 793 [2005]).

Viewing the evidence in light of the elements of the crime as charged to the jury (see *Danielson*, 9 NY3d at 349), we also reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). " 'Jury resolution of credibility issues, particularly those involving sex-related conduct with a victim of tender years who may have difficulty recalling precise dates and times of the acts, will not be disturbed absent manifest error' " (*People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]; see *Brown*, 194 AD3d at 1399). We see no basis to disturb the jury's assessment of witness credibility (see *Brown*, 194 AD3d at 1399).

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

Defendant further contends that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds. Defendant contends in particular, as he did before the court, that the People's failure to disclose voluminous social media records obtained by federal prosecutors pursuant to a search warrant in a related federal criminal action (see generally CPL 245.20 [former (1) (u)]) rendered any certificate of compliance (see former CPL 245.50) improper and thereby rendered any statement of trial readiness illusory and insufficient to stop the running of the speedy trial clock (see former CPL 30.30). The court, over defendant's objection to its holding and rationale, denied the motion, reasoning that, although the People had violated their discovery obligations in failing to properly disclose the social media records, the People had acted in good faith and the court's decision to sanction the People by precluding admission of the social media records at trial cured any impropriety in the certificates of compliance that would have prevented the People from being ready for trial.

Preliminarily, we note that the People failed to preserve for our review their alternative ground for affirmance (see CPL 470.05 [2]) and, in any event, we are precluded from reviewing it on defendant's appeal inasmuch as the court did not make a finding adverse to defendant on that distinct issue (see *People v Walker*, 232 AD3d 1214, 1217-1218 [4th Dept 2024], *lv denied* 42 NY3d 1082 [2025]; *People v Baker*, 229 AD3d 1324, 1328 [4th Dept

2024]; see generally CPL 470.15 [1]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014], *rearg denied* 25 NY3d 1215 [2015]). We further note that defendant failed to preserve for our review his contention regarding the timing of the People's filing of their initial certificate of compliance (see *People v Guerrero*, 235 AD3d 1276, 1278 [4th Dept 2025]; *People v Pitts*, 206 AD3d 1582, 1583-1584 [4th Dept 2022], *lv denied* 38 NY3d 1135 [2022]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

With respect to the merits of the determination before us, we conclude that the court applied the wrong standard in determining defendant's motion. The court, "in [effectively] evaluating whether defendant was prejudiced by the People's failure to disclose certain items, conflated the standard applicable to requests for sanctions under CPL 245.80—which does involve a prejudice analysis—with the standard for evaluating the propriety of a certificate of compliance for purposes of determining whether the People's statement of readiness was valid" (*People v Gaskin*, 214 AD3d 1353, 1355 [4th Dept 2023]; see *People v Bay*, 41 NY3d 200, 213-214 [2023]). "[T]he key question in determining if a proper [certificate of compliance] has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211). Moreover, contrary to the court's reasoning, "while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.* at 212).

As defendant acknowledges on appeal, in light of its determination, the court did not consider whether the People exercised due diligence within the meaning of the statute in effect at the time of defendant's motion. We note that "[i]n *Bay*, the Court of Appeals made clear that whether the People exercised due diligence is not to be examined in a vacuum. To that end, the non-exclusive list of factors articulated by the Court in that case calls for a holistic assessment of the People's efforts to comply with the automatic discovery provisions, rather than a strict item-by-item test that would require us to conclude that a [certificate of compliance] is improper if the People miss even one item of discovery" (*People v Cooperman*, 225 AD3d 1216, 1220 [4th Dept 2024], citing *Bay*, 41 NY3d at 212-213; see *People v Sumler*, 228 AD3d 1350, 1354-1355 [4th Dept 2024]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine the motion after further submissions, if warranted.

All concur except GREENWOOD and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent inasmuch as we agree with defendant that his conviction of predatory sexual assault against a child (Penal Law former § 130.96) is not supported by legally sufficient evidence.

A verdict is legally sufficient when, viewing the facts in the light most favorable to the People, "there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349 [2007] [internal quotation marks omitted]). As relevant here and as alleged in the indictment, "[a] person is guilty of predatory sexual assault against a child when, being [18] years old or more, [the person] commits the crime of . . . course of sexual conduct against a child in the first degree . . . and the victim is less than [13] years old" (Penal Law former § 130.96). As further relevant here and as set forth in the version of the statute applicable at the time of the offense, "[a] person is guilty of course of sexual conduct against a child in the first degree when, over a period of not less than three months in duration . . . [the person], being [18] years old or more, engages in two or more acts of sexual conduct, which include at least one act of sexual intercourse . . . with a child less than [13] years old" (former § 130.75 [1] [b]). The People alleged that the course of sexual conduct occurred between June 1, 2019, and April 18, 2020, when the victim (child) was 9 and 10 years old.

The child, who was 11 years old at the time of trial, testified that defendant engaged in sexual intercourse with her on more than one occasion, and she testified that the last act of sexual intercourse occurred a few days before the police came to defendant's house in mid-April 2020. However, the child did not testify as to when the first act of sexual intercourse occurred, other than that it happened when she was living with defendant, and the evidence established that the child moved in with defendant in the summer of 2019. In denying defendant's motion to dismiss, County Court indicated that the child testified that the events occurred "soon after she moved in" with defendant. However, the record contains no questioning of or testimony from the child regarding when the first incident of abuse occurred, nor is there any testimony that would permit us to draw the inference that the abuse began "soon after" the child moved in with defendant. To that end, the prosecutor asked the child when she moved to defendant's house, who else lived there, and to

identify photographs of his house. The prosecutor asked the child if defendant had ever touched her "in a way that [she] didn't like," if it had occurred "more than one time," and if the child had always been at defendant's house when it occurred. The prosecutor then asked the child about the first time that defendant abused her and in what room it took place but never asked any questions to identify what time of year it was when the first incident occurred. Later, the prosecutor asked the child how often defendant had touched her "in a way that [she] didn't like," and the child replied that it had occurred "every week" and always at defendant's house.

We recognize that a child who is testifying about sex-related conduct does not need to identify precise dates when the incidents occurred, but here there were "no 'markers' in the evidence at trial about when the conduct [began]" (*People v Partridge*, 173 AD3d 1769, 1771 [4th Dept 2019], *lv denied* 34 NY3d 935 [2019]), such as a season (see *People v Woods*, 221 AD3d 1415, 1416-1417 [4th Dept 2023], *lv denied* 40 NY3d 1095 [2024]; *People v Hughes*, 114 AD3d 1021, 1021-1022 [3d Dept 2014], *lv denied* 23 NY3d 1038 [2014]; *People v Raymo*, 19 AD3d 727, 729 [3d Dept 2005], *lv denied* 5 NY3d 793 [2005]), a school year (see *People v Sorrell*, 108 AD3d 787, 788-789 [3d Dept 2013], *lv denied* 23 NY3d 1025 [2014]; *People v Schroo*, 87 AD3d 1287, 1289 [4th Dept 2011], *lv denied* 19 NY3d 977 [2012]), the child's age (see *People v Garcia*, 203 AD3d 1228, 1229 [3d Dept 2022], *lv denied* 38 NY3d 1032 [2022]; *People v Robinson*, 156 AD3d 1123, 1125-1126 [3d Dept 2017], *lv denied* 30 NY3d 1119 [2018]), a holiday (see *Raymo*, 19 AD3d at 729), or a location that is sufficient to pinpoint a date (see *People v Cuadrado*, 227 AD3d 1174, 1176-1177 [3d Dept 2024], *lv denied* 42 NY3d 969 [2024]; *People v Carter*, 219 AD3d 1703, 1704 [4th Dept 2023], *lv denied* 40 NY3d 1091 [2024]). It was apparent from the testimony of the child that she was capable of testifying as to when the first incident of abuse occurred, but the prosecutor simply neglected to ask the question.

We respectfully disagree with the majority that the context of the child's testimony demonstrates that the abuse occurred over a period in excess of three months. The majority relies on the child's testimony that some of the sexual conduct occurred when she was alone with defendant in the residence and defendant's girlfriend's testimony that she regularly worked daytime hours during the summer recess months of 2019. The child, however, testified that the girlfriend would sometimes be in the house when the abuse occurred and further testified that the abuse would occur during the day "if it was on the weekend," but during the week she "would be at school." A rational jury

could not infer from that testimony that the abuse began in the summer of 2019.

We therefore conclude that there is not legally sufficient evidence to establish, without speculation, that two or more acts of sexual intercourse occurred "over a period of time not less than three months in duration" (Penal Law former § 130.75 [1]; *see People v Adolph*, 206 AD3d 753, 754 [2d Dept 2022], *lv denied* 38 NY3d 1148 [2022]; *Partridge*, 173 AD3d at 1771; *see also People v Harrell*, 235 AD3d 1294, 1297 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025]). Inasmuch as there is not legally sufficient evidence to support a conviction of any lesser included offense (*cf. People v Moorhead*, 224 AD3d 1225, 1227 [4th Dept 2024], *lv denied* 41 NY3d 1003 [2024]), we would reverse the judgment and dismiss the indictment. In light of our determination, it is not necessary to address defendant's remaining contentions.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

801

KA 22-01548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

J'SON STRONG, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County
(Charles A. Schiano, Jr., J.), rendered July 25, 2022. The judgment
convicted defendant, upon a plea of guilty, of criminal possession of
a weapon in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from two
judgments, each convicting him, upon his plea of guilty during a
single plea proceeding, of criminal possession of a weapon in the
second degree (Penal Law § 265.03 [3]). As defendant contends, and
the People correctly concede, defendant's waivers of the right to
appeal are invalid (*see generally People v Thomas*, 34 NY3d 545, 564-
566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Motell*,
229 AD3d 1330, 1330-1331 [4th Dept 2024], *lv denied* 43 NY3d 931
[2025]). Contrary to defendant's contention, however, his sentence is
not unduly harsh or severe.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

802

KA 24-02063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

J'SON STRONG, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County
(Charles A. Schiano, Jr., J.), rendered July 25, 2022. The judgment
convicted defendant, upon a plea of guilty, of criminal possession of
a weapon in the second degree.

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

Same memorandum as in *People v Strong* ([appeal No. 1] – AD3d –
[Nov. 21, 2025] [4th Dept 2025]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

803

KA 24-00677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSEPH M. VALLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS L. PELYCH, HORNELL, 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 (Patrick F. McAllister, A.J.), rendered March 11, 2024. The judgment convicted defendant, upon a guilty plea, of criminal sale of a controlled substance in the third degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

804

KA 24-00678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSEPH M. VALLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS L. PELYCH, HORNELL, 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 (Patrick F. McAllister, A.J.), rendered March 11, 2024. The judgment convicted defendant, upon a guilty plea, of criminal sale of a controlled substance in the third degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

805

KA 24-00679

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSEPH M. VALLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

THOMAS L. PELYCH, HORNELL, 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 (Patrick F. McAllister, A.J.), rendered March 11, 2024. The judgment convicted defendant, upon a guilty plea, of criminal sale of a controlled substance in the fifth degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

806

KA 24-00681

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JOSEPH M. VALLEY, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

THOMAS L. PELYCH, HORNELL, 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 (Patrick F. McAllister, A.J.), rendered March 11, 2024. The judgment convicted defendant, upon a guilty plea, of bail jumping in the first degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

807

KA 24-00028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TRENT GOODRICH, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 21, 2023. The judgment convicted defendant, upon a plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]). We affirm.

Defendant contends that County Court erred in enhancing his sentence without affording him an opportunity to withdraw his plea and without conducting a sufficient inquiry into his alleged violations of the conditions of the plea agreement. Even assuming, arguendo, that defendant's challenges to the imposition of the enhanced sentence are preserved for our review (see *People v Jackson*, 34 AD3d 1318, 1318 [4th Dept 2006], lv denied 8 NY3d 923 [2007]; see generally *People v Albergotti*, 17 NY3d 748, 750 [2011]), we conclude that they lack merit. The record establishes that defendant " 'was clearly informed of the consequences of his failure' to abide by the conditions of his plea agreement" (*People v Scott*, 101 AD3d 1773, 1774 [4th Dept 2012], lv denied 21 NY3d 1019 [2013]; see *People v Coker*, 133 AD3d 1218, 1218 [4th Dept 2015], lv denied 27 NY3d 995 [2016]). Thus, upon defendant's violations of the conditions of the agreement, the court was "no longer bound by the agreement and [was] free to impose a greater sentence without offering . . . defendant an opportunity to withdraw his . . . plea" (*Scott*, 101 AD3d at 1774 [internal quotation marks omitted]; see *People v Faso*, 82 AD3d 1584, 1584 [4th Dept 2011], lv denied 17 NY3d 816 [2011], reconsideration denied 17 NY3d 952 [2011]; *People v Parsons*, 210 AD2d 901, 901-902 [4th Dept 1994], lv denied 85 NY2d 941 [1995]). Furthermore, inasmuch as defendant "neither raised an issue 'concerning the validity of the postplea

charge[s]' nor denied 'any involvement in the underlying crime[s]' " or in the commission of other violations of the conditions of the plea agreement, and defense counsel even conceded that the court was entitled to impose an enhanced sentence due to defendant's violations, we conclude that the court had no duty to conduct a further inquiry (*People v Harris*, 197 AD2d 930, 930 [4th Dept 1993], *lv denied* 82 NY2d 850 [1993], quoting *People v Outley*, 80 NY2d 702, 713 [1993]; see *People v Nowlin*, 145 AD3d 1447, 1448 [4th Dept 2016], *lv denied* 29 NY3d 1035 [2017]; *People v Anderson*, 99 AD3d 1239, 1239-1240 [4th Dept 2012], *lv denied* 20 NY3d 1059 [2013]). In any event, the record establishes that the court conducted a sufficient inquiry inasmuch as "[b]oth defendant and his counsel were given ample opportunity to refute the . . . assertions that defendant had violated the plea terms" (*Albergotti*, 17 NY3d at 750; see *People v Sims*, 41 NY3d 995, 996 [2024]; *People v Scott*, 200 AD3d 1729, 1730 [4th Dept 2021]).

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

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

808

KA 22-00207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JOSEPH H. BELSTADT, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT, FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Michael M. Mohun, A.J.), rendered January 14, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). His conviction stems from the disappearance of the 17-year-old victim in September 1993 in Niagara County.

According to witnesses and defendant's statements to the police after the victim's disappearance, the victim entered defendant's car in the early hours of September 19, 1993. The victim's mother filed a missing person report after she and the victim's friends were unable to locate her. The victim was discovered deceased in a ravine around a month later, an article of clothing knotted around her neck. According to expert testimony at trial, the victim's body and clothing reflected signs of a struggle, the cause of her death was asphyxiation by strangulation, and the manner of death was homicide.

In the days following the victim's disappearance, the police began contacting numerous individuals who had seen her in the days before her death. Given that defendant was the last independently confirmed person to see the victim alive after she got into his car, defendant was determined to be a suspect early in the investigation. Among other things, hundreds of pieces of evidence - hairs, fibers, and other material - were collected from the victim's body and from vacuuming defendant's car and sent to the Niagara County Forensic Laboratory. Over the years that followed, evidence was examined and reexamined, analyzed in-house by Niagara County, and contracted out to the Erie County Central Police Services Forensic Science Laboratory as well as labs out of state, and a consultant reviewed evidence in the

early to mid-2000s. In 2017, Mark Henderson, a Niagara County forensic analyst who had worked on the case since its inception, reexamined, among other things, a particular hair found in defendant's car that, in 1997, had been deemed "dissimilar" to the victim's hair by the Erie County lab that had analyzed it. According to Henderson, by using training and experience he had gathered since that time, he determined that the hair matched the victim's known pubic hair. Another visually matching hair was then discovered among those collected from defendant's car. Both pubic hairs were genetically matched to the victim through DNA analysis of the attached root tissue. In addition, around that time, fibers consistent with carpet fibers in defendant's car were found among the victim's clothing. Defendant was indicted in April 2018. After lengthy pretrial practice and a mistrial occasioned by the COVID-19 pandemic in 2020, defendant was tried in 2021 and convicted of murder in the second degree, the sole indicted count. Defendant appeals, and we affirm.

Defendant contends that the conviction is not based on legally sufficient evidence and that the verdict is against the weight of the evidence. Assuming, arguendo, that defendant preserved for our review his challenge to the legal sufficiency of the evidence (*see generally People v McGovern*, 214 AD3d 1339, 1340 [4th Dept 2023], *affd* 42 NY3d 532 [2024]), we conclude, after viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), that the evidence is legally sufficient to support the conviction of murder in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Shortly after the victim's disappearance, defendant himself admitted, and it was independently confirmed by other witnesses, that defendant had given the victim a ride in his car on September 19, 1993, at around 1:30 a.m. Although defendant claimed to have driven her a short distance to the stairs of a nearby church, that claim conflicted with the forensic evidence, namely the victim's pubic hair found in different locations in defendant's car. In addition, testimony at trial reflected defendant's movements and behavior before and after he encountered the victim. After going to a nearby police station to complain about a recent traffic ticket at around 1:00 a.m., defendant declined an invitation to go to Canada with friends, instead opting to drive around because, according to those friends, he was upset over the tickets. While driving, defendant observed the victim and offered to give her a ride. According to his friends, when they returned from Canada, defendant's car was not parked at his grandmother's home, where defendant lived, or at his mother's home. Another witness observed defendant alone in his car, which was wet, and defendant told the witness he had just washed it. In the days after, defendant appeared at various locations in an attempt at establishing a false alibi. He spoke to each of his four friends who had gone to Canada on the night that the victim disappeared, asking them to lie to the police and assert that defendant had gone with them, and defendant was absent from school during the week after the victim's disappearance. Testimony also reflected that defendant had, in the summer of 1993, driven another young woman to a location near where the victim's body would later be found. With respect to the element of intent, we note that the victim was found with clothing knotted around her neck, and

that expert testimony at trial concluded that the state of her clothing and body reflected homicide by asphyxiation following a struggle. Further, the testimony of an individual who had been incarcerated with defendant on an unrelated charge reflected that defendant had admitted to strangling a girl in the early 1990s and leaving her body outdoors. We further conclude, after viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 348 [2007]), that the verdict is not against the weight of the evidence (see *People v Monk*, 57 AD3d 1497, 1499 [4th Dept 2008], *lv denied* 12 NY3d 785 [2009]; see generally *Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the opinion testimony of the expert pathologist, based upon, inter alia, his review of autopsy materials, was properly admitted at trial and did not violate defendant's Sixth Amendment right to confrontation (see *People v Ortega*, 40 NY3d 463, 475-476 [2023]). "[T]he Confrontation Clause does not entirely preclude the use of information contained in testimonial autopsy reports," and an expert may offer opinions related to the cause and manner of death if the expert has "used their independent analysis on the primary data," including autopsy photographs, video recordings, and anatomical measurements (*id.* at 476-477; see *People v Austin*, 237 AD3d 736, 738 [2d Dept 2025]; *People v Taveras*, 228 AD3d 410, 412 [1st Dept 2024], *lv denied* 42 NY3d 1054 [2024]; *People v Rivers*, 225 AD3d 899, 901-902 [2d Dept 2024], *lv denied* 42 NY3d 929 [2024]). Here, the record reflects that the testifying expert, who did not perform or observe the autopsy, reached his conclusions based on an independent review of the proper materials rather than the conclusions of the performing medical examiner (see *Austin*, 237 AD3d at 738; *cf.* *Ortega*, 40 NY3d at 478).

We likewise reject defendant's contention that his due process right to prompt prosecution was violated by the preindictment delay. In determining whether defendant was deprived of due process, we must consider the factors set forth in *People v Taranovich* (37 NY2d 442 [1975]), which are: "(1) the extent of the delay; (2) the reasons for the delay; (3) the nature of the underlying charge; (4) whether . . . there has been an extended period of pretrial incarceration; and (5) whether . . . there is any indication that the defense has been impaired by reason of the delay" (*id.* at 445; see *People v Johnson*, 39 NY3d 92, 96 [2022]). These factors must be reviewed "in light of the particular factors attending to the specific case under scrutiny . . . , there are no clear cut answers in such an inquiry, . . . [and] no one factor or combination of the factors . . . is necessarily decisive" (*Taranovich*, 37 NY2d at 445).

Although the delay in this case was substantial, the nature of the underlying charge was serious and defendant was not arrested on that charge until he was indicted (see *People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]). Moreover, although the delay in this case may have caused some degree of prejudice to defendant, the People satisfied their burden of demonstrating good cause for the delay (see *id.*; *People v Chatt*, 77

AD3d 1285, 1285 [4th Dept 2010], *lv denied* 17 NY3d 793 [2011]). Of note, the People submitted a sworn affidavit from Henderson, which presented a narrative of the investigative events since 1993, discussed the thousands of hours dedicated to the case, addressed the outside labs and consultants used to assist in bringing the investigation to a resolution, and explained the limitations of analyzing hundreds of car sweepings (see generally *People v Johnson*, 211 AD3d 1633, 1634 [4th Dept 2022], *lv denied* 39 NY3d 1111 [2023]). Contrary to defendant's related contention, there was no need for a *Singer* hearing (see *People v Singer*, 44 NY2d 241, 255 [1978]) inasmuch as the record provided the court with "a sufficient basis to determine whether the delay was justified" (*People v Ballowe*, 173 AD3d 1666, 1668 [4th Dept 2019] [internal quotation marks omitted]; see *Rogers*, 103 AD3d at 1151; *People v Gathers*, 65 AD3d 704, 704 [2d Dept 2009], *lv denied* 13 NY3d 859 [2009]).

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

809

CAF 24-01697

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

IN THE MATTER OF MARTHA CRONIN,
PETITIONER-RESPONDENT-RESPONDENT,

V

MEMORANDUM AND ORDER

MARCUS CRONIN, RESPONDENT-PETITIONER-APPELLANT.

ZIMRING LAW, PLLC, MENANDS (JEFFREY L. ZIMRING OF COUNSEL), FOR
RESPONDENT-PETITIONER-APPELLANT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR
PETITIONER-RESPONDENT-RESPONDENT.

ANDREW J. DIPASQUALE, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated July 19, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary residency of the subject child to petitioner-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 6, respondent-petitioner father appeals from an order that, inter alia, denied the father's petition for modification of the parties' prior custody order and granted petitioner-respondent mother's petition for modification of that order by awarding her primary residency of the subject child. We affirm.

Initially, we note that the parties do not dispute that there is a sufficient change in circumstances to warrant an inquiry into whether modification of the existing custody arrangement would be in the child's best interests (*see Matter of Wilson v Cheves*, 240 AD3d 1433, 1433-1434 [4th Dept 2025]; *Matter of Wasicki v Wilber*, 239 AD3d 1487, 1488 [4th Dept 2025]; *Matter of Ridall v Jones*, 230 AD3d 1548, 1549 [4th Dept 2024]). The child is now at the age to attend school, thus rendering the 50-50 shared custody arrangement unworkable for the parties, who live over three hours from each other.

The father contends that Family Court's determination to award the mother primary residency is not in the child's best interests and that he should be awarded primary residency. We reject that contention. "[A] court's determination regarding custody . . . based

upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Ridall*, 230 AD3d at 1549 [internal quotation marks omitted]). Based on our review of the record, we conclude that there is a sound and substantial basis in the record for the court's determination to award primary physical residency to the mother, with extensive visitation to the father (see *Matter of Williams v Grau*, 230 AD3d 1539, 1540 [4th Dept 2024]; *Ridall*, 230 AD3d at 1549).

We have reviewed the father's remaining contention, with respect to the court's reliance on opinion testimony regarding the mother's medical condition, and conclude that, to the extent that it is preserved for our review, it is without merit (see generally *De Long v County of Erie*, 60 NY2d 296, 307 [1983]; *Matter of Valentin v Mendez*, 165 AD3d 1643, 1643 [4th Dept 2018]).

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

810

CAF 24-01641

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

IN THE MATTER OF JUSTICE G.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CANDICE G., RESPONDENT-APPELLANT.

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

BRENDON S. FLEMING, ACTING COUNTY ATTORNEY, ROCHESTER (MARY WHITESIDE
OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Maria Cubillos Reed, J.), entered September 10, 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 mother appeals from an order of fact-finding and disposition that, inter alia, determined that she neglected the subject child. We affirm.

The mother was first referred to petitioner in September 2023, when, in the presence of the subject child, she engaged in conduct that included threatening to kill people and being physically aggressive toward the child. The mother was homeless and was provided with the means to obtain food and shelter for herself and the subject child. However, she failed to avail herself of those services. Notably, the mother received SSI but refused on at least two occasions to use those funds to obtain shelter. The mother was removed from one guest house over aggressive behavior, and her housing assistance was similarly discontinued in October 2023 due to her "behavior issues." The record reflects that the child witnessed and was subject to the aggressive confrontations by the mother, and the child then displayed poor behavior herself. The mother not only failed to address such behavior, but at times encouraged it.

The mother initially contends that petitioner failed to establish

by legally sufficient evidence that the subject child's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired, and that Family Court therefore erred in denying her motion to dismiss the petition on that ground. The mother further contends that the court erred in determining that petitioner established by a preponderance of the evidence that the subject child's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care.

We conclude that the court did not err in denying the mother's motion to dismiss, because, "[v]iewing the evidence in the light most favorable to petitioner, . . . [petitioner] adduced sufficient evidence to make a prima facie case of neglect" (*Matter of Jacob W. [Jermaine W.]*, 170 AD3d 1513, 1513 [4th Dept 2019], lv denied 33 NY3d 906 [2019]; see *Matter of Christian Q.*, 32 AD3d 669, 670-671 [3d Dept 2006]).

We further conclude that the court's determination that the subject child was neglected is supported by a sound and substantial basis in the record (see generally *Matter of Jesus M. [Jamie M.]*, 118 AD3d 1436, 1437-1438 [4th Dept 2014], lv denied 24 NY3d 904 [2014]). "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; see Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). A parent's "failure to provide adequate shelter . . . is, by itself, sufficient to support [a] finding of neglect" (*Jesus M.*, 118 AD3d at 1437; see *Matter of Tyjon R. [Felicia R.]*, 240 AD3d 702, 704 [2d Dept 2025]; *Matter of Alexander L. [Andrea L.]*, 99 AD3d 599, 599 [1st Dept 2012], lv denied 20 NY3d 856 [2013]), and here petitioner established that the mother failed to supply the subject child with adequate shelter, despite being "financially able to do so or offered financial or other reasonable means to do so" (Family Ct Act § 1012 [f] [i] [A]).

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

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

812

CA 24-01699

PRESENT: MONTOUR, J.P., SMITH, NOWAK, AND KEANE, JJ.

IN THE MATTER OF WATERFRONT OPERATIONS
ASSOCIATES LLC, DOING BUSINESS AS ELLICOTT CENTER
FOR REHABILITATION AND HEALTHCARE, PETITIONER-APPELLANT,
ET AL., PETITIONER,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH AND
BARBARA GUINN, AS COMMISSIONER OF NEW YORK STATE
OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE,
RESPONDENTS-RESPONDENTS.

COWART DIZZIA LLP, NEW YORK CITY (SUZAN ARDEN OF COUNSEL), FOR
PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (Frank A. Sedita, III, J.), entered September 26, 2024, in
a proceeding pursuant to CPLR article 78. The judgment dismissed the
petition.

It is hereby ORDERED that the judgment so appealed from is
unanimously vacated, the determination is confirmed without costs, and
the petition is dismissed.

Memorandum: In this proceeding pursuant to CPLR article 78,
petitioner-appellant (petitioner), a skilled nursing facility, appeals
from a judgment that dismissed a petition seeking to annul a
determination of respondent New York State Department of Health (DOH),
made after a fair hearing, affirming the denial of a Medicaid
application filed by petitioner's former resident (resident), who had
designated petitioner as his authorized representative.

As a preliminary matter, we conclude that Supreme Court should
have transferred the proceeding to this Court pursuant to CPLR 7804
(g) inasmuch as the petition in this case raises an issue "whether a
determination made as a result of a hearing held, and at which
evidence was taken, pursuant to direction by law is, on the entire
record, supported by substantial evidence" (CPLR 7803 [4]; *cf. Matter of Waterfront Ctr. for Rehabilitation & Healthcare v New York State Dept. of Health*, 162 AD3d 1717, 1718 [4th Dept 2018]; *see generally Matter of Underwood v Zucker*, 191 AD3d 1438, 1439-1440 [4th Dept

2021]; *Matter of Albino v Shah*, 111 AD3d 1352, 1354 [4th Dept 2013])). In particular, petitioner challenges the determination following a quasi-judicial hearing conducted pursuant to direction by law at which evidence was taken (see 18 NYCRR 360-2.9; see generally 18 NYCRR part 358) on grounds including that DOH's application of 18 NYCRR 360-4.10 in affirming the denial of the application is not supported by substantial evidence (see *Matter of Bosco v McGuire*, 111 AD3d 931, 932-933 [2d Dept 2013]; *Matter of Urrutia v Daines*, 90 AD3d 770, 771 [2d Dept 2011])). Indeed, generally, "[w]hen reviewing a Medicaid eligibility determination made after a fair hearing, we must determine whether the agency's decision is supported by substantial evidence and [is] not affected by an error of law, bearing in mind that the petitioner bears the burden of demonstrating eligibility" (*Matter of Flannery v Zucker*, 136 AD3d 1385, 1385 [4th Dept 2016] [internal quotation marks omitted]; see *Matter of Washington Ctr. for Rehabilitation & Nursing Home v New York State Dept. of Health*, 218 AD3d 1280, 1280-1281 [4th Dept 2023]; cf. *Waterfront Ctr. for Rehabilitation & Healthcare*, 162 AD3d at 1718). "This is so even where, as here, the relevant facts are largely undisputed, [inasmuch] as 'substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably-probatively and logically' " (*Matter of Johnson v New York City Tr. Auth.*, 182 AD3d 970, 972 [3d Dept 2020], quoting 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 181 [1978]; see *Matter of Burnett v Borden Chem. Div. Borden*, 35 NY2d 766, 767 [1974]; *Matter of Blue v Zucker*, 192 AD3d 1693, 1694 [4th Dept 2021])). While petitioner additionally raises questions whether DOH's interpretation of certain regulations is arbitrary and capricious (see CPLR 7803 [3]; *Waterfront Ctr. for Rehabilitation & Healthcare*, 162 AD3d at 1718-1719), the court nevertheless should have "transferred the entire CPLR article 78 proceeding to this Court inasmuch as the petition raises a substantial evidence question, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g)" (*Blue*, 192 AD3d at 1694 [internal quotation marks omitted]; see generally *Matter of Hall v Shah*, 100 AD3d 1357, 1357-1359 [4th Dept 2012])). We therefore vacate the judgment, and we treat the proceeding as if it had been properly transferred and review the parties' contentions de novo (see *Matter of Corbett v Schroeder*, 214 AD3d 1407, 1407-1408 [4th Dept 2023]; *Matter of Elderwood at Cheektowaga v Zucker*, 188 AD3d 1578, 1579 [4th Dept 2020]; *Matter of Keuning v Perales*, 190 AD2d 1033, 1034 [4th Dept 1993])).

Upon conducting that review, we conclude that DOH's determination is supported by substantial evidence and is not affected by an error of law. Contrary to petitioner's contention, DOH rationally relied on 18 NYCRR 360-4.10 (c) (3) to affirm the denial of the resident's Medicaid application on the ground that the eligibility of the resident, an institutionalized spouse, could not be determined because the resident's community spouse refused to cooperate in providing necessary information about her resources (see Social Services Law § 366-c [2] [a], [b]; 18 NYCRR 360-4.10 [a] [2], [7])). Moreover,

substantial evidence supports DOH's conclusion that the exception in 18 NYCRR 360-4.10 (c) (3) did not apply inasmuch as the resident did not meet the criteria for undue hardship given that he obtained appropriate medical care without receiving Medicaid (see 18 NYCRR 360-4.10 [a] [12]; *Bosco*, 111 AD3d at 933; see also *Matter of Hall v Zucker*, 202 AD3d 1490, 1491 [4th Dept 2022]; *Matter of Conners v Berlin*, 105 AD3d 1208, 1211 [3d Dept 2013]). We have considered petitioner'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 24-01563

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

VADIM WOOLF AND HELENA WOOLF, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

JTEKT CORPORATION, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (KATHLEEN J. MARTIN OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Gerald J. Greenan, III, J.), entered September 3, 2024, in an action to recover damages for injuries sustained in a workplace accident. The order denied the motion of defendant JTEKT Corporation to dismiss the complaint.

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

Memorandum: Plaintiffs commenced this action against, inter alia, JTEKT Corporation (defendant), seeking damages arising from a workplace injury sustained by plaintiff Vadim Woolf. After filing the summons and complaint, plaintiffs moved, ex parte, pursuant to CPLR 306-b, for, inter alia, an extension of time in which to serve defendant, an entity located in Japan. Supreme Court, inter alia, granted plaintiffs' request for a 240-day extension. Prior to the expiration of the extended service period, plaintiffs again moved, ex parte, to extend the time in which to serve defendant, and the court entered a second order, which, inter alia, granted an additional 240-day extension. Service thereafter occurred, and defendant answered the complaint.

Defendant then moved to dismiss the complaint pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction. Defendant contended, inter alia, that the complaint failed to state a proper basis for New York's long-arm jurisdiction over defendant. Defendant also contended that service was untimely because plaintiffs should not have been granted the extensions, although it did not move to vacate the prior orders that had granted the extensions.

Defendant appeals from an order denying its motion. Defendant's

brief on appeal, however, addresses only the court's earlier determinations to grant plaintiffs the two extensions pursuant to CPLR 306-b. Those determinations were embodied in two prior orders that are not subject to the present appeal, which is taken from the nonfinal order denying defendant's motion (see CPLR 5501 [a] [1]). We are therefore foreclosed from reviewing defendant's contention (see *Weichert v Hemmerich*, 217 AD3d 1370, 1371 [4th Dept 2023]). Because defendant has raised no other issue on appeal, it has abandoned any contentions with respect to the order on appeal, and therefore the appeal must be dismissed (see *id.*; *Capozzolo v Capozzolo*, 195 AD3d 1534, 1535 [4th Dept 2021]). In any event, even if defendant's appeal could be construed as an appeal from the court's two prior orders, "no appeal lies as of right from an ex parte order," and permission to appeal has not been granted (*Obot v Medaille Coll.*, 82 AD3d 1629, 1630 [4th Dept 2011], *appeal dismissed* 17 NY3d 756 [2011] [internal quotation marks omitted]; see *Sholes v Meagher*, 100 NY2d 333, 335 [2003]; compare *Bradley v Rexcoat*, 164 AD3d 1667, 1667 [4th Dept 2018], with *Bradley v Rexcoat*, 187 AD3d 1576, 1576 [4th Dept 2020]).

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

814

CA 24-00857

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

M.H., AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN,
SHANIQUE B., AND SHANIQUE B., INDIVIDUALLY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

MAGDI E. SAYEGH, M.D., ADEL E. CHOUCANI, M.D.,
AND CHOUCANI, SAYEGH & BAGNARELLO, M.D., LLP,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

POLLACK POLLACK ISAAC & DECICCO, LLP, NEW YORK CITY (JOSHUA A. BLOCK
OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered May 21, 2024, in a medical malpractice action. The order, insofar as appealed from, denied the motion of defendants-appellants to dismiss the complaint and all cross-claims against them.

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

Memorandum: The infant plaintiff and his mother, Shanique B. (plaintiff), commenced this medical malpractice and negligence action seeking damages for injuries that the infant plaintiff sustained after plaintiff suffered a placental abruption and underwent an emergency Cesarean section. Plaintiffs allege, inter alia, that defendant Adel E. Chouchani, M.D., should not have discharged plaintiff from the hospital five days before the infant plaintiff was delivered, and defendant Magdi E. Sayegh, M.D., should have admitted plaintiff to the hospital three days prior to delivery, in light of plaintiff's large uterine fibroid and diagnosed preeclampsia, which posed a risk of placental abruption. Chouchani, Sayegh, and defendant Chouchani, Sayegh & Bagnarello, M.D., LLP (defendants), moved for summary judgment dismissing the complaint and all cross-claims against them. After numerous delays by plaintiffs in responding to the motion, defendants moved to dismiss the complaint and all cross-claims against them based on plaintiffs' failure to file opposing papers in compliance with a court-ordered deadline. In appeal No. 1, defendants appeal, as limited by their brief, from that part of an order denying

the motion to dismiss and, in appeal No. 2, they appeal, as limited by their brief, from that part of an order denying the motion for summary judgment to the extent that it sought dismissal of the negligence cause of action against them.

With respect to the order in appeal No. 1, we reject defendants' contention that Supreme Court abused its discretion in denying their motion. A court's "power to control its calendar is a vital consideration in the administration of the courts" (*Headley v Noto*, 22 NY2d 1, 4 [1968], *rearg denied* 22 NY2d 973 [1968]; see *Matter of Bow v Bow*, 117 AD3d 1542, 1545 [4th Dept 2014]). Here, plaintiffs' counsel requested, and defendants' counsel consented to, numerous adjournments to respond to defendants' motion for summary judgment. Approximately a year after the initial return date, however, defendants opposed any further adjournments. The court granted an additional adjournment but advised that further adjournments would not be granted. Subsequently, the court granted another adjournment, but it also sanctioned plaintiffs by awarding costs to defendants. Defendants moved to dismiss based on the delay. The court required counsel for the parties to attend an in-person conference and "afforded plaintiffs' counsel an *in camera* opportunity to provide information for the court to consider before rendering [its] decision." The court then issued its order denying the motion to dismiss, which further stated that the motion for summary judgment would be granted in its entirety, with prejudice and without further notice or order of the court, if plaintiffs did not file opposition papers by a date certain. The court's order represented a balancing of the competing interests of the parties, and we cannot conclude that the court abused its discretion in denying the motion (see generally *Castiglione v Pisanczyn*, 217 AD3d 1372, 1372-1373 [4th Dept 2023]). Therefore, we affirm the order in appeal No. 1.

With respect to the order in appeal No. 2, however, we agree with defendants that the court erred in denying the motion insofar as it sought summary judgment dismissing the negligence cause of action against them. "On a motion for summary judgment in a medical malpractice action, a defendant has the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Zielinski v Blessios*, 227 AD3d 1385, 1386 [4th Dept 2024] [internal quotation marks omitted]; see *Kristie M. v Mercy Hosp. of Buffalo*, 240 AD3d 1228, 1229 [4th Dept 2025]; *McMahon-DeCarlo v Wickline*, 224 AD3d 1388, 1388-1389 [4th Dept 2024]).

Here, we agree with the court that defendants met their initial burden on the motion by establishing that they did not deviate from the accepted standard of care by discharging plaintiff and not readmitting her to the hospital (see *Shakyra M. v Strittmatter*, 240 AD3d 1197, 1198 [4th Dept 2025]; *Nesterenko v Hall*, 239 AD3d 1314, 1315 [4th Dept 2025]; *Boland v Imboden*, 163 AD3d 1408, 1409 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]). Defendants submitted affidavits by both Chouchani and Sayegh that addressed each negligence claim raised in plaintiffs' complaint and their bills of particulars (see *Kristie M.*, 240 AD3d at 1229). Among other things, they explained

that they recognized plaintiff's risk for placental abruption and that their care and treatment took into consideration that risk. They explained that a maternal-fetal medicine specialist was consulted during plaintiff's hospitalization five days before her delivery, and the specialist advised that plaintiff could be managed as an outpatient if she had twice-weekly prenatal appointments. Chouchani opined that he took appropriate action by discharging plaintiff five days prior to her delivery with appropriate instructions for follow-up care. Sayegh opined that he took appropriate action by close observation and monitoring of plaintiff and confirmed fetal well-being three days prior to delivery.

We further conclude that plaintiffs failed to raise a triable issue of fact whether defendants deviated from good and accepted medical practice (see *Guyett v Kaleida Health*, 229 AD3d 1101, 1102 [4th Dept 2024]). Plaintiffs' expert did not address why it was improper for Chouchani and Sayegh to rely on the specialist's opinion that plaintiff could be managed on an outpatient basis (see *Schwenzfeier v St. Peter's Health Partners*, 213 AD3d 1077, 1080 [3d Dept 2023]; see also *Elstein v Hammer*, 192 AD3d 1075, 1078 [2d Dept 2021]). Indeed, plaintiffs' expert did not acknowledge the specialist's recommendation, and plaintiffs did not oppose the motion in which, inter alia, the specialist sought summary judgment dismissing the complaint against him. Plaintiffs' expert also did not address the testing done by Chouchani and Sayegh that confirmed fetal well-being. In short, plaintiff's expert failed to address the specific assertions made by Chouchani and Sayegh (see *Wicks v Virk*, 198 AD3d 1315, 1315 [4th Dept 2021]; *Boland*, 163 AD3d at 1409).

We therefore reverse the order in appeal No. 2 insofar as appealed from, grant the motion in its entirety, and dismiss the complaint against defendants.

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

815

CA 24-01767

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

M.H., AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN,
SHANIQUE B., AND SHANIQUE B., INDIVIDUALLY,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

MAGDI E. SAYEGH, M.D., ADEL E. CHOUCANI, M.D.,
AND CHOUCANI, SAYEGH & BAGNARELLO, M.D., LLP,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

THE TARANTINO LAW FIRM, LLP, BUFFALO (TAMSIN J. HAGER OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

POLLACK POLLACK ISAAC & DECICCO, LLP, NEW YORK CITY (BRIAN J. ISAAC OF
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered October 15, 2024, in a medical malpractice action. The order, insofar as appealed from, denied in part the motion of defendants-appellants for summary judgment.

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

Same memorandum as in *M.H. v Sayegh* ([appeal No. 1] – AD3d – [Nov. 21, 2025] [4th Dept 2025]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

821

CA 23-01842

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

O. GREGORY ZAZULAK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

SHIRLEY SARNA, AS EXECUTOR OF THE ESTATE
OF ELAINE SARNA, DECEASED, DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR
DEFENDANT-APPELLANT.

O. GREGORY ZAZULAK, PLAINTIFF-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered October 13, 2023, in a personal injury action. The order denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury under the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, among other things, to recover damages for injuries that he allegedly sustained in an automobile accident with the decedent. Plaintiff alleged that, as a result of the accident, he suffered injuries that constituted serious injuries within the meaning of Insurance Law § 5102 (d) under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories. Decedent thereafter moved for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury that was causally related to the accident and did not sustain economic loss in excess of basic economic loss (see § 5102 [a]). While this appeal was pending, decedent died and defendant was substituted as the named defendant in her capacity as executor of decedent's estate. Defendant now appeals from an order that denied decedent's motion. We modify.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; see CPLR 3212 [b]) and "must do so by tender[ing] evidentiary proof in

admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Here, we must "view[] the evidence in the light most favorable to plaintiff[]" as the nonmoving party (*Mariacher v LPCiminelli, Inc.*, 225 AD3d 1288, 1292 [4th Dept 2024]). "On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]).

Contrary to defendant's contentions, Supreme Court properly denied the motion with respect to the significant limitation of use and permanent consequential limitation of use categories. Decedent's own submissions establish that plaintiff sustained, at the very least, a cervical spine sprain/strain that resulted in limited range of motion, and decedent failed to establish as a matter of law that the limitations sustained by plaintiff from the cervical spine sprain/strain were not significant (see *Banas v Waikiki*, 216 AD3d 1413, 1415 [4th Dept 2023]; *Cook v Peterson*, 137 AD3d 1594, 1598 [4th Dept 2016]). Decedent also failed to eliminate all issues of fact with respect to permanent consequential limitation of use inasmuch as decedent's submissions, including excerpts of plaintiff's deposition that occurred three years after the accident, raise triable issues of fact whether the symptoms of plaintiff's alleged permanent consequential limitation of use have been of lengthy duration and plaintiff continues to suffer from his accident-related injuries (see *Banas*, 216 AD3d at 1415; *Latini v Barwell*, 181 AD3d 1305, 1307 [4th Dept 2020]; *Clark v Aquino*, 113 AD3d 1076, 1077 [4th Dept 2014]).

Moreover, we conclude that decedent's submissions in support of the motion raise a triable issue of fact whether the accident caused plaintiff's alleged injuries (see *Barnes v Occhino*, 171 AD3d 1455, 1456-1457 [4th Dept 2019]). Decedent "failed to submit evidence establishing as a matter of law that the injuries were entirely [preexisting] . . . and were not exacerbated by the accident in question" (*Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]; see *Sheets v Kilbury*, 196 AD3d 1096, 1097 [4th Dept 2021]). Thus, inasmuch as decedent failed to meet her initial burden regarding the significant limitation of use and permanent consequential limitation of use categories of serious injury, "the burden never shifted to plaintiff to raise a triable issue of fact" with respect thereto (*Tate v Brown*, 125 AD3d 1397, 1398 [4th Dept 2015] [internal quotation marks omitted]; see *Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]; see generally *Winegrad*, 64 NY2d at 853).

Furthermore, contrary to defendant's further contention, we conclude that her submissions raise "triable issues of fact concerning whether plaintiff sustained economic losses in excess of basic economic loss as a result of the accident" (*Cicco v Durolek*, 147 AD3d 1487, 1488 [4th Dept 2017]; see *Swanson v Dominesey*, 187 AD3d 1551, 1553 [4th Dept 2020]).

We agree with defendant, however, that the court erred in denying the motion insofar as it sought summary judgment dismissing plaintiff's claim under the 90/180-day category of serious injury (see *Licari v Elliott*, 57 NY2d 230, 236, 238 [1982]; *Totaro v Malinowski*, 238 AD3d 1475, 1476 [4th Dept 2025]; *Baldauf v Gambino*, 177 AD3d 1307, 1308 [4th Dept 2019]), and we therefore modify the order accordingly. Decedent submitted "competent evidence establishing that plaintiff's activities were not curtailed to a great extent and that [he] therefore did not sustain a serious injury under the 90/180[-day] category of serious injury," and plaintiff failed to raise a triable issue of fact with respect to that category (*Wilson v Colosimo*, 101 AD3d 1765, 1767 [4th Dept 2012] [internal quotation marks omitted]; see *Totaro*, 238 AD3d at 1476).

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

823

KA 24-01195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC J. WEIR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Melinda H. McGunnigle, J.), rendered July 2, 2024. The judgment convicted defendant, upon a plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of criminal sexual act in the first degree (Penal Law former § 130.50 [3]), defendant contends that his waiver of the right to appeal should not be enforced because County Court sua sponte added the waiver as a condition of the plea (*see People v Sutton*, 184 AD3d 236, 243-245 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]). He thus contends that the waiver of the right to appeal does not preclude our review of his challenge to the severity of his sentence. We reject that contention.

During proceedings immediately before defendant entered his guilty plea, both defense counsel and defendant stated on the record that they agreed that the plea agreement provided that the "proposed disposition" of the case included a waiver of the right to appeal. There is no indication in the record that the waiver of the right to appeal was added, sua sponte, by the court, which during the plea colloquy "used the appropriate model colloquy with respect to that waiver of the right to appeal" (*People v Coon*, 240 AD3d 1427, 1427 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]; *see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We therefore conclude that the valid waiver forecloses

defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *Coon*, 240 AD3d at 1427).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

824

KA 23-01822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CALEB BRUNDIGE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (PAUL B. CURTIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 18, 2023. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the second degree.

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

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

Defendant contends that Supreme Court erred in refusing to suppress physical evidence, specifically a gun, because it was recovered during an unlawful inventory search of the vehicle that he was driving. We reject that contention. "[W]here a vehicle has been lawfully impounded, the inventory search itself must be conducted pursuant to 'an established procedure' that is related 'to the governmental interests it is intended to promote' and that provides 'appropriate safeguards against police abuse' " (*People v Walker*, 20 NY3d 122, 126 [2012], quoting *People v Galak*, 80 NY2d 715, 716 [1993]; see *People v Tardi*, 122 AD3d 1337, 1338 [4th Dept 2014], *affd* 28 NY3d 1077 [2016]). "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose" (*People v Johnson*, 1 NY3d 252, 256 [2003]). In following that procedure, which must be standardized in order to limit officer discretion, the police must produce a "meaningful inventory list" (*id.* at 256).

Here, the evidence at the suppression hearing established that it is the policy of the Buffalo Police Department (BPD) to tow a vehicle in its control whenever, inter alia, it is necessary to safeguard the vehicle and its contents from damage or theft, the vehicle presents a

hazard or inconvenience to the public, or the vehicle is not drivable and the owner is unable to make arrangements for immediate private towing. Here, the police properly decided to tow and impound defendant's vehicle because the vehicle's registration had been suspended due to a lack of valid insurance coverage, rendering it unlawful to operate the vehicle on the road (see *People v Williams*, 214 AD3d 1395, 1396 [4th Dept 2023], *lv denied* 40 NY3d 931 [2023]; *People v David*, 209 AD3d 1276, 1277 [4th Dept 2022]; see also Vehicle and Traffic Law §§ 318 [1] [a]; 512). Defendant's contention that the police did not lawfully impound his vehicle under BPD policy because they did not first inquire into whether he could have the vehicle privately towed is unpreserved for our review because it was not raised in defendant's suppression motion and was not addressed by the court (see generally CPL 470.05 [2]; *People v Peterson*, 240 AD3d 1194, 1195 [4th Dept 2025]; *People v Jacque-Crews*, 213 AD3d 1335, 1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]).

We further conclude that the evidence at the suppression hearing established that "the police followed the procedure set forth in the applicable [policy] of the [BPD] in conducting the inventory search" (*People v Nesmith*, 124 AD3d 1325, 1326 [4th Dept 2015], *lv denied* 26 NY3d 1042 [2015]; see *Williams*, 214 AD3d at 1396; *People v Wilburn*, 50 AD3d 1617, 1618 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]). Specifically, the witness testimony, inventory search form, and the body-worn camera (BWC) footage depicting the inventory search demonstrated the police officer's compliance with BPD policy, and showed that a meaningful inventory list resulted (see *People v Hayden-Larson*, 179 AD3d 1549, 1550 [4th Dept 2020], *lv denied* 35 NY3d 970 [2020]; *People v Morman*, 145 AD3d 1435, 1436 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Owens*, 39 AD3d 1260, 1261 [4th Dept 2007], *lv denied* 9 NY3d 849 [2007]). Although the BWC footage and testimony established that the police failed to list several items found inside the vehicle on the inventory form and did not describe some of the items included on the form in great detail, we note that an " 'inventory search [is] not rendered invalid [merely] because the officers failed to secure and catalogue every item found in the vehicle' " (*Hayden-Larson*, 179 AD3d at 1550; see *Morman*, 145 AD3d at 1436; *Owens*, 39 AD3d at 1261) and that it is not for "courts to micromanage the procedures used to search properly impounded cars" (*Walker*, 20 NY3d at 127). We also reject defendant's contention that comments made by one of the police officers who was present during the inventory search, when coupled with the aforementioned deficiencies in the inventory search procedure, rendered the search an improper pretextual search of the vehicle (see *Johnson*, 1 NY3d at 256; cf. *People v Cunningham*, 239 AD3d 1418, 1419 [4th Dept 2025]).

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

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

826

KA 22-01831

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHANE T. STOKES, SR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 13, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant contends that his guilty plea was involuntary because it was coerced by statements made by County Court. Defendant failed to move to withdraw his guilty plea or vacate the judgment of conviction. Thus, he failed to preserve that contention for our review (see *People v Bellamy*, 170 AD3d 1652, 1653 [4th Dept 2019]; *People v Kelly*, 145 AD3d 1431, 1431 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

827

KA 22-00560

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARIUS L. JONES, ALSO KNOWN AS DARIUS JONES,
ALSO KNOWN AS DARIUS LAMAR JONES,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered August 24, 2021. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Contrary to defendant's contention, County Court did not mischaracterize the waiver of the right to appeal as "an absolute bar to the taking of a first-tier direct appeal" (*People v Thomas*, 34 NY3d 545, 558 [2019], cert denied – US –, 140 S Ct 2634 [2020]). Instead, the court "followed the model colloquy nearly verbatim" (*People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], lv denied 42 NY3d 1079 [2025]), and explained to defendant that he was "not actually giving up the right to file a notice of appeal" and that "there are certain issues that still can be raised" after a waiver of the right to appeal, including the voluntariness of the plea and the legality of the sentence (see *People v Brinson*, 240 AD3d 1376, 1377 [4th Dept 2025]; *People v Edmonds*, 229 AD3d 1275, 1277 [4th Dept 2024], lv denied 43 NY3d 930 [2025]). Defendant's subsequent refusal to sign a written waiver of the right to appeal is of no moment where, as here, "the oral waiver was adequate" (*People v Thomas*, 237 AD3d 1557, 1558 [4th Dept 2025], lv denied 43 NY3d 1059 [2025] [internal quotation marks omitted]; see *People v Lopez*, 6 NY3d 248, 257 [2006]).

Defendant's waiver encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

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

828

CAF 24-01310

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

IN THE MATTER OF THE STEUBEN COUNTY
DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF
MARISSA M. CURRAN, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

BRYON J. SCHWARTZ, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Steuben County (Chauncey J. Watches, J.), entered July 29, 2024, in a proceeding pursuant to Family Court Act article 4. The order, inter alia, committed respondent to 60 days in jail.

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 4, respondent father appeals from an order that, inter alia, directed him to serve 60 days in jail for willfully violating the terms of a child support order. The father contends that Family Court erred in determining that he willfully violated the child support order because he established at the confirmation hearing that he was financially unable to make the payments due to medical conditions. We reject that contention and affirm.

Because a "parent is presumed to have sufficient means to support [their] minor child" (*Matter of Monroe County Child Support Enforcement Unit v Hemminger*, 186 AD3d 1093, 1093 [4th Dept 2020]; see Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]), evidence that a parent has failed to pay support as ordered alone establishes that the failure to pay was willful, thus shifting the burden to the parent to offer "some competent, credible evidence of [their] inability to make the required payments" (*Powers*, 86 NY2d at 70; see *Matter of Mandile v Deshotel*, 166 AD3d 1511, 1512 [4th Dept 2018]). Where the nonpaying parent contends that they are unable to comply with the support order due to a physical disability that interferes with employment, the parent must "offer competent medical evidence to substantiate that claim and establish that the alleged physical disability affected [their] ability to work" (*Monroe County Child Support Enforcement Unit*, 186 AD3d at 1093 [internal quotation marks omitted]; see *Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323 [4th Dept 2012], lv denied 19 NY3d 803 [2012]; *Matter of Fogg v Stoll*, 26

AD3d 810, 810-811 [4th Dept 2006])).

Here, as the father correctly concedes, petitioner met its initial burden of establishing that he failed to pay court-ordered child support, thus shifting the burden to him to demonstrate an inability to pay based on medical conditions that prevented him from working. The father failed to meet that burden. At the hearing, the father testified that he could not work due to a shoulder injury, and he submitted two letters from a physician's assistant stating that he was "unable to work at this time." Even assuming, *arguendo*, that the letters constitute competent medical evidence, we conclude that the physician's assistant did not identify the injuries sustained by the father or explain why he could not work. Moreover, the letters were dated August 10, 2023 and September 21, 2023, well after the father's last child support payment in April 2023, and the father failed to pay any support from September 2021 to March 2023. The father offered no medical evidence to support his contention that he was physically unable to work prior to August 2023 (*see Yamonaco*, 91 AD3d at 1323; *Fogg*, 26 AD3d at 810-811). We therefore conclude that the court properly determined that the father willfully violated the child support order.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

829

CAF 24-01402

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

IN THE MATTER OF OSIRUS K.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

HORACE W., RESPONDENT-APPELLANT.

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

LINDSEY PASTUSZYNSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(ROXANNA Q. HERREID OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered July 26, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights on the ground of abandonment. We reject the father's contention that petitioner failed to establish by clear and convincing evidence that he abandoned the subject child (see generally § 384-b [3] [g] [i]; [4] [b]; *Matter of Annette B.*, 4 NY3d 509, 514 [2005], *rearg denied* 5 NY3d 783 [2005]). An order terminating parental rights may be granted where the parent has abandoned the child "for the period of six months immediately prior to the date on which the petition [for termination of parental rights] is filed" (§ 384-b [4] [b]). A child is abandoned by their parent if that parent "evinces an intent to forego [their] parental rights and obligations as manifested by [their] failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency" (§ 384-b [5] [a]). "In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed" (*id.*), and it is the parent's burden "to establish that circumstances existed that prevented [the parent's] contact with the child or agency or that the agency discouraged such contact" (*Matter of Najuan W. [Stephon W.]*, 184 AD3d 1111, 1112 [4th Dept 2020]; see *Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785 [4th Dept 2017]).

Here, the undisputed evidence at the factfinding hearing established that the father failed to maintain contact with the child for the statutory period. To the extent the record supports that the father attempted to contact the child, we conclude that those efforts were "minimal, sporadic [and] insubstantial" and thus insufficient to preclude a finding of abandonment (*Matter of Dennym K.J. [Ronnie O.]*, 215 AD3d 1254, 1255 [4th Dept 2023] [internal quotation marks omitted]; *cf. Matter of Jarrett P. [Jeremy P.]*, 173 AD3d 1692, 1693 [4th Dept 2019], *lv denied* 34 NY3d 902 [2019]; *Matter of John F. [John F., Jr.]*, 149 AD3d 1581, 1582 [4th Dept 2017]). Additionally, the fact that the father had a paternity petition pending at the time petitioner commenced this proceeding, standing alone, is insufficient to prevent a finding of abandonment, particularly in the absence of any facts establishing that the father was taking other affirmative steps to assert his paternity (*see Dennym K.J.*, 215 AD3d at 1255-1256; *cf. Jarrett P.*, 173 AD3d at 1693; *Matter of Darrell J.D.J. [Kenneth R.]*, 156 AD3d 788, 789-790 [2d Dept 2017]). We further conclude that the father failed to demonstrate that there were circumstances rendering contact with the child or petitioner infeasible or that petitioner prevented or discouraged him from maintaining such contact (*see Matter of Arielle L. [Cassandra B.]*, 238 AD3d 1528, 1529 [4th Dept 2025]; *Dennym K.J.*, 215 AD3d at 1255-1256; *see generally Annette B.*, 4 NY3d at 514).

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

833

CA 25-00542

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

MARY GARNER, PLAINTIFF,

V

MEMORANDUM AND ORDER

BENCHMARK ABBOTT ROAD PLAZA ASSOCIATES, LLC,
DEFENDANT-RESPONDENT,
AND KDJB FOODS, INC., DOING BUSINESS AS
LACKAWANNA SAVE-A-LOT, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF
COUNSEL), FOR DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (JENNIFER L. RODGERS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered January 22, 2025. The order, insofar as appealed from, granted that part of the motion of defendant Benchmark Abbott Road Plaza Associates, LLC seeking summary judgment dismissing the cross-claim against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she allegedly slipped and fell on a watery substance on the floor of a grocery store owned and operated by defendant KDJB Foods Inc., doing business as Lackawanna Save-A-Lot (KDJB). The second amended complaint names as defendants KDJB and Benchmark Abbott Road Plaza Associates, LLC (Benchmark), which owned the property and leased it to KDJB, and the two defendants asserted cross-claims against each other for indemnification and contribution. Following discovery, Benchmark moved for summary judgment dismissing the second amended complaint and cross-claim against it. Supreme Court granted the motion, which plaintiff did not oppose. KDJB appeals from the order insofar as it dismissed the cross-claim against Benchmark. We affirm.

We agree with KDJB that certain documents submitted by Benchmark in support of the motion were not properly authenticated (*see Byrd v Target*, 228 AD3d 1242, 1245 [4th Dept 2024]; *Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]; *see generally Szymanski v Robinson*, 234 AD2d 992, 992 [4th Dept 1996]) and did not meet the requirements for self-authentication under CPLR 4540-a because they were not

produced by KDJB during discovery (see CPLR 4540-a). Nevertheless, based on the deposition testimony also submitted by Benchmark in support of the motion, we conclude that Benchmark met its initial burden to establish "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

Specifically, Benchmark submitted deposition testimony from plaintiff, who testified that she slipped on water near a cooler in the dairy section of the store and that the water in question came from the cooler. Benchmark also submitted deposition testimony from one of its representatives as well as a representative of KDJB, both of whom agreed that Benchmark, as an out-of-possession landlord, was not responsible for conditions inside the store, which is where the water upon which plaintiff slipped was located. We reject KDJB's contention that the deposition testimony of its representative raised an issue of fact whether the offending water came from a leak in the roof, which Benchmark was obligated to maintain and repair under the lease. Although KDJB's representative testified that he recalled roof leaks at the store that needed to be repaired by Benchmark, he added that the leaks were not in the area where plaintiff fell. The mere fact that there had been leaks in the roof in other parts of the store does not raise a triable issue of fact whether the water upon which plaintiff slipped came from a roof leak.

Under the circumstances, we conclude that Benchmark met its burden of establishing as a matter of law that it was not responsible for the dangerous condition inside the store that allegedly caused plaintiff's injuries, thus shifting the burden to KDJB to "produce evidentiary proof in admissible form sufficient" to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Inasmuch as KDJB proffered no evidence of its own in opposition to the motion, the court properly granted that part of Benchmark's motion seeking to dismiss the cross-claim.

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

836

CA 24-01481

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

EHNI LER HTOO, PLAINTIFF-RESPONDENT,

V

ORDER

EVOLV TECHNOLOGIES, INC., ET AL., DEFENDANTS,
DAY AUTOMATION SYSTEMS, INC., DEFENDANT-RESPONDENT,
AND CITY OF UTICA, DEFENDANT-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (DANIEL K. CARTWRIGHT
OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF ROBIN ZIMPEL, PLLC, SYRACUSE (ROBIN C. ZIMPEL-FONTAINE
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Mark R.
Rose, J.), entered August 23, 2024. The order denied the motion of
defendant City of Utica to dismiss the complaint and any cross-claims
against it.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

837

CA 25-00130

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

ELIZABETH G. QUATTRONE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE 2 CHAUTAUQUA-CATTARAUGUS BOARD OF
COOPERATIVE EDUCATIONAL SERVICES AND
BOARD MEMBERS RONALD CATALANO, NANCY RENCKENS,
THOMAS DEJOE, LINDA HOFFMAN, ANITA RAY,
CHRISTINE SCHNARS, DWIGHT EAGAN, GREGORY COLE,
ROBERT CARPENTER, SYLVESTER CLEARY, DAVID LOWREY,
NANCY STOCK AND RICHARD VOGAN, IN THEIR PERSONAL
AND OFFICIAL CAPACITIES, DEFENDANTS-RESPONDENTS.

ELIZABETH G. QUATTRONE, PLAINTIFF-APPELLANT PRO SE.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a letter of the Supreme Court, Chautauqua County
(Grace Marie Hanlon, J.), dated July 23, 2024. The letter declined to
sign an order to show cause submitted by plaintiff.

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

Memorandum: Plaintiff appeals from the denial of her application
for an order to show cause. The appeal must be dismissed inasmuch as
"no appeal lies from the denial of an application to sign an order to
show cause" (*Bayview Loan Servicing, LLC v Kelly*, 235 AD3d 939, 940
[2d Dept 2025]; see *Smith v Smith*, 178 AD3d 980, 981 [2d Dept 2019];
Green v Onondaga County Bar Assoc., 41 AD2d 694, 695 [4th Dept 1973]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

838

KA 22-01853

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MASURE EVANS, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN 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
(Thomas E. Moran, J.), rendered October 17, 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 modified on the law by remitting the matter to Supreme
Court, Monroe County, for further proceedings on the suppression
application and as modified the judgment is affirmed in accordance
with the following memorandum: On appeal from a judgment convicting
him, upon his plea of guilty, of attempted criminal possession of a
weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]),
defendant contends that he did not receive effective assistance of
counsel from the attorney representing him at his suppression hearing.
We agree with defendant. A weapon was recovered after police officers
stopped defendant's vehicle after they allegedly observed him driving
without wearing a seatbelt. When defendant reached into his pocket to
retrieve his identification, he lifted his right leg up to access his
pocket, and, at that point, one of the officers allegedly observed the
barrel of a handgun underneath defendant's leg. Defendant contends
that defense counsel was ineffective for failing to request an adverse
inference charge concerning surveillance videos of the area from
cameras operated by the City of Rochester Police Department that were
undisputedly not preserved and reasonably likely to be material.
Supreme Court, as relevant here, denied that part of defendant's
omnibus motion seeking suppression of the weapon on the basis of lack
of probable cause to stop defendant's vehicle, without mentioning the
unpreserved surveillance videos.

Although defense counsel otherwise competently represented
defendant, we conclude that the single omission of failing to request
that the court consider an adverse inference charge at the suppression

hearing deprived defendant of meaningful representation (see *People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016]; see generally *People v Turner*, 5 NY3d 476, 480 [2005]). Defense counsel's error in failing to make that argument was sufficiently egregious and prejudicial as to deprive defendant of his constitutional right to effective legal representation because the only evidence presented by the People at the hearing was testimony from one of the arresting officers, whose testimony was inconsistent at times, and an adverse inference charge could have successfully undermined the officer's testimony on the issue of probable cause to stop defendant, i.e., whether defendant was, in fact, not wearing a seatbelt. Indeed, suppression of the gun that was seized as a result of defendant's encounter with the police would have been dispositive of the sole count of the indictment, charging defendant with criminal possession of a weapon in the second degree (see *Carter*, 142 AD3d at 1343; see generally *People v Bilal*, 27 NY3d 961, 962 [2016]; *People v Clermont*, 22 NY3d 931, 934 [2013]). Under the circumstances of this case, defense counsel's failure to request an adverse inference charge could not have been grounded in legitimate strategy (see generally *People v McGee*, 20 NY3d 513, 518 [2013]). We note that defendant's contention survives his guilty plea inasmuch as he demonstrated that defense counsel's error infected the plea bargaining process (see *Carter*, 142 AD3d at 1343).

We therefore conditionally modify the judgment by remitting the matter to Supreme Court "for further proceedings on the suppression application, to include legal argument by counsel for both parties and, if defendant so elects, reopening of the hearing" (*Clermont*, 22 NY3d at 934; see *People v Layou*, 114 AD3d 1195, 1198 [4th Dept 2014]). In the event that defendant prevails on the suppression application, the judgment is reversed, the plea is vacated and the indictment is dismissed and, if the People prevail, then the judgment "should be amended to reflect that result" (*Clermont*, 22 NY3d at 932; see *Layou*, 114 AD3d at 1198-1199).

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

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

839

KA 23-01171

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

CHRISTOPHER TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered January 20, 2023. The judgment convicted defendant, upon a plea of guilty, of kidnapping in the second degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

840

KA 22-01846

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT COLON, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 31, 2022. The judgment convicted defendant upon a jury verdict of murder in the second degree, criminal possession of a weapon in the second degree (four counts), criminal possession of a weapon in the third degree (two counts), attempted murder in the second degree, assault in the first degree, attempted robbery in the first degree (two counts) and attempted robbery 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, inter alia, murder in the second degree (Penal Law § 125.25 [1]), stemming from a shooting in March 2021, and, inter alia, attempted murder in the second degree (§§ 110.00, 125.25 [1]), stemming from a shooting in April 2021.

Defendant contends that the police lacked probable cause to arrest him following the April 2021 shooting and that Supreme Court erred in refusing to suppress evidence obtained as a result of the arrest. We reject that contention. When police officers arrived at the scene of the April 2021 shooting, an eyewitness reported to them that the shooter had fled in a "red Jeep" that had traveled south on a specific street before immediately turning west on another specific street. An investigator then received a broadcast from a police camera room operator that a red SUV had been involved in the shooting and had been captured on a police surveillance camera at a nearby intersection. The investigator accessed that camera, which was about a block and a half from the shooting and consistent with the path of travel of the shooter's vehicle as described by the eyewitness, and obtained a portion of a video depicting the suspect vehicle, a red and

black Ford Escape, which he then sent to the rest of his department.

At the same time, officers performed a search for any parolees who were on GPS monitoring and were in proximity to the April 2021 shooting. That search revealed that defendant had been in the area but had quickly left, immediately after the shooting. Using defendant's GPS data, the police tracked him until he came to a stop in a driveway. At that location, the police discovered the suspect vehicle and took defendant, who was seated inside, into custody. Based on the GPS and other evidence, including defendant's placement at the scene by means of his GPS ankle monitor, that he left the scene immediately after the shooting, and that he was continuously tracked to and discovered in the vehicle believed to have been used by the shooter, we conclude that the police possessed probable cause to arrest defendant (*see generally People v Neal*, 220 AD3d 1191, 1192 [4th Dept 2023], *lv denied* 41 NY3d 984 [2024]).

Contrary to defendant's contention, under the circumstances of this case, the fact that the vehicle as described by the eyewitness differed in make from that seen on surveillance video does not impact the validity of the arrest (*see generally People v Brujan*, 104 AD3d 481, 481 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *People v Glaze*, 255 AD2d 932, 933 [4th Dept 1998], *lv denied* 93 NY2d 853 [1999]; *Taylor v City of Mount Vernon*, 161 AD2d 631, 632 [2d Dept 1990]). Most notably, the vehicle observed on surveillance video generally matched the described vehicle in color, was in close physical and temporal proximity to the shooting, was traveling consistent with the path of travel described by the eyewitness, and then was continuously tracked from the scene to where it was ultimately found. To the extent that defendant contends that the People could not establish the basis of the knowledge relied upon by arresting officers without calling the camera room operator who reported that a red SUV involved in the shooting had been seen on a nearby surveillance camera, "the People are not obligated to produce any particular witness, provided they sustain their burden of coming forward with evidence showing that there was probable cause for the arrest" (*People v Parris*, 83 NY2d 342, 346 [1994]). In any event, we conclude that the People sufficiently established the basis for that knowledge through the testimony of the officer who obtained the surveillance video and sent the relevant portion to his department as well as the testimony of the officer who responded to the scene and obtained the witness report regarding the shooter's vehicle and path of travel (*see generally People v Moss*, 232 AD3d 1327, 1328 [4th Dept 2024]; *People v Myhand*, 120 AD3d 970, 973 [4th Dept 2014], *lv denied* 25 NY3d 952 [2015]). Inasmuch as we conclude that defendant's arrest was lawful, we reject defendant's contention that the court erred in refusing to suppress evidence obtained incident to the lawful arrest (*see Moss*, 232 AD3d at 1328).

We likewise reject defendant's contention that the court erred in admitting in evidence video camera footage from the interior of a store, depicting defendant and his codefendant prior to the March 30 shooting, on the ground that it was not properly authenticated. At trial, the People previously entered in evidence the undisputedly

authenticated videos from the exterior of the store, depicting defendant and codefendant walking toward and leaving it. The footage from the interior of the store temporally fit within the footage from the exterior, reflecting that it was part of an unbroken series of events. Further, the clothing and other attributes of defendant and codefendant were identical in the exterior and interior footage, and codefendant testified that he and defendant had entered that store on the day of the March 30 shooting and identified himself and defendant in still images taken from the exterior footage. Under these circumstances, we conclude that "[t]he totality of the evidence, including the relationship of the [video footage] at issue to other [video footage] that [was] undisputedly authenticated, supported the inference that the [footage] at issue depicted the relevant [events], and any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Houston*, 181 AD3d 477, 478 [1st Dept 2020], *lv denied* 35 NY3d 1027 [2020] [internal quotation marks omitted]). The consistency with the timing of and details depicted in the exterior footage as well as codefendant's identification of himself and defendant in the exterior footage provided sufficient "reasonable inferential linkages" to authenticate the interior video (*People v Patterson*, 93 NY2d 80, 85 [1999]; see generally *People v Goldman*, 35 NY3d 582, 595-596 [2020]).

Contrary to defendant's further contention, opinion testimony from an officer at trial identifying the grip of a handgun protruding from defendant's waistband in a still image did not invade the fact-finding function of the jury. The relevant testimony, which was used to identify the presence of a firearm from a grip only, implicated "the unique characteristics of [the handgun] . . . that called for professional or technical knowledge and was beyond the ken of the typical juror" (*People v Jenkins*, 228 AD3d 782, 783 [2d Dept 2024], *lv denied* 42 NY3d 938 [2024]; see generally *People v Jones*, 224 AD3d 1348, 1351 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).

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

841

KA 22-00415

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROQAWN GOSSOM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 9, 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: In appeal No. 1, 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 [1] [b]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of rape in the second degree (former § 130.30 [1]). In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (§ 265.03 [3]). There were two plea hearings, with appeal Nos. 2 and 3 stemming from the same plea hearing. In all three appeals, defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We conclude on these records that defendant's waivers of the right to appeal were knowing, voluntary, and intelligent (see *People v Bundscho*, 239 AD3d 1261, 1261 [4th Dept 2025]; *People v Fomakoye*, 229 AD3d 1380, 1380 [4th Dept 2024], lv denied 42 NY3d 970 [2024]; see generally *People v Thomas*, 34 NY3d 545, 559-564 [2019], cert denied — US —, 140 S Ct 2634 [2020]). Defendant's valid waivers of the right to appeal encompass his challenges to the severity of the

sentences (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

842

KA 22-00416

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROQAWN GOSSOM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 9, 2022. The judgment convicted defendant upon his plea of guilty of rape in the second degree.

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

Same memorandum as in *People v Gossom* ([appeal No. 1] – AD3d – [Nov. 21, 2025] [4th Dept 2025]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

843

KA 22-00417

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROQAWN GOSSOM, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 9, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Gossom* ([appeal No. 1] – AD3d – [Nov. 21, 2025] [4th Dept 2025]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

844

KA 23-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY TAYLOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), rendered May 15, 2023. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in denying his motion to compel specific performance of the original plea agreement. We reject that contention. A defendant may not compel specific performance where the record does not reflect the defendant's unequivocal acceptance of a plea offer on which the defendant relied (*see People v Johnson*, 181 AD2d 832, 832 [2d Dept 1992], *lv denied* 80 NY2d 833 [1992]; *see generally People v Hill*, 254 AD2d 726, 727 [4th Dept 1998], *lv denied* 92 NY2d 1050 [1999]). Here, even assuming, arguendo, that defendant did unequivocally express his acceptance of the plea offer, we conclude that the court did not err in denying the motion inasmuch as defendant was not "placed in a no-return position in reliance on the plea agreement . . . such that specific performance is warranted as a matter of essential fairness" (*People v Smith*, 93 AD3d 1239, 1239 [4th Dept 2012] [internal quotation marks omitted]; *see People v Weather*, 106 AD3d 1518, 1520-1521 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]; *People v Jones*, 67 AD3d 1437, 1437 [4th Dept 2009], *lv denied* 14 NY3d 771 [2010]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

845

KA 22-00595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SIR CHARLES MOSLEY IV, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (AARON FRIEDMAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Victoria M. Argento, J.), rendered March 24, 2022. The judgment
convicted defendant upon a jury verdict of criminal possession of a
controlled substance in the third degree and resisting arrest.

It is hereby ORDERED that the case is held, the decision is
reserved and the matter is remitted to Supreme Court, Monroe County,
for further proceedings in accordance with the following memorandum:
On appeal 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 resisting arrest (§ 205.30), defendant
contends that Supreme Court erred in denying his motion to dismiss the
indictment on statutory speedy trial grounds. In particular,
defendant contends that, at the time the People filed their initial
certificate of compliance (COC), they had not provided him with
discoverable material and that the People's statement of readiness for
trial thus could not be deemed valid. We conclude that the court
failed to apply the correct standard in determining defendant's
motion.

Where, as here, a defendant is charged with a felony, the People
must announce readiness for trial within six months of the
commencement of the action (see CPL 30.30 [1] [a]; *People v England*,
84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]). "A statement
of readiness [made] at a time when the People are not actually ready
is illusory and insufficient to stop the running of the speedy trial
clock" (*England*, 84 NY2d at 4) and will be deemed invalid (see CPL
30.30 [former (5)]).

As relevant here, "[a]ny statement of readiness must be
accompanied or preceded by a certification of good faith compliance
with the disclosure requirements of [CPL] 245.20" (CPL 30.30 [former

(5)]; see CPL former 245.50 [1]; *People v Cooperman*, 225 AD3d 1216, 1217 [4th Dept 2024]). A COC must state that "after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" and must also "identify the items provided" (CPL former 245.50 [1]; see *People v Gaskin*, 214 AD3d 1353, 1354 [4th Dept 2023]). Notwithstanding the provisions of any other law, and absent an individualized finding of special circumstances by the court before which the charge is pending, the prosecution will not be deemed ready for trial for purposes of CPL 30.30 until it has filed a "proper" COC pursuant to CPL 245.50 (1) (CPL former 245.50 [3]; see *People v Bay*, 41 NY3d 200, 210 [2023]).

In evaluating the propriety of a COC, "the key question . . . is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " (*Bay*, 41 NY3d at 211, quoting CPL former 245.50 [1]). "[W]hile good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" (*id.* at 212; see CPL former 245.20 [2]; former 245.50 [1], [3]).

On a CPL 30.30 motion to dismiss on the ground that the People failed to exercise due diligence and therefore improperly filed a COC, "the People bear the burden of establishing that they did, in fact, exercise due diligence and made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure" (*Bay*, 41 NY3d at 213). Where the People fail to meet their burden, "the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed" (*id.*).

Here, we agree with defendant that the court erred in concluding that the People's initial COC was proper solely on the basis that the People acted in good faith with respect to their discovery obligations. The court was required to determine whether the People satisfied their burden of establishing that they exercised due diligence and made reasonable efforts to satisfy their obligations under CPL article 245 at the time they filed their initial COC (see *People v Lawrence*, 231 AD3d 1497, 1499-1500 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]). In light of the court's failure to consider whether the People met that burden, we hold the case, reserve decision and remit the matter to Supreme Court to make that determination and, if appropriate, to determine whether the statement of readiness was valid and whether the People were ready within the requisite time period (see CPL 30.30 [1] [a]).

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

847

KA 22-01183

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ZYON MCCOY, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County
(Thomas E. Moran, J.), rendered June 8, 2022. The judgment convicted
defendant upon his plea of guilty of criminal possession of a weapon
in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his
plea of guilty of criminal possession of a weapon in the second degree
(Penal Law § 265.03 [1] [b]), defendant contends that his plea was not
knowingly, voluntarily, and intelligently entered because the defense
counsel who represented him at the plea proceeding misinformed him
that he would retain the right to raise on appeal certain contentions
that were, in fact, forfeited by pleading guilty (*see generally People v Lafferty*, 227 AD3d 1480, 1481-1482 [4th Dept 2024], *lv denied* 42
NY3d 928 [2024], *reconsideration denied* 42 NY3d 1036 [2024]).
Although, as defendant correctly concedes, he failed to preserve that
contention for our review (*see generally People v Motell*, 229 AD3d
1330, 1331 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]), we
nevertheless exercise our power to review it as a matter of discretion
in the interest of justice (*see CPL 470.15 [3] [c]; People v Mothersell*, 204 AD3d 1403, 1405 [4th Dept 2022]). However, we
conclude that defendant's contention involves matters outside the
record on appeal and must be raised in a motion pursuant to CPL 440.10
(*see People v Richards*, 239 AD3d 1330, 1331 [4th Dept 2025]; *People v Barber*, 192 AD3d 1679, 1680 [4th Dept 2021], *lv denied* 37 NY3d 953
[2021]). Specifically, although the record contains certain
statements by defense counsel reflecting that counsel provided advice
to defendant regarding challenges that would survive defendant's
guilty plea, the record is not clear as to what specific advice was
provided to defendant prior to his entering his guilty plea and
whether such advice was inaccurate.

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

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

848

KA 24-00491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BLAIR K. THOMAS, 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 (Brian D. Dennis, J.), rendered September 12, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Brinson*, 240 AD3d 1376, 1377 [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 used the appropriate model colloquy with respect to the waiver of the right to appeal (*see NY Model Colloquies, Waiver of Right to Appeal; see generally Thomas*, 34 NY3d at 567; *People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]). Defendant's contention that the oral colloquy and written waiver were defective because they did not explain that the list of rights that survive the waiver was not exhaustive is without merit inasmuch as "no particular litany regarding the claims that survive or do not survive a waiver of the right to appeal is required for the waiver to be valid" (*People v Alfonso*, 237 AD3d 1572, 1573 [4th Dept 2025], *lv denied* 43 NY3d 1053 [2025]; *see People v Johnson*, 14 NY3d 483, 486 [2010]; *People v Wood*, 217 AD3d 1407, 1408 [4th Dept 2023], *lv denied* 40 NY3d 1000 [2023]). We reject defendant's further contentions that the waiver of the right to appeal was unknowing and involuntary because the court's inquiry required only confirmatory responses by defendant (*see Hoose*, 236 AD3d at 1295; *People v Burch*, 234 AD3d 1246, 1246-1247 [4th Dept 2025], *lv*

denied 43 NY3d 1006 [2025]; *People v Brown*, 41 AD3d 1234, 1234 [4th Dept 2007], *lv denied* 9 NY3d 873 [2007]) and that the waiver was unknowing and involuntary because he did not receive any consideration in exchange for the waiver (see *People v Allen*, 174 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019]).

Defendant's valid waiver of the right to appeal encompasses his challenges to the court's denial of his motion to dismiss the superseding indictment on statutory speedy trial grounds (see *Brinson*, 240 AD3d at 1377-1378; *People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]) and the court's suppression ruling (see *People v Sanders*, 25 NY3d 337, 342 [2015]). In addition, defendant's further contention that his plea was not voluntarily entered because he provided only monosyllabic confirmatory responses to the court's questions is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by the valid waiver of the right to appeal (see *People v Johnson*, 229 AD3d 1300, 1301 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024]).

Finally, defendant's challenge to the severity of the sentence is encompassed by the valid waiver of the right to appeal (see *Lopez*, 6 NY3d at 255-256).

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

850

CAF 25-00124

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

IN THE MATTER OF MARIAH W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMBER N., RESPONDENT-APPELLANT.

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

JAMES M. CHERNETSKY, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 19, 2024, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of fact-finding and disposition that, inter alia, determined that she neglected the subject child by taking certain actions after learning that the child claimed to have been sexually abused by the stepfather. We reverse.

In the petition against the mother, petitioner alleged that the mother neglected the child by inflicting or allowing to be committed sex offenses against the child (see *generally* Family Ct Act § 1012 [e] [iii] [A]). Petitioner proceeded with that theory at trial and argued in summation that the mother knew or should have known of the sexual abuse and failed to protect the child. In its decision, however, Family Court stated that it did not believe that the mother had knowledge of the abuse allegations until child protective services came to her home and concluded that, if she was not on notice of the abuse, she could not be faulted for a failure to intervene. The court further held, however, that the mother had neglected the child (see § 1012 [f] [i] [B]) based on its belief that the mother's reaction to the child's disclosure placed the child at risk of emotional harm.

Pursuant to Family Court Act § 1051 (b), "[i]f the proof does not

conform to the specific allegations of the petition, the court may amend the allegations to conform to the proof; provided, however, that in such case the respondent shall be given reasonable time to prepare to answer the amended allegations." Here, the basis for the court's finding of neglect pursuant to section 1012 (f) (i) (B) was not alleged in the petition, and the court did not amend the allegations to conform to the proof or give the mother notice or an opportunity to respond to any such implied amendment (see *Matter of Malia A. [Dwayne T.M.]*, 213 AD3d 492, 492-493 [1st Dept 2023]; *Matter of Justin R. [Gilbert R.]*, 127 AD3d 758, 759 [2d Dept 2015]; cf. *Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1439 [4th Dept 2011]). As the mother contends, had she known that the court was considering a theory of neglect based solely on her post-disclosure conduct, she would have prepared a defense to that theory. We therefore conclude that the court's finding of neglect on that ground was improper (see *Justin R.*, 127 AD3d at 759; *Matter of Arianna S. [Virginia R.]*, 111 AD3d 461, 461-462 [1st Dept 2013]), and the petition must be dismissed (see Family Ct Act § 1051 [c]; *Arianna S.*, 111 AD3d at 461-462).

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

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

851

CAF 24-01290

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

IN THE MATTER OF THE ADOPTION OF A CHILD
WHOSE FIRST NAME IS MAKAYLA

JASON L., PETITIONER-RESPONDENT;

MICHAEL B., RESPONDENT-APPELLANT.

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

CARL J. SCHWARTZ, JR., PENN YAN, FOR PETITIONER-RESPONDENT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Yates County (Patrick F. McAllister, A.J.), entered July 31, 2024, in a proceeding pursuant to Domestic Relations Law § 111. The order, inter alia, determined that the consent of respondent to the adoption of the subject child is not required.

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

Memorandum: Respondent, the biological father of the subject child, appeals from an order determining, following an evidentiary hearing, that he abandoned the child and that his consent to the adoption of the child by petitioner, who is married to the child's mother and has acted as the child's stepfather since she was approximately 18 months old, is not required pursuant to Domestic Relations Law § 111. We affirm.

Where, as here, a child is conceived or born in wedlock, a parent's consent to adoption is required unless the parent "evinces an intent to forego [their] parental or custodial rights and obligations as manifested by [their] failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so" (Domestic Relations Law § 111 [2] [a]; see § 111 [1] [b]). When a parent's "inability to visit with the child[] results from [their] own deliberate acts, [such as criminal conduct,] the underlying circumstances need not preclude a finding of a lack of contact with the child[] evincing an intent to abandon the[child]" (*Matter of Joshua II.*, 296 AD2d 646, 648 [3d Dept 2002], *lv denied* 98 NY2d 613 [2002]; see *Matter of Julia P.*, 306 AD2d 937, 938 [4th Dept 2003]; see also *Matter of Nathon O.*,

55 AD3d 995, 996 [3d Dept 2008], *lv denied* 11 NY3d 714 [2008])). Indeed, "[t]he fact that a parent is incarcerated does not in itself excuse [their] failure to support, maintain contact with, or plan for the future of [the] child" (*Matter of Amanda*, 197 AD2d 923, 924 [4th Dept 1993], *lv denied* 82 NY2d 662 [1993]; see *Matter of Clair*, 231 AD2d 842, 842 [4th Dept 1996], *lv denied* 89 NY2d 806 [1997]; see generally *Matter of Gregory B.*, 74 NY2d 77, 88-89 [1989], *rearg denied* 74 NY2d 880 [1989])). Nevertheless, "'[w]here the person having custody of the child thwarts or interferes with the noncustodial parent's efforts to visit or communicate with the child, a finding of abandonment is inappropriate'" (*Matter of Brianna B. [Swazette S.-Shacoya L.]*, 175 AD3d 1791, 1792 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020])). "'The party seeking a finding of abandonment has the burden of establishing abandonment by clear and convincing evidence'" (*id.*).

Here, we conclude that Family Court properly dispensed with respondent's consent to the adoption of the child inasmuch as petitioner established by clear and convincing evidence that respondent abandoned the child (see Domestic Relations Law § 111 [2] [a]; *Brianna B.*, 175 AD3d at 1791-1792; *Amanda*, 197 AD2d at 923-924). The court properly considered respondent's "'contact with the child[] during the period of time, whether six months or longer, immediately preceding the filing of the [operative] petition'" (*Matter of Sophia [Tammy M.W.-Irhad R.]*, 195 AD3d 1549, 1551 [4th Dept 2021], *lv denied* 37 NY3d 913, 914 [2021])). Contrary to respondent's contention, "[a]lthough [he] was incarcerated for a part of that period, that 'does not in itself excuse his failure to . . . maintain contact with . . . [the] child'" (*Matter of Joseph*, 227 AD2d 974, 974-975 [4th Dept 1996]; see *Amanda*, 197 AD2d at 924). The evidence presented at the hearing established that respondent sent the child a single letter during his period of incarceration of approximately 2½ years, which constitutes "insubstantial and infrequent contact [that] is insufficient to preclude a finding of abandonment" (*Amanda*, 197 AD2d at 924; see § 111 [6] [b]; *Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], *lv denied* 6 NY3d 708 [2006]; *Matter of Taylor O.P.*, 303 AD2d 1024, 1024 [4th Dept 2003])). The court was entitled to reject respondent's testimony that he was logistically and financially unable to contact the child more during his incarceration, particularly considering the evidence that he had the means to contact other people from prison such as his sister (see *Matter of Hayden II. [Renee II.-Devan JJ.]*, 135 AD3d 997, 999-1000 [3d Dept 2016], *lv denied* 27 NY3d 904 [2016]; see also *Brianna B.*, 175 AD3d at 1792), and we see no basis to disturb the court's determination here. Moreover, contrary to his related contention, respondent's testimony that he could not contact the child following his release from prison due to the conditions of his parole "fall[s] short of adequately explaining [his] failure to meet [his] parental obligations" inasmuch as there is no indication that he was precluded from contacting the mother, which he failed to do (*Hayden II.*, 135 AD3d at 999; see § 111 [2] [a]; *Matter of Bambi C. v Michial F.*, 265 AD2d 816, 816 [4th Dept 1999])). Finally, to the extent that respondent contends otherwise, we conclude that the court properly determined that the record does not support

the conclusion that petitioner or the mother thwarted or interfered with respondent's efforts to communicate with the child (see *Brianna B.*, 175 AD3d at 1792; *Brittany S.*, 24 AD3d at 1299; *Amanda*, 197 AD2d at 924).

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

852

CAF 23-01344

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

IN THE MATTER OF GODDESS H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAMON H., RESPONDENT-APPELLANT.

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

LINDSEY PASTUSZYNSKI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 3, 2023, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, as limited by his brief, respondent father appeals from an order of fact-finding and disposition insofar as it adjudged the subject child to have been neglected.

Contrary to the father's contention, we conclude that there is a sound and substantial basis in the record supporting Family Court's determination that, under the circumstances of this case (*cf. Matter of Linda E.*, 143 AD2d 904, 908 [2d Dept 1988]), petitioner met its burden of establishing, by a preponderance of the evidence, that the child was neglected based upon the father's conduct in allowing the child to witness the father engaging in sex and sexual conduct in open areas of his home (see *Matter of Jacyah V. [Joseph V.]*, 188 AD3d 586, 587 [1st Dept 2020]; *Matter of Raelene B. [Alex D.]*, 179 AD3d 1315, 1317 [3d Dept 2020]; *Matter of Heather WW.*, 300 AD2d 940, 941 [3d Dept 2002]; see generally *Matter of Gina R. [Christina R.]*, 211 AD3d 1483, 1484 [4th Dept 2022]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

855

CA 24-01150

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

JOSEPH R. TAKATS, III, AND AMICA MUTUAL
INSURANCE COMPANY, AS SUBROGEE OF JOSEPH R.
TAKATS, III, PLAINTIFFS-RESPONDENTS,

V

ORDER

PORTSIDE CONDOMINIUM ASSOCIATES, INC.,
PORTSIDE CONDOMINIUM BOARD OF MANAGERS,
FAIRWOOD REALTY MANAGEMENT CORP.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LAW OFFICES OF JOHN WALLACE, HARTFORD, CONNECTICUT (JAMES J. NAVAGH OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

COOKE DOYLE LLC, BUFFALO (RODGER P. DOYLE OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Michael
Siragusa, A.J.), entered June 24, 2024. The order denied a motion to
compel arbitration.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

856

CA 24-00601

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

IN THE MATTER OF JON Z. AND VICTOR Z.,
FOR THE APPOINTMENT OF A GUARDIAN OF THE
PROPERTY AND/OR PERSON OF MARGARET Z.,
AN ALLEGED INCAPACITATED PERSON.

ORDER

JON Z., PETITIONER-APPELLANT;

THERESA M. GIROUARD, ESQ., APPOINTED GUARDIAN
FOR MARGARET Z., AN ALLEGED INCAPACITATED PERSON,
RESPONDENT-RESPONDENT.

JON Z., PETITIONER-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Oneida County (Julie G. Denton, J.), dated September 26, 2023. The order denied the motion of petitioner for relief pursuant to CPLR 5015 and Judiciary Law § 487.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

857

CA 24-01303

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

SUZANNE K. CIANCI, LIMITED ADMINISTRATOR
OF THE ESTATE OF DONALD J. TUOHEY, SR., DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

THE UNIVERSITY OF ROCHESTER, DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL),
FOR DEFENDANT-APPELLANT.

PHETERSON SPATORICO, LLP, ROCHESTER (STEVEN A. LUCIA OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(William K. Taylor, J.), entered July 12, 2024. The judgment awarded
plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, defendant's motion for
a directed verdict is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action for, inter alia,
medical malpractice, arising from an incident in which defendant's
employees performed chest compressions on plaintiff's decedent after
he became unresponsive shortly after he presented to the emergency
department of defendant's hospital with complaints of, inter alia,
abdominal pain. The employees were not aware at the time that
decedent had previously executed a Medical Order for Life-Sustaining
Treatment (MOLST) in which he declined life-saving measures, including
chest compressions. The chest compressions were successful in
reviving decedent but allegedly resulted in injuries to decedent's
chest, including fractures to his ribs. Several hours later, decedent
suffered another heart attack and died. Plaintiff alleged that the
employees breached the applicable standard of care by performing chest
compressions on decedent in derogation of the MOLST, causing pain and
suffering via the resulting injuries to decedent's chest area.
Supreme Court denied defendant's motion seeking to dismiss the
complaint pursuant to, inter alia, CPLR 3211 (a) (7), and the matter
proceeded to a jury trial. The court subsequently denied defendant's
motion for a directed verdict and its motion to set aside the verdict
in favor of plaintiff. Defendant now appeals from the final judgment
awarding plaintiff damages.

Contrary to defendant's contention with respect to its motion to dismiss, the complaint states a cause of action for medical malpractice as opposed to "wrongful life." Plaintiff properly sought damages "for decedent's pain and suffering, which the complaint alleges was the result of medical malpractice in that [defendant's employees] breached the standard of care by administering treatments without consent and in direct contravention of decedent's wishes" as articulated in the MOLST (*Greenberg v Montefiore New Rochelle Hosp.*, 205 AD3d 47, 50 [1st Dept 2022]; see *Lanzetta v Montefiore Med. Ctr.*, 210 AD3d 535, 536 [1st Dept 2022]). We reject defendant's further contention that plaintiff's cause of action for medical malpractice sounds in battery and is thus time-barred. As alleged by plaintiff, defendant's employees were simply unaware of decedent's MOLST and his desire to avoid life-saving measures, i.e., they "negligently exceeded the scope of the patient's consent" (*Mitchell v Lam*, 186 AD3d 1072, 1072 [4th Dept 2020]; see *Ponholzer v Simmons*, 78 AD3d 1495, 1496 [4th Dept 2010], *lv dismissed* 16 NY3d 886 [2011]).

Defendant further contends that plaintiff's cause of action for medical malpractice is barred in the absence of an explicit statute creating a private cause of action for the violation of a MOLST and that the court thus erred in denying defendant's motion to dismiss. Even assuming, arguendo, that no such statutory right exists, we conclude that plaintiff's cause of action may proceed "under traditional common-law principles" of medical malpractice (*Chapman v Silber*, 97 NY2d 9, 20 [2001]; see generally *Greenberg*, 205 AD3d at 50).

Defendant contends in the alternative that the court erred in denying its motion to dismiss because there can be no cause of action for violating a MOLST in an emergency situation as alleged in the complaint. We reject that contention. The right of competent adults to refuse medical treatment, even life-saving treatment, is a "fundamental common-law right" (*Rivers v Katz*, 67 NY2d 485, 492 [1986], *rearg denied* 68 NY2d 808 [1986]; see *Myers v Schneiderman*, 30 NY3d 1, 10 [2017], *rearg denied* 30 NY3d 1009 [2017]), and an advance directive may provide for the withholding of cardiopulmonary resuscitation, i.e., the withholding of care in acute emergency situations (see e.g. Public Health Law § 2994-bb). Thus, although the existence of life-threatening or emergency circumstances may be relevant to whether the standard of care has been breached in a particular situation, it does not, in and of itself, relieve a defendant from the general responsibility to abide by a MOLST. We reject defendant's related contention that it is statutorily immune from suit and that the court thus erred in denying its motion to dismiss. Although health care providers may disregard an order not to resuscitate if, inter alia, they "believe in good faith that consent to the order has been revoked" or if "other significant and exceptional medical circumstances warrant disregarding the order" (Public Health Law § 2994-ee [1] [a]; [2]), here plaintiff alleged that defendant's employees were simply unaware that the MOLST existed, not that they decided to disregard the order in good faith or due to any circumstance other than that they were unaware of the MOLST.

We agree with defendant, however, that the court erred in denying its motion for a directed verdict. "[V]iewing the evidence in [the] light most favorable to [plaintiff] and affording [plaintiff] the benefit of every inference," we conclude that there was "no rational process by which a jury could find in favor of" plaintiff inasmuch as there was no expert testimony establishing the applicable standard of care or a breach thereof (*Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016]; see *Hytko v Hennessey*, 62 AD3d 1081, 1083-1084 [3d Dept 2009]; see generally *James v Wormuth* [appeal No. 2], 93 AD3d 1290, 1291 [4th Dept 2012], *affd* 21 NY3d 540 [2013]). At trial, plaintiff's expert described how a hospital could communicate a patient's MOLST in order to ensure that it was honored, what hospitals were "allowed" to do, what he would "expect," what "should" happen, and what "option[s]" were available, but he did not state what an accepted standard of care required. Further, even assuming, *arguendo*, that plaintiff's expert articulated a standard of care, we conclude that he failed to opine that any such standard was violated under the specific circumstances of this case (see *Navarro v Ortiz*, 203 AD3d 834, 835-836 [2d Dept 2022]; see generally *James*, 93 AD3d at 1291).

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

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

858

CA 24-01076

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

ARMBRUSTER CAPITAL MANAGEMENT, INC.,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ELIZABETH BARRETT AND APEX WEALTH ADVISERS,
LLC, FORMERLY KNOWN AS APEX ADVISERS, LLC,
DEFENDANTS-APPELLANTS.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

ADAMS LECLAIR LLP, ROCHESTER (STEVEN E. COLE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 7, 2024. The order, insofar as appealed from, denied the cross-motion of defendants for leave to amend the second counterclaim and to add parties.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the cross-motion is granted upon condition that the amended answer is served within 30 days of entry of the order of this Court.

Memorandum: Plaintiff and defendant Apex Wealth Advisers, LLC, formerly known as Apex Advisers, LLC (Apex), are registered investment advisors. Defendant Elizabeth Barrett (defendant) is a financial advisor and the owner of Apex. Plaintiff and defendants entered into an asset purchase agreement (APA) whereby defendant sold Apex's client list to plaintiff for a set price, payable in installments. In connection with the APA, defendant agreed to work part-time for plaintiff for the purpose of providing plaintiff with assistance in retaining Apex's former clients. However, defendant resigned from plaintiff's employment after less than a year.

Plaintiff commenced this action for breach of a restrictive covenant provision in the APA, and defendants counterclaimed for, inter alia, defamation, alleging that plaintiff made statements asserting that defendant lacked professional competence or integrity. Plaintiff moved to dismiss the defamation counterclaim pursuant to CPLR 3016 (a) and 3211 (a) (7). Defendants cross-moved for leave to amend the defamation counterclaim and to add as parties plaintiff's chief executive officer and president (individual parties), who

authored the alleged defamatory statements. Supreme Court granted the motion and denied the cross-motion. As limited by their brief, defendants appeal only from the denial of their cross-motion.

"Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013] [internal quotation marks omitted]; see *Caputo v Tubiolo*, 236 AD3d 1426, 1427 [4th Dept 2025], *lv denied* 44 NY3d 905 [2025]; *LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1304 [4th Dept 2011]). "The decision to allow or disallow the amendment is committed to the court's discretion" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; see *Fusco v Hansen*, 228 AD3d 1279, 1280 [4th Dept 2024]).

A party asserting a claim for defamation must show "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Fika Midwifery PLLC v Independent Health Assn., Inc.*, 208 AD3d 1052, 1054 [4th Dept 2022] [internal quotation marks omitted]; see *Miserendino v Cai*, 218 AD3d 1261, 1262 [4th Dept 2023]; *Accadia Site Contr., Inc. v Skurka*, 129 AD3d 1453, 1453 [4th Dept 2015]). Statements "that tend to injure another in his or her trade, business or profession" constitute defamation per se (*Fika Midwifery PLLC*, 208 AD3d at 1054 [internal quotation marks omitted]). In addition, a plaintiff must "set forth in the complaint the particular words complained of, as required by CPLR 3016 (a), and must state the time, place and manner of the allegedly false statements and to whom such statements were made" (*id.* [internal quotation marks omitted]).

Initially, we reject plaintiff's assertion, raised as an alternative basis for affirmance (see generally *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), that the proposed amended counterclaim failed to comply with CPLR 3016 (a). In support of their cross-motion, defendants submitted the emails that were sent by the individual parties, which contained the alleged defamatory statements. We conclude that, in doing so, they met the pleading requirements of CPLR 3016 (a) (see generally *Accadia*, 129 AD3d at 1454; *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]; *Polish Am. Immigration Relief Comm. v Relax*, 172 AD2d 374, 374 [1st Dept 1991]), as the court implicitly found.

We conclude that the court abused its discretion in denying defendants' cross-motion (see *Holst*, 105 AD3d at 1374; *LHR, Inc.*, 88 AD3d at 1304). Defendants sufficiently alleged that the statements made by the individual parties were false and that they were reasonably susceptible of a defamatory connotation. In determining the sufficiency of a defamation pleading, we must "consider 'whether the contested statements are reasonably susceptible of a defamatory connotation' " (*Davis v Boenheim*, 24 NY3d 262, 268 [2014]; see *Bisimwa v St. John Fisher Coll.*, 194 AD3d 1467, 1471 [4th Dept 2021]), and, in doing so, we must "give the disputed language a fair reading in the

context of the publication as a whole" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]). Here, the emails were sent to clients of plaintiff who had previously been clients of defendants and advised them that defendant was no longer employed by plaintiff. The emails stated that the investment trading industry was "highly regulated," that plaintiff had "compliance policies" to protect its clients against "conflicts of interest," and that defendant found those policies "overly burdensome." We conclude that the disputed language provides a basis "from which the ordinary reader could draw an inference" (*James v Gannett Co.*, 40 NY2d 415, 420 [1976], *rearg denied* 40 NY2d 990 [1976]) that plaintiff was accusing defendant of failing to adhere to ethical standards in the investment trading industry.

We further agree with defendants that the statements constituted defamation per se, such that defendants did not need to allege special damages. " 'A statement imputing incompetence or dishonesty to the [party] is defamatory per se if there is some reference, direct or indirect, in the words or in the circumstances attending to their utterance, which connects the charge of incompetence or dishonesty to the particular profession or trade engaged in by [the party]' " (*Miserendino*, 218 AD3d at 1265). The statement "must be more than a general reflection upon [the party's] character or qualities[;] . . . [it] must reflect on [the party's] performance or be incompatible with the proper conduct of [their] business" (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997]). Here, as alleged in the proposed amended counterclaim, the statements conveyed that defendant was unable to conduct her work in a legally compliant and ethical manner and that she lacked professional competence or integrity.

Contrary to plaintiff's contention, its submissions in opposition to the cross-motion did not establish that the proposed amendment was patently lacking in merit. In support of its contention that the contested statements were substantially true, plaintiff submitted defendant's email to plaintiff's chief executive officer and excerpts from defendant's deposition. The individual parties stated in their emails that defendant found compliance with plaintiff's policies "overly burdensome" and that the parties could not "come to an agreement which satisfied both sides" or that defendant had "decided that the only way to avoid the rule was to resign." In defendant's email to plaintiff's chief executive officer, she stated that she found plaintiff's pre-approval and reporting requirements with respect to personal securities trading to be "burdensome and time consuming," and she admitted that again in her deposition. She further testified, however, that the statement "the only way to avoid the rule was to resign" was untrue because "[t]hat was not the only way." In other words, defendant's statements established that she found the policies burdensome and time-consuming, but they do not establish that she left plaintiff's employment because of those policies, as stated in the emails by the individual parties.

Moreover, even assuming, arguendo, that the statements were substantially true and that defendants are relying on a theory of defamation by implication, we conclude that the proposed amended counterclaim is not patently lacking in merit. " 'Defamation by

implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*Armstrong*, 85 NY2d at 380-381; see *Bisimwa*, 194 AD3d at 1472; *Partridge v State of New York*, 173 AD3d 86, 90 [3d Dept 2019]). There is a heightened legal standard for a claim of defamation by implication (see *Bisimwa*, 194 AD3d at 1472). "Under that standard, '[t]o survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the [party asserting the defamation claim] must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference' " (*id.*; see *Partridge*, 173 AD3d at 91-92). The second part of the test is an objective inquiry and " 'asks whether the plain language of the communication *itself* suggests that an inference was intended or endorsed' " (*Partridge*, 173 AD3d at 94).

We agree with defendants that they met the heightened pleading standard. As testified to by defendant, the statements that were made do not tell the whole story and convey a false impression that defendant was entirely at fault for the demise of the employment relationship because she found plaintiff's compliance policies burdensome. But as alleged in the answer, plaintiff's chief executive officer blamed defendant for the departure of a large client, said that he did not trust her and that she would steal all of plaintiff's clients, and threatened legal action against her. Defendant resigned from employment shortly after that outburst. Thus the statements by the individual parties, even if true, conveyed the false suggestion and impression that the only reason defendant left plaintiff's employment was because she did not want to comply with policies that were in place to "protect[]" the clients. Furthermore, the plain language of the statements suggested that the individual parties intended that false suggestion and impression so that the clients would remain with plaintiff.

Inasmuch as we conclude that the court abused its discretion in denying that part of defendants' cross-motion for leave to amend the defamation counterclaim, we further conclude that the court abused its discretion in denying that part of defendants' cross-motion for leave to add the individual parties to the defamation counterclaim. In opposition, plaintiff does not raise any contention that the defamation counterclaim against the individual parties is time-barred (see generally CPLR 203 [f]; *Buran v Coupal*, 87 NY2d 173, 177-181 [1995]).

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

860

KA 24-01207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRENT L. RUSSELL, DEFENDANT-APPELLANT.

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

VINCENT A. HEMMING, DISTRICT ATTORNEY, WARSAW (GABRIELLE M. LINSEY OF
COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wyoming County Court (Melissa Lightcap Cianfrini, A.J.), dated July 18, 2024. The order determined that respondent is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting an upward departure from the risk level recommended by the Board of Examiners of Sex Offenders (Board). As the People correctly note, however, the court did not grant an upward departure; instead, it assessed 10 points under risk factor 12 (failure to accept responsibility) that were not recommended by the Board but were requested by the People. The assessment increased defendant's point total to 115, thereby rendering him a presumptive level three risk, and defendant did not request a downward departure.

To the extent that defendant contends that the court erred in assessing points under risk factor 12, we reject that contention. The evidence at the SORA hearing established that defendant denied guilt to the police following his arrest on the qualifying offense, denied guilt during his testimony at trial, denied guilt at sentencing, and denied guilt once again during his interview for the presentence investigation report (*see People v Wilgosz*, 213 AD3d 1271, 1272-1273 [4th Dept 2023]; *People v Ellis*, 204 AD3d 1388, 1389 [4th Dept 2022]). Moreover, although given the opportunity at the SORA hearing to take the stand and accept responsibility for his sexual offense, defendant remained silent (*see People v Aldana*, 154 AD3d 1020, 1021 [3d Dept 2017]). Under the circumstances, we conclude that defendant's

statements not only fail to reflect a genuine acceptance of responsibility (see *People v Mahar*, 208 AD3d 1612, 1614 [4th Dept 2022], *lv denied* 39 NY3d 906 [2023]), they reflect a denial of responsibility.

Defendant further contends that his attorney was ineffective in failing to subpoena documents from the Department of Corrections and Community Services to establish that he successfully completed a sex offender treatment program while incarcerated, which he believes would have demonstrated that he accepted responsibility for the qualifying offense. There is no indication in the record, however, whether such documents exist. We note that "a sex offender's participation in a sex offender treatment program is *some* evidence that the offender has accepted responsibility and that such evidence must be considered in conjunction with any other reliable evidence bearing on the subject (e.g., statements by the sex offender)" (*People v Solomon*, 202 AD3d 88, 90 [1st Dept 2021], *lv denied* 38 NY3d 906 [2022] [emphasis added]). Thus, the fact that defendant may have successfully completed sex offender treatment does not preclude a finding that there was no "genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board" (*People v Vasquez*, 149 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]).

Defendant's remedy for his attorney's alleged failure to obtain relevant evidence for the SORA hearing "is to move before the County Court to vacate the order, at which time he can present evidence in support of his allegations, proof of which is otherwise absent from this record" (*People v Johnson*, 142 AD3d 1061, 1061 [2d Dept 2016], *lv denied* 28 NY3d 1104 [2016]; see *People v Brown*, 125 AD3d 1380, 1381 [4th Dept 2015]).

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

866

CAF 23-02055

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

IN THE MATTER OF MAXINE L.

ONEIDA COUNTY DEPARTMENT OF FAMILY AND
COMMUNITY SERVICES, PETITIONER-RESPONDENT;

ORDER

ROMEL L., RESPONDENT,
AND TAJIONNA P., RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

MARYANGELA SCALZO, UTICA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered November 1, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the care and custody of the subject child with petitioner.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court dated June 1, 2023.

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

868

CAF 24-02038

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

IN THE MATTER OF DE'SHAUN H.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CIERRA S., RESPONDENT-APPELLANT.

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

HOLLY A. ADAMS, COUNTY ATTORNEY, CANANDAIGUA (CHELSEA B. CARTER OF
COUNSEL), FOR PETITIONER-RESPONDENT.

ALEXANDRA BURKETT, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County
(Jacqueline E. Sisson, A.J.), dated November 7, 2024, in a proceeding
pursuant to Social Services Law § 384-b. The order, inter alia,
terminated respondent's parental rights with respect to the subject
child.

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

Memorandum: In this proceeding pursuant to Social Services Law
§ 384-b, respondent mother appeals from an order that, inter alia,
terminated her parental rights with respect to the subject child on
the ground of permanent neglect.

Contrary to the mother's contention, Family Court did not err in
concluding that her failure to appear at the fact-finding hearing
constituted a default. The court on several occasions warned the
mother that if she failed to appear, the court would proceed in her
absence, which could result in the termination of her parental rights.
Nevertheless, the mother "did not appear at the fact-finding hearing
and, although her attorney was present at the hearing, the attorney
did not participate" (*Matter of David P.S. [Grace C.L.]*, 222 AD3d
1332, 1332 [4th Dept 2023]; see generally *Matter of Jayden M. [Carlos
M.]*, 237 AD3d 1560, 1562 [4th Dept 2025], lv denied 44 NY3d 902
[2025]). Although "an appeal from a dispositional order in a
permanent neglect proceeding would ordinarily bring up the
fact-finding order for review, no appeal lies from an order entered
upon default" (*Matter of Corey MM. [Cassandra LL.]*, 177 AD3d 1119,
1120 [3d Dept 2019]; see CPLR 5511; see also *Matter of Lilliana S.*

[*Nicole D.*], 234 AD3d 1248, 1249 [4th Dept 2025]), and thus the mother's challenges to the sufficiency of the evidence adduced during the fact-finding hearing are not properly before us (see *Corey MM.*, 177 AD3d at 1120).

We reject the mother's contention that she was denied effective assistance of counsel. The mother did not "demonstrate the absence of strategic or other legitimate explanations" for counsel's failure to participate at the fact-finding hearing (*Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010] [internal quotation marks omitted]; see *People v Benevento*, 91 NY2d 708, 712 [1998]); to the contrary, by declining to participate, counsel preserved the mother's ability to move to vacate the default if grounds for such a motion existed (see generally *Matter of Kenneth L. [Michelle B.]*, 92 AD3d 1245, 1246 [4th Dept 2012]). We further conclude that counsel was not ineffective in ultimately failing to move to vacate the default judgment inasmuch as such a motion had "little or no chance of success" on this record (*Matter of Buckley v Kleinahans*, 162 AD3d 1561, 1562 [4th Dept 2018] [internal quotation marks omitted]).

Finally, contrary to the mother's contention, the court did not err in refusing to issue a suspended judgment. The court's sole concern at a dispositional hearing is "the best interests of the child[] . . . and its determination is entitled to great deference" (*Matter of Aubree R. [Natasha B.]*, 217 AD3d 1565, 1567 [4th Dept 2023], *lv denied* 40 NY3d 905 [2023] [internal quotation marks omitted]). At the time of the dispositional hearing in this case, the child had been in foster care since he was four weeks old and had bonded with his foster parents, who wished to adopt him. Any progress that the mother made in addressing the issues that led to the child's removal "was not sufficient to warrant any further prolongation of the [child's] unsettled familial status" (*id.* [internal quotation marks omitted]; see *Matter of London J. [Niaya W.]*, 138 AD3d 1457, 1458 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]).

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

871

CA 24-01532

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

TAMMY K., PHILLIP K., HER SPOUSE, AND
TAMMY AND PHILLIP K., INDIVIDUALLY AND AS
PARENTS AND NATURAL GUARDIANS OF MINORS
P.K.J. AND N.K., CLAIMANTS-APPELLANTS,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE POLICE, AND
NEW YORK STATE TROOPER CHAD BERRY,
DEFENDANTS-RESPONDENTS.
(CLAIM NO. 136486.)

THE MORRIS LAW FIRM, BUFFALO (NICOLE D. JONES OF COUNSEL), FOR
CLAIMANTS-APPELLANTS.

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

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered August 28, 2024, in a personal injury action. The order, insofar as appealed from, granted the motion of defendants for summary judgment and dismissed the claim.

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

Memorandum: Claimants, individually and as the parents and natural guardians of their minor children, commenced this action seeking damages related to injuries claimant Tammy K. and her children allegedly suffered when the vehicle Tammy was operating collided with a vehicle operated by defendant New York State Trooper Chad Barry. Claimants alleged that the trooper "negligently and recklessly attempted pursuit of a 'traffic violator' " by making a U-turn into oncoming traffic.

Following discovery, defendants moved for summary judgment dismissing the claim, contending that the Court of Claims lacked jurisdiction over the individual trooper, the trooper's actions were privileged under Vehicle and Traffic Law § 1104, and the trooper did not act with "reckless disregard for the safety of others" (§ 1104 [e]). Claimants opposed the motion and cross-moved for summary judgment on the claim. According to claimants, the trooper was negligent, the reckless disregard standard of care in section 1104 did not apply to the case, and, even if that standard of care applied, the

trooper's conduct was reckless. The court granted the motion and denied the cross-motion on grounds that it lacked jurisdiction over the individual trooper and defendant New York State Police (NYSP), the reckless disregard standard of care applied, and, as a matter of law, the trooper's conduct did not rise to the level of reckless disregard for the safety of others. Claimants appeal, and we now affirm.

Preliminarily, we note that, although the court also granted the motion insofar as it sought summary judgment dismissing the claims related to the children, claimants do not challenge that determination on appeal. We therefore deem any such challenge abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to claimants' contention, the court did not err in granting that part of the motion seeking summary judgment dismissing the claim against the trooper on the ground that the court lacked jurisdiction over him. "[T]he jurisdiction of the Court of Claims is limited and does not extend to claims against individuals" (*Smith v State of New York*, 72 AD2d 937, 938 [4th Dept 1979]; *see Cappetta v State of New York*, 240 AD3d 1066, 1066-1067 [3d Dept 2025]; *see generally* Court of Claims Act § 9; *Morell v Balasubramanian*, 70 NY2d 297, 300-301 [1987]), such as the trooper. The same rule applies to state agencies, including the NYSP, where, as here, "the State is the real party in interest" (*Morell*, 70 NY2d at 300).

We further conclude that the court properly granted the motion insofar as it sought summary judgment dismissing the claim against defendant State of New York. Contrary to claimants' contention, the reckless disregard standard of Vehicle and Traffic Law § 1104 (e) applies here. Vehicle and Traffic Law § 1104 (a) permits the driver of "an authorized emergency vehicle, when involved in an emergency operation, [to] exercise the privileges set forth in [that] section," subject to certain conditions not applicable here. One of those "privileges" is the ability to "[d]isregard regulations governing directions of movement or turning in specified directions" (§ 1104 [b] [4]). Although claimants concede that the trooper was operating an authorized emergency vehicle at the time of the accident, they contend that he was not engaged in an emergency operation when he made a U-turn to investigate a mere traffic infraction that posed no danger to the public. We disagree.

As defined in Vehicle and Traffic Law § 114-b, the term "emergency operation" includes pursuit of "an actual or suspected violator of the law." Qualifying violations of the law include minor traffic infractions such as driving with excessively tinted windows (*see Thompson v City of New York*, 210 AD3d 1031, 1033-1034 [2d Dept 2022]) or operating a motor vehicle with an expired inspection sticker (*see Anderson v Suffolk County Police Dept.*, 181 AD3d 765, 765 [2d Dept 2020]). Moreover, a U-turn, such as the one made by the trooper, is privileged conduct (*see id.*; *Flood v City of Syracuse*, 166 AD3d 1573, 1573 [4th Dept 2018]; *Dodds v Town of Hamburg*, 117 AD3d 1428, 1429 [4th Dept 2014]). Inasmuch as the trooper was engaged in an emergency operation when he attempted the U-turn, his conduct is governed by the reckless disregard standard of care in section 1104

(e).

Finally, we conclude that defendants met their burden of establishing that the trooper was not reckless in the manner in which he executed his U-turn and that claimants failed to raise a triable issue of fact in opposition. As we have stated in prior U-turn cases, a momentary lapse in judgment " 'does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach' " (*Dodds*, 117 AD3d at 1429, quoting *Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; see *Flood*, 166 AD3d at 1573).

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

872

CA 24-00617

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

IN THE MATTER OF DANIEL M. HOEFLER,
JOANNE M. HOEFLER, LISA M. MILES,
DANIEL H. MCCLUNG, TARA S. MCCLUNG,
PETITIONERS-APPELLANTS,
ET AL., PETITIONERS,

V

MEMORANDUM AND ORDER

TOWN OF POMPEY PLANNING BOARD, PALLADINO FARMS,
LLC, AND HILL COUNTRY FARM BREWERY, LLC,
DOING BUSINESS AS HERITAGE HILL BREWERY,
RESPONDENTS-RESPONDENTS.

MANCUSO BRIGHTMAN PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR
PETITIONERS-APPELLANTS DANIEL M. HOEFLER, JOANNE M. HOEFLER, LISA M.
MILES, DANIEL H. MCCLUNG, AND TARA S. MCCLUNG.

HARRIS BEACH MURTHA CULLINA PLLC, SYRACUSE (BRIAN D. GINSBERG OF
COUNSEL), FOR RESPONDENT-RESPONDENT TOWN OF POMPEY PLANNING BOARD.

Appeal from a judgment (denominated order and judgment) of the
Supreme Court, Onondaga County (Gerard J. Neri, J.), entered March 25,
2024, in a proceeding pursuant to CPLR article 78. The judgment
dismissed the petition.

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

Memorandum: Respondents Palladino Farms, LLC and Hill Country
Farm Brewery, LLC, doing business as Heritage Hill Brewery (Palladino
respondents) applied for site plan review of their proposal to further
develop their property by constructing a 10,000-square-foot addition
to an existing barn for the purpose of operating a meat processing
facility (project). The application for the project was reviewed by
respondent Town of Pompey Planning Board (Planning Board) over the
course of several meetings, one of which allowed for comment from the
public. Following the public hearing, the Planning Board adopted a
resolution that contained a negative declaration pursuant to the State
Environmental Quality Review Act ([SEQRA] ECL art 8), classifying the
project as an unlisted action, and determining that it would not have
any significant adverse environmental impact. The resolution also
approved the Palladino respondents' site plan application.

Petitioners commenced this CPLR article 78 proceeding seeking,

inter alia, to annul the Planning Board's negative declaration and site plan approval based on alleged violations of SEQRA, including that the Planning Board failed to comply with the substantive requirements of SEQRA in issuing its negative declaration. Petitioners-appellants (petitioners) now appeal from a judgment that dismissed the petition in its entirety, and we affirm.

Petitioners contend that the Planning Board erred in classifying the project as an unlisted action inasmuch as 6 NYCRR 617.4 (b) (6) (iii) applied to render the project a type 1 action requiring the preparation of a full environmental assessment form. Petitioners further contend that the Planning Board erred in issuing a conditional negative declaration inasmuch as it failed to comply with the requirements of 6 NYCRR 617.7 (d). Those specific contentions were not raised in the petition, and they are therefore unpreserved for our review (see *Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 887 [4th Dept 2021]; *Matter of Cornell v Annucci*, 173 AD3d 1760, 1761 [4th Dept 2019]). We have no discretionary authority to reach unpreserved contentions in a CPLR article 78 proceeding such as this one (see *Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Cameron Transp. Corp.*, 197 AD3d at 887; *Matter of Barnes v Venettozzi*, 135 AD3d 1250, 1251 [3d Dept 2016]).

We reject petitioners' contention that the Planning Board failed to comply with the requirements of SEQRA in issuing a negative declaration. Our review of the SEQRA determination "is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or [was] an abuse of discretion" (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal quotation marks omitted]; see *Matter of United Ref. Co. of Pa. v Town of Amherst*, 173 AD3d 1810, 1812 [4th Dept 2019], *lv denied* 34 NY3d 913 [2020]). With respect to the substantive determination, judicial review "is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [internal quotation marks omitted]; see *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). To that end, "an agency's substantive obligations under SEQRA must be viewed in light of a rule of reason. Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a [final environmental impact statement] will satisfy the substantive requirements of SEQRA" (*Jackson*, 67 NY2d at 417 [internal quotation marks omitted]).

Here, we conclude that the Planning Board complied with its substantive obligations under SEQRA when it issued a negative declaration inasmuch as it took the requisite " 'hard look' " at the relevant environmental factors, including noise, lighting, wastewater, and parking considerations, and "made a 'reasoned elaboration' of the basis for its determination" (*id.*; see *Matter of Renew 81 for All v New York State Dept. of Transp.*, 224 AD3d 1273, 1274-1275 [4th Dept

2024]; *Matter of Coalition for Cobbs Hill v City of Rochester*, 194 AD3d 1428, 1432 [4th Dept 2021]). To the extent that petitioners assert that the Planning Board failed to comply with its SEQRA obligations because it segmented its environmental review with respect to the issue of parking, that contention is unpreserved for our review, and we have no discretionary authority to reach it (see *Cameron Transp. Corp.*, 197 AD3d at 887).

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

874

CA 24-00851

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

NEW YORK CENTRAL MUTUAL FIRE INSURANCE
COMPANY, AS SUBROGEE OF DIANA SOUTHALL,
PLAINTIFF-RESPONDENT,

V

ORDER

KATHERINE O'DONNELL, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

LAW OFFICES OF JOHN WALLACE, HARTFORD, CONNECTICUT (JAMES J. NAVAGH OF
COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (MATTHEW F. WITHIAM-LEITCH OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph C. Lorigo, J.), entered May 2, 2024, in a personal injury action. The order, insofar as appealed from, denied the motion of defendant Katherine O'Donnell for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 29, 2025,

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

876

KA 24-01626

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JESSICA HUGHES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Gordon J. Cuffy, A.J.), rendered December 15, 2023. The judgment convicted defendant, upon her plea of guilty, of assault in the first degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

877

KA 24-01082

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

KYREE D. OUTLEY, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 18, 2024. The judgment convicted defendant, upon a plea of guilty, of assault in the second degree.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

878

KA 24-00795

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEITH LAWSON, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Onondaga County Court (Theodore H. Limpert, J.), dated April 12, 2024. The order denied the motion of defendant pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Memorandum: Defendant appeals, by permission of this Court, from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [3]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant's conviction stems from a search of his residence and a moped found in a shared backyard; handguns and methamphetamine were found in a locked compartment of the moped. We affirm.

When a CPL 440.10 motion is made, a hearing to develop additional background facts is not "invariably necessary" (*People v Satterfield*, 66 NY2d 796, 799 [1985]; see *People v Lostumbo*, 175 AD3d 844, 846 [4th Dept 2019], lv denied 34 NY3d 1017 [2019]; see generally CPL 440.30 [5]). To be entitled to a hearing, a defendant "must show that the nonrecord facts sought to be established [at a hearing] are material and would entitle [them] to relief" (*Satterfield*, 66 NY2d at 799; see *People v Carota*, 235 AD3d 1069, 1071 [3d Dept 2025], lv denied 43 NY3d 962 [2025]; *People v Streeter*, 194 AD3d 1407, 1408 [4th Dept 2021], lv denied 37 NY3d 974 [2021], reconsideration denied 37 NY3d 1029 [2021]). We review a court's summary denial of a CPL 440.10 motion for an abuse of discretion (see *People v Fredericks*, 43 NY3d 551, 561 [2025], rearg denied 43 NY3d 1014 [2025]; *Carota*, 235 AD3d at 1071;

People v Maull, 218 AD3d 1236, 1240 [4th Dept 2023])).

We conclude that County Court did not abuse its discretion in denying the motion without a hearing. Defendant moved to vacate the judgment due to purported ineffective assistance of counsel. Defendant first alleged that defense counsel was ineffective in failing to investigate a potential defense, i.e., that other people had access to the moped in the shared backyard. But as the court noted, the guns and drugs were found in a *locked* compartment of the moped, and defendant had the key in his possession when the search warrant was executed. Thus, there was no viable defense against defendant's possession of the guns and drugs recovered in this case (see *People v James*, 215 AD3d 1176, 1178 [3d Dept 2023], *lv denied* 40 NY3d 935 [2023]; see generally *People v Caban*, 5 NY3d 143, 152 [2005])).

Defendant next alleged that defense counsel was ineffective in providing him with inaccurate information concerning the evidence against him, i.e., that his fingerprints were found on items seized from his apartment and the moped. Defendant admits, however, that a DNA analysis showed a mixture of DNA from four individuals on a weapon recovered from the moped and that he was one of the contributors. Even assuming, arguendo, that defense counsel misrepresented the nature of the forensic evidence against defendant, we conclude that such error did not constitute a denial of meaningful representation under the facts of this case. "In the context of a guilty plea, a defendant has been afforded meaningful representation when [they] receive[] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Cafarelli*, 193 AD3d 1350, 1351 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021] [internal quotation marks omitted]; see *People v Johnson*, 229 AD3d 1300, 1302 [4th Dept 2024], *lv denied* 42 NY3d 1020 [2024])). Here, there was copious evidence incriminating defendant, and defense counsel negotiated a favorable plea agreement for defendant. Defense counsel's alleged shortcomings did not rise to the level of ineffective assistance, and the court therefore did not abuse its discretion in denying the motion without a hearing (see *Streeter*, 194 AD3d at 1408-1409; see also *People v Viera*, 200 AD3d 726, 727 [2d Dept 2021], *lv denied* 37 NY3d 1165 [2022]; see generally *Satterfield*, 66 NY2d at 799-800).

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

879

KA 23-00305

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HAROLD SMITH, 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 (Thomas E. Moran, J.), rendered December 12, 2022. The judgment convicted defendant upon a guilty plea of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We affirm. Defendant's valid waiver of the right to appeal precludes our review of his contention that he was denied his statutory right to a speedy trial (*see People v Kelly*, 231 AD3d 1515, 1516 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *People v Wint*, 222 AD3d 1050, 1051 [3d Dept 2023], *lv denied* 41 NY3d 945 [2024]; *People v Paduano*, 84 AD3d 1730, 1730 [4th Dept 2011]).

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

882

CAF 24-01211

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ASHLEY THOMPSON AND
CHRISTOPHER THOMPSON, PETITIONERS-RESPONDENTS,

V

ORDER

AUTUMN SCHNEIDER, RESPONDENT-APPELLANT.

CHERYL LAMANCHE, RESPONDENT.

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

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

MICHAEL J. KERWIN, SYRACUSE, ATTORNEY FOR THE CHILD.

CATHERINE M. SULLIVAN, LIVERPOOL, FOR RESPONDENT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL),
FOR ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES.

Appeal from an order of the Family Court, Onondaga County
(Christina F. DeJoseph, J.), entered June 12, 2024. The order, inter
alia, appointed petitioners the kinship guardians of the subject
child.

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

Entered: November 21, 2025

Ann Dillon Flynn
Clerk of the Court

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

883

CAF 24-01212

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ERIC BROWN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JULIANA RUPERTO, RESPONDENT-RESPONDENT.

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

ANDREW J. DIPASQUALE, ROCHESTER, FOR RESPONDENT-RESPONDENT.

LAURA ESTELA CARDONA, EAST SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered May 24, 2024, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation with 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, petitioner father appeals from an order that dismissed his petition seeking visitation with the subject child. We affirm.

Although visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated (see *Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]; *Matter of Smith v Stewart*, 145 AD3d 1534, 1535 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]), "the presumption may be rebutted when it is shown, 'by a preponderance of the evidence, that visitation would be harmful to the child' " (*Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014], quoting *Granger*, 21 NY3d at 92; see *Matter of Fowler v Jones*, 225 AD3d 1162, 1162 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024]). "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013] [internal quotation marks omitted]; see *Fowler*, 225 AD3d at 1162).

Contrary to the father's contention, Family Court's determination that visitation as requested by the father would not be in the child's

best interests has a sound and substantial basis in the record (see *Matter of Grayson v Lopez*, 178 AD3d 1427, 1428 [4th Dept 2019]). "[W]here, as here, domestic violence is alleged, the [court] must consider the effect of such domestic violence upon the best interests of the child[]" (*id.* [internal quotation marks omitted]; see *Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *Matter of Carroll v Carroll*, 125 AD3d 1485, 1487 [4th Dept 2015], *lv denied* 25 NY3d 907 [2015]). There was evidence that the father committed acts of domestic violence against respondent mother, including tasing her one time when she was three months pregnant with the child and choking her another time when she was eight months pregnant with the child to the point where she lost consciousness and was hospitalized. He also repeatedly punched her during an incident while she was holding the two-month-old child. Additionally, there was testimony from the mother to support the court's further finding that the father, who has been incarcerated since the child was 11 months old, was seeking communication with the child only because he wanted to communicate with the mother (see *Matter of Rulinsky v West*, 107 AD3d 1507, 1508 [4th Dept 2013]).

The father's contention that he was denied due process of law by the court's alleged preconceived determinations of credibility and demonstrated lack of impartiality is not preserved for our review (see *Matter of Torres v Burchell*, 228 AD3d 1303, 1304 [4th Dept 2024], *lv denied* 42 NY3d 908 [2024]; *Matter of Anthony J. [Siobvan M.]*, 224 AD3d 1319, 1319 [4th Dept 2024]), and we decline to exercise our power to review the father's contention in the interest of justice.

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

884

CAF 24-01210

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF RONNIE BURLEY, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

KYLE E. RICHMOND, RESPONDENT-APPELLANT.

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

PETER J. DIGIORGIO, JR., UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered January 19, 2024, in a proceeding pursuant to Family Court Act article 6. The order confirmed the report of a Referee that awarded petitioner sole legal and primary physical custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order confirming a report by the Referee that, among other things, granted petitioner maternal uncle's amended custody petition and awarded him sole legal and primary physical custody of the subject child. We affirm.

The father's contention that Family Court did not conduct the required review of decisions and reports pursuant to Family Court Act § 651 (e) is improperly raised for the first time on appeal and thus is not properly before us (*see Matter of Jonathan M. v Jessica N.*, 236 AD3d 1360, 1362 [4th Dept 2025], *lv denied* 44 NY3d 902 [2025]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

With respect to the father's contention that he was denied effective assistance of counsel, we note at the outset that, "because the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings" (*Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010] [internal quotation marks omitted]). " 'So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, a [parent's] constitutional right to the effective assistance of counsel will have

been met' " (*Matter of Laura E. v Matthew E.*, 226 AD3d 1117, 1118 [3d Dept 2024]; see *Matter of Rotundo v Deptola*, 232 AD3d 1323, 1323-1324 [4th Dept 2024]). Here, we are unable to review the father's allegation that counsel failed to request an adjournment inasmuch as it "involves matters outside the record on appeal" (*Rotundo*, 232 AD3d at 1324; see *Matter of Brooks v Martinez*, 218 AD3d 568, 569 [2d Dept 2023]). The father's allegations that counsel also failed to object to the court's admonishment regarding the father's disruptive behavior and failed to make an expanded or follow-up request for a *Lincoln* hearing did not constitute ineffective assistance because those actions would have had "little or no chance of success" (*People v Wilmet*, 239 AD3d 1436, 1438 [4th Dept 2025], *lv denied* 44 NY3d 985 [2025] [internal quotation marks omitted]). Indeed, the admonishment was not improper (see generally *People v Mercer*, 66 AD3d 1368, 1369 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]) and the court properly exercised its discretion in declining to hold a *Lincoln* hearing (see *Matter of Brady J.S. v Darla A.B.*, 208 AD3d 1023, 1026 [4th Dept 2022], *lv denied* 39 NY3d 904 [2022]). We reject the father's allegations that counsel was ineffective for not asking him questions on the substantive legal issues and for not submitting a written response to the Referee's report inasmuch as he did not "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]). Finally, although counsel was unable to meet with the father prior to the date of the hearing due to circumstances beyond her control, " '[t]he record, viewed in its totality, establishes that the [father] received meaningful representation' " (*Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]; see *Rotundo*, 232 AD3d at 1324).

We reject the father's contention that the court abused its discretion in denying his request to substitute assigned counsel. "The right of an indigent party to assigned counsel under the Family Court Act is not absolute," and a party seeking the appointment of substitute counsel "must establish that good cause for release existed necessitating dismissal of assigned counsel" (*Matter of Destiny V. [Mark V.]*, 107 AD3d 1468, 1469 [4th Dept 2013] [internal quotation marks omitted]; see *Matter of Biskupski v McClellan*, 278 AD2d 912, 912 [4th Dept 2000]). The father failed to make that showing here (see *Matter of Bracken v Bracken*, 225 AD3d 1241, 1241 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; see generally *People v Linares*, 2 NY3d 507, 511 [2004]).

We also reject the father's contention that the court's determination is not supported by a sound and substantial basis in the record. It is well settled that "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). "[A] parent's incarceration does not, standing alone, per se constitute an extraordinary circumstance" (*Matter of Lisa F. v Thomas E.*, 211 AD3d 1367, 1369 [3d Dept 2022]), and "[t]he extraordinary circumstances

analysis must consider the cumulative effect of all issues present in a given case . . . , including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role" (*Matter of Tuttle v Worthington* [appeal No. 2], 219 AD3d 1142, 1144 [4th Dept 2023] [internal quotation marks omitted]). Here, it is undisputed that the subject child has lived with the uncle his entire life, and following the death of the child's mother, the uncle " 'ha[s] taken care of the child . . . and provided him with stability' " (*id.*; see *Matter of DellaPiana v DellaPiana*, 161 AD3d 1228, 1231 [3d Dept 2018]). During that time, the father never sought to assume the primary parental role, and the child " 'developed a strong emotional bond' " with the uncle (*Tuttle*, 219 AD3d at 1145; see *Matter of Lewis v Speaker*, 143 AD3d 822, 824 [2d Dept 2016]). We thus conclude that the court properly determined that the uncle established the existence of extraordinary circumstances (see *Matter of Cathcart v Williams*, 236 AD3d 1479, 1480 [4th Dept 2025]; see also *Tuttle*, 219 AD3d at 1145) and that it properly determined that it was in the best interests of the child to award sole legal and primary physical custody to the uncle (see *Cathcart*, 236 AD3d at 1480; *Matter of Chasity CC. v Frederick DD.*, 165 AD3d 1412, 1416-1417 [3d Dept 2018]; see also *Tuttle*, 219 AD3d at 1145).

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

888

CA 24-01733

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

EUGENE FISCH, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF NEW YORK AND DISTRICT ATTORNEY
OF NEW YORK COUNTY, DEFENDANTS-RESPONDENTS.

EUGENE FISCH, PLAINTIFF-APPELLANT PRO SE.

MURIEL GOODE-TRUFANT, CORPORATION COUNSEL, NEW YORK CITY (HANNAH J. SAROKIN OF COUNSEL), FOR DEFENDANT-RESPONDENT CITY OF NEW YORK.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered July 16, 2024. The order denied the motion of plaintiff for leave to reargue his opposition to a prior motion for a change of venue.

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

Memorandum: Plaintiff, pro se, commenced this personal injury action pursuant to the Adult Survivors Act (see CPLR 214-j) asserting causes of action to recover damages arising from an alleged act of sexual assault. Defendant City of New York (NYC) answered the complaint and filed a demand to change venue to New York County pursuant to CPLR 504 (3). Plaintiff failed to respond to the demand, and NYC thereafter moved for a change of venue. Supreme Court, by order entered February 23, 2024 (February order), granted the motion. Plaintiff moved for leave to reargue NYC's motion, which was denied. Plaintiff then filed a motion to "[r]everse [d]ecision." The court treated the filing as another motion for leave to reargue the February order and denied plaintiff's motion by order entered July 16, 2024 (July order). Plaintiff filed a notice of appeal from the July order.

It is well settled that "[a]n order denying a motion [for leave] to reargue is not appealable" (*Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]; see *Crockett v Home Depot U.S.A., Inc.*, 237 AD3d 1604, 1606 [4th Dept 2025]). Here, plaintiff failed to appeal from the February order granting NYC's motion to change venue and

instead appealed only from the denial of his second motion for leave to reargue, and thus his appeal must be dismissed.

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

889

CA 24-01660

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF JOSHUA BOUCK, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT-APPELLANT.

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

LAW OFFICE OF KEITH D. MILLER, LIVERPOOL (KEITH D. MILLER OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered June 6, 2024, in a proceeding pursuant to CPLR article 78. The judgment granted the petition and vacated the determination of an Administrative Law Judge.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determination is confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, upon a Department of Motor Vehicles fatality hearing, suspending his driving privileges based on a finding that he violated Vehicle and Traffic Law § 1212 (reckless driving) (see Vehicle and Traffic Law § 510 [3]). Respondent appeals from a judgment that, inter alia, vacated the determination. The underlying accident occurred when petitioner parked a tow truck on the side of a highway, partially obstructing the driving lane, and a passenger vehicle struck the tow truck.

As a preliminary matter, we conclude that Supreme Court should have transferred the proceeding to this Court (see *Matter of Corbett v Schroeder*, 214 AD3d 1407, 1407-1408 [4th Dept 2023]). The petition raises a question of substantial evidence, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g). We therefore vacate the judgment, and we treat the proceeding as if it had been properly transferred and review petitioner's contentions de novo (see *Corbett*, 214 AD3d at 1407-1408; *Matter of Elderwood at Cheektowaga v Zucker*, 188 AD3d 1578, 1579 [4th Dept 2020]; *Matter of Hope Day Care, LLC v New York State Off. of Children & Family Servs.*, 162 AD3d 1639, 1640

[4th Dept 2018], *lv denied* 32 NY3d 905 [2018]).

Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Corbett*, 214 AD3d at 1408; *Matter of Thompson v New York State Dept. of Motor Vehs.*, 170 AD3d 1657, 1657-1658 [4th Dept 2019]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). The New York State Police collision reconstruction findings report admitted into evidence during the administrative law hearing concluded that the primary contributing factor to the fatal accident was "improper lane usage on the part of [petitioner,]" inasmuch as his parked vehicle blocked more than five feet of the driving lane, combined with the fact that the "amber hazard lighting" on petitioner's vehicle was "obstructed to approaching vehicles." That provided a "reasonable and plausible" basis for the finding of recklessness (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1046 [2018] [internal quotation marks omitted]). Petitioner's conflicting testimony presented a credibility issue that the Administrative Law Judge (ALJ) was entitled to resolve against petitioner (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 445 [1987]).

We further reject petitioner's contention that it was an error of law for the ALJ to conclude that a person can be culpable of recklessness under Vehicle and Traffic Law § 1212 even though their vehicle was stationary and no other traffic infraction was established. When evaluating whether an ALJ's interpretation of a statute was affected by an error of law, "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971], *rearg denied* 29 NY2d 749 [1971]; *cf. Matter of Universal Metal & Ore, Inc. v Westchester County Solid Waste Commn.*, 145 AD3d 46, 56 [2d Dept 2016]). Section 1212 (a) defines reckless driving as "driving or using any motor vehicle . . . in a manner which unreasonably interferes with the free and proper use of the public highway or any parking lot, or unreasonably endangers users of the public highway or any parking lot." Addressing "the plain language of the statute[] as the best evidence of legislative intent" (*Matter of Synergy, LLC v Kibler*, 124 AD3d 1261, 1262 [4th Dept 2015], *lv denied* 25 NY3d 967 [2015] [internal quotation marks omitted]), we conclude that a reasonable reading of section 1212 is that a finding of culpability for recklessness does not require any other traffic violation to be established. Furthermore, the language "or using" in the statute implies that there are activities other than driving that can result in culpability, and it is a fundamental principal of construction that a statute "should [be] construe[d] . . . [so as] 'to avoid rendering any of its language superfluous' " (*Van Wie Chevrolet, Inc. v General Motors, LLC*, 145 AD3d 1, 9 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017]). Petitioner's contention that his vehicle was engaged in a "hazardous operation" (Vehicle and Traffic Law § 117-b) and was legally parked pursuant to Vehicle and Traffic Law § 1144-a (b) was not raised during the administrative hearing and, therefore, is not preserved for our review (*see Matter of Cornell v*

Annucci, 173 AD3d 1760, 1761 [4th Dept 2019]; *Matter of Bernstein v Department of State, Div. of Licensing Servs.*, 96 AD3d 1183, 1184-1185 [3d Dept 2012]).

We have reviewed petitioner's remaining contention and conclude that it does not require a different result.